



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**EQUAL EMPLOYMENT OPPORTUNITY
MANAGEMENT DIRECTIVE FOR
29 C.F.R. PART 1614 (EEO-MD-110),**

AS REVISED, AUGUST 5, 2015

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
EQUAL EMPLOYMENT OPPORTUNITY
MANAGEMENT DIRECTIVE**

EEO MD-110

EFFECTIVE DATE: August, 5, 2015

TO THE HEADS OF FEDERAL AGENCIES

1. **SUBJECT. FEDERAL SECTOR COMPLAINTS PROCESSING MANUAL**
2. **PURPOSE.** The purpose of this Directive is to provide federal agencies with Commission policies, procedures, and guidance relating to the processing of employment discrimination complaints governed by the Commission's regulations in 29 C.F.R. Part 1614. Federal agencies covered by 29 C.F.R. Part 1614 are responsible for developing and implementing their own equal employment programs, including alternative dispute resolution programs, and complaint processing procedures consistent with the Commission's regulations. It is the Commission's responsibility to direct and further the implementation of the policy of the government of the United States to provide equal opportunity in federal employment and to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, genetic information, or retaliation. Pursuant to its obligations and statutory authority, the Commission issues such rules, regulations, orders, and instructions including management directives, as it deems necessary and appropriate to carry out its responsibilities to communicate federal equal employment opportunity management policy, requirements, guidance and information to federal agencies. The Commission's instructions are directive in nature, and heads of federal agencies are responsible for prompt and effective compliance with Commission Management Directives and Bulletins. This complaint processing manual will ensure that agency personnel responsible for complaints processing are in possession of all current Commission guidance materials so that the Commission's policies, procedures, and regulations are consistently and uniformly applied government-wide. The manual consists of several chapters with subject headings identified in the table of contents. Some chapters are issued in connection with specific sections of the regulations. Other chapters include guidance and direction on topics, which we know from our experience processing complaints under previous regulations, are needed and are applicable to Part 1614. This manual will be supplemented by new and revised materials, as they are issued. The Commission's objective is for this manual to

- assist federal agency personnel in administering the discrimination complaint process.
3. **SUPERSESSSION.** This directive supercedes EEO MD-110 issued November 9, 1999, and Management Bulletin MB-100-1, issued October 24, 2003.
 4. **AUTHORITY.** This Directive is issued pursuant to EEOC's obligations and authority under section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; section 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §633a; section 6(d) of the Fair Labor Standards Act of 1938, as amended (the Equal Pay Act), 29 U.S.C. § 206(d); section 211 of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff10; Reorganization Plan No. 1, 3 C.F.R. § 321(1078) and Executive Order 11478, 3 C.F.R. § 803 (1966-1970 Compilation) reprinted in 42 U.S.C. § 2000e note, issued in 1969 and 12106, 44 Fed. Reg. 1053 (1979).
 5. **POLICY INTENT.** The policy objective of this Directive is to ensure that federal personnel responsible for processing employment discrimination complaints do so consistently and in accordance with the Commission's regulations set out at 29 C.F.R. Part 1614, and with the guidance, policies and procedures contained in this Directive and in the attached manual.
 6. **APPLICABILITY AND SCOPE.** The provisions of this Directive apply to all federal agencies covered by 29 C.F.R. Part 1614.
 7. **RESPONSIBILITIES.** Heads of federal agencies are responsible for ensuring that employment discrimination complaints are processed fairly, promptly, and in strict accordance with the complaint processing procedures set out in 29 C.F.R. Part 1614 and with the guidance incorporated in paragraph eight of this Directive. Since the Commission's guidance is binding in nature, federal agencies are required to comply with it.
 8. **POLICIES AND PROCEDURES.** The Commission's specific policies, procedures and guidance related to the processing of federal sector employment discrimination are contained in this Complaints Processing Manual. All statements of guidance that the Commission approves become Commission guidance. Care has been taken to delineate any agency action that is suggested

rather than required by Commission policy. All time frames stated here are in calendar days.

9. **INQUIRIES.** Unless otherwise specifically noted in the manual, further information concerning this Directive or guidance contained in the attached manual may be obtained by contacting:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M. Street, N.E.
Washington, DC 20507
Telephone: (202) 663-4599

August 5, 2015
Date

s/Jenny R. Yang
Jenny R. Yang
Chair

Management Directive MD-110

PREAMBLE

I. HISTORICAL AUTHORITY P-i

II. THE LATE 1970s-1980 P-iv

III. THE 1990s TO THE PRESENTP-v

CHAPTER 1 1-1

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AGENCY AUTHORITY AND RESPONSIBILITY 1-1

I. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 1-1

II. FEDERAL AGENCY 1-2

III. EEO DIRECTOR’S INDEPENDENT AUTHORITY AND REPORTING RELATIONSHIPS..... 1-4

 A. Federal Agencies Must Appoint an EEO Director Who Shall Be Responsible for - See 29 C.F.R. § 1614.102(c):..... 1-4

 B. The EEO Director Must Report Directly to the Agency Head..... 1-4

IV. AVOIDING CONFLICTS OF INTEREST..... 1-5

 A. Separation of EEO Complaint Program from the Agency’s Personnel Function 1-6

 B. Complaints That Present Potential Conflicts of Interest 1-7

 C. Agencies Must Avoid Conflicts of Interest in Processing Complaints 1-8

 D. Separation of EEO Complaint Program from Agency’s Defensive Function..... 1-9

V. DELEGATION OF AUTHORITY TO RESOLVE DISPUTES..... 1-10

VI. EEO OFFICIALS CANNOT SERVE AS REPRESENTATIVES..... 1-10

VII.SPECIAL EMPHASIS PROGRAM 1-10

VIII.AGENCY STATISTICAL REPORTING REQUIREMENTS FOR THE COMPLAINT PROCESS 1-10

 A. Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints 1-11

 B. Quarterly and Fiscal Year EEO Complaint Statistics Required by Title III of the No FEAR Act..... 1-11

 C. Annual Report to Congress, the Commission, and the U.S. Attorney General Required by Title II of the No FEAR Act..... 1-11

IX. PROGRAM REVIEW PROCEDURES FOR COMPLIANCE 1-12

 A. Notice to Agency of Non-Compliance 1-12

 B. Written Notice to Head of Federal Agency 1-13

 C. Public Notification of Non-Compliance 1-13

X. PILOT PROJECTS 1-14

 A. Request for Pilot Authority..... 1-14

 B. Process for Submitting, Reviewing, and Approving Pilot Projects..... 1-15

CHAPTER 2 2-1

EQUAL EMPLOYMENT OPPORTUNITY PRE-COMPLAINT PROCESSING..... 2-1

I. INTRODUCTION..... 2-1

 A. Counseling Generally 2-1

- B. Full-Time EEO Counselors 2-2
- C. EEO Counselor Training Requirements 2-2
- D. EEO Counseling and Investigations 2-2
- E. EEO Counseling and EEO ADR 2-3
- II. MANDATORY EEO COUNSELOR TRAINING REQUIREMENTS 2-3**
 - A. Minimum Requirements 2-3
 - B. Minimum Standards for Thirty-Two Hour Training Course 2-4
 - C. Standards for Continuing Training Requirements 2-5
- III. THE ROLES AND RESPONSIBILITIES OF AN EEO COUNSELOR 2-5**
- IV. INITIAL INTERVIEW SESSION 2-7**
 - A. Provide Required Written Notice 2-7
 - B. Provide Information on Other Procedures as Required 2-7
 - C. Explain Statutes and Regulations 2-8
- V. THE LIMITED INQUIRY 2-12**
 - A. Determining the Claim(s) 2-12
 - B. Determining the Basis(es) 2-13
 - C. When the Basis(es) Is Not Covered by the EEO Laws 2-13
- VI. RESOLUTION 2-14**
 - A. Extension of Counseling for Resolution Efforts 2-14
 - B. Resolution of the Dispute 2-14
 - C. Failure to Resolve the Dispute 2-15
- VII. THE EEO ADR PROGRAM 2-15**
 - A. The Choice of EEO Counseling or EEO ADR 2-15
 - B. Role of the EEO Counselor during EEO ADR Process 2-16
 - C. Completing the EEO ADR Process 2-16
- VIII. FINAL INTERVIEW 2-17**
 - A. Right to Pursue the Claim Through the Formal Process 2-17
 - B. Requirements of the Formal Complaint 2-17
 - C. Time Frames to Complete the Final Interview 2-18
 - D. Name(s) of Person(s) Authorized to Receive Complaints 2-18
 - E. Loss of Confidentiality During Formal Process 2-19
 - F. Written Notice of Right to File a Discrimination Complaint 2-19
- IX. THE EEO COUNSELOR’S REPORT 2-19**
 - A. Time Limits 2-20
 - B. Contents of Report 2-21
 - C. Confidentiality of Negotiations for Resolution 2-21
- X. COUNSELING CLASS ACTION COMPLAINTS 2-22**

- CHAPTER 3 3-1**
- ALTERNATIVE DISPUTE RESOLUTION FOR EEO MATTERS 3-1**
- I. INTRODUCTION 3-1**
- II. CORE PRINCIPLES OF EEO ADR 3-2**
 - A. Fairness 3-2

- B. Flexibility..... 3-4
- C. Training 3-4
- D. Evaluation..... 3-5
- III. DEVELOPING AN EEO ADR PROGRAM..... 3-6**
 - A. Written Procedures 3-6
 - B. EEO ADR Throughout the EEO Process 3-7
 - C. Matters Inappropriate for EEO ADR..... 3-8
 - D. Dealing with Non-EEO Issues..... 3-8
 - E. Choosing Among EEO ADR Techniques 3-8
 - F. Time Frames of the EEO ADR Process 3-9
 - G. Representation of the Parties 3-9
 - H. Spin-Off Complaints..... 3-9
 - I. Collective Bargaining Agreements and the Privacy Act 3-9
 - J. Recordkeeping 3-10
 - K. Independent ADR Office..... 3-10
- IV. PROVIDING INFORMATION 3-11**
 - A. Agencies Must Fully Inform Employees about the EEO Process 3-11
 - B. Providing Information about the EEO ADR Program..... 3-12
 - C. Explaining the Benefits of EEO ADR 3-12
 - D. Informing the Employee about Filing Rights 3-13
 - E. Pre-EEO ADR Meeting 3-13
- V. NEUTRALS..... 3-13**
 - A. Sources of Neutrals..... 3-14
 - B. Qualifications of Neutrals..... 3-15
 - C. Role of the Neutral 3-16
 - D. Promoting Trust..... 3-17
- VI. ADR TECHNIQUES 3-17**
 - A. Mediation..... 3-18
 - B. Facilitation 3-18
 - C. Settlement Conferences 3-18
- VII.RESOLUTIONS MUST BE IN WRITING..... 3-18**

- CHAPTER 4 4-1**
- PROCEDURES FOR RELATED PROCESSES..... 4-1**
- I. INTRODUCTION..... 4-1**
- II. MIXED CASE COMPLAINTS AND APPEALS - 29 C.F.R. § 1614.302..... 4-1**
 - A. Definitions 4-1
 - B. Procedures 4-1
- III. NEGOTIATED GRIEVANCE PROCEDURES - 29 C.F.R. § 1614.301..... 4-5**
 - A. Where Agency Is Covered by 5 U.S.C. § 7121(d) 4-5
 - B. Where Agency Is not Covered by 5 U.S.C. § 7121(d) 4-6
 - C. Administrative Grievance Procedure..... 4-6
- IV. AGE DISCRIMINATION COMPLAINTS 4-6**

- A. Election of Administrative Process 4-6
- B. Aggrieved May Bypass Administrative Process 4-7
- C. Responsibilities Regarding Notices of Intent to Sue 4-7
- V. EQUAL PAY ACT COMPLAINTS..... 4-9**

- CHAPTER 5 5-1**
- AGENCY PROCESSING OF FORMAL COMPLAINTS..... 5-1**
- I. AGENCY SHALL ACKNOWLEDGE FORMAL COMPLAINT 5-1**
- II. THE AGENCY SHALL ALSO PROVIDE OTHER INFORMATION AND NOTICE OF RIGHTS..... 5-2**
 - A. Agency Shall Inform the Complainant of the Agency’s Obligations..... 5-2
 - B. Agency Shall Inform Complainant of His/Her Rights 5-3
- III. AGENCIES MUST AVOID FRAGMENTING EEO COMPLAINTS 5-5**
 - A. Identifying and Defining the Claim in an EEO Complaint 5-6
 - B. A Complainant May Amend a Pending Complaint..... 5-10
 - C. Consolidation of Complaints 5-14
 - D. Partial Dismissals 5-15
 - E. No Remands by Administrative Judges..... 5-16
 - F. “Spin-off” Complaints 5-16
 - G. Training 5-16
- IV. AGENCY DISMISSAL PROCESS..... 5-16**
 - A. Bases for Dismissals That May Exist As of the Filing of the Complaint or Develop Thereafter 5-17
 - B. Dismissals that Generally Occur After the Agency Accepts the Complaint Based on Complainant’s Actions or Inactions..... 5-26
 - C. Processing of Partially Dismissed Complaints 5-27
 - D. Allegations of Dissatisfaction Regarding Processing of Pending Complaints..... 5-28
- V. CONDUCTING THE INVESTIGATION..... 5-30**
 - A. Agency Retains Responsibility..... 5-30
 - B. Investigations Must Be Timely Completed..... 5-30
 - C. Failure to Complete Investigation within Time Limit..... 5-31
 - D. What Must Be Done for an Investigation to Be Considered Appropriate..... 5-32
- VI. FINAL ACTIONS..... 5-32**
 - A. Final Action by Agency Following an Administrative Judge’s Decision 5-32
 - B. Final Actions in All Other Circumstances..... 5-33

- CHAPTER 6 6-1**
- DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS... 6-1**
- I. INTRODUCTION..... 6-1**
- II. MINIMUM TRAINING REQUIREMENTS FOR ALL INVESTIGATORS..... 6-1**
 - A. Standards for New Investigator Training Requirement..... 6-2
 - B. Standards for Continuing Investigator Training..... 6-3
- III. RESPONSIBILITIES 6-3**

- A. Director of Equal Employment Opportunity 6-3
- B. Equal Employment Opportunity Investigator..... 6-3
- C. Complainant..... 6-4
- IV. INVESTIGATION..... 6-4**
 - A. Methods of Investigation 6-4
 - B. Purpose of the Investigation 6-5
 - C. General Investigative Requirements..... 6-5
 - D. Failure to Complete Investigation within Time Limit..... 6-6
- V. THE ROLE OF THE INVESTIGATOR..... 6-6**
 - A. Collecting and Discovering Factual Information 6-6
 - B. Variety of Methods Available 6-6
 - C. Investigator Must Be Unbiased and Objective..... 6-7
 - D. Investigator Must Be Thorough..... 6-8
- VI. EVIDENCE 6-9**
 - A. Quality of Evidence 6-9
 - B. Types of Evidence 6-10
 - C. Sources of Evidence 6-12
 - D. Evidence on the Question of Remedies 6-14
- VII. WITNESSES AND REPRESENTATIVES IN THE FEDERAL EEO PROCESS 6-15**
 - A. Disclosure of Investigative Material to Witnesses 6-15
 - B. Travel Expenses..... 6-16
 - C. Official Time 6-16
 - D. Duty Status/Tour of Duty 6-19
 - E. Use of Government Property 6-20
- VIII. COMPLAINT FILE..... 6-20**
 - A. Contents of the Complaint File..... 6-20
 - B. Complaint Files Should Not Include 6-20
 - C. Redactions 6-21
 - D. Features of the Complaint File 6-21
 - E. Organization of the Complaint File 6-21
 - F. Availability of Complaint Files 6-23
 - G. Disposition of Complaint Files..... 6-23
- IX. THE INVESTIGATIVE SUMMARY..... 6-25**
- X. COMPLAINANTS’ OPPORTUNITY TO REVIEW THE INVESTIGATIVE FILE .
..... 6-25**
- XI. SANCTIONS FOR FAILURE TO COOPERATE DURING THE
INVESTIGATION..... 6-26**
- XII. SANCTIONS FOR FAILURE TO DEVELOP AN IMPARTIAL AND
APPROPRIATE FACTUAL RECORD..... 6-27**
- XIII. OFFER OF RESOLUTION 6-28**
 - A. Elements of the Offer 6-28
 - B. Model Language for the Offer..... 6-30

CHAPTER 7 7-1

HEARINGS 7-1

I. INTRODUCTION..... 7-1

II. THE ROLE OF THE AGENCY AT THE HEARING STAGE..... 7-3

 A. Forward Complaint File to the Commission 7-3

 B. Hearing Room and Production of Witnesses..... 7-3

 C. Hearings Are Closed to the Public 7-3

 D. Verbatim Hearing Transcripts and Court Reporters..... 7-3

 E. The Site of the Hearing..... 7-4

 F. Request for Change in Venue 7-6

 G. Agency Costs 7-6

III. THE ROLE OF THE ADMINISTRATIVE JUDGE 7-7

 A. Administrative Judge’s Review of the Record 7-7

 B. Developing the Record in Complaints with Inadequate Records..... 7-8

 C. Dismissal of Complaint by Administrative Judge 7-10

 D. Administrative Judge’s Authority 7-10

 E. Summary Judgment (Decisions without a Hearing)..... 7-17

 F. Transmittal of the Decision and Hearing Record 7-18

IV. DISCOVERY..... 7-19

 A. Introduction 7-19

 B. Right to Seek Discovery 7-19

 C. Methods of Discovery 7-21

 D. Discovery Procedures 7-22

 E. Failure to Request Discovery Implies Waiver of Subsequent Requests for Documents
 7-26

 F. Cost of Discovery 7-27

V. EXCLUSION AND DISQUALIFICATION 7-27

 A. Exclusion from a Hearing..... 7-27

 B. Disqualification of a Representative from Future Hearings 7-32

 C. Referral of Attorney Representatives to Bar Association 7-34

CHAPTER 8 8-1

COMPLAINTS OF CLASS DISCRIMINATION..... 8-1

IN THE FEDERAL GOVERNMENT 8-1

I. INTRODUCTION..... 8-1

II. PRE-CERTIFICATION PROCEDURES 8-1

 A. Pre-Complaint Processing 8-1

 B. Filing and Presentation of the Class Complaint 8-2

**III. INDIVIDUAL COMPLAINTS FILED ON BASES AND ISSUES IDENTICAL TO
 CLASS COMPLAINTS 8-3**

IV. CERTIFICATION OR DISMISSAL - 29 C.F.R. § 1614.204(d) 8-5

 A. Class Complaint Criteria 8-5

B. Developing the Evidence for Purpose of Certification Determination..... 8-5

V. CERTIFICATION DECISION - 29 C.F.R. § 1614.204(d)(7) 8-6

A. Administrative Judge Issues Decision on Certification..... 8-6

B. Transmittal of Decision 8-6

C. Right to Appeal the Administrative Judge’s Decision 8-7

VI. NOTIFICATION - 29 C.F.R. § 1614.204(e) 8-7

A. Timing and Method of the Notice 8-7

B. Content of the Notice..... 8-8

C. Individuals May Not Opt Out..... 8-8

D. Settlement Notice 8-8

VII. DEVELOPING THE EVIDENCE - 29 C.F.R. § 1614.204(f) 8-8

A. The Process of Developing the Evidence 8-8

B. Use of Agency Resources and Facilities by Class Agent..... 8-9

VIII. RESOLUTION - 29 C.F.R. § 1614.204(g) 8-10

A. Resolution by the Parties 8-10

B. Notice of Proposed Resolution 8-10

C. Administrative Judge Shall Review Resolution 8-10

IX. HEARING - 29 C.F.R. §§ 1614.204(h) and (i)..... 8-11

A. Hearing Procedures..... 8-11

B. Site of the Class Hearing 8-11

C. Travel Expenses..... 8-12

D. Official Time for Agency Employees 8-12

X. ADMINISTRATIVE JUDGE’S DECISION ON THE MERITS OF THE CLASS COMPLAINT..... 8-12

XI. AGENCY FINAL ACTIONS - 29 C.F.R. §§ 1614.204(j) and (k)..... 8-13

A. Action on Administrative Judge’s Decision..... 8-13

B. Agency Final Action Requirements 8-13

C. Binding Nature of Agency Final Action Implementing Administrative Judge’s Decision 8-13

D. Notification of Agency Final Action..... 8-14

XII. RELIEF FOR INDIVIDUAL CLASS MEMBERS - 29 C.F.R. § 1614.204(l)..... 8-14

A. Claims for Individual Relief by Class Members Where Discrimination Is Found . 8-14

B. Timing of Agency Decision on Individual Claims for Relief 8-14

C. Oversight of Individual Claims for Relief..... 8-15

D. Limits on the Duration of a Finding of Class-Wide Discrimination 8-16

E. Where Class-Wide Discrimination Is Not Found..... 8-16

XIII. REPRISAL..... 8-17

CHAPTER 9 9-1

APPEALS TO THE COMMISSION..... 9-1

I. INTRODUCTION..... 9-1

II. ADVISING THE PARTIES OF THEIR APPEAL RIGHTS..... 9-2

A. Rights Following Administrative Judge Issuance of a Decision..... 9-2

- B. Agency Final Action..... 9-4
- C. Agency Final Decision 9-5
- D. Agency Procedural Decision 9-6
- E. Mixed Case Complaints..... 9-6
- III. PERSONS WHO MAY APPEAL 9-6**
 - A. A Complainant May Appeal..... 9-6
 - B. An Agency Must Appeal 9-7
 - C. An Agency May Appeal 9-7
 - D. A Class Agent May Appeal 9-7
 - E. A Class Member or Petitioner May Appeal 9-8
 - F. A Grievant May Appeal 9-8
- IV. FILING THE APPEAL AND RESPONSE 9-9**
 - A. How to Appeal..... 9-9
 - B. Service of Notice of Appeal 9-10
 - C. Appeal Will Be Acknowledged..... 9-10
 - D. Dismissal of Appeal..... 9-11
 - E. Briefs and Supporting Documents..... 9-11
 - F. Statements in Opposition to an Appeal 9-11
 - G. Submission of Case File 9-11
 - H. Signatures on Electronic Documents..... 9-12
- V. APPELLATE PROCEDURE 9-13**
 - A. Where Record Is Complete..... 9-13
 - B. Where Record Requires Supplementation..... 9-13
 - C. Sanctions..... 9-14
 - D. Appeals Decisions Are Final 9-15
- VI. STANDARDS OF REVIEW ON APPEAL 9-16**
 - A. Review of Final Decisions Issued by the Agency 9-16
 - B. Review of Decisions Issued by Administrative Judges..... 9-17
 - C. The Responsibility of the Parties..... 9-18
- VII.RECONSIDERATION..... 9-18**
 - A. Reconsideration Is Not an Appeal 9-18
 - B. Reconsideration Procedures 9-19
 - C. Reconsideration Decision Is Final 9-20
- VIII.REMEDIES..... 9-20**
 - A. An Agency Shall Provide Full Relief after a Finding of Discrimination 9-20
 - B. Clear and Convincing Standard Needed to Limit Relief; Duty to Cure Discrimination Remains..... 9-20
 - C. Relief in Individual Cases..... 9-20
 - D. Relief in Class Cases 9-21
- IX. COMPLIANCE..... 9-21**
 - A. Relief Ordered in a Decision on Appeal..... 9-21
 - B. Interim Relief..... 9-22
 - C. Sanctions..... 9-23

- D. Priority Consideration for Cases Remanded for Investigation..... 9-24
- E. Remand of Dismissed Claims..... 9-24
- F. Complainant May File an Appeal Alleging a Breach of a Settlement Agreement.. 9-25
- G. Complainant May Appeal to the Commission for Enforcement of an Agency Final Action..... 9-25
- H. Compliance Reports Required by Commission Appellate Decisions Containing Orders for Corrective Action 9-25
- X. CIVIL ACTIONS..... 9-26**
- XI. NOTICE REQUIREMENTS..... 9-26**

- CHAPTER 10..... 10-1**
- ADMINISTRATIVE APPEALS, CIVIL ACTIONS, 10-1**
- AND APPOINTMENT OF COUNSEL 10-1**
- I. INTRODUCTION..... 10-1**
- II. ADMINISTRATIVE APPEALS 10-1**
 - A. Time Limits for Appeals to the Commission - 29 C.F.R. § 1614.402 10-1
 - B. Appeals to the Commission Regarding Compliance with Settlement Agreements and Final Action - 29 C.F.R. § 1614.504(a) 10-3
 - C. Petitions to Consider MSPB Decisions 10-4
 - D. Appeal to MSPB on Mixed Case Complaint..... 10-4
- III. CIVIL ACTIONS..... 10-4**
 - A. Time Limits for Civil Actions 10-4
 - B. Termination of the Commission Processing..... 10-5
 - C. Mixed Case Complaints..... 10-6
- IV. NOTICE OF COMPLAINANT'S RIGHT TO REQUEST COURT APPOINTMENT OF COUNSEL AND STATEMENT OF RIGHT TO APPEAL 10-6**

- CHAPTER 11..... 11-1**
- REMEDIES 11-1**
- I. INTRODUCTION..... 11-1**
- II. NON-DISCRIMINATORY PLACEMENT 11-1**
- III. BACK PAY..... 11-2**
 - A. Back Pay Issues 11-2
 - B. Determining Gross Back Pay 11-3
 - C. Overtime or Premium Pay as a Component of Back Pay..... 11-3
 - D. Retirement Deductions and Back Pay 11-3
 - E. Interim Earnings Deducted from Back Pay..... 11-4
 - F. Worker's Compensation Benefits May Be Partially Deductible for Back Pay 11-4
 - G. Availability for Work – Prerequisite for Receipt of Back Pay..... 11-5
 - H. Unemployment Compensation Not Deducted from Back Pay – the Collateral Source Rule 11-5
 - I. Tax Consequences of a Lump Sum Payment of Back Pay..... 11-6
 - J. Liquidated Damages (ADEA and EPA only)..... 11-6

K. Restoration of Leave..... 11-6

IV. FRONT PAY 11-7

V. OTHER FORMS OF EQUITABLE RELIEF 11-7

VI. ATTORNEYS FEES AND COSTS..... 11-9

A. Introduction 11-9

B. Determination of Prevailing Party Status 11-9

C. Presumption of Entitlement 11-10

D. Awards to Prevailing Parties in Negotiated Settlements 11-12

E. Awards of Costs and Fees for Expert and Non-Lawyer Services 11-12

F. Computation of Attorney’s Fees..... 11-13

G. Contents of Fee Application and Procedure for Determination 11-17

H. Miscellaneous Issues 11-18

VII. COMPENSATORY DAMAGES..... 11-20

A. Entitlement to Seek Compensatory Damages 11-20

B. Legal Principles 11-21

CHAPTER 12..... 12-1

SETTLEMENT AUTHORITY 12-1

I. INTRODUCTION..... 12-1

II. AUTHORITY..... 12-1

III. TITLE VII AUTHORITY INDEPENDENT OF BACK PAY ACT..... 12-3

IV. NO FINDING OF DISCRIMINATION NECESSARY FOR SETTLEMENTS.... 12-4

V. CASH AWARDS WITHOUT CORRESPONDING PERSONNEL ACTIONS 12-5

VI. PERSONNEL ACTIONS WITH LUMP SUM PAYMENTS 12-5

VII. IMPLEMENTING SETTLEMENT AGREEMENTS..... 12-6

**APPENDIX A EEO-MD-110 INTERAGENCY AGREEMENT BETWEEN
THE U.S. [NON CONFLICT AGENCY] AND THE U.S. [AGENCY].....
..... APP. A-1**

APPENDIX B EEO-MD-110 EEO COUNSELING TECHNIQUESAPP. B-1

APPENDIX C EEO-MD-110 EEO COUNSELOR CHECKLIST..... APP. C-1

APPENDIX D EEO-MD-110 INFORMATION ON OTHER PROCEDURES .. APP. D-1

**APPENDIX E EEO-MD-110 (SAMPLE) NOTICE OF POSSIBLE APPLICABILITY
OF 5 U.S.C. § 7121(D) TO ALLEGED DISCRIMINATORY ACTION
(29 C.F.R. PART 1614).....APP. E-1**

APPENDIX F EEO-MD-110 SAMPLE RESOLUTION AGREEMENT APP. F1

**APPENDIX G EEO-MD-110 NOTICE OF RIGHT TO FILE A DISCRIMINATION
COMPLAINT (SAMPLE) APP. G-1**

APPENDIX H EEO-MD-110 EEO COUNSELOR’S REPORT 29 C.F.R. § 1614.105..... 1

EEOC APPENDIX I EEO-MD-110 RESERVEDAPP. I-1

APPENDIX J EEO-MD-110 MODELS FOR ANALYSIS APP. J-1

**APPENDIX K EEO-MD-110 NOTICE OF INCOMPLETE INVESTIGATION
(SAMPLE) APP. K-1**

APPENDIX L EEO-MD-110 COMPLAINT FILE FORMATAPP. L-1
APPENDIX M EEO-MD-110 REQUEST FOR A HEARING FORM APP. M-1
APPENDIX N EEO-MD-110 EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION OFFICES AND GEOGRAPHIC JURISDICTIONS FOR
FEDERAL EMPLOYEE AND APPLICANT HEARING REQUESTS
..... APP. N-1
APPENDIX O EEO-MD-110 NOTICE OF APPEAL - AGENCY APP. O-1
APPENDIX P EEO-MD-110 NOTICE OF APPEAL/PETITION - COMPLAINANT
.....APP. P-1
APPENDIX Q EEO MD-110 QUICK REFERENCE CHART DOCUMENTATION
REQUIRED TO CLOSE COMPLIANCE WITH THE MOST COMMON
OFO ORDERS APP. Q-1

PREAMBLE

HISTORY OF THE FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY COMPLAINT PROCESS

This section examines the history of the federal sector equal employment opportunity (EEO) complaint process. It provides an overview of the historical authority that transferred the responsibility for the federal sector EEO process from the Civil Service Commission (CSC) to the Equal Employment Opportunity Commission (EEOC or the Commission).

I. HISTORICAL AUTHORITY

The Government first recognized a policy of nondiscrimination in federal employment during the 1940s. Specifically, in July 1948, President Harry S. Truman issued the first Executive Order to declare a policy of nondiscrimination in federal employment.¹ Executive Order 9980 prohibited discrimination in federal employment on the bases of race, color, religion, or national origin.² Executive Order No. 9980, 13 Fed. Reg. 4,311 (July 28, 1948). The Order designated the head of each department to be personally responsible for insuring that employment decisions were based “solely on merit and fitness,” and it required the head of each department to designate a Fair Employment Officer to appraise department personnel actions, receive discrimination complaints, and take necessary corrective or disciplinary action. *Id.* The Fair Employment Officer’s decisions were appealable to the head of the department. *Id.* Executive Order 9980 also established a Fair Employment Board (FEB) in the CSC to advise department heads on issues related to fair employment, disseminate information relevant to fair employment programs, and coordinate department programs. *Id.* The FEB was authorized “to review decisions made by the head of any department which are appealed . . . or referred to the Board by the head of the department for advice, and to make recommendations to such head.” *Id.*

President Dwight D. Eisenhower carried forward the Government’s nondiscrimination policy when he issued Executive Order 10590, which superseded Executive Order 9980. Executive Order No. 10590, 20 Fed. Reg. 409 (Jan. 19, 1955). The Order required each department or agency head to establish procedures to provide a complainant with a fair hearing and the opportunity to appeal their case. *Id.* Executive Order 10590 re-designated the Fair Employment Officer as an Employment Policy Officer and abolished the FEB, replacing it with the

¹ In 1941, President Franklin D. Roosevelt signed Executive Order 8802, which prohibited government contractors from engaging in employment discrimination based on race, creed, color, or national origin. Executive Order No. 8802, 6 Fed. Reg. 3,109 (June 27, 1941).

² President Truman concurrently issued Executive Order 9981, which ordered desegregation of the U.S. Armed Forces. Executive Order No. 9981, 13 Fed. Reg. 4,313 (July 26, 1948).

President's Committee on Government Employment Policy. Id. The Committee's authority was limited, however, to reviewing cases and rendering advisory opinions to the agency or department heads before issuance of a final agency action. Id.

In March 1961, President John F. Kennedy issued Executive Order 10925, which amended Executive Order 10590. Executive Order 10925 replaced the President's Committee on Government Employment Policy with the President's Committee on Equal Employment Opportunity.³ Executive Order No. 10925, 26 Fed. Reg. 1,977 (Mar. 8, 1961). The Order charged this new committee with studying federal employment practices and recommending additional steps to fully achieve the policy of nondiscrimination. Id. The Committee was empowered with the authority to impose sanctions for violations of the Executive Order. Id.

In September 1965, President Lyndon B. Johnson issued Executive Order 11246, which superseded Executive Order 10590 but retained the prohibition on discrimination in federal employment on the bases of race, color, creed, or national origin. Executive Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965). Notably, Executive Order 11246 returned appellate review of final agency actions to the CSC and authorized the CSC to issue regulations and orders necessary to carry out its responsibilities.⁴ Id. The Order required each department and agency head to comply with the CSC's procedures, and to establish and maintain a positive program of equal employment opportunity. Id.

In August 1969, President Richard Nixon further amended Executive Order 11246 by issuing Executive Order 11478, which required department and agency heads to "establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment." Executive Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 12, 1969). President Nixon tasked the CSC with reviewing and evaluating agency programs. Id. Executive Order 11478 also required agencies to "provide access to counseling for employees who feel aggrieved and . . . encourage the resolution of employee problems on an informal basis." Id.

By 1970, despite the issuance of numerous Executive Orders addressing nondiscrimination, employment discrimination remained a significant problem in the federal government. Legislative History of the Equal Employment Opportunity Act of 1972 (U.S. Government Printing Office, Washington, D.C., H.R. 1746, Pub. L. No. 92-261, 1972 at p. 1728 [hereinafter: Legislative History (1972)]. Congress did not find the administrative procedures established by

³ Executive Order 10925 also added "creed" as a prohibited basis of discrimination and prohibited federal government contractors from discriminating on account of race. Executive Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

⁴ Executive Order 11246 also imposed nondiscrimination requirements on contractors and subcontractors as a condition of doing business with the federal government. Executive Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

the CSC to be effective. *Id.* at 82. The CSC rarely reversed agency decisions and was criticized for failing to address systemic discrimination. *Id.* at 82-84. In addition, testimony presented to Congress suggested that federal employees had little faith in the complaint process and often feared retaliation for challenging discriminatory employment practices. *Id.* at 83. Furthermore, Congress “found that inadequate remedies existed to make aggrieved persons whole,” including the unavailability of back pay as an administrative remedy and procedural obstacles potentially limiting the ability of federal employees to bring claims against the federal government, such as sovereign immunity. *Id.* As a result, Congress passed the Equal Employment Opportunity Act of 1972, which amended Title VII to extend its coverage to include federal employees while retaining the CSC’s role in the administrative process.⁵ *Id.* Additionally, Congress passed the Rehabilitation Act of 1973, which prohibited the federal government from discriminating against qualified individuals with disabilities and required federal agencies to establish affirmative action programs to provide greater employment opportunities for individuals with disabilities. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

Despite the passage of the Equal Employment Opportunity Act and the Rehabilitation Act, there were still several problems with the federal complaint/appeals process. The CSC’s procedural regulations were viewed as fundamentally biased against complainants, and the complaint process itself was difficult for individual complainants to navigate. U.S. Department of Labor, Civil Rights Center, *To Eliminate Employment Discrimination* (1975)). Furthermore, by the 1970s, seventeen federal agencies and departments were responsible for enforcing forty different nondiscrimination statutes and executive orders. EEOC History: 35th Anniversary: 1965 – 2000: The Law, <http://www.eeoc.gov/eeoc/history/35th/thelaw/index.html>. As a result, in 1978, President Jimmy Carter submitted two reorganization plans to Congress to eliminate duplication and conflict by placing the responsibility for coordinating all federal EEO programs exclusively with the Commission. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (May 5, 1978); Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36,037 (Aug. 15, 1978).

President Carter issued Executive Order 12067 to implement Reorganization Plan No. 1 and transfer the functions of the Equal Employment Opportunity Coordinating Council (EEOCC) to the EEOC. Executive Order No. 12067, 43 Fed. Reg. 28,967 (Jan. 3, 1979). Executive Order 12067 delineated the Commission’s responsibility for “develop[ing] uniform standards, guidelines, and policies” for promoting and furthering equal employment opportunity without regard to race, color, religion, sex, national origin, age, or handicap. *Id.* Executive Order 12067 required department and agency heads to comply with the Commission’s final rules, regulations, policies, procedures, and orders. *Id.*

⁵ In 1974, Congress amended the Equal Pay Act (EPA) and Age Discrimination in Employment Act (ADEA) to extend coverage to the federal sector. P. Law No. 93-259, 88 Stat. 58 & 88 Stat. 74 (Apr. 8, 1974). Initially, the CSC was responsible for the enforcement of the EPA and the ADEA with respect to the federal sector. *Id.*

After President Carter submitted his Reorganization Plans to Congress in 1978, Congress passed the Civil Service Reform Act of 1978, which abolished the CSC and distributed its functions primarily among three agencies: the EEOC; a newly established Office of Personnel Management (OPM); and the Merit Systems Protection Board (MSPB), which replaced the CSC. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat 1111 (1978). The Reorganization Plan gave the Commission responsibility over the hearings and appeals functions for certain cases involving employment discrimination. *Id.* In December 1978, President Carter issued Executive Order 12106, which transferred additional CSC functions to the Commission and amended Executive Order 11478 by adding disability and age as protected bases. Executive Order No. 12106, 44 Fed. Reg. 1,053 (Jan. 3, 1979). President Carter also issued Executive Orders 12107 implementing the Civil Service Reform Act of 1978 and Reorganization Plan No. 2. Executive Order No. 12107, 44 Fed. Reg. 1,055 (Jan. 3, 1979). In June 1979, President Carter signed Executive Order 12144, which transferred certain equal pay and age discrimination enforcement functions to the Commission. Executive Order No. 12144, 44 Fed. Reg. 37,193 (June 26, 1979).

II. The Late 1970s-1980

Prior to the Commission obtaining authority over the federal sector EEO process, the CSC had authority to issue regulations and orders with respect to the processing of federal sector EEO complaints. As a result of Executive Order 11246, the CSC issued its initial regulations pertaining to complaint processing at 5 C.F.R. Part 1613, effective April 3, 1966. 5 C.F.R. Part 713 *et seq.* These regulations provided time frames for filing complaints, required agency investigations, a hearing by an agency panel or an agency appointed hearing officer, a final decision by the agency head or a designee, and a process allowing complainants to file appeals with the CSC's Board of Appeals and Review. *Id.* After President Johnson issued Executive Order 11375, in October 1967, which prohibited discrimination in federal employment on the basis of sex, the CSC amended its regulations to require that sex discrimination complaints be processed the same as other EEO complaints. Fed. Reg. 15,631 (Nov. 10, 1967). In 1969, the CSC revised its regulations. Significant changes to the regulations included: complainants were required to participate in informal counseling prior to filing a formal complaint, and complaints examiners were prohibited from being employees of the respondent agency. *Id.* The CSC subsequently amended its regulations several times between 1972 and 1979.

When the Commission gained authority over the CSC's functions regarding federal sector employment discrimination in 1979, it decided to keep the existing process in place until a detailed study could be completed. EEOC Adoption and Amendment of Civil Service Commission Federal Employee Discrimination Complaint Regulations, 43 Fed. Reg. 60,900 (Dec. 29, 1978). Thus, the Commission adopted the CSC regulations with only minor technical changes. 43 Fed. Reg. 60,900 (Dec. 29, 1978). The regulations were moved from 5 C.F.R. Part 713 and re-designated at 29 C.F.R. Part 1613, effective Jan. 1, 1979. *Id.* at 60,901.

In the early 1980s, the Commission amended its regulations with respect to the issue of remedies for complainants alleging discrimination in violation of the Rehabilitation Act. Specifically, in October 1981, the Commission amended its regulations to authorize back pay to applicants for federal employment who successfully proved disability discrimination in order to comply with the 1978 amendments to the Rehabilitation Act of 1973. Complaints of Handicap Discrimination in the Federal Government, 46 Fed. Reg. 51,384 (Oct. 20, 1981). The 1978 amendments provided that prevailing complainants of disability discrimination were entitled to the same remedies as those provided under Title VII. Id. The Commission's amendments deleted the provision in the regulations prohibiting back pay awards to applicants aggrieved by disability discrimination. Id.

During the mid-1980s, the Commission significantly revised its regulations governing the processing of federal sector complaints. Initially, the regulations were amended in 1985, to provide for a special panel to resolve conflicts between the MSPB and the Commission. EEOC and Merit Systems Protection Board Regulations for Special Panel Proceedings, 50 Fed. Reg. 53,897 (Dec. 27, 1985). Subpart D, "Processing Mixed Case Complaints," was amended to provide for a means to refer cases to a special panel, the organization of the special panel, and the procedures of the panel. Id. Subsequently, the Commission revised its regulations, effective November 30, 1987. 1987 Revisions to Federal Employee Discrimination Complaint Procedures, 52 Fed. Reg. 41,920 (Oct. 30, 1987). The revised regulations encompassed numerous changes including providing additional grounds for dismissing complaints, as well as providing a right of appeal for complainants alleging breach of a settlement agreement. Id. In addition, the Commission in 1987 renamed complaints examiners "Administrative Judges" (effective March 30, 1987) in order to "reflect more accurately the nature of the position." Nomenclature Change to Federal Employee Discrimination Complaint Procedures, 52 Fed. Reg. 10,085 (Mar. 30, 1987).

III. THE 1990s TO THE PRESENT

The 1990s also represented a time of significant change to the Commission's regulations governing the processing of federal sector complaints. The Commission issued revised regulations effective October 1, 1992. 57 Fed. Reg. 12,634 (Apr. 10, 1992). These revisions moved the regulations from 29 C.F.R. Part 1613 to 29 C.F.R. Part 1614. Id. Part 1614 was organized differently than the prior version of the regulations. Id. Specifically, Part 1613 contained separate subparts for each type of complaint (Title VII complaints, age complaints, mixed case complaints, etc.). Part 1614 consolidated the procedures as much as possible in an effort to avoid repetition. Id. One noteworthy change encompassed in the 1992 revisions was extending the time limit to contact an EEO Counselor from 30 days to 45 days. Id. at 12,635.

Pursuant to the recommendations of a Federal Sector Workgroup, comprised of representatives from various offices throughout the EEOC, the Commission revised its regulations again in 1999, effective November 9, 1999. 1999 Revisions to EEOC Federal Employee Discrimination

Complaint Procedures, 64 Fed. Reg. 37,644 (July 12, 1999)(codified at 29 C.F.R. Part 1614). Some of the significant changes to the regulations included: a requirement that agencies establish an alternative dispute resolution program, providing additional grounds for dismissal, providing Commission Administrative Judges with the authority to dismiss complaints, and making Administrative Judge decisions final decisions without potential agency modification. Id. at 37,644-37,645; 37,650. In addition, the revised regulations implemented changes to the provisions governing class complaints to ensure that complaints “raising class claims are not unjustifiably denied class certification and are resolved under the appropriate legal standards consistent” with the federal courts. Id. at 37,651. Moreover, the Commission issued guidance regarding its new regulations in EEO Management Directive-110 (MD-110) (Nov. 9, 1999).

In 1992, Congress amended Section 501 of the Rehabilitation Act to adopt the employment nondiscrimination standards of the Americans with Disabilities Act (ADA). 67 Fed. Reg. 35,732 (May 21, 2002). Effective June 20, 2002, the Commission deleted from its regulations the text of its old Section 501 regulation, at 29 C.F.R. § 1614.203. Id. The new text of § 1614.203 provides, in pertinent part, that the standards used to determine whether Section 501 of the Rehabilitation Act has been violated in a complaint alleging employment discrimination shall be the standards applied under the ADA. 67 Fed. Reg. 35,735 (May 21, 2002).

In an effort to clarify its procedures on mixed case complaints, the Commission issued EEO Management Bulletin 100-1 (EEO MB 100-1) on October 24, 2003. This bulletin advises agencies to delete from their copies of EEO MD-110 Section II.B.4.d in Chapter 4. EEO-MB 100-1 (Oct. 24, 2003). This section advised agency representatives to file a motion with an MSPB Administrative Judge to consolidate matters that were not within their jurisdiction with matters that were properly before the MSPB Administrative Judge. Id. The MSPB notified the Commission that this section was improper because it constituted a request for an MSPB Administrative Judge to hear matters that may not be within the jurisdiction of the MSPB. Id.

In 2004, the process that led to the current regulatory revisions began when the Commission created a workgroup to develop consensus recommendations from the Commissioners for improvements to the federal sector EEO complaint process. The workgroup considered a number of items including testimony and submissions from a November 12, 2002, Commission meeting on federal sector reform, staff proposals, and submissions from internal and external stakeholders including the National Employment Lawyers Association and the Commission’s union. The workgroup determined that while there was no consensus among the Commissioners for large-scale revision of the federal sector EEO process, there was agreement on several discrete changes to the existing regulations that would clarify or build on the 1999 Part 1614 revisions.

Based on the workgroup’s recommendations, a Notice of Proposed Rulemaking (NPRM) was drafted that amended certain sections of 29 C.F.R. 1614. The Commission approved the draft NPRM on June 2, 2008, circulated it to federal agencies on June 4, 2008, pursuant to Executive Order 12067, and gave agencies two months to submit comments. Thirty-three (33) agencies or

agency components submitted comments. After coordination with the Office of Management and Budget (OMB) and the commenting agencies, the Commission formally submitted the draft NPRM to OMB for review under Executive Order 12866 on July 27, 2009.

The Commission approved the NPRM on December 9, 2009, and published it in the Federal Register on December 21, 2009. The Commission received 35 public comments: 14 from federal agencies; 6 from individuals; 5 from civil rights groups; 5 from members of the bar; and 5 from unions or other groups. The Commission issued the Final Rule, with public comments discussed in the preamble, on July 25, 2012.

The final rule contains a number of key revisions to 29 C.F.R. Part 1614:

- As part of the Commission's authority to review agency programs for compliance with Commission directives and guidelines that promote equal employment opportunity in the federal workplace, the Commission can issue notices to agencies when non-compliance is found and not corrected.
- Agencies can seek approval from the Commission to conduct pilot projects in which the complaint processing procedures vary from the requirements of Part 1614.
- A complaint that alleges that a proposal or preliminary step to taking a personnel action is discriminatory can be dismissed, unless the complainant alleges that the proposal is retaliatory.
- An agency that has not completed its investigation in a timely manner must inform the complainant in writing that the investigation is not complete, provide an estimated date of completion, and remind the complainant that s/he has a current right to request a hearing or file a lawsuit.
- An Administrative Judge's decision on the merits of a class complaint is a final decision, rather than a recommended decision, which an agency can implement or appeal.
- Agencies must submit appeals and complaint files to the Commission in a digital format, unless they can establish good cause for not doing so. Complainants are encouraged to submit digital filings.

The rule also required that the Commission provide guidance regarding the changes made by the final rule and continue to assess the federal sector EEO complaint process with a view to further improvements.

The Commission is now in the process of considering more significant changes to the federal sector complaint process than those issued in the Final Rule adopted in 2012. An Advanced Notice of Proposed Rulemaking (ANPRM) was issued in Feb. 2015 asking federal agencies,

employees and the public to consider how the Commission's federal sector complaint process currently works and whether wholesale revisions to the process are needed. The Commission received approximately 100 comments in response. After review of those comments, the Commission intends to issue a NPRM to amend the 1614 regulations. A final revised 1614 regulation may incorporate changes to the processing of complaints and therefore to MD-110. Nonetheless, because the 2012 Final Rule is already in effect and there is a need to provide agencies with guidance on how to implement important changes made in that rule, the Commission believes it is necessary to issue this revised MD-110.

CHAPTER 1
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AGENCY
AUTHORITY AND RESPONSIBILITY

I. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (the Commission) enforces five federal laws that prohibit employment discrimination against applicants for federal employment, current federal employees, or former federal employees: [Title VII of the Civil Rights Act of 1964, as amended](#) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); the [Equal Pay Act of 1963](#) (prohibiting agencies from paying different wages to men and women performing equal work in the same work place); the [Age Discrimination in Employment Act of 1967, as amended](#) (prohibiting discrimination against persons age 40 or older); [Sections 501 and 505 of the Rehabilitation Act of 1973, as amended](#) (prohibiting discrimination on the basis of disability); and [Title II of the Genetic Information Nondiscrimination Act of 2008](#) (prohibiting discrimination based on genetic information).

The Commission provides leadership and guidance to federal agencies on all aspects of the federal government's equal employment opportunity program. The Commission ensures federal agency and department compliance with Commission regulations, provides technical assistance to federal agencies concerning EEO complaint adjudication, monitors and evaluates federal agencies' affirmative employment programs, develops and distributes federal sector educational materials and conducts training for stakeholders, provides guidance and assistance to our Administrative Judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.

To carry out these duties, the Commission is authorized to issue rules, regulations, orders, and instructions governing the federal sector pursuant to Section 717(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16(b); Section 15(b) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 633a(b); Section 505(a)(1) of the Rehabilitation Act of 1973, 29 U.S.C. § 794a(a)(1); the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff10; the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*; Section 303 of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. No. 107-174; Executive Order 12067, 43 Fed. Reg. 28,967 (June 30, 1978); and Executive Order 11478, 34 Fed. Reg. 12,985 (Aug. 8, 1969), *as amended* by Executive Order 12106 (Dec. 28, 1978). It is pursuant to these authorities that the Commission issues this Management Directive.

In furtherance of its mission, to stop and remedy unlawful employment discrimination, the Commission will from time to time review agency programs and provide guidance regarding whether they are in compliance with the Commission's rules, regulations, orders, management directives, management bulletins, and any other instructions issued by the Commission. See 29 C.F.R. § 1614.102(e). It is the intent of the Commission to assist agencies in perfecting their EEO programs and to avoid or rectify any deficiencies in their programs that prevent them from reaching the statutory mandate of being model workplaces free from unlawful discrimination.

II. FEDERAL AGENCY

In this Management Directive the term

“Federal Agency” or **“Agency,”** refers to military departments as defined in 5 U.S.C. § 102, executive agencies as defined in 5 U.S.C. § 105, the U.S. Postal Service, the Postal Regulatory Commission, the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration Commissioned Corps, the Government Printing Office (except for complaints under the Rehabilitation Act), and the Smithsonian Institution. See 29 C.F.R. § 1614.103(b). The term also may include such other agencies, administrations, or bureaus (sub-components) as may be established within the above-listed that are given the authority to establish a separate unit tasked with implementing an agency program consistent with the requirements of 29 C.F.R. § 1614.102.

Federal agencies are required by statute not to engage in discrimination on the bases of race, color, religion, sex, national origin, age, disability, genetic information, or retaliation. They are also responsible for providing any reasonable accommodations throughout the EEO process for the aggrieved/complainant. A federal employee, former employee, or job applicant who believes s/he was discriminated against has a right to file a complaint with the agency's office responsible for its EEO programs. Federal agencies must offer pre-complaint counseling or EEO alternative dispute resolution (EEO ADR) to individuals who allege that they were discriminated against by the agency. If pre-complaint counseling or EEO ADR does not resolve the dispute(s), the individual can file a formal discrimination complaint with the agency's EEO office. The agency may dismiss the complaint for certain procedural reasons or conduct an investigation. At the conclusion of the investigation, the agency will issue a notice that provides the complainant with the option of either requesting a hearing before a Commission Administrative Judge or having the agency issue a final agency decision. The final agency action can be appealed to the Commission, or the complainant may file a civil action in a U.S. District Court. The authority the agency has to investigate and resolve complaints of discrimination stems from the statutory obligation that states that federal

agencies have the primary responsibility to ensure nondiscrimination in employment. 42 U.S.C. § 2000e-16(e).

In this Management Directive, the term

“Final Agency Action” refers to an agency’s last and final action on a complaint of employment discrimination. The final agency action may be in the form of a final agency decision, a final agency order implementing an Administrative Judge’s decision, or a final determination on a breach of settlement agreement claim.

“Final Agency Decision” refers to a decision on a complaint of discrimination made by the agency, without an Administrative Judge, that is appealable to the Commission. It includes agency decisions to dismiss or agency decisions on the merits.

“Final Agency Order” refers to a decision by an agency to implement or not implement an Administrative Judge’s decision, which is appealable to the Commission. Where the agency’s final order does not fully implement the Administrative Judge’s decision, the agency must simultaneously appeal to the Commission.

“Final Agency Determination” refers to an agency determination as to whether there was a breach of a settlement agreement that is appealable to the Commission.

In light of the significant responsibility agencies have for ensuring the integrity of the EEO process, agency programs must comply with the rules, regulations, orders, and instructions issued by the Commission to ensure that complaints of employment discrimination are resolved fairly and quickly. 29 C.F.R. § 1614.102(e) clearly sets forth both the authority of the Commission over the federal sector EEO programs and the duty of federal agencies to maintain EEO programs in a manner consistent with the mandatory directives of the Commission.

III. EEO DIRECTOR'S INDEPENDENT AUTHORITY AND REPORTING RELATIONSHIPS

In this Management Directive the term

<p>“EEO Director” - refers to the Director of the Office of Equal Employment Opportunity, Director of Civil Rights, EEO Officer, or any other title used for the position that is responsible for carrying out the responsibilities set forth in 29 C.F.R. § 1614.102(c).</p>
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A. Federal Agencies Must Appoint an EEO Director Who Shall Be Responsible for - See 29 C.F.R. § 1614.102(c):

1. implementing continuing affirmative employment programs to promote equal employment opportunity, see 29 C.F.R. § 1614.102(c)(1), and Commission issued Directives and Guidance (such as MD-715 and its Instructions) for specific information;
2. identifying and eliminating discriminatory employment practices and policies, including the counseling of individuals and the fair and impartial investigations of complaints; and
3. advising the agency head on matters related to equal employment opportunity.

B. The EEO Director Must Report Directly to the Agency Head

To ensure that federal agencies achieve their goal of being a model workplace, all managers and employees must view/consider equal employment opportunity as an integral part of the agency's strategic mission. Commission regulations require that the EEO Director “be under the immediate supervision of the agency head.” 29 C.F.R. § 1614.102(b)(4). The purpose of this requirement is to ensure that the EEO Director has the access and authority to ensure that the agency truly considers the elimination of workplace discrimination to be a fundamental aspect of the agency's mission.

Where such sub-components are authorized, the EEO Director shall be under the immediate supervision of the head of the sub-component. The sub-component EEO Director may, in the alternative, report to either the EEO Director of the parent organization or to the head of the parent organization.

In order to maintain and exercise the independent authority required of the position, the EEO Director cannot be placed under the supervision of the agency's Chief Human Capital Officer or other officials responsible for executing and

advising on personnel actions or providing the agency with a legal defense to claims of discrimination, such as the Office of General Counsel.

By placing the EEO Director under the immediate supervision of the head of the agency, the agency underscores the importance of equal employment opportunity to the mission of each federal agency and ensures that the EEO Director is able to act with the greatest degree of independence.

This unfettered relationship allows the agency head to have a clear understanding of EEO factors when making organizational decisions. Placing the EEO Director under the authority of others within the agency may undermine the EEO Director's independence, especially where the person or entity to which the EEO Director reports is involved in, or would be affected by, the actions of the EEO Director in the performance of his/her implementation of the agency program set forth in 29 C.F.R. § 1614.102.

IV. AVOIDING CONFLICTS OF INTEREST

Federal agencies have a unique role to play in ensuring equal employment opportunity. First, every agency head has a statutory obligation to eradicate unlawful employment discrimination that may occur within the agency. This anti-discrimination responsibility is what requires federal agencies to administer a fair and impartial investigative process designed to determine the validity of complaints, as well as to employ affirmative efforts to root out discrimination and ensure equal employment opportunity. The agency head designates the Director of the Office responsible for the agency's EEO programs to carry out this obligation.

At the same time, the agency head has a fiduciary obligation to defend the agency against legal challenges brought against it (agency defensive function), including charges of discrimination. The agency head designates the General Counsel of the agency (or an agency representative) to carry out this obligation.

In this Management Directive, the term

“Agency Representative” refers to any or all agency employees, (for example Defense Counsel, agency counsel, or legal representative), whose job duties include defending the agency's personnel policies and/or actions. The term is not limited to attorneys employed in an agency's Office of General Counsel or Office of Legal Counsel. The term also includes attorneys in the Office of Human Capital and non-attorney employees whose job duties include defending the agency's personnel policies and/or actions, for example, labor relations specialists.

Some may view the agency's investigative process as inherently biased because the agency accused of discrimination is the same agency that is charged with administering the EEO investigative process. Nevertheless, the statute requires that an agency comply with rules, regulations, orders and instructions which shall include the issuance of a "final action" on a complaint of discrimination, and Commission regulations establish a comprehensive system through which agencies must issue these final agency actions. Moreover, as the Commission's regulations make clear, and as this management directive reinforces, a federal agency head is obligated to protect both the integrity of the agency's EEO process and the legal interests of the agency.

It is important to reiterate that prior to the issuance of the final agency action, the agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination. Because the agency carries this responsibility of impartially processing discrimination complaints, conflicts of interest can arise when agency representatives in offices, programs, or divisions within the agency with a legal defensive role play a part in the impartial processing. This does not mean that any involvement in the EEO process by the Office of General Counsel or Office of Human Capital automatically creates a potential conflict, but instead refers to impermissible involvement in the EEO process by those employees or units of employees designated to represent the agency in adversarial proceedings. See [Complainant v. Dep't. of Defense](#), EEOC Appeal No. 0120084008 (June 6, 2014) (finding that an agency representative should not interfere with the development of the EEO investigative record by "us[ing] the power of its office to intimidate a complainant or her witnesses"); see also [Rucker v. Dep't. of the Treasury](#), EEOC Appeal No. 0120082225 (Feb. 4, 2011) (stating an agency "should be careful to avoid even the appearance that it is interfering with the EEO process.")

While the information in the following sections illustrates the conflicts that may compromise the integrity of the impartial EEO complaint process, it is not intended to imply that agency representatives are a negative influence on the process. Many agency representatives provide meaningful contributions to the EEO in the workplace by educating managers and employees, consulting senior leaders with lessons learned from workplace disputes, and seeking to protect the agency by advising leadership to end a discriminatory practice as soon as it becomes apparent. This section focuses on the narrow occasions where the intersection of responsibilities creates a conflict affecting the impartiality of the complaint process.

A. Separation of EEO Complaint Program from the Agency's Personnel Function

The EEO complaint program is an integral part of the agency's "affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies." See 29 C.F.R. § 1614.102(a). To carry out this function in an impartial manner, the agency's personnel function must be kept separate from the EEO complaint process. The same agency official(s) responsible for executing and advising on personnel actions may not also be responsible for managing, advising, or overseeing the EEO pre-complaint or

complaint processes. The EEO processes often scrutinize and challenge the motivations and impacts of personnel actions and decisions. In order to maintain the integrity of the EEO investigative and decision-making processes, those EEO functions must be kept separate from the personnel function.

B. Complaints That Present Potential Conflicts of Interest

1. When the Alleged Responsible Management Official Is the Head of the Agency

A conflict of interest may exist when the responsible management official alleged to have engaged in discriminatory conduct is the agency head or a member of the immediate staff of the agency head, or occupies a high-level position of influence in the agency. Real or perceived conflict may occur as a result of the undue influence that the high-level official may have over the EEO Director and other involved agency personnel. Whether this conflict is real or presents the appearance of a conflict, the matter must be addressed through procedures designed to safeguard the integrity of the EEO complaint process. For example, when an EEO complaint alleges that the agency head or a member of his/her immediate staff has engaged in discrimination, the agency head should recuse himself/herself from the decision-making process, and engage an official outside his/her chain of command to issue a final action on the case. Agencies with questions regarding unique conflict issues may contact the Office of Federal Operations (OFO) for additional guidance.

2. When the Alleged Responsible Management Official Is the EEO Director or Supervisor in the EEO Office

If an employee wishes to file a complaint alleging discrimination by the EEO Director or another supervisor in the EEO office, a real or perceived conflict may exist because the interests of the responding official would challenge the objectivity or perceived objectivity of the EEO office. This matter must be addressed through procedures designed to safeguard the integrity of the EEO complaint process. For example, when an EEO complaint alleges that the EEO Director or a member of his/her immediate staff discriminated, the EEO Director shall recuse himself/herself and retain a third party to conduct the counseling, and investigation and draft the final agency decision for the agency head to issue.

C. **Agencies Must Avoid Conflicts of Interest in Processing Complaints**

Agencies are required to develop an impartial factual record in accordance with the instructions contained in this Management Directive. See 29 C.F.R. § 1614.108(b). Therefore, agencies must develop procedures for investigating complaints in which it is perceived that the EEO office would have an actual or perceived conflict of interest. In developing an impartial record where a conflict of interest or the appearance of a conflict exists, agencies should consider the following:

1. **Formal or Informal Arrangements**

Agencies should consider whether the EEO program would be best served by entering into a formal contract with a third party or whether an informal arrangement with a third party would suffice. When establishing a formal contract, many agencies enter into interagency agreements with other agencies to handle one or more of the stages in the EEO process. See Appendix A for a sample Interagency Agreement. Other agencies have developed informal arrangements with a third party, whereby the third party provides EEO services on an as-needed basis.

Agencies should consider the best source from which to obtain a third party. Agencies have reported using private contractors, parallel sub-components within a department or agency, and other federal agencies. The Commission does not endorse any particular type of third party over any other. However, agencies should ensure that the third party adheres to the applicable requirements established in this Management Directive.

2. **Stages of the EEO Process**

Agencies should assess the stages of the EEO complaint process at which the assistance of a third party would be most effective. Many agencies assign a third party the responsibility of providing counseling, administering EEO ADR, conducting the investigation, and/or writing the accept/dismiss letter and/or the final agency action. Pursuant to 29 C.F.R. § 1614.110(a), the agency is responsible for issuing a final order either fully implementing an Administrative Judge's decision or not fully implementing and appealing the Administrative Judge's decision; pursuant to 29 C.F.R. §1614.110(b), the agency is responsible for taking final action by issuing a final agency decision (FAD). Although the agency must issue the final action, it may assign a third party to write the final action and review the final action before issuance.

D. Separation of EEO Complaint Program from Agency's Defensive Function

Heads of agencies must manage the dual obligations of carrying out fair and impartial investigations of complaints that result in final agency determinations as to whether discrimination has occurred and defending the agency against claims of employment discrimination. Only through the vigilant separation of the investigative and defensive functions can this inherent tension be managed.

Ensuring a clear separation between the agency's EEO complaint program and the agency's defensive function is thus the essential underpinning of a fair and impartial investigation, enhancing the credibility of the EEO office and the integrity of the EEO complaints process.

There must be a firewall between the EEO function and the agency's defensive function. The firewall will ensure that actions taken by the agency to protect itself from legal liability will not negatively influence or affect the agency's process for determining whether discrimination has occurred and, if such discrimination did occur, for remedying it at the earliest stage possible.

It is important for the EEO Director to be provided with sufficient legal resources (either directly or through contracts) so that the legal analyses necessary for reaching final agency decisions can be made within the autonomous EEO office.

At a minimum, however, the agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters. Legal sufficiency reviews in the EEO process involve legal analysis made by the EEO office during the processing of EEO complaints, such as acceptance/dismissal of complaints, legal theories utilized by the EEO office during investigations, and legal determinations made in final agency actions. The optimal situation is for the EEO office to have sufficient internal legal resources. However, when necessary and requested by the EEO office, legal sufficiency reviews conducted outside the EEO office must be handled by individuals that are separate and apart from the agency's defensive function.

Similarly, impartiality or the appearance of impartiality is not ensured by simply rotating agency representatives within the same office and is undermined where the agency representative's associates are assigned the legal sufficiency function in EEO cases from the representative's caseload.

V. DELEGATION OF AUTHORITY TO RESOLVE DISPUTES

The agency must designate an individual to attend settlement discussions convened by a Commission Administrative Judge or to participate in EEO alternative dispute resolution (ADR) attempts. Agencies should include an official with settlement authority during all settlement discussions and at all EEO ADR meetings (Note: The agency's official with settlement authority should not be the responsible management official or agency official directly involved in the case. This is not a general prohibition on those officials from being present at appropriate settlement discussions and participating, only that they are not the officials with the settlement authority.) The probability of achieving resolution of a dispute improves significantly if the designated agency official has the authority to agree immediately to a resolution reached between the parties. If an official with settlement authority is not present at the settlement or EEO ADR negotiations, such official must be immediately accessible to the agency representative during settlement discussions or EEO ADR.

VI. EEO OFFICIALS CANNOT SERVE AS REPRESENTATIVES

EEO officials must have the confidence of the agency and its employees. It is inconsistent with their neutral roles for EEO Counselors, EEO Investigators, EEO Program Managers, or EEO Directors to represent agencies or complainants in the EEO complaint process. Therefore, persons in these positions cannot serve as representatives for complainants or for agencies in connection with the processing of discrimination complaints. See 29 C.F.R. § 1614.605(c) (disqualification of representatives for conflict of duties).

VII. SPECIAL EMPHASIS PROGRAM

The head of the agency shall designate an Equal Employment Opportunity Officer(s) and such Special Emphasis Program Managers, clerical, and administrative support as may be necessary to carry out the functions described in Part 1614 in all organizational units of the agency and at all agency installations. 29 C.F.R. § 1614.102(b)(4).

Special Emphasis Program Managers should include managers of the Program for Employees with Disabilities, the Federal Women's Program, the Hispanic Employment Program and such other programs as may be required by the Office of Personnel Management or the particular agency.

An agency head may delegate authority under this part to one or more designees. 29 C.F.R. § 1614.607.

VIII. AGENCY STATISTICAL REPORTING REQUIREMENTS FOR THE COMPLAINT PROCESS

A. Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints

The Commission requires each covered agency to use EEOC Form 462, Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints, to provide an annual report of the status of all pre-complaints and formal complaints processed under its EEO complaints program. See 29 C.F.R. § 1614.602(a). The Commission annually provides detailed instructions for reporting the data in an EEOC Form 462 User's Instruction Manual located on the Guidance page of the Commission's electronic document submission portal.

B. Quarterly and Fiscal Year EEO Complaint Statistics Required by Title III of the No FEAR Act

Pursuant to 29 C.F.R. § 1614.703, agencies are required to post cumulative quarterly and fiscal year EEO complaint statistics, titled "Equal Employment Opportunity Data Posted Pursuant to Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. No. 107-174," on the home page of the agency's public website. Agencies should provide a hyperlink to the statistical data entitled "No FEAR Act Data." Section 1614.704 of 29 C.F.R. sets forth the list of statistical data the agency must post. Additional information regarding No FEAR Act posting is found at <http://www.eeoc.gov/federal/directives/index.cfm>.

C. Annual Report to Congress, the Commission and the U.S. Attorney General Required by Title II of the No FEAR Act

Title II of the No FEAR Act of 2002 requires each federal agency to submit to Congress, the Commission and the Attorney General an annual report that includes the agency's fiscal year Equal Employment Opportunity complaint statistics among other requirements. More information on the No FEAR Act annual report requirements can be found in [5 C.F.R. §§ 724.301-302](#). All No FEAR Act reports should be sent to:

Chair of the Equal Employment Opportunity Commission
c/o Office of Federal Operations
Attention: No FEAR Act Report Coordinator
P.O. Box 77960
Washington, DC 20013

No FEAR Act reports may soon also be submitted electronically through the Commission's electronic document submission portal.

Other Commission reporting requirements are set forth in Management Directive 715 issued in October 2003 which is located on the Commission's website at <http://www.eeoc.gov/federal/directives/md715.cfm>.

IX. PROGRAM REVIEW PROCEDURES FOR COMPLIANCE

Agency programs will be reviewed for compliance with Commission rules, regulations, orders, Management Directives, Management Bulletins, or any other instructions issued by the Commission. Due to the variation in the requirements set forth in the above issuances the method of review may vary, depending on the requirement(s) at issue. A review may result from multiple sources: 1) monitoring agency submissions including complaint files, plans, and reports; 2) monitoring correspondence and news media for reports of agency action or non-action indicative of compliant or noncompliant activity; 3) requesting information directly from the agency; and 4) on-site visits or virtual conferences.

Pursuant to 29 C.F.R. § 1614.102(e), in cases where any of an agency's EEO programs or activities are found not to be in compliance with a Commission issuance, the agency will be notified of such non-compliance, and the agency will be given the opportunity to respond to the Commission. The agency's response should contain a statement of the agency's compliance, a plan to bring the program or activity into compliance, or a justification as to why the agency will not comply. Failure to respond or an inadequate agency response will result in escalation to the next step in this process.

A. Notice to Agency of Non-Compliance

In cases where noncompliance is discovered, the agency EEO Director or responsible Program Manager will be notified in writing of the noncompliance. The notice will include:

- 1) the requirement with which the Commission believes that the agency is not in compliance and the source of that requirement;
- 2) a statement explaining how the Commission became aware of the noncompliance;
- 3) a statement as to how the agency is not in compliance and the basis for that conclusion;

- 4) a stated reasonable period of time to cure the noncompliance with recommended actions; and
- 5) a stated reasonable period of time in which the agency may establish that it is, in fact, in compliance or a stated reasonable period of time to establish a justification for the noncompliance.

B. Written Notice to Head of Federal Agency

The Chair of the Commission may issue a notice to the head of the agency whose program is noncompliant when an agency head fails to be responsive and/or where efforts to assist the agency in reaching compliance through the steps set forth in Section IX.A. The notice to the agency head will include:

- 1) the compliance requirement with which the Commission believes the agency is not complying and the source of that compliance requirement;
- 2) a statement explaining how the Commission became aware of the noncompliance;
- 3) the efforts undertaken by the Commission's Office of Federal Operations to obtain compliance;
- 4) the agency response to the Commission's efforts; and
- 5) a stated period of time within which the agency head must respond with a plan to bring the program into compliance.

C. Public Notification of Non-Compliance

Where the head of the agency fails to respond timely and in good faith with a plan that the Director of Federal Operations believes is sufficient to bring the agency program into compliance, the Chair of the Commission will publically identify the noncompliant agency and the factual bases surrounding the noncompliance.

1. The Chair will evaluate the repercussions and reach of the effect of the noncompliance on equal employment opportunity and publish or publically identify the fact of noncompliance in a manner reflective of the reach and severity of the harm.

2. Public identification may occur by using, among other means, publication in the Annual Report to Congress, a press release, posting some form of notice of noncompliance on the Commission's public website, or any other means the Chair deems appropriate.

X. PILOT PROJECTS

Unless prohibited by law or executive order, the Commission, in its discretion and for good cause shown, may grant agencies prospective variances from the complaint processing procedures prescribed in 29 C.F.R. Part 1614. Variances will permit agencies to conduct pilot projects of proposed changes to the complaint processing requirements of 29 C.F.R. Part 1614 that may later be made permanent through regulatory change. See 29 C.F.R. § 1614.102(f).

A. Request for Pilot Authority

Agencies requesting variances must submit in writing a request for pilot authority. In its written request, the agency requesting a variance must:

1. identify the specific section(s) of 29 C.F.R. Part 1614 from which it wishes to deviate and provide a summary description of what it proposes to do instead;
2. provide information clearly defining the stages in the pilot project and how matters will progress to completion within the pilot project;
3. explain the expected benefits and expected effect on the EEO complaints process of the proposed pilot project;
4. certify that the pilot project will ensure fairness and neutrality with the ultimate goal of achieving equality of employment opportunity;
5. state how the agency intends to maintain an adequate record for a potential hearing or appeal;
6. submit information demonstrating the agency's current status of operating within regulatory guidelines for complaint processing (information should include EEO Form 462 timeliness indicators, Management Directive 715 self-assessment, and any third-party evaluations, such as Commission program evaluations, Office of Inspector General evaluation reports, or Government Accountability Office reports);
7. provide a written description of the knowing and voluntary opt-in provision for participants;

8. indicate the proposed duration of the pilot project;
9. describe the method to be used to inform agency employees and applicants of the pilot project; and
10. explain the method by which it intends to evaluate the success of the pilot project on an interim basis and at the completion of the pilot project, including identification of well-defined, clear, and measurable objectives and their connection to program objectives, the criteria for determining pilot project performance, a way to isolate the effects of the pilot project, and how data will be collected for evaluation purposes.

B. Process for Submitting, Reviewing, and Approving Pilot Projects

The Commission will annually review and evaluate requests for pilot authority. Agencies should submit their request electronically at the end of the second quarter of the fiscal year, and the Commission will make its determination by the end of the third quarter. All approved pilot projects will begin at the beginning of the next fiscal year and terminate not more than 24 months later, unless extended (see below). The process for approval of pilot authority follows:

1. The Commission announces the opening period of the request for pilot authority at the end of the second quarter of the fiscal year (March 31).
2. Agencies submit requests to the Office of Federal Operations by April 15.
3. The Office of Federal Operations reviews requests and makes recommendations (completed by May 15).
4. The Office of Federal Operations submits requests and recommendations to the Commission by May 15.
5. The Commission review, including a briefing period regarding the requests for variances and recommendations from the Office of Federal Operations, will be completed within 30 days (or by June 15).
6. The Commission votes on approval of requests for pilot authorities.
7. The Office of Federal Operations sends Commission determinations to proposing agencies.
8. Pilot projects must begin the first day of the next fiscal year (October 1).

9. The 24-month maximum time frame for pilot projects will permit agencies to accept complaints into the pilot projects for up to 24 months and allow agencies a reasonable amount of time to conclude the processing of those complaints.
10. Agencies administering pilot projects must submit quarterly reports to the Office of Federal Operations with information on the total complainants opting into the pilot project, the average age of complaints with the pilot project, and updated pilot project evaluation data. See Section X.A.10 of this Chapter.
11. Agencies administering pilot projects must submit a final evaluation report at the conclusion of the pilot project. The report must provide a detailed evaluation of the results of the pilot project and be submitted to the Commission within 90 days of the conclusion of the pilot project.

Variations will not be granted for individual cases and will usually not be granted for more than 24 months. The Director of the Office of Federal Operations for good cause shown may grant requests for extensions of variations for up to an additional 12 months. Additionally, the Director of the Office of Federal Operations may terminate an agency's pilot authority if the agency fails to comply with the requirements of the variance. Prior to termination of the pilot authority, the Director of the Office of Federal Operations will send a notice to the agency requesting information on compliance with the variance provisions.

Electronic submission of pilot authority requests must be made using email transmission of all documents to federalsectoreeo@eoc.gov or through the Commission's electronic document submission portal.

CHAPTER 2

EQUAL EMPLOYMENT OPPORTUNITY PRE-COMPLAINT PROCESSING

I. INTRODUCTION

A. Counseling Generally¹

The EEO process begins when a person who believes s/he has been aggrieved meets with an EEO Counselor.² For further information on coverage under the statutes, [see Section 2.III.A.1 in “Threshold Issues” of the Commission’s Compliance Manual.](#)

In this Management Directive, the term

“EEO Counselor” refers to any agency or contracted employee who, serving as a neutral, provides an aggrieved individual with his/her rights and obligations under equal employment opportunity laws, gathers limited data and may attempt an informal resolution where ADR is not offered or accepted, pursuant to 29 C.F.R. § 1614.

The EEO Counselor provides vital information regarding the EEO process and other processes that may be available to the aggrieved individual, gathers basic information regarding the matter(s) from the aggrieved individual, and attempts to informally resolve the matter(s) if the matter does not go to the alternative dispute resolution program. The EEO Counselor plays a vital role in ensuring prompt and efficient processing of the formal complaint. This section of the Management Directive provides Commission guidance and procedures that EEO Counselors should follow when presented with individual and class claims of discrimination.

¹ Please note: there is no pre-counseling phase of the 29 C.F.R. § 1614 process.

² The Commission consistently has held that a person may satisfy the criterion of EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process. [See Hyman v. Dep’t. of the Navy](#), EEOC Appeal No. 0120100060 (May 26, 2011); [Martell v. Dep’t. of Commerce](#), EEOC Appeal No. 0120110980 (Dec. 21, 2000); [Lodge v. Social Security Administration](#), EEOC Appeal No. 0120110847 (May 12, 2011).

All **time periods** set out in this Management Directive are stated in calendar days unless otherwise indicated. The first day counted is the day after the event from which the time period begins to run and the last day of the period shall be included unless it falls on a Saturday or Sunday or federal holiday, in which case the period shall be extended to include the next business day. All time periods are subject to waiver, estoppel, and equitable tolling. See the [Commission's Compliance Manual](#), "Threshold Issues" 915-003, Section 2-IV Timeliness for further information.

B. Full-Time EEO Counselors

Agencies should use full-time EEO Counselors whenever possible. If an agency must rely on EEO Counselors for whom EEO counseling is a collateral-duty, agencies should consider the following best practices: (1) include a timeliness component in the performance plan of the collateral-duty EEO Counselors; (2) implement an agency policy to remove collateral duties from EEO Counselors for tardiness or inferior work product; and (3) provide incentives for good performance by using on-the-spot awards, letters to supervisors, and awards presentations.³ The Commission also expects agencies to use the step-by-step guide at Appendix B to develop or refine its own counseling procedures.

C. EEO Counselor Training Requirements

Continuing education and training for employees working in federal sector EEO is vitally important to promoting the goals and objectives of equal employment opportunity. This Chapter establishes mandatory training requirements for EEO Counselors. See Section II below for mandatory training requirements.

D. EEO Counseling and Investigations

An EEO Counselor, whether agency or contracted, may not serve as an investigator in a dispute in which s/he provided counseling to the aggrieved person. The EEO Counselor's role is to provide an environment for open dialogue leading to an informal resolution prior to the filing of a complaint. The role is compromised if the EEO Counselor also serves as an investigator of the complaint, as the role of the investigator is that of a neutral fact finder who

³For more information, please review the Commission's report "[Attaining a Model Agency Program: Efficiency](#)" (2004).

collects and discovers factual information concerning the claim(s) in the complaint under investigation and prepares an investigative summary.

The Commission also discourages agencies from allowing an EEO Counselor to act as an investigator in a different dispute. Combining the roles of EEO Counselor and investigator (even with regard to different disputes) can create a perception of bias and potentially confuse individuals with regard to the purpose of the counseling process. Therefore, the Commission recommends against using EEO Counselors as investigators, except as a last resort.

E. EEO Counseling and EEO ADR

Both EEO alternative dispute resolution (ADR) and EEO counseling are essential to the prompt resolution of claims of discrimination. The opportunity for informal resolution is important. EEO ADR is a term used to describe a variety of approaches to resolving conflict that differ from traditional adjudicatory methods or adversarial methods. EEO ADR provides a means of improving the efficiency of the federal EEO complaint process by attempting early and informal resolution of EEO disputes without the filing of a complaint.

When an aggrieved person seeks pre-complaint counseling, the EEO Counselor must fully inform the individual of:

1. how the agency EEO ADR program works;
2. the opportunity to participate in the program where the agency agrees to offer EEO ADR in a particular case; and
3. the right to file a formal complaint if EEO ADR does not achieve a resolution.

See Chapter 3 of this Management Directive for more detailed EEO ADR information.

II. MANDATORY EEO COUNSELOR TRAINING REQUIREMENTS

A. Minimum Requirements

To ensure quality counseling throughout the federal sector, the Commission requires that new EEO Counselors, including contract and collateral-duty EEO Counselors, receive a minimum of thirty-two (32) hours of EEO Counselor

training prior to assuming counseling duties. In addition to the training for new EEO Counselors, all EEO Counselors are required to receive at least eight (8) hours of continuing EEO Counselor training each fiscal year.

The Commission has developed training courses to satisfy these minimum requirements, and it offers them to agencies through the Commission's Revolving Fund Program on a fee-for-service basis.⁴ Agencies may also develop their own courses to satisfy this requirement as long as the training meets the minimum standards set forth by the Commission.

B. Minimum Standards for Thirty-Two-Hour Training Course

New EEO Counselors must receive at a minimum, training in the following areas before an agency assigns them to provide EEO counseling to aggrieved persons:

1. an overview of the entire EEO process set forth under 29 C.F.R. Part 1614, emphasizing important time frames in the EEO process, providing an overview of counseling class complaints, and analyzing fragmentation issues (see Chapter 5, Section III of this Management Directive for a discussion of fragmentation);
2. a review of the roles and responsibilities of an EEO Counselor, as described in this Chapter and in the appendices to this Management Directive;
3. an overview of the statutes that the Commission enforces, including [Title VII of the Civil Rights Act of 1964, as amended](#) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); the [Equal Pay Act of 1963](#) (prohibiting agencies from paying different wages to men and women performing equal work in the same work place); the [Age Discrimination in Employment Act of 1967, as amended](#) (prohibiting discrimination against persons age 40 or older); [Sections 501 and 505 of the Rehabilitation Act of 1973, as amended](#) (prohibiting discrimination against people with disabilities); and [Title II of the Genetic Information Nondiscrimination Act of 2008](#) (prohibiting discrimination based on genetic information);
4. an explanation of the theories of discrimination, including the disparate treatment, adverse impact, and reasonable accommodation theories, and

⁴ For more information about EEOC training courses, visit the Commission's website at <http://www.eeoc.gov/federal/training/index.cfm>.

providing more detailed instructions concerning class actions and issues attendant to fragmentation;

5. a review of the practical development of issues through role-playing or other practices designed to have attendees practice providing EEO counseling, including the initial intake session with an aggrieved person, identifying claims, writing reports, and attempting resolution;
6. a review of other procedures available to aggrieved persons: the right to go directly to court under the Age Discrimination in Employment Act after notice to the Commission; mixed case processing issues, including the right of election; class complaints processing issues; and the negotiated grievance procedure, including the right of election;
7. an overview of the remedies available for each law, such as compensatory damages, attorney's fees, and costs available to prevailing parties: and
8. an overview of the agency's informal and formal EEO ADR processes.

C. Standards for Continuing Training Requirements

Once new EEO Counselors complete the minimum requirements, they must receive a minimum of eight hours of continuing EEO counseling training during every fiscal year thereafter. The purpose of this continuing training requirement is to keep EEO Counselors informed of developments in EEO practice, law, and guidance, as well as to enhance and develop their counseling skills. Accordingly, agencies should conduct a needs assessment to determine specific areas for training. The Commission anticipates that this training will include segments on legal and policy updates, regulatory and statutory changes, counseling skills development, and EEO ADR program updates.

III. THE ROLES AND RESPONSIBILITIES OF AN EEO COUNSELOR

When an aggrieved individual seeks EEO counseling, the EEO Counselor begins their role of educator and must ensure that the aggrieved individual understands his/her rights and responsibilities in the EEO process, including the option to participate in EEO ADR. The EEO Counselor will also perform the roles of information gatherer, and facilitator, and possibly translator, messenger, and suggestion maker as set forth below. The EEO Counselor must perform several tasks in all cases, regardless of whether the aggrieved individual ultimately participates in EEO ADR, including:

1. Advise the aggrieved individual about the EEO complaint process under 29 C.F.R. Part 1614. The EEO Counselor should explain the reasonable accommodations available throughout the EEO process. The EEO Counselor should explain the agency EEO ADR program, stating that the program is available to the aggrieved individual or advising whether the program will be made available. The EEO Counselor should further explain that if the EEO ADR program is available, the aggrieved individual will have to decide whether to seek pre-complaint resolution through the EEO ADR process or through the traditional EEO counseling process. In this regard, the EEO Counselor should inform the aggrieved individual about the differences between the two processes. (Educator)
2. Determine the claim(s) and basis(es) raised by the aggrieved individual. (Information gatherer)
3. Conduct a limited inquiry during the initial interview with the aggrieved individual for the purpose of determining jurisdictional questions. This includes determining whether there may be issues relating to the timeliness of the individual's EEO Counselor contact and obtaining information relating to this issue. It also includes obtaining enough information concerning the claim(s) and basis(es) so as to enable the agency to properly identify the legal claim raised if the individual files a complaint at the conclusion of the EEO counseling process. (Information gatherer)

Use of the term "initial interview" in this context is not intended to suggest that during the first meeting with the aggrieved person an EEO Counselor must obtain all of the information s/he needs to determine the claim(s) or basis(es). Nor does it mean that if the aggrieved individual decides to participate in EEO ADR, the EEO Counselor is prevented from contacting them to obtain such additional information as s/he needs for this specific purpose.

4. Seek a resolution of the dispute at the lowest possible level, unless the agency offers EEO ADR and the aggrieved individual agrees to participate in the EEO ADR program. If the dispute is resolved in counseling, the EEO Counselor must document the resolution. (Facilitator, translator, messenger, and suggestion maker)
5. Advise the aggrieved individual of his/her right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or EEO ADR are unsuccessful. (Educator)

6. Prepare a report sufficient to document that the EEO Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise. (Report Writer)
7. Advise the aggrieved person that their identity will not be revealed unless the aggrieved person authorizes them to reveal it or they file a formal complaint with the agency. (Educator)

The Commission has developed a guide for EEO counseling that agencies may use in developing or refining their own procedures. (See Appendix B of this Management Directive).

IV. INITIAL INTERVIEW SESSION

A. Provide Required Written Notice

At the initial session or as soon as possible thereafter, the EEO Counselor must provide all aggrieved individuals written notice of their rights and responsibilities. 29 C.F.R. § 1614.105(b). The Commission has set forth this information in the “EEO Counselor Checklist,” in Appendix C of this Management Directive.

B. Provide Information on Other Procedures as Required

Depending upon the facts and circumstances of the case, an aggrieved person may have options other than the Part 1614 procedure available in pursuit of a discrimination claim. The individual, in some cases, may have to elect the process s/he wishes to pursue. Election options apply in age discrimination complaints, mixed case complaints, Equal Pay Act complaints, and claims where certain negotiated grievance procedures apply. In addition, procedures may be available through the Office of Special Counsel. As such, EEO Counselors must be familiar with these procedures and be able to identify such cases when the aggrieved person first seeks counseling. See Appendices D and E of this Management Directive.⁵

⁵ See Chapter 4, Section II, of this Management Directive, for additional guidance on the election process applicable to mixed case complaints.

C. Explain Statutes and Regulations

EEO Counselors must have a good working knowledge of the complaint processing regulations in Part 1614 and a sufficient familiarity with federal anti-discrimination statutes, regulations and Commission guidance that will enable them to identify bases and claims correctly. These statutes are:

1. [Title VII of the Civil Rights Act of 1964, as amended](#)

Title VII prohibits discrimination based on race, color, religion, sex, and national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any employment practice that the individual reasonably and in good faith believes violates Title VII.

Title VII's prohibition against sex discrimination includes discrimination on the basis of pregnancy, sexual orientation and gender identity including transgender status.

A claim of discrimination based on sexual orientation is inherently a claim of sex discrimination. [Baldwin v. Dep't. of Transportation](#), EEOC Appeal No. 0120133080 (July 15, 2015). A claim of discrimination based on gender identity or transgender status is also a claim of sex discrimination. [Macy v. Dep't. of Justice](#), EEOC Appeal No. 0120120821 (Apr. 20, 2012). EEO Offices should therefore process such complaints under 29 C.F.R. Part 1614 as claims of sex discrimination, unless complainant specifically requests to use a different process. For additional information, see [Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment](#)

2. [Age Discrimination in Employment Act of 1967, as amended \(ADEA\)](#)

The ADEA prohibits discrimination in employment on the basis of age (40 years or older). It also prohibits retaliation against individuals exercising their rights under the statute. Unlike Title VII and the Rehabilitation Act, the ADEA allows persons claiming age discrimination to go directly to court, after giving the Commission 30 days' notice of the intent to file such an action, without utilizing an agency's administrative complaint procedures. If, however, an individual chooses to file an administrative complaint, s/he must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies 180 days after filing a formal complaint, if the

agency has not taken a final action, or 180 days after filing an appeal with the Commission if the Commission has not issued a decision.

3. [Rehabilitation Act of 1973, as amended](#)

The Rehabilitation Act prohibits discrimination on the basis of mental and physical disabilities, as well as retaliation for exercising rights under the Act. The Rehabilitation Act requires that agencies make reasonable accommodations to the known physical or mental limitations of an applicant or qualified employee with a disability unless the agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program. (Congress amended the Rehabilitation Act of 1973 in October 1992 to provide that the standards used to determine whether non-affirmative action employment discrimination has occurred shall be the standards applied under [Title I of the Americans with Disabilities Act](#). See § 503(b) of the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat 4344 (Oct. 29, 1992); 29 U.S.C. § 791(g).) (Congress amended the Rehabilitation Act again when it issued the [Americans with Disabilities Act Amendments Act of 2008](#).) This statute broadly interprets the definition of disability by adding “major bodily functions” as a major life activity and by directing that the determination of whether an impairment substantially limits a major life activity should be determined based on the impairment’s effect in its active state (for impairments that are episodic or in remission) and should be determined without taking into account the ameliorative effects of mitigating measures, such as medication.

4. [Equal Pay Act of 1963 \(EPA\)](#)

The EPA prohibits sex-based wage discrimination. It prohibits federal agencies from paying employees of one sex lower wages than those of the opposite sex for performing substantially equal work. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions.⁶ The EPA also prohibits retaliation for exercising rights under the Act.

5. [Lilly Ledbetter Fair Pay Act of 2009](#)

⁶Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. EPA complaints are processed under Part 1614. In the alternative, an EPA complainant may go directly to a court of competent jurisdiction on the EPA claim.

The [Lilly Ledbetter Fair Pay Act of 2009](#) amended Title VII of the Civil Rights Act of 1964 to provide that an individual subjected to compensation discrimination under Title VII, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a complaint within forty-five (45) days of any of the following:

- a. When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- b. When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- c. When the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or in part on such compensation decision or other practice.

The Act also has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation pending on or after that date.

6. [Genetic Information Nondiscrimination Act of 2008 \(GINA\)](#)

GINA prohibits discrimination by federal agencies based on an individual's genetic information, which includes the results of genetic tests to determine whether the individual is at increased risk of acquiring a condition in the future, as well as an individual's family medical history. Specifically, the law prohibits the use of genetic information in making employment decisions, restricts the acquisition of genetic information by federal agencies, imposes strict confidentiality requirements, and prohibits retaliation against individuals who oppose actions made unlawful by GINA. The remedies available under GINA are the same as those available under Title VII and the Rehabilitation Act.

7. [Commission Regulations, Guidelines, and Policy Directives](#)

The Commission has issued regulations that address the application of federal nondiscrimination law to the federal government. The regulations governing the processing of federal sector discrimination complaints are contained in Title 29 of the Code of Federal Regulations (C.F.R.), Part 1614. The regulations set out the EEO Counselor's obligations enumerated in Section II of this Chapter.

Other Commission regulations and guidelines address the substantive provisions of federal nondiscrimination law. For example, 29 C.F.R. Part 1630 sets forth Commission regulations applicable to the Rehabilitation Act. EEO Counselors should be familiar with Part 1630 in order to counsel individuals who present claims of disability discrimination.⁷ The Commission also has disseminated enforcement guidance on discrete issues and areas of nondiscrimination law, such as "[Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors](#)," issued June 18, 1999, and "[Revised Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act](#)," issued October 17, 2002. These documents and other Enforcement Guidance are available on the Commission's website at http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm in the Enforcement Guidance and Related Documents section.

⁷ The Commission has issued guidelines covering all of the substantive bases of prohibited discrimination. EEO Counselors should be familiar with 29 C.F.R. Part 1604 (Guidelines on Sex Discrimination) and Appendix to Part 1604 (Questions and Answers on the Pregnancy Discrimination Act); Part 1605 (Guidelines on Religious Discrimination); Part 1606 (Guidelines on National Origin Discrimination); Part 1620 (The Equal Pay Act); Part 1625 (the Age Discrimination in Employment Act); and Part 1635 (Guidelines on the Genetic Information Nondiscrimination Act).

V. THE LIMITED INQUIRY

Once the EEO Counselor has determined the basis(es) and claim(s) adhering to the guidance set forth below, s/he should conduct a limited inquiry. Prior to any resolution attempts, a limited inquiry should be conducted in all counseling. The purpose of the limited inquiry is to obtain information to determine jurisdictional questions if a formal complaint is filed and is performed regardless of whether the aggrieved person subsequently chooses EEO ADR. The limited inquiry also is used to obtain information for settlement purposes if the person chooses EEO counseling over EEO ADR, or does not have the right to choose between EEO counseling and EEO ADR, for example where the agency has specified in its written EEO ADR procedures that the matter is inappropriate for EEO ADR. For further information, see Chapter 3 Section III.C of this Management Directive.

While the scope of the inquiry will vary based on the complexity of the claims, the inquiry is intended to be limited and is not intended to substitute for the in-depth fact-finding required in the investigative stage of formal complaint process. The EEO Counselor must at all times control the inquiry. If the aggrieved person or agency personnel raise objections to the scope or nature of the inquiry, the EEO Counselor shall seek guidance and assistance from the EEO Director. If the EEO Counselor has problems with the inquiry, s/he should immediately notify the EEO Director.

Appendix B includes suggested methods for conducting the inquiry. This guidance may be used to supplement established procedures.

A. Determining the Claim(s)

1. Fragmentation

The EEO Counselor plays a crucial role in the complaint process. As discussed in more detail in Chapter 5, Section III of this Management Directive, EEO Counselors must assist the aggrieved individual in articulating the claim so as to avoid fragmenting the claim. EEO Counselors must review the materials set forth in Section III of Chapter 5 and become familiar with the concept of fragmentation.

2. Identifying the claim(s)

At the initial interview, the EEO Counselor must determine what action(s) the agency has taken or is taking that causes the aggrieved person to believe s/he is the victim of discrimination. Before the EEO Counselor begins the inquiry, s/he must be certain that the claim(s) are clearly

defined and the aggrieved person agrees with how the agency defines the claim(s). The EEO Counselor must also determine, based on his/her understanding of the claims, whether special procedures apply. For further information about special procedures, see Chapter 4 of this Management Directive.

If a claim is like or related to a previously filed complaint, then the complaint should be amended to include that claim when the agency can complete the development of an impartial and appropriate factual record within 360 days of when the original complaint was filed. If the claim is not like or related to a previously filed complaint, or where an impartial and appropriate record cannot be developed within 360 days of when the original complaint was filed, the claim should be processed as a separate complaint. Commission regulations require agencies to consolidate complaints for processing unless it is impossible to do so. See 29 C.F.R. § 1614.606. In a process set forth in Chapter 5, Section III.B of this Management Directive, a complainant shall be instructed to submit a letter to the agency's EEO Director or designee, describing the new incident(s) and stating that s/he wishes to amend his/her complaint to include the new incident(s). The EEO Director or designee shall review the request and determine the correct handling of the amendment in an expeditious manner.

B. Determining the Basis(es)

The aggrieved person must believe s/he has been discriminated against on the basis of race, color, sex (includes pregnancy, equal pay, gender identity, and sexual orientation) when discrimination based on, religion, national origin, age (40 and over), disability, genetic information, or in retaliation for having participated in activity protected by the various civil rights statutes. The EEO Counselor should determine if the aggrieved person believes that his/her problem is the result of discrimination on one or more of the bases.

C. When the Basis(es) Is Not Covered by the EEO Laws

If it is clear that the aggrieved person's problem does not involve a basis(es) set forth in the Commission's laws and regulations, the EEO Counselor should inform the aggrieved person and, if possible, provide him/her with the appropriate process for addressing the matter. If the aggrieved person insists that s/he wants to file a discrimination complaint, the EEO Counselor should conduct a final interview and issue the Notice of Right to File a Discrimination Complaint.

Under no circumstance should the EEO Counselor attempt to dissuade a person from filing a complaint.

VI. RESOLUTION

In almost all instances, informal resolution with an EEO Counselor, freely arrived at by all parties involved in the dispute, is the best outcome of a counseling action. In seeking resolution, the EEO Counselor must listen to and understand the viewpoint of both parties so that s/he is able to assist the parties in achieving resolution. The EEO Counselor's role is to facilitate resolution, not develop, or advocate specific terms of an agreement. The EEO Counselor must be careful not to inject his/her views on settlement negotiations.⁸

Appendix C includes suggested methods for seeking resolution. This guidance may be used to supplement established agency procedures.

A. Extension of Counseling for Resolution Efforts

When the aggrieved individual and an EEO Counselor engage in resolution efforts, they may decide that they need additional time to reach an agreement. If the aggrieved person consents, the EEO office may extend the counseling period an additional period up to but not exceeding 60 days. See 29 C.F.R. § 1614.105(e).

B. Resolution of the Dispute

If, during the course of the limited inquiry, the agency and the aggrieved person agree to an informal resolution of the dispute, the terms of the resolution must be reduced to writing, clearly identify the claims resolved, and be signed by both parties⁹ to help ensure they have the same understanding of the terms of the resolution. See 29 C.F.R. § 1614.603. The Commission recommends that the EEO Counselor, with the knowledge and guidance of the EEO Director, set forth the terms as agreed to by the parties (agency and the aggrieved individual) of the informal resolution in a settlement transmitted to the parties. The letter should

⁸ As noted in Appendix C, at point "B," the EEO Counselor acts as a neutral and not as an advocate for the aggrieved person or the agency. When the aggrieved person seeks advice from the EEO Counselor, the Counselor should remind him/her of the right to representation.

⁹ Please note that in the federal EEO process, the parties are the complainant and the agency. See [Bates v. Tennessee Valley Authority](#), 851 F.2d 1366, 1368 (11th Cir. 1988). The supervisor/manager who has been accused of discrimination is not a party to the EEO complaint, although he may be subject to other legal liability. Id.

state clearly the terms of the informal resolution and should notify the aggrieved person of the procedures available under 29 C.F.R. § 1614.504, in the event that the agency fails to comply with the terms of the resolution. Other laws may provide requirements in settlement agreements, as for example, the [Older Worker's Benefit Protection Act of 1990](#). Appendix F in this Management Directive is a recommended format for the resolution settlement.

The EEO Counselor shall transmit a signed and dated copy of the settlement to the EEO Director. The EEO Director shall retain the copy for four years or until s/he is certain that, the agreement has been fully implemented.

C. Failure to Resolve the Dispute

The aggrieved person may not be satisfied with the agency's proposed resolution of the dispute, or the agency officials may not agree to the aggrieved person's suggestions. If informal resolution is not possible, the EEO Counselor must hold a final interview with the aggrieved person and issue the Notice of Right to File a Discrimination Complaint. No further counseling should occur.

VII. THE EEO ADR PROGRAM

A. The Choice of EEO Counseling or EEO ADR

At the initial counseling session the EEO Counselor will inquire whether the aggrieved is interested in trying to resolve the matter through the agency's EEO ADR program. If the aggrieved is interested, then within a reasonable time, the agency must decide whether to offer EEO ADR to the aggrieved person. When the agency offers EEO ADR in accordance with its EEO ADR policy/procedures, and the aggrieved agrees to participate, then the agency must provide an official with settlement authority for the EEO ADR process. See Chapter 3 of this Management Directive for more information about the EEO ADR process. If the agency offers EEO ADR, then the aggrieved person must be given a reasonable time to choose whether to pursue counseling or participate in EEO ADR. If the aggrieved person chooses to participate in EEO ADR, counseling activities must end. The EEO Counselor should resume the EEO process as specified in Section VII.B of this Chapter.

To participate in EEO ADR, the aggrieved person must sign the agency's Election Form, Agreement to Mediate, or other similar form. The EEO Counselor's Report should include the signed form.

B. Role of the EEO Counselor during EEO ADR Process

When an aggrieved person chooses to participate in the EEO ADR process, the EEO Counselor cannot attempt to resolve the matter. Once the aggrieved person selects EEO ADR, the EEO Counselor must complete the intake functions of counseling (that is, obtaining the information needed to determine the basis(es), claim(s), timeliness, and desired redress) and refer the dispute for EEO ADR processing. Once those tasks are completed, the EEO Counselor should have no further involvement in resolving the matter until s/he learns the outcome of the EEO ADR process. The role of the EEO Counselor will vary depending on whether the parties successfully resolve the dispute during EEO ADR.

1. Successful EEO ADR Outcome

The EEO Counselor shall advise the aggrieved person that if the dispute is resolved during the EEO ADR process, the terms of the agreement must be in writing, clearly identify the claims resolved, and be signed by both parties. See 29 C.F.R. § 1614.603.

2. Unsuccessful EEO ADR/Aggrieved Withdraws from ADR

The EEO Counselor shall advise the aggrieved person that if EEO ADR does not resolve the dispute, or if the matter is not resolved within ninety (90) days from the initial contact with the EEO Counselor, the aggrieved person will receive a final interview and Notice of Right to File a Formal Complaint explaining how to file a formal complaint.

In addition, the EEO Counselor must prepare the EEO Counselor's Report and conduct the final interview. The report should state whether the parties attempted EEO ADR, but cannot reveal any other information about the EEO ADR attempt.

C. Completing the EEO ADR Process

If the agency offers EEO ADR in a particular case and the aggrieved person agrees to participate, the pre-complaint processing period shall be up to ninety (90) days. See 29 C.F.R. § 1614.105(f). Should the parties successfully resolve the dispute during the EEO ADR process, they must sign a written settlement agreement. See 29 C.F.R. § 1614.603. In addition, the EEO ADR program should notify the EEO Counselor of the settlement, and provide a copy of the document.

If the dispute is not resolved within the 90-day period, the EEO ADR program will notify the EEO Counselor, who will issue the Notice of Right to File a Discrimination Complaint, required by 29 C.F.R. § 1614.105(d), as soon as possible, but not later than the 90th day after the individual initiates the EEO process or contacts the EEO office. See 29 C.F.R. § 1614.105(f).

VIII. FINAL INTERVIEW

During the final interview with the aggrieved person, the EEO Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. The EEO Counselor should provide the aggrieved with information to move the matter forward and answer any questions the aggrieved may have. The EEO Counselor must not indicate whether s/he believes the discrimination complaint has merit. Since EEO counseling inquiries are conducted informally and do not involve sworn testimony or extensive documentation, the EEO Counselor (1) cannot make findings on the claim of discrimination, and (2) should not imply to the aggrieved person that his/her interpretation of the claims of the case constitutes an official finding of the agency on the claim of discrimination. See Appendix G for a sample Notice of Right to File a Discrimination Complaint.

In addition, the EEO Counselor must provide the aggrieved person with the following information:

A. Right to Pursue the Claim through the Formal Process

If the dispute has not been resolved to the satisfaction of the aggrieved person, the EEO Counselor must tell the aggrieved person that s/he has the right to pursue the claim further through the formal complaint procedure. It is the aggrieved person, and not the EEO Counselor, who must decide whether to file a formal complaint of discrimination.

B. Requirements of the Formal Complaint

The EEO Counselor must inform the aggrieved person that the complaint:

1. Must be in writing;
2. Must be specific with regard to the claim(s) that the aggrieved person raised in EEO counseling and that the person wishes to pursue;

3. Must be signed by the complainant or complainant's attorney; and
4. Must be filed within **fifteen (15) calendar days** from the date s/he receives the Notice of Right to File a Discrimination Complaint. Written complaints filed by facsimile, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier must meet the regulatory time frames. The date of the postmark, facsimile, electronic communication, hand delivery, delivery to a third-party commercial carrier or in person filing at the agency's EEO office is considered the date filed and must be within the requisite 15 days.

C. Time Frames to Complete the Final Interview

The EEO Counselor must conduct the final interview and issue the Notice of Right to File a Discrimination Complaint within 30 days of the date the aggrieved person brought the dispute to the EEO Counselor's attention. If, however, the aggrieved person consented to a written extension of time, the extension cannot exceed 60 days for counseling. If the aggrieved agreed to participate in EEO ADR, the counseling period may not exceed 90 days. If the dispute is not resolved at the end of the extended time period, the EEO Counselor must advise the aggrieved party in writing of his/her right to file a complaint.

The 30-day EEO counseling period (or as extended by agreement of the aggrieved party) commences when the aggrieved person (1) first initiates contact with any agency official logically connected with the EEO process and (2) exhibits an intent to begin the EEO process. The unavailability of an EEO Counselor to meet with the aggrieved person for a period of time after such initial contact does not toll the 30-day counseling period. Absent agreement from the aggrieved person to extend the time period, the EEO Counselor must conduct the final interview and issue the Notice of Right to File a Discrimination Complaint at the end of the 30-day period.

D. Name(s) of Person(s) Authorized to Receive Complaints

The EEO Counselor shall provide the aggrieved person with the names of persons authorized to receive complaints of discrimination. The EEO Counselor shall inform the aggrieved person (or his/her representative) that the complaint must be delivered to one of the authorized persons.

E. Loss of Confidentiality during Formal Process

In accordance with 29 C.F.R. § 1614.105(b)(2)(g), the EEO Counselor should explain that unless the aggrieved authorizes or files a formal EEO complaint, the EEO Counselor will not reveal their identity. Once the complaint is filed, the complaint file, or part of it, may be shared only with those who are involved and need access to it. This includes the EEO Director, agency EEO officials, and possibly persons whom the aggrieved person has identified as being responsible for the actions that gave rise to the complaint. The complaint file is not a public document to be released outside the EEO complaint process. The identity of the aggrieved person does not remain confidential in the formal complaint process.

F. Written Notice of Right to File a Discrimination Complaint

After the final interview and not more than 30 days after the aggrieved contacted the EEO office, the written Notice of Right to File a Discrimination Complaint must be issued. The Notice must specify that an aggrieved person has **15 calendar days** after receipt of the notice of Right to File a Discrimination Complaint to file a formal complaint (including a class complaint).

The notice must also advise the aggrieved person of the appropriate official with whom to file a complaint and of complainant's duty to inform the agency immediately when the complainant retains counsel or a representative.

The EEO Counselor must advise the aggrieved individual of his/her duty to inform the agency of a change of address if s/he should move during the pendency of the EEO process and the possible consequences for not doing so.

IX. THE EEO COUNSELOR'S REPORT

When advised that an aggrieved person has filed a formal complaint, the EEO Counselor will submit a written report pursuant to 29 C.F.R. § 1614.105(c). The report will contain relevant information about the aggrieved person, jurisdiction, claims, bases, requested remedy, and the EEO Counselor's checklist, as specified in the sample EEO Counselor's Report. See Appendix H of this Management Directive. If the aggrieved person attempted to resolve the dispute via counseling or EEO ADR, the report should state that the aggrieved person chose either traditional EEO counseling or the EEO ADR program and that the dispute was not resolved through either procedure. However, the report should **not** provide a summary of the resolution attempts, nor any opinion as to whether discrimination occurred.

A. Time Limits

The EEO Counselor must submit to the office designated to accept formal complaints and to the aggrieved individual a copy of the EEO Counselor's Report. This must be done within **fifteen (15) days** after notification by the EEO Director or other appropriate official that a formal complaint has been filed. It is essential that the EEO Counselor maintain his/her record of counseling so that this regulatory time limit is met.

B. Contents of Report

The report must include:

1. A precise description of the claim(s) and the basis(es) identified by the aggrieved individual;
2. Pertinent documents gathered during the inquiry, if any;
3. Specific information bearing on timeliness of the counseling contact;
4. An explanation for why the counseling process was untimely, if applicable; and
5. An indication as to whether an attempt was made to resolve the complaint.

The EEO Counselor should also retain a copy of the EEO Counselor's Report for availability in the event that the original EEO Counselor's Report, submitted to the office designated to accept formal complaints, is lost or misplaced. All notes, drafts and other records of counseling efforts will be maintained by the agency after counseling is completed for a period up to four years after resolution of the case.

Appendix H is a recommended format for an EEO Counselor's report.

C. Confidentiality of Negotiations for Resolution

In order to facilitate resolution attempts, all parties involved in resolution must be free to explore all avenues of relief. Offers and statements by parties made in response to resolution attempts by the EEO Counselor cannot be used against either party during the administrative EEO process if resolution attempts fail. The EEO Counselor will not report any discussions that occur during negotiations for resolution. For confidentiality of EEO ADR activities see Chapter 3, Section II.a.3 of this Management Directive.

X. COUNSELING CLASS ACTION COMPLAINTS

Occasionally, an EEO Counselor may need to provide EEO counseling to an aggrieved person or group of individuals who seek to represent a class of persons.¹⁰ A class is defined as a group of employees, former employees, or applicants who allege that they have been or are being adversely affected by an agency personnel policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, genetic information, disability, or retaliation. See 29 C.F.R. §§ 1614.103(a) and 1614.204; see also Chapter 8 of this Management Directive for further guidance for class actions.

The aggrieved person(s) comes to the EEO Counselor as a class agent representing the group. A class inquiry must be brought to the attention of an EEO Counselor by a class agent **within forty-five (45) calendar days** of the date when the specific policy or practice adversely affected the class agent or, if a personnel action, within 45 days of the effective date of that action.

The EEO counseling requirements for class claims are the same as those for individual claims of discrimination, but the facts must be framed to meet the requirements of 29 C.F.R. § 1614.204.

It is strongly recommended that, if class allegations are raised or an individual approaches an EEO Counselor as a class agent for counseling, the EEO Counselor immediately contact the EEO Director, or designated person, for advice and guidance.

¹⁰ This need may arise in the course of counseling an individual where the EEO Counselor identifies allegations of class discrimination.

CHAPTER 3 ALTERNATIVE DISPUTE RESOLUTION FOR EEO MATTERS

I. INTRODUCTION

Statutes enforced by the Commission, regulations, and executive orders encourage, with very narrow, mission specific, exceptions, the use of Alternative Dispute Resolution (ADR) in resolving employment EEO disputes.¹ EEO ADR is a term used to describe a variety of approaches to resolving EEO disputes rather than traditional adjudicatory methods or adversarial methods. Examples of traditional adjudicatory methods include litigation, hearings, and agency administrative processing and appeals.

The Commission's regulations at 29 C.F.R. § 1614.102 (b)(2) require agencies to establish or make available an EEO ADR program. The EEO ADR program must be available during the pre-complaint process and the formal complaint process. The Commission regulations extend the counseling period when EEO ADR is used. See 29 C.F.R. § 1614.105(f). In the federal EEO process, the

“parties” are the agency and the aggrieved/complainant. See [Bates v. Tennessee Valley Authority](#), 851 F.2d 1366, 1368 (11th Cir. 1988). As such, the manager who was accused of discrimination does not qualify as a party because that person is not a statutorily proper defendant in the federal EEO process.

Accordingly, once the agency decides to offer EEO ADR, the accused manager has a duty to cooperate, like any witness, in the EEO ADR process, but may not be the agency official that has settlement authority.

Agencies and aggrieved individuals/complainants have realized many advantages from utilizing EEO ADR. EEO ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually satisfactory fashion. EEO ADR usually costs less and uses fewer resources than traditional administrative or adjudicative processes, particularly processes that include a hearing or litigation. Early resolution of disputes through EEO ADR can make agency resources available for mission-related programs and activities. The agency can avoid costs such as court reporters and expert witnesses. In addition, employee morale can be enhanced when agency management is viewed as open-minded and cooperative in seeking to resolve disputes through EEO ADR.

¹ Agencies may have additional responsibilities under the Alternative Dispute Resolution Act, 5 U.S.C. § 574. The EEOC does not have jurisdiction to enforce the ADRA on federal agencies.

The Commission will review an agency's program and its EEO ADR policies, upon request, for consistency with 29 C.F.R. Part 1614. For more information, please contact the Office of Federal Operations at (202) 663-4599 or OFO.EEOC@EEOC.GOV.

II. CORE PRINCIPLES OF EEO ADR

Agencies may be flexible in designing their EEO ADR programs to fit their environment and workforce, provided the programs conform to the core principles set forth below. However, the Commission believes that there are certain requirements that are absolutely necessary for the successful development of any EEO ADR program. The core principles include the concepts of fairness, flexibility, training, and evaluation. Discussed below are these concepts.

A. Fairness

Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the EEO ADR proceeding by providing, at a minimum: as much information about the EEO ADR proceeding to the parties as soon as possible; the right to be represented throughout the EEO ADR proceeding; and an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented. Fairness also requires the following elements:

1. Voluntariness

Parties must knowingly and voluntarily enter into an EEO ADR proceeding. An EEO ADR resolution can never be viewed as fair if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, the dissatisfaction of one party could lead to conflicts within the workplace or even to charges that the resolution was coerced or reached under duress.

In addition, aggrieved parties should be assured that they are free to end the EEO ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they prefer that process to EEO ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management, EEO officials, or the third-party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.

Note: When the agency determines it to be appropriate to offer EEO ADR to an individual, there is no conflict with voluntariness when the agency requires the responsible management official to participate since s/he is not a party and is not the agency official with settlement authority. When the agency offers the individual EEO ADR and the individual agrees to participate, the parties have voluntarily entered into the EEO ADR process.

2. Neutrality

To be effective, an EEO ADR proceeding must be impartial and independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator ensures this impartiality. In this Management Directive a

“neutral” refers to a third party who has no stake in the outcome of the proceeding whose function is to assist the parties in resolving the matters at hand.

A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve. For example, s/he might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Or s/he may be an employee within the same agency as long as s/he can remain neutral regarding the outcome of the proceeding. The agency must ensure the independence and objectivity of the neutral at all times.

3. Confidentiality

Confidentiality is essential to the success of all EEO ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in the [Administrative Dispute Resolution Act of 1996](#) (ADRA), specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. [See 5 U.S.C. § 574.](#) Parties who know that their EEO ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of EEO ADR information. For implementation and reporting purposes, the details of a resolution can be

disseminated to specific offices only with a need to have that information. Neither the ADRA nor the Commission's core principles require the parties to agree that a settlement must be confidential.

Confidentiality must be maintained by the parties, by any agency employees involved in the EEO ADR proceeding and in the implementation of an EEO ADR resolution, and by any neutral third party involved in the proceeding. The Commission encourages agencies to issue clear, written policies protecting the confidentiality of what is said and done during an EEO ADR proceeding in accordance with 5 U.S.C. § 574.

4. Enforceability

Enforceability is a key principle upon which a successful EEO ADR program depends. Section 1614.504 of 29 C.F.R. provides that: "Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process, shall be binding on both parties." The regulation sets forth specific procedures for enforcing such a settlement agreement. Agreements resolving claims of employment discrimination reached through EEO ADR are enforceable through this procedure.

B. Flexibility

The EEO ADR program must be flexible enough to respond to the variety of situations individual agencies face. There is not necessarily one EEO ADR model which will work for all of an agency's programs, or all of its offices within the same program. Because agencies have different missions and cultures, they have flexibility in designing their EEO ADR programs. Agencies must also exercise flexibility in implementing the EEO ADR program. This flexibility will allow agencies to adapt to changing circumstances that could not have been anticipated or predicted at the time the program was initially implemented.

C. Training

An EEO ADR program, to be successful, will require that the agency at regular intervals provide appropriate training and education on EEO ADR to its employees, managers and supervisors, neutrals, and other persons protected under the applicable laws. See 29 C.F.R. § 1614.102(b)(3).

In order to encourage the successful operation of EEO ADR throughout the agency, all managers and supervisors must receive EEO ADR training, either through an agency-conducted program or through an external source such as another federal agency or a private contractor. The EEO ADR training must include the following, at a minimum:

1. The [ADRA](#) and its amendments, with emphasis on the federal government's interest in encouraging mutual resolution of disputes and the benefits associated with utilizing ADR;
2. The Commission's regulations and Policy Guidance with respect to EEO ADR: 29 C.F.R. §§ 1614.102(b)(2), 1614.105(f), 1614.108(b), and 1614.603 (voluntary settlement attempts);
3. The operation of the EEO ADR method or methods that the agency employs;
4. Exposure to other EEO ADR methods, including interest-based mediation, if this method is not already in use by the agency; and
5. Drafting the settlement agreement, including the notice provision pursuant to 29 C.F.R. § 1614.504, where the aggrieved party believes the agency failed to comply with the terms of the settlement agreement and any other legally required notices.

D. Evaluation

An evaluation component is essential to developing and maintaining an effective EEO ADR program, and should be in place before an EEO ADR program is implemented. The evaluation will assist in determining whether the EEO ADR program has achieved its goals and will provide feedback on how the program might be made more efficient and achieve better results. Evaluations can range from analyzing the EEO ADR data on an annual basis to interviewing the EEO ADR participants about their experience in the process.

III. DEVELOPING AN EEO ADR PROGRAM

A. Written Procedures

The agency must establish written procedures detailing the operation of its EEO ADR program. The written procedures shall include, at a minimum, the following information:

1. The type or types of EEO ADR resources and techniques that the agency offers;
2. The stages of the EEO process at which EEO ADR will be offered and the appropriate agency official(s) who makes the determination to offer EEO ADR on behalf of the agency (note the responsible management official for the alleged discrimination is not the proper agency official for this decision);
3. The time frames involved in the administrative process and the EEO ADR process;
4. The source or sources of neutrals;
5. Those matters where EEO ADR is not available and the criteria the agency uses to determine when an issue is appropriate for ADR;
6. Assurance to the aggrieved party that EEO ADR is voluntary and that s/he may terminate the EEO ADR procedure at any time and return to the informal EEO process where they will be issued a Notice of Right to File a Formal Complaint or in the formal EEO process to the place where processing had ceased;
7. Assurance to the aggrieved party that its EEO ADR program is fair and that s/he has the right to representation;
8. An explanation to the aggrieved party with respect to confidentiality, neutrality, and enforceability; and
9. An assurance that the agency will make accessible an individual with settlement authority, and that no responsible management official or agency official directly involved in the case will serve as the person with settlement authority.

B. EEO ADR throughout the EEO Process

If a case is appropriate, agencies may offer EEO ADR at any stage of the EEO process. With that said, the Commission encourages agencies to resolve complaints of employment discrimination as early in the process as possible. See 29 C.F.R. § 1614.603.

1. EEO ADR during the Counseling Stage

Under 29 C.F.R. § 1614.102(b)(2), agencies must establish or make available an EEO ADR program during the pre-complaint process. Chapter 2 of this Management Directive provides additional guidance concerning the process of offering EEO ADR during counseling.

2. EEO ADR after the Complaint Is Filed

Under 29 C.F.R. § 1614.102(b)(2), agencies must establish or make available an EEO ADR program during the formal complaint process. The regulations also state: “Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.” See 29 C.F.R. § 1614.108(b). As such, agencies must design their EEO ADR program to allow the parties to pursue EEO ADR techniques after various stages of the formal complaint processing period.

3. EEO ADR at the Hearing and Appellate Stages

The Commission encourages EEO ADR attempts by the Commission’s Administrative Judges prior to arranging a hearing. See Chapter 7 in this Management Directive. However, the parties may also pursue EEO ADR through the agency’s EEO ADR program. To do so, the parties must notify the hearing office prior to utilizing the agency’s EEO ADR program.

Similarly, EEO ADR may be beneficial at the appellate stage of the administrative process. At this stage, the parties should notify the Office of Federal Operations (OFO) of their interest in EEO ADR. They may utilize the agency’s EEO ADR program, or request a neutral from OFO.

C. Matters Inappropriate for EEO ADR

While the Commission contemplates that the majority of matters are appropriate for EEO ADR, the Commission recognizes that there are instances in which EEO ADR may not be appropriate or feasible. See [5 U.S.C. § 572\(b\)](#). Agencies may decline to offer EEO ADR for particular issues related to the agency's mission, such as security clearances, but not for broad issues such as promotions or performance evaluations. Agencies have discretion to determine whether a given dispute is appropriate for EEO ADR. However, agencies may not decline to offer EEO ADR to particular cases because of the bases involved (that is, race, color, religion, sex, national origin, age, disability, genetic information, or retaliation).

D. Dealing with Non-EEO Issues

Although the purpose of the EEO ADR program is to address disputes arising under statutes enforced by the Commission, the Commission has found that many workplace disputes brought to the process often include non-EEO issues. In designing their EEO ADR programs, agencies may provide sufficient latitude for the parties to raise and address both EEO and non-EEO issues (that is, issues that do not fall under the jurisdiction of EEO laws, statutes and regulations) in the resolution of their disputes. However, agencies are still responsible for any other statutory obligations they may have.

E. Choosing among EEO ADR Techniques

Agencies should carefully consider the needs of their workforce when selecting techniques and choose the technique or techniques that are most likely to result in the earliest successful resolution of workplace disputes.

The Commission does not mandate the use of a particular EEO ADR technique in an agency's EEO ADR program; however, the selected technique(s) must be used in a manner that is consistent with the core principles. Additionally, each agency's EEO ADR program shall make available to parties at a minimum one ADR technique which allows for the meaningful participation of all involved parties (such as mediation, facilitation, or settlement conferences). The EEO ADR program must not diminish an individual's right to pursue his/her claim under the 1614 process should EEO ADR not resolve the dispute. For example, an EEO ADR program may not require an individual to waive, as a prerequisite to participation, his/her right to an investigation, to a hearing, or to appeal the final decision to the Commission.

F. Time Frames of the EEO ADR Process

An EEO ADR program must be designed around the time frames of the EEO regulations. For example, 29 C.F.R. § 1614.105(f) provides that if the parties agree to participate in the EEO ADR process, the pre-complaint processing period may be extended not to exceed ninety (90) days. This time frame must be met to be consistent with the regulation. If the dispute is not resolved in this time frame, the agency must advise the aggrieved person not later than the 90th day after the EEO Counselor contact of their right to file a formal complaint. However, resolution efforts may continue so long as the parties and the neutral agree.

Similarly, if an individual enters into an EEO ADR procedure after a formal complaint is filed, the time period for processing the complaint may be extended by agreement for not more than 90 days. If the dispute is not resolved, the complaint must be processed within the extended time period.

G. Representation of the Parties

Aggrieved persons have the right to representation throughout the complaint process, including during any EEO ADR process. While the purpose of EEO ADR is to allow the parties to fashion their own resolution to a dispute, it is important that any agency 'dispute resolution procedure' provide all parties the opportunity to bring a representative to the EEO ADR forum if they desire to do so. Note, EEO Officials are not eligible to represent aggrieved individuals/complainants in the EEO ADR process. See Chapter 1 Section VI of this Management Directive for more information.

H. Spin-Off Complaints

Nothing said or done during attempts to resolve the complaint through EEO ADR can be made the subject of an EEO complaint. Likewise, an agency's decision not to offer EEO ADR for a particular case, or an agency's failure to provide a neutral, cannot be made the subject of an EEO complaint.

I. Collective Bargaining Agreements and the Privacy Act

Agencies must be mindful of obligations they may have under collective bargaining agreements to discuss development of EEO ADR programs with representatives of appropriate bargaining units. Agencies must also be mindful of the prohibitions of disclosing information about individuals pursuant to the

Privacy Act. All pre- and post-complaint information is contained in a system of records subject to the Act. Unless the complaining party elects union representation or gives his/her written consent, such information, including the fact that a particular person has sought counseling or filed a complaint, cannot be disclosed to the union.

J. Recordkeeping

Pursuant to the Commission's authority set forth in 29 C.F.R. § 1614.602(a) to collect federal complaints processing data and pursuant to the agency's obligation to report EEO activity to the Commission, the Commission requires agencies to maintain a record of EEO ADR activity for annual reporting to the Commission no later than October 31 of each year. This information will be provided to the Commission on the Form 462.

K. Independent ADR Office

In this Management Directive

an “**Independent ADR Office**” refers to an office that functions independently of the traditional EEO Office. In addition to EEO disputes, an Independent ADR Office may attempt to informally resolve a variety of workplace concerns, such as, grievances, or general employee disagreements.²

The Commission encourages the implementation of an Independent ADR Office as a best practice. A primary advantage of an Independent ADR Office is that the agencies can resolve disputes that do not belong in the EEO process, which then permits the EEO staff to focus on the traditional EEO complaint process. While employees may go directly to the Independent ADR Office without first meeting with the EEO Counselor, an independent ADR office is not an office for the purpose of initiating the EEO process. As a result, during the first contact with an Independent ADR Office, the aggrieved individual must be informed of the need to contact an EEO Counselor and regulatory time frames, should they wish to protect their rights to take the matter through the traditional EEO process.

Where an agency permits ADR office employees to perform any collateral EEO duty (no matter how small or infrequent), the ADR office is no longer independent and therefore any contact by an aggrieved party with the ADR office staff will initiate the traditional EEO process, including EEO counseling and

² For more information, refer to the Commission's ADR report, entitled “[Part II – Best Practices in ADR \(FY 2003-FY 2004\)](#).”

Form 462 reporting. The agency's ADR staff member must provide to the aggrieved person the same information EEO Counselors are required to provide to the aggrieved persons, meet all training requirements of an EEO Counselor, and fully carry out the EEO Counselor's roles and responsibilities. This includes providing the EEO Counselor's report to the EEO Office for issuance in a timely manner. The ninety (90) day pre-complaint processing period will begin from the first contact with the ADR office staff member. Furthermore, an EEO Counselor may not act as a neutral in a case where s/he has previously provided EEO counseling. (See Chapter 2, Section I.E of this Management Directive for guidance on the qualifications, roles, and responsibilities of an EEO Counselor).

IV. PROVIDING INFORMATION

Aggrieved persons need information about all aspects of EEO ADR in order to make an informed choice between EEO ADR and the traditional EEO complaint process. The information provided at the counseling stage largely determines whether aggrieved persons will utilize the EEO ADR process. As such, EEO ADR programs should ensure that aggrieved persons are informed of all of the various steps in the traditional EEO process before beginning the actual EEO ADR proceeding. The aggrieved persons should also learn about the benefits of resolving the EEO dispute through EEO ADR. Although an informed choice is necessary to conduct an EEO ADR proceeding, an additional value is that once aggrieved persons choose EEO ADR over other alternatives, they have made a commitment to its success.

A. Agencies Must Fully Inform Employees about the EEO Process

29 C.F.R. § 1614.105(b)(2), which covers pre-complaint processing, requires that the EEO Counselor advise the aggrieved person that s/he may choose between participation in the EEO ADR program offered by the agency and the traditional EEO counseling procedures. Before the aggrieved person makes a choice between counseling and EEO ADR, the EEO Counselor must fully inform the person about the stages of the EEO process. (See Chapter 2 of this Management Directive). The EEO Counselor also must also advise the aggrieved person about other appropriate statutory or regulatory forums, such as the Merit Systems Protection Board or a negotiated grievance process.

B. Providing Information about the EEO ADR Program

1. The EEO Counselor should provide the aggrieved person with information about the agency EEO ADR program, including, but not limited to, the following:
 - a. A definition of the term EEO “alternative dispute resolution (ADR)” – (the definitions in this Chapter can be used);
 - b. An explanation of the stages in the EEO process where EEO ADR is available;
 - c. A thorough description of the particular EEO ADR technique(s) used in the agency’s program;
 - d. A thorough description of how the program is consistent with the EEO ADR core principles in ensuring fairness (including the right to representation), which requires voluntariness, neutrality, confidentiality, and enforceability;
 - e. An explanation of procedural and substantive alternatives; and
 - f. Information regarding all of the time frames involved in the traditional EEO complaint process and the EEO ADR process.
2. Information about the agency’s EEO ADR program may be provided to the aggrieved person through discussions, memoranda, video presentations, booklets, or pamphlets. In addition, the Commission recommends that agencies issue an EEO ADR policy, which shows the agency head’s support of the EEO ADR program and encourages all employees to participate in the program.

C. Explaining the Benefits of EEO ADR

To encourage the aggrieved persons to consider participating in the EEO ADR program, they will need to understand the benefits of the EEO ADR process. The Commission recommends that the EEO ADR program prepare talking points to promote the use of EEO ADR. In particular, agencies could identify the following benefits of EEO ADR:

1. EEO ADR saves time and money, as litigation and adjudication generally costs more and can take years to reach a decision;
2. Settlement agreements do not require admissions of liability;

3. The parties maintain considerable control over the EEO ADR process and will decide their own outcome;
4. Settlement agreements are more durable because there is buy-in from the parties;
5. EEO ADR can improve office morale and productivity by repairing the parties' relationship and avoiding the tension caused by the investigative process; and
6. Unlike decisions which are published, the terms of the settlement agreement are not routinely disclosed.

D. Informing the Employee about Filing Rights

Whether or not the aggrieved person chooses to participate in the agency's EEO ADR program, the EEO Counselor shall advise the aggrieved person of his/her rights and responsibilities in the EEO complaint process, as set forth in 29 C.F.R. § 1614.105(b).

E. Pre-EEO ADR Meeting

Once the matter is accepted into the EEO ADR program, either the neutral or a member of the EEO ADR office may hold a pre-EEO ADR meeting. The purpose of this meeting is to provide information about the EEO ADR proceeding and address preliminary matters. For example, the meeting could clarify the issues in dispute, determine the scope of authority among the participants, discuss the role of the representatives, and ask the parties to develop a list of the desired results that s/he would like to achieve through EEO ADR.

V. NEUTRALS

ADRA defines a neutral as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." [5 U.S.C. § 571\(9\)](#). The Act further states that a neutral is a:

permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict

of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

[5 U.S.C. § 573 \(a\).](#)

A. Sources of Neutrals

EEO ADR proceedings are most successful where a neutral or impartial third party, with no vested interest in the outcome of a dispute, allows the parties themselves to attempt to resolve their dispute. An agency should also consider the aggrieved person's perception of the third party's impartiality in appointing a neutral for an EEO ADR proceeding. For the neutral to be effective, the participants in an EEO ADR program must perceive the neutral as completely impartial. The selection of neutrals must comply with the core principles of ADR articulated in Section II above.

An agency may use neutrals for its EEO ADR program, subject to their qualifications, from the following sources:

1. Other federal agencies/sub-components (through a federal neutral sharing program or other arrangement);
2. Private organizations, private contractors, bar associations, or individual volunteers; or
3. Within their own agency, provided that they are impartial and independent of any control by either party, in both perception and reality.

The Commission recommends that agencies disclose their source of neutrals to the parties. Many federal agencies offer external sources of neutrals. Federal Executive Boards (FEB) throughout the nation offer pools of neutrals who are available for federal agency EEO dispute resolution. Similarly, the Federal Mediation and Conciliation Service (FMCS) also provides neutrals throughout the country. Within the metropolitan Washington, D.C., area, the Department of Health and Human Services offers an interagency mediation program called the Sharing Neutrals Program. This program operates a pool of trained and experienced collateral-duty mediators who provide mediation services to agencies in exchange for like services to the program from the recipient agency. More information about these programs may be obtained online at the [Commission's federal sector ADR page](#).

In the event that an agency uses one of its own employees as a neutral, it must ensure the neutrality and impartiality of the neutral. If EEO Counselors and

investigators are used as neutrals, the agency must ensure that they do not serve as a neutral in the same dispute in which they provided counseling or conducted an investigation. Furthermore, an agency may use EEO Counselors and investigators as neutrals if, and only if, they satisfy the minimum training requirements. Agencies should also be aware that having EEO Counselors and investigators switch roles between performing their traditional EEO duties and providing EEO ADR can be confusing to the aggrieved persons and to the EEO staff as to their role in a particular case. To avoid this confusion, agencies must clearly communicate to the aggrieved persons the function being performed by the agency employee, whether EEO counseling, investigating, or EEO ADR. To the extent possible, agencies are encouraged to designate individuals as EEO Counselors/Investigators or EEO ADR neutrals, and limit the switching of roles between the EEO and EEO ADR programs.

B. Qualifications of Neutrals

1. Training in ADR Theory and Techniques

Any person who serves as a neutral in an agency's EEO ADR program must have professional training in whatever dispute resolution technique(s) the agency utilizes in its program. The Commission will accept as sufficient such training as is generally recognized in the dispute resolution profession. For example, the Interagency Program on Sharing Neutrals administered by the Department of Health and Human Services requires the following expertise: 1) at least 20 hours of basic mediation skills training; 2) at least three co-mediations with a qualified mediator or five independent mediations and positive evaluations from a qualified trainer/evaluator; and 3) at least two references from two qualified mediators or trainer/evaluators.

2. Knowledge of EEO Law

Any person who serves as a neutral in an agency's EEO ADR program must be familiar with the following EEO laws and areas:

- a. The entire EEO process pursuant to 29 C.F.R. Part 1614, including time frames;
- b. The Civil Service Reform Act and the statutes that the Commission enforces (including Title VII of the Civil Rights Act of 1964, as amended, the Rehabilitation Act of 1973, as amended, the

Americans with Disabilities Act Amendments Act of 2008, the Age Discrimination in Employment Act of 1967, as amended, the Equal Pay Act of 1963, as amended, and the Genetic Information Nondiscrimination Act of 2008);

- c. The theories of discrimination (for example, disparate treatment, adverse impact, harassment, and reasonable accommodation); and
- d. Remedies, including compensatory damages, costs, and attorney's fees.

C. Role of the Neutral

In any EEO ADR proceeding conducted under this Directive, the neutral is expected to be “neutral, honest, and to act in good faith.” The neutral must also act consistently with the ADRA and strive to ensure:

1. That EEO ADR proceedings are consistent with EEO law and Part 1614 regulations, including time frames;
2. That proceedings are fair and consistent with the core principles in this Chapter, particularly providing the parties the opportunity to be represented by any eligible person of his/her choosing throughout the proceeding (see Section III.G of this chapter for more information);
3. That an agency representative participating in EEO ADR has the authority and responsibility to negotiate in good faith and that a person with authority to approve or enter into a settlement agreement is accessible to the agency's representative;
4. That any agreement between the parties can be enforced, assist the parties in preparation of the written settlement agreement that includes the signatures of the appropriate agency representative and aggrieved person, and inform the parties of the review process the agency uses to ensure the terms of the agreement are enforceable;
5. Confidentiality, including destroying all written notes taken during the EEO ADR proceeding or in preparation for the proceeding; and
6. Neutrality, including having no conflict of interest with respect to the proceeding (for example, material or financial interest in the outcome, personal friend or co-worker of a party, supervisory official over a party),

unless such interest is fully disclosed in writing to the parties and they agree that the neutral may serve.

D. Promoting Trust

Trust fosters the open and frank communication between the parties that is an essential factor in reaching a fair resolution of an EEO complaint. Once the individual has chosen EEO ADR to attempt resolution, the neutral can develop the parties' trust by:

1. Providing full information about the EEO ADR proceeding as soon as possible, including information on its impartiality, the relative merits of EEO ADR as compared with the traditional form of complaint processing, and the confidentiality of the EEO ADR process;
2. Giving the parties the opportunity to request and obtain relevant information from one another, so that they have sufficient information to make informed decisions; and
3. Explaining the safeguards that are in place to protect parties from pressures to resolve the complaint.

VI. ADR TECHNIQUES

Numerous ADR techniques are available for use by agencies in their programs. Each agency's EEO ADR program should strive to use those ADR techniques which are a best fit for their culture. While the Commission does not mandate that agencies offer any specific ADR techniques, agencies must at a minimum make available to parties one ADR technique which allows for the meaningful participation of all involved parties in the dispute. Mediation, facilitation, and settlement conferences are common ADR techniques which involve the participation of all parties to the dispute.

Techniques may be combined to provide advantageous aspects of more than one method. For example, an agency may provide coaching to one or more of the parties as a way of preparing parties for mediation. Or, an agency may provide coaching as one of the services after mediation. However, coaching alone would not be sufficient, as it does not allow for meaningful participation of all parties to the dispute. Agencies are not limited to using only one method or technique in their EEO ADR programs. They may find that using various methods in combination may also yield fruitful results and be very effective in reaching resolution. See the [Federal Workplace Conflict Management Desk Reference](#) at [ADR.gov](#) for a non-exhaustive list of ADR techniques.

A. Mediation

In this Management Directive the term

“Mediation” refers to the process where a third-party neutral, who is not a decision maker, facilitates discussion between the parties to help them reach a mutually acceptable resolution.

In a mediation the neutral guides the process and determines when to meet with both parties in a joint session or individually, establishes a tone to help parties engage in meaningful discussion, and creates a safe environment for discussion.

B. Facilitation

Facilitation involves the use of techniques to improve the flow of information in a meeting between parties to a dispute. The techniques may also be applied to decision-making meetings where a specific outcome is desired (for example, resolution of a conflict or dispute). The term “facilitator” is often used interchangeably with the term “mediator,” but a facilitator does not typically become as involved as the mediator in the substantive issues. The facilitator focuses more on the communication processes involved in resolving a matter.

C. Settlement Conferences

In a settlement conference, disputing parties, their representatives, and a judge or referee hold a meeting designed to bring formal adversarial proceedings to a satisfactory close. The role of a settlement judge is similar to that of a mediator in that s/he assists the parties procedurally in negotiating an agreement.

VII. RESOLUTIONS MUST BE IN WRITING

If the agency and the aggrieved person agree to a resolution of the matter, the Commission regulations require that the terms of the resolution be in writing and signed by both parties to verify they have the same understanding of the terms of the resolution. See 29 C.F.R. § 1614.603; Chapter 12 of this Directive. The written agreement must state clearly the terms of the resolution and contain the procedures available under 29 C.F.R. § 1614.504, in the event that the agency fails to comply with the terms of the resolution. Written agreements must comply with [EEOC’s Enforcement Guidance on Non-Waivable Employee Rights under Enforced Statutes](#), wherein the Commission sets forth its position that:

“an agency may not interfere with the protected right of employees to file a complaint or participate in any manner in an investigation, hearing, or proceeding under the laws enforced by the Commission.”

Additionally, any written agreement settling a claim under the Age Discrimination in Employment Act (ADEA) must also comply with the requirements of the Older Workers Benefit Protection Act of 1990 (OWBPA) Pub. L. No. 101- 433 (1990), the [ADEA, 29 U.S.C. § 626\(f\)](#), and the Commission’s regulations regarding Waiver of Rights and Claims under the ADEA at 29 C.F.R. Part 1625. Neither the ADRA nor the Commission’s core principles require the parties to agree that a settlement must be confidential.

The agency representative shall transmit a signed and dated copy of the resolution to the EEO Director. The EEO Director shall retain the copy in accordance with the appropriate National Archives and Records Administration schedules.

CHAPTER 4 PROCEDURES FOR RELATED PROCESSES

I. INTRODUCTION

As noted in Chapter 2, Section IV.B and Appendix D of this Management Directive, different procedures apply to certain related processes. The relationship between 29 C.F.R. Part 1614 EEO complaints, Merit Systems Protection Board (MSPB) actions, grievances filed pursuant to negotiated grievance procedures, notices of intent to sue in Age Discrimination in Employment Act (ADEA) complaints, and the alternative available in Equal Pay Act (EPA) complaints are set out more specifically here. All time frames in this Chapter are expressed in calendar days.

II. MIXED CASE COMPLAINTS AND APPEALS - 29 C.F.R. § 1614.302

A. Definitions

A “mixed case complaint” is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, genetic information, or reprisal related to or stemming from an action that may be appealed to the MSPB. The complaint may contain only a claim of employment discrimination or it may contain additional non-discrimination claims that the MSPB has jurisdiction to address. A “mixed case appeal” is an appeal filed directly with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, genetic information, or reprisal. There is no right to a hearing before a Commission Administrative Judge on a mixed case complaint.

B. Procedures

The Commission regulations provide for processing discrimination complaints on claims that are otherwise appealable to the MSPB. Two determinations must be made to decide if the mixed case regulations apply. First, the employee must have standing to file such an appeal with the MSPB. Second, the claim that forms the basis of the discrimination complaint must be appealable to the MSPB. For information on who can file and the actions that can be appealed to the MSPB see 5 C.F.R. § 1201.3. Note that because the MSPB does not have jurisdiction to hear non-appealable matters, complaints not containing those matters should be

processed by the agency under the 1614 process and not mixed with matters that are appealable to the MSPB through amendment, consolidation or held in abeyance. See [Complainant v. Inter-American Foundation](#), EEOC Appeal No. 0120132968, (Jan. 8, 2014) (wherein the Commission essentially overturned the doctrine of inextricably intertwined). We note, however, that a proposed action merges with the decision on an appealable matter - for example, a proposed removal merges into the decision to remove. See [Wilson v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 0120122103 (September 10, 2012).

1. **Election to Proceed Is Required**

- a. The regulations provide that a covered individual may raise claims of discrimination in a mixed case either as a direct appeal to the MSPB or as a mixed case EEO complaint with the agency, **but not both**. 29 C.F.R. § 1614.302(b).
- b. Whatever action the individual files first is considered an election to proceed in that forum. 29 C.F.R. § 1614.302(b). Filing a formal EEO complaint constitutes an election to proceed in the EEO forum. Contacting an EEO Counselor or receiving EEO counseling does not constitute an election.
- c. Where an aggrieved person files an MSPB appeal and timely seeks counseling, counseling may continue pursuant to 29 C.F.R. § 1614.105, at the option of the parties. In any case, counseling must be terminated with notice of rights pursuant to 29 C.F.R. §§ 1614.105(d), (e), or (f).

2. **Procedures for Handling Dual Filing**

- a. Where the agency does not dispute MSPB jurisdiction
 - (1) If an individual files a mixed case appeal with the MSPB before filing a mixed case complaint with the agency, and the agency does not dispute MSPB jurisdiction, the agency must thereafter dismiss any complaint on the same claim, regardless of whether the claims of discrimination are raised in the appeal to the MSPB.¹

¹ A Commission Administrative Judge may dismiss the mixed case complaint pursuant to 29 C.F.R. § 1614.109(b).

- (2) The agency or the Commission's Administrative Judge must advise the complainant that s/he must bring the claims of discrimination contained in the dismissed complaint to the attention of the MSPB, pursuant to 5 C.F.R. § 1201.151, et seq.
- (3) Where an agency has not accepted a complaint for processing, that is, has disposed of the complaint on procedural grounds, the resulting final agency decision is appealable to the Commission. 29 C.F.R. § 1614.302(c)(1); Abegglen v. Dep't. of Energy, EEOC Appeal No. 01966055 (Oct. 9, 1998).

b. Where the agency or the MSPB Administrative Judge questions MSPB jurisdiction

The agency shall hold the mixed case complaint in abeyance until the MSPB Administrative Judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him/her to bring the discrimination claim to the attention of the MSPB. During this period, all time limitations for processing or filing the complaint will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to the Commission. If the MSPB Administrative Judge finds that MSPB has jurisdiction over the claim, the agency shall dismiss the mixed case complaint and advise the complainant of the right to petition the Commission to review the MSPB's final decision on the discrimination issue. If the MSPB Administrative Judge finds that the MSPB does not have jurisdiction over the claim, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

c. Where a complainant files with the agency first

If an employee first files a mixed case complaint at the agency and then files a mixed case appeal with the MSPB, the agency should advise the MSPB of the prior agency filing and request that the MSPB dismiss the appeal without prejudice.

3. Processing Where MSPB Dismisses a Mixed Case Appeal Because It Finds No Jurisdiction (That Is, the Case Is Not Mixed)

- a. If an individual files a mixed case appeal with the MSPB instead of a mixed case complaint, and the MSPB subsequently dismisses the appeal as non-jurisdictional, the agency must inform the individual that s/he may contact an EEO Counselor within forty-five (45) days to raise the discrimination claim(s) and that the filing date of the mixed case appeal will be deemed to be the date the individual initially contacted the EEO Counselor.
- b. If the individual filed the appeal after the agency issued an agency final decision on the mixed case complaint or after the agency failed to issue a final decision on the mixed case complaint within 120 days, (pursuant to 5 C.F.R. § 1201.154(b)(2)), the agency must provide the complainant with a thirty (30) day notice of right to a hearing and decision from a Commission Administrative Judge or an immediate final decision by the agency pursuant to 29 C.F.R. § 1614.108(f) and thereafter proceed as in a non-mixed case.

4. Processing Mixed Case Complaints Filed at the Agency

If an employee elects to file a mixed case complaint, the agency must process the complaint in the same manner as it would any other discrimination complaint, except:

- a. Upon completion of the investigation, the agency must notify the complainant that a final decision will be issued within forty-five (45) days without a hearing before a Commission Administrative Judge.
- b. Upon the filing of a complaint, the agency must advise the complainant that if a final decision is not issued within 120 days of the date of filing the mixed case complaint, the complainant may appeal the claim to the MSPB at any time thereafter, as specified in 5 C.F.R. §§ 1201.154(a) & (b), or may file a civil action as specified in 29 C.F.R. § 1614.310(g), but not both.
- c. Also upon the filing of a complaint, the agency must notify the complainant that if s/he is dissatisfied with the agency's final decision on the mixed case complaint, s/he may appeal the claim to the MSPB (not the Commission) within thirty (30) days of receipt of the agency's final decision pursuant to 5 C.F.R. § 1201.154(a).

- d. Within forty-five (45) days following completion of the investigation, the agency must issue a final decision without a hearing before a Commission Administrative Judge. 29 C.F.R. § 1614.302(d)(2).
- e. Upon issuance of the agency's final decision on a mixed case complaint, the agency must advise the complainant of the right to appeal the claim to the MSPB (not the Commission) within 30 days of receipt of the notice and of the right to file a civil action as provided in 29 C.F.R. §§ 1614.310 and 1614.310(a).

III. NEGOTIATED GRIEVANCE PROCEDURES - 29 C.F.R. § 1614.301

A. Where Agency Is Covered by [5 U.S.C. § 7121\(d\)](#)

1. When an aggrieved employee is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, the employee must elect to file an EEO complaint or a grievance. The underlying principle is that an aggrieved employee who has a choice of forums in which to proceed cannot go forward in more than one forum (unless the employing agency is exempt from coverage of [5 U.S.C. § 7121\(d\)](#)). This is true "irrespective of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination." 29 C.F.R. § 1614.301(a).
2. If an employee first files a grievance and thereafter files a complaint of discrimination on the same claim, the complaint must be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal to the Commission from a final decision as provided in subpart D of Part 1614 (Appeals and Civil Actions). The dismissal of the complaint must advise the complainant of the obligation to raise discrimination claims in the grievance process and of the right to appeal the final grievance decision to the Commission. 29 C.F.R. § 1614.301(a).

B. Where Agency Is Not Covered by 5 U.S.C. § 7121(d)

1. The U.S. Postal Service and the Tennessee Valley Authority are examples of two agencies not covered by [5 U.S.C. § 7121\(d\)](#). In such agencies, an aggrieved individual may file a complaint pursuant to Part 1614 and also a grievance pursuant to a collective bargaining agreement involving the same claim.
2. In such agencies, complaints filed pursuant to Part 1614 may be held in abeyance where a grievance is filed on the same claim, if written notice of the abeyance is provided.
3. Complaints may be held in abeyance until a final decision is issued on the grievance.

C. Administrative Grievance Process

There is nothing that prevents an employee from using an agency's administrative process, as opposed to a negotiated grievance process, and the EEO complaint process. See [Diefenderfer v. Dep't. of Transportation](#), EEOC Appeal No. 01980578, (Oct. 7, 1998). However, the Commission has consistently held that utilization of agency procedures, union grievances, and other remedial processes does not toll the time limit for contacting an EEO Counselor. See [Black v. Dep't. of the Interior](#), EEOC Appeal No. 0120110122 (Aug. 19, 2011).

IV. AGE DISCRIMINATION COMPLAINTS

It is incumbent upon federal agency personnel responsible for processing discrimination complaints to inform complainants or potential complainants of the following procedures available to them in pursuing an age discrimination complaint.

A. Election of Administrative Process

An aggrieved person may file an administrative age discrimination complaint with the agency pursuant to 29 C.F.R. Part 1614. If the aggrieved person elects to file an administrative complaint, s/he must exhaust administrative remedies before s/he may file a civil action in U.S. District Court. Exhaustion of administrative remedies occurs when the agency takes final action or 180 days after filing the complaint if no final action is taken. See 29 C.F.R. § 1614.201; see also Chapter 9, Sections II and III of this Management Directive.

B. Aggrieved May Bypass Administrative Process

Alternatively, an aggrieved person may bypass the administrative complaint process, and file a civil action directly in U.S. District Court provided that the aggrieved person first provides the Commission with a written notice of intent to sue under the ADEA. The notice to the Commission must be filed within 180 days of the date of the alleged discriminatory action. Once a timely notice of intent to sue is filed with the Commission, the aggrieved person must wait at least thirty (30) days before filing a civil action.

C. Responsibilities Regarding Notices of Intent to Sue

The following is a statement of the procedures and a delineation of the responsibilities on the part of the aggrieved person, the Commission, and the agency with respect to the filing and processing of notices of intent to sue under the ADEA.

1. The Aggrieved Person

It is the responsibility of the aggrieved person to provide the Commission with a written notice of intent to sue within 180 days of the date of the alleged discriminatory action.

- a. Notices of intent to sue must be delivered to the Commission in one of the following ways:

hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M Street, NE
Washington, DC 20507

or mailed to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 77960

Management Directive

Washington, DC 20013

or may soon be submitted through the Commission's electronic document submission portal or fax at (202) 663-7022.

- b. The notice of intent to sue should be dated and must contain the following information:
- (1) statement of intent to file a civil action under Section 15(d) of the Age Discrimination in Employment Act of 1967, as amended;
 - (2) name, address, and telephone number of the employee or applicant;
 - (3) name, address, and telephone number of the complainant's designated representative, if any;
 - (4) name and location of the federal agency or installation where the alleged discriminatory action occurred;
 - (5) date on which the alleged discriminatory action occurred;
 - (6) statement of the nature of the alleged discriminatory action(s); and
 - (7) signature of the complainant or the complainant's representative.

2. The Commission

- a. Upon receipt of a notice of intent to sue, the Commission will promptly notify the concerned agency (and all persons named in the notice as prospective defendants in the action, if any), in writing, of its receipt of the notice of intent to sue and will provide the agency with a copy of the notice. Commission contact with the concerned agency will normally be through the agency-headquarters-level Office of Equal Employment Opportunity or similarly designated office, as the case may be. A copy of the Commission's notification will be provided to the aggrieved person and/or his/her representative, if any. Additionally, the Commission will take any appropriate action to ensure the elimination of any unlawful practice.

- b. Where an aggrieved person files a civil action before the agency has completed its inquiry, or before the Commission has reviewed the agency's disposition, the Commission will terminate the inquiry and will take no further action on the notice of intent to sue.

3. The Agency

Upon receipt of a notice of intent to sue, an agency must review the claim(s) of age discrimination and conduct an inquiry sufficient to determine whether there is evidence that unlawful age discrimination has occurred. Agencies may determine their method of review/inquiry and the method may vary depending on the scope and complexity of the claims. Agencies are encouraged to make good faith efforts to resolve disputes.

V. EQUAL PAY ACT COMPLAINTS

An aggrieved individual does not have to file an administrative complaint before filing a lawsuit under the Equal Pay Act (EPA). If an aggrieved individual nonetheless wants to file an administrative complaint, it will be processed like Title VII complaints under Part 1614. Complainants in EPA cases should be notified of the statute of limitations (two years or, if a willful violation is alleged, three years), which applies even if the individual files an administrative complaint, and of the right to file directly in a court of competent jurisdiction without first providing notice to the Commission or exhausting administrative remedies.

CHAPTER 5 AGENCY PROCESSING OF FORMAL COMPLAINTS

I. AGENCY SHALL ACKNOWLEDGE FORMAL COMPLAINT

Immediately upon receipt of a formal complaint of discrimination, the agency shall acknowledge receipt of the complaint in writing. The acknowledgment letter shall inform the complainant of the date on which the complaint was filed. If the complaint is mailed, the date of filing is the postmark date, not the date the agency received the complaint. Where the matter is appropriate for ADR, the agency may include a notice to that effect in its acknowledgment letter.

Commission regulations require that an EEO Counselor provide **both** the agency office designated to accept complaints and the complainant with a written report within fifteen (15) days of being advised that the complainant has filed a formal EEO complaint. 29 C.F.R. § 1614.105(c). Agencies thus should immediately notify the EEO Counselor that a complainant has filed a complaint so as to expedite the preparation and delivery of the written report.

Within a reasonable time after receipt of the written EEO Counselor report, the agency should send the complainant a second letter (commonly referred to as an "acceptance" letter), stating the claim(s) asserted and to be investigated. If the second letter's statement of the claim(s) asserted and claim(s) for investigation differs, the letter further shall explain the reasons for the difference, including whether the agency is dismissing a portion of the complaint. The agency shall advise the complainant that s/he may submit a statement to the agency concerning the agency's articulation of the claim, which shall become a part of the complaint file. (Dismissals are governed by 29 C.F.R. § 1614.107(a). Additional dismissal guidance is provided in Section IV of this Chapter of the Management Directive.) The agency shall notify the complainant of a partial dismissal by letter and further inform the complainant that there is no immediate right to appeal the partial dismissal. The agency should advise the complainant that the partial dismissal shall be reviewed either by a Commission Administrative Judge, if the complainant requests a hearing before an Administrative Judge, or by the Commission, if the complainant files an appeal of a final agency action or final agency decision. (See Section IV.C below for further discussion on the requirements of a partial dismissal.)

Unless the complainant states otherwise, copies of the acknowledgment and all subsequent actions on the complaint shall be mailed or delivered to the complainant's representative with a copy to the complainant.

II. THE AGENCY SHALL ALSO PROVIDE OTHER INFORMATION AND NOTICE OF RIGHTS

A. Agency Shall Inform the Complainant of the Agency's Obligations

1. To Investigate in a Timely Manner

The agency is required to investigate the complaint in a timely manner. The investigation must be appropriate, impartial, and completed within **180 days** of filing the complaint (as described more fully in Section V.D and in Chapter 6 of this Directive), or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to 29 C.F.R. § 1614.107(a). The EEO Director or designee and the complainant may agree in writing, consistent with 29 C.F.R. § 1614.108(e), to an extension of not more than **ninety (90) days**; or within the period of time set forth in 29 C.F.R. §§ 1614.108(e) or 1614.606 if there are multiple complainants with similar allegations of discrimination or complainant has filed multiple complaints which the agency has consolidated. If the agency fails to complete the investigation in 180 days, it shall issue written notice to complainant informing the complainant that it was unable to complete the investigation, the estimated date of completion, and complainant's right to file a civil action or request a hearing. See 29 C.F.R. § 1614.108(g). See Appendix K for a sample notice letter.

Agencies are required to complete investigations within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint. Regardless of amendment or consolidation of complaints, the investigation shall be complete in not more than 360 days, unless there is a written extension of not more than 90 days.

For example, if a complainant amends a complaint or files another complaint, the agency will consolidate on day 179 of the originally filed complaint, and then the investigation must be complete by the 359th day.

If the complainant wants to add another amendment on the 358th day of the investigation, the agency will have only 2 days to investigate that amendment unless the complainant agrees in writing to an extension of not more than 90 days. When no written extension exists and the agency is unable to conduct an impartial and appropriate investigation in 2 days it should not consolidate or accept the amendment rather; the agency should advise the complainant to seek counseling on the newest matter and process it as a new complaint.

An investigation is deemed completed when the report of the investigation is served on the complainant in conjunction with the notice of the right to elect either a hearing before a Commission Administrative Judge or a final decision from the agency pursuant to 29 C.F.R. § 1614.108(f).

2. To Process Mixed Cases Timely

The Commission deems a mixed case complaint timely investigated in the same manner and applying the same time limitations as non-mixed cases. However, if a final decision is not issued on the mixed case complaint within **120 days** of filing, the complainant may appeal to the Merit Systems Protection Board (MSPB) at any time thereafter pursuant to MSPB regulation 5 C.F.R. § 1201.154(a) or may file a civil action as provided in 29 C.F.R. § 1614.310(g), but not both. See 29 C.F.R. § 1614.302(d)(1). The complainant is not entitled to a hearing before the Commission on a mixed case. See more instructions for processing these cases in Chapter 4 Section II.

3. Unilateral Extension for Sanitizing Classified Information

After providing notice to the complainant, the agency may unilaterally extend the time period or any period of extension for no more than thirty (30) days where it must sanitize a complaint file that may contain information classified pursuant to [Executive Order 12356](#) or successor orders as secret in the interest of national defense or foreign policy. 29 C.F.R. § 1614.108(e).

B. Agency Shall Inform Complainant of His/Her Rights

The agency shall provide every complainant in writing notice of all rights and responsibilities enumerated in Chapters 2, 3, and 4 of this Management Directive. This includes:

1. The Right to Request a Hearing

Except in mixed cases, the complainant has the right to request a hearing before a Commission Administrative Judge after **180 calendar days** from the filing of a formal complaint or after completion of the investigation, whichever comes first. 29 C.F.R. § 1614.106(e)(2). Complainants must request a hearing directly from the Commission's field office that has jurisdiction over the geographic area in which the complaint arose, as set forth in Appendix N of this Management Directive. See 29 C.F.R.

§ 1614.108(g). In an agency's written acknowledgment of receipt of a complaint or an amendment to a complaint, the agency shall advise the complainant of the Commission's office and address where a hearing request is to be sent as well as the agency office to which the copy of the request should be sent. The complainant shall certify to the Administrative Judge that s/he sent a copy of the request to the agency EEO office to the attention of the individual and at the address that the agency previously informed the complainant.

2. The Right to Appeal

The complainant has the right to appeal a dismissal, final action, or decision. Partial dismissals are not immediately appealable. See 29 C.F.R. §§ 1614.107(b) and 1614.401, and, Section IV.C of this Chapter for further guidance.

- a. Agencies shall inform the complainant that s/he may appeal within **thirty (30) days** of receipt of the dismissal, final action, or decision. Appeals may be mailed to:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington D C 20013

or hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Appellate Review Programs
131 M Street NE. Suite 5SW12G
Washington, DC 20507

or may be submitted through the Commission's electronic document submission portal or by fax at (202) 663-7022.

- b. Agencies shall provide the information at 29 C.F.R. § 1614.403 (a)-(f) (use of appeal form EEOC Form 573, Notice of Appeal/Petition (a copy of which is appended hereto as Appendix P); content of petition; service of copies on agency EEO Director; certification of delivery; and opposition brief schedule).
- c. With regard to a mixed case, if the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the

complainant may appeal the matter to the MSPB, not the Commission, within 30 days of receipt of the agency's final decision.

3. The Right to File a Civil Action

The complainant has the right to file a civil action in a U.S. District Court on EEO discrimination claims raised in the administrative process:

- a. Within **ninety (90) days** of receipt of a final action on an individual or class complaint if no appeal has been filed;
 - b. After **180 days** from the date of filing an individual or class complaint if an appeal has not been filed and a final action has not been taken;
 - c. Within **90 days** of receipt of the Commission's final decision on appeal; or
 - d. After **180 days** from the date of the filing of an appeal with the Commission if there has been no final decision by the Commission.
4. See Appendix C of this Management Directive, which sets forth a detailed list of a complainant's rights about which the agency must advise the complainant.

III. AGENCIES MUST AVOID FRAGMENTING EEO COMPLAINTS

The fragmentation, or breaking up, of a complainant's legal claim during EEO complaint processing has been a significant problem in the federal sector. For complainants, fragmented processing can compromise their ability to present an integrated and coherent claim of an unlawful employment practice for which there is a remedy under the federal equal employment statutes. For agencies and the Commission, fragmented processing substantially increases case inventories and workloads when it results in the processing of related matters as separate complaints.¹

The fragmentation of EEO claims must be prevented at all levels of the complaint process, including pre-complaint EEO counseling. This section is designed to promote

¹ See [Cobb v. Dep't. of the Treasury](#), EEOC Request No. 05970077 (Mar. 13, 1997); [Toole v. Equal Employment Opportunity Commission](#), EEOC Appeal No. 01964702 (May 22, 1997).

understanding of the concept of fragmentation and to provide guidance on avoiding fragmented complaint processing.

Note that because the MSPB does not have jurisdiction to hear non-appealable matters, complaints not containing those matters should be processed by the agency under the 1614 process and not mixed with matters that are appealable to the MSPB through amendment, consolidation or held in abeyance. See [Complainant v. Inter-American Foundation](#), EEOC Appeal No. 0120132968, (Jan. 8, 2014) (wherein the Commission essentially overturned the doctrine of inextricably intertwined). We note, however, that a proposed action merges with the decision on an appealable matter - for example, a proposed removal merges into the decision to remove. See [Wilson v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 0120122103 (September 10, 2012).

This section is not designed to address claims that include both a mixed and non-mixed matters. Where the complainant has or brings an amendment which contains a mixed issue (one that can be appealed directly to the MSPB), fragmentation does not occur where the agency assigns a second complaint number and processes the non-mixed matters under the 29 C.F.R. 1614 process and the mixed matters under the 5 C.F.R. 1201 process.

A. Identifying and Defining the Claim in an EEO Complaint

1. Fragmentation often occurs at the point where the agency identifies and defines the complainant's claim, most commonly during the counseling and investigative stages. A claim refers to an assertion of an unlawful employment practice or policy for which, if proven, there is a remedy under the federal equal employment statutes. Fragmentation often results from a failure to distinguish between the claim the complainant is raising and the evidence (factual information) s/he is offering in support of that claim.

Example 1

An African-American employee complains to the EEO Counselor that his supervisor is stricter about his time and attendance than with the unit's Caucasian employees. This is a legal claim of race-based disparate treatment in the terms and conditions of the complainant's employment with regard to time and attendance. In support of this claim, the complainant tells the EEO Counselor about a number of different occasions when the supervisor denied his request for annual leave or required him to use leave because he was tardy, while treating similarly situated Caucasian employees more favorably. These specific incidents should be considered the evidence supporting the complainant's claim that

the supervisor is treating him differently because of his race with regard to his time and attendance. Fragmentation would occur if each of these incidents were considered a separate claim and processed as a separate complaint.

Example 2

A female employee complains to the EEO Counselor that she is being subjected to a hostile work environment due to the ongoing sexual harassment by her male co-workers. This is the complainant's legal claim. In support of this claim, the complainant tells the EEO Counselor of specific incidents of a sexual advance, a sexual joke and a comment of a sexual nature. These individual incidents are evidence in support of the complainant's claim and should not be considered as separate claims in and of themselves.

2. Often, when an agency identifies each piece of factual evidence (usually constituting a single incident) offered by the complainant as a separate and distinct legal claim, it ignores the complainant's real underlying issue of a pattern of ongoing discrimination.² In contrast, fragmentation rarely occurs when the complainant presents a legal claim based on a single incident (such as a particular selection decision or a termination decision) rather than a series of events.

In defining a legal claim, the agency must exercise care where a series of incidents offered by a complainant initially seem different from one another.

² See, for example, [Reid v. Dep't. of Commerce](#), EEOC Request No. 05970705 (Apr. 22, 1999); [Ferguson v. Dep't. of Justice](#), EEOC Request No. 05970792 (Mar. 30, 1999); [Manalo v. Dep't. of the Navy](#), EEOC Appeal Nos. 01960764 and 01963676 (Nov. 5, 1996), request for reconsideration denied, EEOC Request No. [05970254](#) (May 29, 1998).

Example 3

A complainant tells the EEO Counselor that she believes that the agency discriminated against her when she was not selected for a GS-14 Engineer position, when she was not detailed to serve in a similar position, and when she was denied access to a particular training program. All of these seemingly different incidents are part of the same claim of a discriminatory non-selection as the complainant has alleged that the detail and the training would have enhanced her qualifications for the GS-14 Engineer position and, therefore, are relevant to the agency's failure to select her for that position.

Practice Tip: When defining a claim, two components must be identified. First, the claim must contain a factual statement of the employment practice or policy being challenged. As already discussed, it is critical that EEO Counselors, investigators, and other EEO staff members ensure that they understand the exact nature of the complainant's concerns so that the employment practice is defined broadly enough to reflect any allegation of a pattern of ongoing discrimination. Particular attention should be given to claims involving terms and conditions of employment. In Example 1 above, the employment practice being challenged is: disparate treatment in terms and conditions of employment with regard to time and attendance policies. In Example 2 above, the employment practice is: the creation of a hostile work environment because of sexual harassment. In Example 3 above, the employment practice might be defined as: management's failure to advance the complainant's career to a GS-14 position. The second component of a legal claim is the identification of the basis (because of race, color, national origin, sex, religion, reprisal, age, disability, or genetic information) for a violation of an equal employment statute.

3. **Timeliness Issues:** One of the reasons the distinction between legal claims and supporting evidence is important is because complainants frequently raise factual incidents that occur outside of the 45-day time period for contacting an EEO Counselor. In general, for a legal claim to be timely raised, at least one of the incidents the complainant cites as evidence in support of his/her claim must have occurred within the 45-day time period for contacting an EEO Counselor. (The usual exceptions should still be made. See Section IV of this Chapter on dismissals.) If the claim itself is timely raised, the question remains as to how the agency is to treat those factual incidents that the complainant cited as evidence in support of his/her claim that occurred outside the 45-day time limit.

The answer is that an agency must consider, at least as background, all relevant evidence offered in support of a timely raised legal claim, even if the evidence involves incidents that occurred outside the 45-day time limit. This is true of supporting evidence that the complainant offered during EEO counseling as well as later in the investigative stage. During the investigation, the degree to which a certain piece of proffered evidence is relevant to the legal claim will determine what sort of investigation is necessary of that particular piece of evidence. For example, in a non-selection case, a selection decision made long before the one at issue, involving different agency officials, may have little relevance to the current claim. On the other hand, if the selecting official in the most recent non-selection also failed to select the complainant for a similar position six months before, that piece of evidence may be very relevant to the complainant's claim. Investigators should not simply disregard relevant information the complainant provided in support of his/her claim as untimely raised; nor should they send the complainant back to counseling as if the supporting evidence was a new claim to be processed as a separate complaint.

With regard to the timeliness of a claim of harassment, because the incidents that make up a harassment claim collectively constitute one unlawful employment practice, the claim is actionable, as long as at least one incident that is part of the claim occurred within the filing period. Such a claim can include incidents that occurred outside the filing period that the complainant knew or should have known were actionable at the time of their occurrence. See [Bulluck v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 0120114276 (Mar. 14, 2012); [Richardson v. U.S. Postal Service](#), EEOC Appeal No. 0120111122 (Feb. 1, 2012). However, the Supreme Court has held that no recovery is available for discrete acts such as hiring, firing, and promotions that fall outside the filing period, even if they are arguably related to other discriminatory acts that occur within the filing period. [National Railroad Passenger Corp. v. Morgan](#), 536 U.S. 101 (2002). See also [EEOC Compliance Manual 915.003, Section 2: "Threshold Issues,"](#) (rev. July 21, 2005). However, as the Court recognized, an employee may use the prior discrete acts as background evidence in support of a timely harassment claim.

Practice Tip: It is critical that agencies document their actions and the reasons for those actions in the record for Administrative Judge and Commission consideration later in the process. For example, if the agency's investigator decides that a certain factual incident raised by the complainant is of little relevance to his/her claim and, therefore, decides that an investigation of that incident is very minimal, the investigator

should document that decision and the reasons for it in the investigative report.

B. A Complainant May Amend a Pending Complaint

At any time prior to the agency's mailing of the notice required by 29 C.F.R. § 1614.108(f) at the conclusion of the investigation, 29 C.F.R. § 1614.106(d) permits a complainant to amend a pending EEO complaint to add claims that are like or related to those claim(s) raised in the pending complaint.³ There is no requirement that the complainant seek counseling on these new claims. See [Braxton v. U.S. Postal Service](#), EEOC Appeal No. 0120102410 (Oct. 29, 2010). After the complainant has requested a hearing, s/he may file a motion with the Administrative Judge to amend the complaint to include claims that are like or related to those raised in the pending complaint.

This situation most frequently occurs when an alleged discriminatory incident occurs after the filing of an EEO complaint. In the past, agencies usually made these subsequent incidents the basis of a separate EEO complaint. A separate EEO complaint is not appropriate, however, if the new incident of discrimination raises a claim that is like or related to the original complaint. Rather, the original complaint should be amended to include the new incident of discrimination.

When a complainant raises a new incident of alleged discrimination during the processing of an EEO complaint, it must be determined whether this new incident:

1. provides additional evidence offered to support the existing claim, but does not raise a new claim in and of itself;
2. raises a new claim that is like or related to the claim(s) raised in the pending complaint; or
3. raises a new claim that is **not** like or related to the claim(s) raised in the pending complaint.

In order to facilitate such a determination, the complainant shall be instructed by the investigator (or any other EEO staff person with whom complainant raises the new incident) to submit a letter to the agency's EEO Director or a designee describing the new incident(s) and stating that s/he wishes to amend his/her complaint to include the new incident(s). The EEO Director or designee shall

³ Note that technical amendments to a complaint, such as changing the name of the agency head, should be handled quickly and without adding additional case processing time.

review this request, determine whether a fair and impartial investigation of the new claims can be accomplished within 360 days of the original filed complaint, and determine the correct handling of the amendment in an expeditious manner.

1. New Incident That Is Part of the Existing Claim

If the EEO Director or designee concludes that the new incident(s) provides additional evidence offered in support of the claim raised in the pending complaint, but does not raise a new claim in and of itself, then the EEO Director or designee should instruct the investigator to include the new incident in the investigation. A copy of this letter should be sent to the complainant unless they have provided notice that they have a representative. In such a case, the acknowledgment and all subsequent actions on the complaint should be mailed or delivered to complainant's representative with a copy to the complainant, unless the complainant has stated otherwise.

Example 4

During EEO counseling and in her formal complaint, an agency employee has alleged that her co-workers were harassing her because of her gender, and she cites five examples of harassment. During the investigation, she provides an initial affidavit detailing these incidents. Shortly thereafter, the employee contacts the investigator and tells him of several new incidents of gender-based harassment by these same co-workers. In this case, these new incidents are additional evidence offered by complainant in support of her pending claim of discriminatory harassment, and the investigator should be instructed to incorporate these new facts into his investigation of the pending claim. In this instance, the investigative period is not extended beyond 180 days, except with the consent of the complainant pursuant to 29 C.F.R. § 1614.108(e).

2. **New Incident That Raises a New Claim Like or Related to the Pending Claim**

While a complaint is pending, a complainant may raise a new incident of alleged discrimination that is not part of the existing claim, but may be part of a new claim that is like or related to the pending claim. In deciding if a subsequent claim is “like or related” to the original claim, a determination must be made as to whether the later incident adds to or clarifies the original claim, and/or could have reasonably been expected to grow out of the investigation of the original claim. See [Complainant v. Dep’t. of the Army](#), EEOC Appeal No. 0120142480 (Nov. 25, 2014); [Scher v. U.S. Postal Service](#), EEOC Request No. 05940702 (May 30, 1995); [Webber v. Dep’t. of Health and Human Services](#), EEOC Appeal No. 01900902 (Feb. 28, 1990).

In accordance with 29 C.F.R. § 1614.108(f) and guidance set forth in Section II(A)(1) of this Chapter, if the EEO Director or designee concludes that the new incident(s) raises a new claim, but that this new claim is like or related to the claim(s) raised in the pending complaint, the agency must amend the pending complaint to include the new claim. Accordingly, and pursuant to 29 C.F.R. § 1614.106(e), the agency shall acknowledge receipt of an amendment to a complaint in writing and inform the complainant of the date on which the amendment was filed. The EEO Director or designee should also send a copy of the letter to the EEO Investigator who is investigating the complainant’s prior complaint with instructions to include the new incident(s) in the investigation.

Example 5

An agency employee files a race discrimination complaint alleging he was not selected for a particular supervisory position, despite his belief that he was the best qualified candidate for the job. During the investigation into his complaint, the same selecting official does not select the complainant for another supervisory position. Complainant again asserts he was not selected because of his race. This new claim of a discriminatory non-selection is sufficiently like or related to the original non-selection claim that the agency should amend the original complaint to include the subsequent non-selection.

Example 6

During the investigation into her claim that the agency is discriminating against her in the terms and conditions of her employment because her supervisor denied her developmental assignments that could lead to upward mobility in the agency, the complainant informs the investigator that her supervisor just issued her a letter of warning for attendance problems. The complainant asserts that the supervisor took this action in retaliation for her complaint about the denial of development assignments. This new claim of retaliation is related to the pending claim because it grew out of the investigation into that claim. The agency should amend the original complaint to include this subsequent, but related, claim.

Example 7

An agency employee files a complaint of discrimination when his request for a hardship transfer is denied. During the investigation into his complaint, the complainant sends a letter to the EEO office stating that he has decided to resign from the agency because of the agency's failure to transfer him and the resulting stress. He further states that he is no longer seeking the transfer as a remedy to his complaint, but asserts he is entitled to a compensatory damages award instead. The EEO office should amend the original complaint to include the complainant's new like or related claim of constructive discharge.

Pursuant to 29 C.F.R. § 1614.106(e)(2), the agency is required to complete its investigation of an EEO complaint within 180 days of the filing of a complaint unless the parties agree in writing to extend the time period. If a complaint is amended, however, this deadline is adjusted so that the agency must complete its investigation within the earlier of 180 days after the last amendment to the complaint or not more than 360 days after the filing of the original complaint.

Pursuant to 29 C.F.R. § 1614.108(g) the agency is still required to issue a notice to complainant that the investigation is not complete and estimating a time in which it will be complete. A complainant retains the right to request a hearing, even in the case of an amended complaint, after 180 days have passed since the filing of the original complaint, even if the agency's investigation has not been completed. In such a case, an Administrative Judge may develop the record through discovery and the

hearing process, or utilize other means within his/her discretion to ensure that the amended complaint is properly addressed.

3. New Incident Raises Claim That Is Not Like or Related to Pending Claim

In cases where subsequent acts of alleged discrimination do not add to or clarify the original claim, and/or could not have been reasonably expected to grow out of the investigation of the original claim, the later incident should be the subject of a separate EEO complaint. In such cases, fragmented processing of an EEO complaint is not at issue because there are two distinct and unrelated legal claims being alleged.

If the EEO Director or designee concludes that the new claim raised by the complainant is **not** like or related to the claim(s) raised in the pending complaint, then the complainant must be advised in writing that s/he should seek EEO counseling on the new claim. The postmark date of the letter (from complainant requesting an amendment) to the EEO Director or designee would be the date for time computation purposes used to determine if initial counselor contact was timely under 29 C.F.R. § 1614.105(b).

Example 8

An agency employee sought EEO counseling and filed a formal complaint concerning his allegation that the agency discriminated against him in the terms and conditions of his employment by requiring that he adhere to a specific work schedule while not imposing a similar requirement on a comparative employee. During the investigation into this complaint, the complainant tells the investigator that he was recently not selected for a position in another facility and believes this occurred as a result of discrimination. In this case, the discriminatory non-selection claim is not like or related to the adherence to the work schedule claim, as it is factually distinct and cannot reasonably be said to add to or clarify the original claim.

C. Consolidation of Complaints

As noted above, a new claim that is not like or related to a previously filed complaint provides the basis for a new, and separate, complaint. The complainant must present the new, unrelated claim to an EEO Counselor and the new claim is subject to all of the regulatory case processing requirements. In order to address a

different fragmentation concern, 29 C.F.R. § 1614.606 requires agencies to consolidate for joint processing two or more complaints of discrimination filed by the same complainant, after appropriate notification is provided to the parties.⁴ While it is anticipated that most consolidated complaints will be investigated together, in certain circumstances, such as significant geographic distance between the sites of two complaints, consolidation does not preclude an agency from investigating each complaint separately. In all instances, however, where an individual requests a hearing, the consolidated complaints should be heard by a single Administrative Judge; or where the complainant requests a final agency decision, the agency should issue a single decision. An agency must consolidate complaints filed by the same complainant before the agency issues the notice required by 29 C.F.R. § 1614.108(f) at the conclusion of the investigation.

When a complaint has been consolidated with an earlier filed complaint, the agency must complete its investigation within the earlier of 180 days after the filing of the last complaint or not later than 360 days after the filing of the original complaint. See Section II.A.1 of this Chapter for more information on time limits. A complainant has the right to request a hearing, even in the case of consolidated complaints, after 180 days have passed since the filing of the original complaint, even if the agency's investigation is not complete. If not already consolidated, an Administrative Judge or the Commission in their discretion may consolidate two or more complaints of discrimination filed by the same complainant.

Section 1614.606 of 29 C.F.R. permits, but does not require, the consolidation of complaints filed by different complainants that consist of substantially similar allegations or allegations related to the same matter.

D. Partial Dismissals

Another method of addressing the fragmentation problem is 29 C.F.R. § 1614.107(b), which provides for no immediate right to appeal a partial dismissal of a complaint. See Section IV.C of this Chapter for a more detailed discussion of partial dismissals. Partial dismissals will be preserved and decided within the context of the rest of the complaint.

⁴ Through mandatory consolidation, the Commission seeks to address the situation where a single complainant has multiple complaints pending against an agency. Even if the complaints are unrelated, their resolution in a single proceeding may make better use of agency and Commission resources.

E. No Remands by Administrative Judges

To further avoid the fragmenting of EEO claims, Administrative Judges will not remand issues to agencies for counseling or other processing. Once a case is before an Administrative Judge, that Administrative Judge is fully responsible for processing it. Chapter 7, “Hearings,” in this Management Directive discusses more fully this provision.

F. “Spin-off” Complaints

Section 1614.107(a)(8) of 29 C.F.R. provides for the dismissal of spin-off complaints, which are complaints about the processing of existing complaints. Complaints about the processing of existing complaints should be referred to the agency official responsible for complaint processing, and/or processed as part of the original complaint, as set forth in Section IV.D of this Chapter.

G. Training

As already emphasized, the EEO Counselor and investigator have critical roles in identifying, defining, and clarifying an aggrieved employee’s legal claims. Therefore, agencies must provide all agency EEO Counselors and investigators with mandatory training in this area as well as ensure that all contract EEO Counselors and investigators have received training in this area. See Chapter 2, Section II (EEO Counselor training) and Chapter 6, Section II (investigator training) of this Management Directive.

IV. AGENCY DISMISSAL PROCESS

Circumstances under which an agency may dismiss a complaint are set forth in 29 C.F.R. § 1614.107(a). An agency’s authority to dismiss a complaint ends when a complainant requests a hearing. An agency should process dismissals expeditiously. To avoid common errors in dismissing complaints of discrimination see [EEOC, Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds](#), issued in September of 2014 on the Commission’s website.

The agency should clearly set forth its reasoning for dismissing the complaint in all dismissal decisions and include evidence in the record that supports the grounds for dismissal. For example, if the agency dismisses a claim under 29 C.F.R. § 1614.107(a)(3) because a civil action was filed by complainant, the agency should ensure that a copy of the civil complaint is included in the record.

A. Bases for Dismissals That May Exist as of the Filing of the Complaint or Develop Thereafter

1. Untimely Counseling Contact - 29 C.F.R. § 1614.107(a)(2)

- a. A claim that was not brought to the attention of an EEO Counselor in a timely manner.
- b. The complainant did not contact an EEO Counselor within **forty-five (45) days** of the discriminatory event or within **45 days** of the effective date of the personnel action, 29 C.F.R. § 1614.105(a)(1), and the complainant did not show that the 45-day contact period should be extended pursuant to 29 C.F.R. § 1614.105(a)(2). See, for example, [Ball v. U.S. Postal Service](#), EEOC Request No. 05880247 (July 6, 1988) (reasonable suspicion standard used to determine when the 45-day limitation period begins; time limit is not triggered until the complainant reasonably suspects discrimination, but before all of the facts that support the charge of discrimination have become apparent). An agency may be barred from dismissing a complaint on timeliness grounds where:
 - (1) the agency could not establish that the complainant was notified of the time limits and was otherwise aware of them, or did know and reasonably should have known that the discriminatory practice or personnel action occurred or that despite due diligence was prevented by circumstances beyond his/her control from contacting an EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission; or
 - (2) the complainant contends that the claim is a part of a pattern of discrimination or establishes that there are other equitable circumstances that mitigate untimely contact. Time limits are subject to waiver, estoppel, and equitable tolling under 29 C.F.R. § 1614.604(c).

2. **Untimely Filing of the Formal Complaint – 29 C.F.R. § 1614.107(a) (2)**

The complainant failed to file a formal complaint within **fifteen (15) days** of his/her receipt of the EEO Counselor’s Notice of Right to File a Formal Complaint in an individual complaint, 29 C.F.R. § 1614.105(d), or in a class complaint, 29 C.F.R. § 1614.204(c). The agency has the burden of proving that the complainant received the notice and that the notice clearly informed the aggrieved person of the 15-day filing time frame. See, for example, [Paoletti v. U.S. Postal Service](#), EEOC Request No. 05950259 (Aug. 17, 1995). This time limit is also subject to waiver, estoppel, and equitable tolling under 29 C.F.R. § 1614.604(c).

3. **Failure to State a Claim - 29 C.F.R. § 1614.107(a)(1)**

The complainant failed to state a claim under 29 C.F.R. § 1614.103. This may include a claim that does not allege discrimination on a basis encompassed in one of the statutes applicable to federal sector employees. In determining whether a complaint states a claim, the proper inquiry is whether the conduct if true would constitute an unlawful employment practice under the EEO statutes. [Cobb v. Dep’t. of the Treasury](#), EEOC Request No. 05970077 (Mar. 13, 1997) (a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant cannot prove a set of facts in support of the claim which would entitle the complainant to relief; the trier of fact must consider all of the alleged harassing incidents and remarks and, considering them together in the light most favorable to the complainant, determine whether they are sufficient to state a claim). See also [Burlington Industries, Inc. v. Ellerth](#), 524 U.S. 742, 752-753 (1998) (referencing cases in which courts of appeals considered whether various employment actions were sufficient to state a claim under the civil rights laws). Dismissal for failure to state a claim also may be appropriate where the complainant named the improper agency. See 29 C.F.R. § 1614.106(a).

An agency shall accept a complaint from any aggrieved employee or applicant for employment who believes that s/he was discriminated against by that agency because of race, color, religion, sex, national origin, age, disabling condition, genetic information, or retaliation. The Commission has long defined an “aggrieved employee” as one who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy. [Diaz v. Dep’t. of the Air Force](#), EEOC Request No. 05931049 (Apr. 21, 1994); see also [Wildberger v. Small Business Administration](#), EEOC Request No. 05960761 (Oct. 8, 1998). An agency is required to address EEO complaints only when filed by an individual who has suffered direct,

personal deprivation at the hands of the employer; the agency's act must have caused some concrete effect on the aggrieved person's employment status. [Quinones v. Dep't. of Defense](#), EEOC Request No. 05920051 (Mar. 12, 1992).

Further, it is inappropriate for an individual to use the EEO process to lodge a collateral attack against another proceeding. For example, [see Schneider v. U.S. Postal Service](#), EEOC Request No. 05A01065 (Aug. 16, 2002)(affirming agency dismissal of complaint alleging discriminatory delay in submission of worker's compensation claim as collateral attack on OWCP claim process); [Jones v. Dep't. of the Army](#), EEOC Request No. 05A00428 (Mar. 1, 2002) (affirming dismissal of complaint regarding polygraph examination as a collateral attack on the agency's internal investigation of disappearance of agency property); or [Lingad v. U.S. Postal Service](#), EEOC Request No. 05930106 (June 25, 1993) (holding that discriminatory actions taken to influence the outcome of decision rendered under the negotiated grievance procedure is outside the purview of EEO process). The proper forum to raise these kinds of issues is within the process itself. An agency should dismiss these complaints as failures to state a claim.

When an individual alleges retaliation in a complaint, they do not need to make a showing of an adverse employment action. [See Burlington Northern & Santa Fe Railway Co. v. White](#), 548 U.S. 53, 68 (2006); [EEOC Compliance Manual 915.003 Section 8-Retaliation II.D.3](#) (May 20, 1998) (any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity states a claim). The significance of the act of alleged retaliation will often depend upon the particular circumstances. For example, in [Isom v. U.S. Postal Service](#), EEOC Appeal No. 0120113627 (Nov. 7, 2012), the complainant alleged that he was required to perform both forklift and jitney duties. The record revealed that other employees were required to perform either forklift or jitney duties but not both and that the supervisor involved was under pressure to discipline complainant for refusing an assignment even if the discipline was not warranted. The Commission found a viable claim of retaliation was stated and remanded the case to the agency to process.

4. **Abuse of Process - 29 C.F.R. § 1614.107(a)(9)**

Section 1614.107(a)(9) of 29 C.F.R. is the appropriate provision under which an agency may dismiss a complaint on the extraordinary grounds of abuse of process.

- a. Abuse of process is defined as a clear pattern of misuse of the process for ends other than that which it was designed to accomplish. See [Buren v. U.S. Postal Service](#), EEOC Request No. 05850299 (Nov. 18, 1985); [Kleinman v. U.S. Postal Service](#), EEOC Appeal No. 01943637 (September 22, 1994); [Sessoms v. U.S. Postal Service](#), EEOC Appeal No. 01973440 (June 11, 1998). The Commission has a strong policy in favor of preserving a complainant's EEO rights whenever possible. The occasions in which application of the standards are appropriate must be rare, because of the strong policy in favor of preserving a complainant's EEO rights whenever possible. See generally [Love v. Pullman](#), 404 U.S. 522 (1972); [Wrenn v. Equal Employment Opportunity Commission](#), EEOC Appeal No. 01932105 (Aug. 19, 1993). Therefore, such dismissals must be taken only in cases where there is a clear misuse or abuse of the administrative process.
- b. In order to determine whether a complaint, or a number of consolidated complaints, should be dismissed for this reason under 29 C.F.R. § 1614.107(a)(9), the agency or Administrative Judge must strictly apply the criteria established by the Commission on this issue.⁵ This requires an analysis of whether the complainant evidences an ulterior purpose to abuse or misuse the EEO process. Agencies are cautioned that numerous complaint filings alone is not a sufficient basis for determining that there has been an abuse of the process. However, multiple filings on the same issues, lack of specificity in the allegations, and the filing of complaints on allegations previously raised, may be considered in deciding whether a complainant has engaged in a pattern of abuse of the EEO process. All pending complaints from a complainant which satisfy these criteria should be consolidated for dismissal under this section.
- c. Cases in which the Commission has found an abuse of the EEO process include those where, upon review of the complainant's

⁵ The Commission retains the authority on appeal to protect its administrative processes from abuse by either party.

record, including the number and types of complaints filed, the Commission has concluded that the complainant has pursued a scheme involving the misuse and misapplication of the EEO process for an end other than that which it was designed to accomplish.

- (1) For example, in reviewing a complainant's prior complaints, the Commission has found abuse of process where the complainant presented similar or identical allegations, evidencing a pattern of initiating the complaint process whenever the agency did anything that dissatisfied the complainant. [Hooks v. U.S. Postal Service](#), EEOC Appeal No. 01953852 (Nov. 28, 1995).
- (2) The Commission has also found abuse of process when the complainant presented similar or identical allegations related to the complainant's dissatisfaction with the EEO process itself. [Goatcher v. U.S. Postal Service](#), EEOC Request No. 05950557 (Oct. 18, 1996). The complainant in [Goatcher](#) filed numerous complaints concerning the agency's purported denial of access to sufficient equipment and storage for EEO claims, denial of official time for such claims, inadequate EEO counseling, agency monitoring of time spent in the EEO process, and failure to maintain her anonymity during EEO counseling.
- (3) In [Sessoms v. U.S. Postal Service](#), EEOC Appeal No. 01973440 (June 11, 1998), the Commission noted that the appellant was experienced in the EEO process, but that he pursued a clear pattern of abuse of the EEO process by filing numerous frivolous complaints. The Commission noted, "A definite pattern of initiating the complaint machinery with respect to any matter with which appellant was dissatisfied has developed . . . clearly has amounted to an abuse of process." See also [Kessinger v. U.S. Postal Service](#), EEOC Appeal No. 01976399 (June 8, 1999) (clear pattern of abuse from multiple filings, totaling over 160 complaints and 150 appeals, many of which were duplicate complaints of earlier, dismissed filings; the Commission found the complainant's actions an intentional effort to clog the agency's in-house administrative machinery); [Stoyanov v. Dep't. of the Navy](#), EEOC Appeal Nos. 0120113142, 0120113817, and 0120114019 (Dec. 6, 2011) (clear pattern of abuse from multiple filings many of which concerned

selections for positions for which complainant was not eligible to apply).

- d. The Commission has stressed in such cases that a party cannot be permitted to utilize the EEO process to circumvent other administrative processes; nor can individuals be permitted to overburden the EEO system, which is designed to protect individuals from discriminatory practices.

Example 1

The complainant originally filed a complaint of discrimination in non-selection for promotion. Subsequently, he repeatedly filed complaints of reprisal, alleging that the agency was denying him official time to prepare EEO complaints, denying him the use of facilities and storage space for his EEO materials, providing improper EEO counseling, and unfairly keeping tabs on the amount of official time he was spending on his EEO complaints. Many of the allegations in these complaints were vague, and raised allegations previously raised in earlier complaints. In fact, he had on several occasions copied a previous complaint on which he would write a new date in order to file new complaint. Over the course of several months, he filed a total of 25 complaints in this manner. The agency could consolidate the subsequent complaints and dismiss them under 29 C.F.R. § 1614.107(a) for abuse of process. The complainant had demonstrated a pattern of abuse of the process, involving multiple complaints containing identical or similar allegations. (See, for example, [Kessinger v. U.S. Postal Service](#), EEOC Appeal No. 01976399 (June 8, 1999); [Story v. U.S. Postal Service](#), EEOC Request No. 05970083 (May 22, 1998).)

Example 2

The complainant originally filed a complaint of discrimination in non-selection for promotion. Subsequently she filed a total of 15 complaints, many alleging specific and distinct acts of reprisal for her prior EEO activity. Based on the number of complaints alone, the agency attempted to dismiss them all for abuse of process.

There was insufficient evidence to dismiss the complaints for abuse of process. Evidence of numerous complaint filings, in and of itself, is not a sufficient basis for determining that there has been an abuse of the process. In this case, there was no evidence that the complainant's ulterior purpose was to abuse the EEO process, or that she was misusing the process for ends other than that which it was designed to accomplish. It may be appropriate, however, for the agency to consolidate the individual complaints for processing. (See, for example, [Manley v. Dep't. of the Air Force](#), EEOC Appeal No. 01975901 (May 29, 1998); and [Donnelly v. Dep't. of Energy](#), EEOC Appeal No. 01972171 (Nov. 17, 1997) for decisions rejecting agency contentions of abuse of process.)

5. States the Same Claim - 29 C.F.R. §1614.107(a)(1)

The complaint states the same claim that is pending before or had been decided by the agency or Commission except in those cases where a class action complaint is pending.⁶ The Commission has interpreted this regulation to require that the complaint must set forth the "identical matters" raised in a previous complaint filed by the same complainant, in order for the subsequent complaint to be rejected. [Terhune v. U.S. Postal Service](#), EEOC Request No. 05950907 (July 18, 1997); [Russell v. Dep't. of the Army](#), EEOC Request No. 05910613 (Aug. 1, 1991) (interpreting 29 C.F.R. § 1613.215(a)(1), the predecessor of 29 C.F.R. § 1614.107(a)(1)).

6. Complainant Files a Civil Action - 29 C.F.R. § 1614.107(a)(3)

The complainant files a civil action concerning the same allegation, at least **one hundred eighty (180) days** after s/he filed his/her administrative complaint. The requirement in 29 C.F.R. § 1614.409 that the civil action shall be dismissed only if it was filed pursuant to 29 C.F.R. § 1614.408 evidences the intent of the Commission to restrict the dismissals of EEO complaints for filing a civil action to those civil actions which were brought under the statutes enforced by the Commission. Where a complainant has not filed a civil action pursuant to the specific statutes listed in 29 C.F.R. § 1614.408, the complaint may not be dismissed

⁶ In that case, an individual complaint will be subsumed under the class complaint. See Chapter 8 Section III of this Management Directive for detailed information on when a case should be subsumed.

pursuant to 29 C.F.R. § 1614.107(a)(3). See [Krumholz v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 01934799 (Dec. 15, 1993), aff'd, EEOC Request No. [05940346](#) (Oct. 21, 1994).

7. **Issue Has Been Decided - 29 C.F.R. § 1614.107(a)(3)**

The same issue has been decided by a court of competent jurisdiction and the complainant was a party to the lawsuit. Commission regulations mandate dismissal of the EEO complaint under these circumstances so as to prevent a complainant from simultaneously pursuing both administrative and judicial remedies on the same matters, wasting resources, and creating the potential for inconsistent or conflicting decisions. [Stromgren v. Dep't. of Veterans Affairs](#), EEOC Request No. 05891079 (May 7, 1990); [Sandy v. Dep't. of Justice](#), EEOC Appeal No. 01893513 (Oct. 19, 1989). The proper inquiry to determine whether dismissal is warranted is whether the issues in the EEO complaint and the civil action are the same, that is, whether the acts of alleged discrimination are identical. [Bellow v. U.S. Postal Service](#), EEOC Request No. 05890913 (Nov. 27, 1989). The factual allegations and not the bases or the precise relief requested should be the crux of the legal analysis.

8. **Allegation Raised in Negotiated Grievance Proceeding - 29 C.F.R. § 1614.107(a)(4)**

The complainant has raised the allegation in a negotiated grievance procedure that permits allegations of discrimination, indicating an election to pursue a non-EEO process. Section 1614.301(a) of 29 C.F.R. provides that “a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both.” This subsection also provides that an election to proceed under 1614 is indicated by the “filing of a written complaint,” while an election to proceed under a negotiated grievance procedure is indicated by the “filing of a timely written grievance.” See [Casey v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 01944605 (Aug. 9, 1995).⁷ The withdrawal of a

⁷ An agency cannot deny a complainant his statutory and regulatory right to file an EEO complaint because the union exercised its right to file its own grievance pursuant to the terms of a Collective Bargaining Agreement. See [Callahan v. Dep't. of the Interior](#), EEOC Appeal No. 0120110309 (Jan. 5, 2012) (complainant stated that the union filed a grievance without his knowledge and there was no evidence in the record that complainant was involved in filing the grievance); see also [Cate v. Dep't. of the Army](#), EEOC Appeal No. 0120110083 (Nov. 21, 2011).

grievance does not abrogate its effect for purposes of an election. [Bracket v. Dep't. of the Air Force](#), EEOC Request No. 05910383 (Aug. 8, 1991).

9. Appeal Made to MSPB - 29 C.F.R. § 1614.107(a)(4)

The complainant has elected to appeal the claim to the Merit Systems Protection Board, rather than file a mixed case complaint under 29 C.F.R. § 1614.302.

10. Complaint Alleges a Preliminary Step - 29 C.F.R. § 1614.107(a)(5)

The complaint alleges that a proposal to take or a preliminary step in taking a personnel action is discriminatory. This provision requires the dismissal of complaints that allege discrimination “in any preliminary steps that do not, without further action, affect the person: for example, progress reviews or improvement periods that are not a part of any official file on the employee.” 57 Fed. Reg. 12,643 (Apr. 10, 1992); *see*, for example, [McAlhane v. U.S. Postal Service](#), EEOC Request No. 05940949 (July 7, 1995). However, if the complaint alleges that a proposal to take or a preliminary step in taking a personnel action is retaliatory, the complaint should not be dismissed because a proposed action could be considered adverse treatment in the context of reprisal if it is reasonably likely to deter protected activity.⁸ *See* [Brown v. Dep't. of Defense](#), EEOC Appeal No. 0120103139 (Dec. 8, 2010) (complainant’s claim that the agency discriminated against him when it placed him on a performance improvement plan stated a viable claim of retaliation). In addition, if the individual alleges that the preliminary step was part of a pattern of harassing the individual for a prohibited reason, the complaint cannot be dismissed under this section because the preliminary step has already affected the employee. *See*, for example, [Noone v. Central Intelligence Agency](#), EEOC Request No. 05940422 (Jan. 23, 1995); *see also* [Bennett v. U.S. Postal Service](#), EEOC Appeal No. 0120111470 (Jan. 5, 2012).

11. Complaint is Moot - 29 C.F.R. § 1614.107(a)(5)

A complaint may be dismissed as moot where there is no reasonable expectation that the alleged violation will recur, and interim relief or

⁸ Dismissal of allegedly retaliatory proposals and other preliminary steps may be appropriate under 29 C.F.R. § 1614.107(a)(1) if the alleged retaliatory actions are not “materially adverse,” that is, would not dissuade a reasonable employee in complainant’s circumstances from engaging in protected activity. *See* [Burlington Northern & Santa Fe Railway Co. v. White](#), 548 U.S. 53, 68 (2006).

events have completely and irrevocably eradicated the effects of the alleged violation. See [Wildberger v. Small Business Administration](#), EEOC Request No. 05960761 (Oct. 8, 1998), (citing [County of Los Angeles v. Davis](#), 440 U.S. 625 (1979)). When such circumstances exist, no relief is available, and there is no need for a determination of the rights of the parties. The Commission has also held, however, that where a complainant has made a timely request for compensatory damages, an agency must address the issue of compensatory damages before it can dismiss a complaint for mootness. See, for example, [Salazar v. Dep't. of Justice](#), EEOC Request No. 05930316 (Feb. 9, 1994).⁹

12. **Dissatisfaction with the Processing of a Complaint - 29 C.F.R. § 1614.107(a)(8)**

The complaint alleges dissatisfaction with the processing of a previously filed complaint. See discussion in Section IV.D of this Chapter of the Management Directive.

B. Dismissals that Generally Occur after the Agency Accepts the Complaint Based on Complainant's Actions or Inactions

1. **The Complainant Cannot Be Located - 29 C.F.R. § 1614.107(a)(6)**

The regulations permit dismissal where the complainant cannot be located. The provision requires that the agency make reasonable efforts to locate the complainant and inform the complainant that s/he must respond to the agency's notice of proposed dismissal within **fifteen (15) days** sent to his/her last known address. A matter may not be "dismissed" under this section until after the complaint has been filed. See [Clairborne v. Dep't. of the Air Force](#), EEOC Appeal No. 01972713 (Mar. 19, 1998).

2. **The Complainant Failed to Respond or Proceed in a Timely Fashion - 29 C.F.R. § 1614.107(a)(7)**

⁹ A different situation is presented where an agency unilaterally and unconditionally promises in writing to provide the full and complete remedy as defined by the Administrative Judge. Although the complaint is "moot" in the sense that the guarantee of complete relief completely and irrevocably eradicates the effects of the alleged violation, the Administrative Judge will not dismiss the complaint as moot, but will issue an order determining the appropriate remedy. The purpose of this requirement is to ensure that the complainant will be able to seek enforcement of the agency's agreement to provide full relief should the agency fail to do so. See Chapter 7, Section III.D.15 of this Management Directive.

The regulations permit dismissal where the complainant has failed to respond to a written “request to provide relevant information or to otherwise proceed” within **15 days** of receipt, provided that the request contained notice of the proposed dismissal and further provided that there is otherwise insufficient available information to adjudicate the claim. The regulation further states that an agency may not dismiss on this basis where the record includes sufficient information to issue a decision. See [Delancy v. U.S. Postal Service](#), EEOC Appeal No. 0120111686 (Mar. 13, 2012). The Commission also has held that the regulation is applicable only in cases where there is a clear record of delay or contumacious conduct by the complainant. See [Martinez v. U.S. Postal Service](#), EEOC Appeal No. 0120113028 (Nov. 2, 2011) (dismissal of complaint for failure to cooperate was improper where there was insufficient evidence to support a conclusion that complainant purposely engaged in delay or contumacious conduct, and there was sufficient information in the record to have permitted the agency to continue the investigation, including extensive information as to the alleged discriminatory action and the responsible officials).

C. Processing of Partially Dismissed Complaints

There is no immediate right to appeal a partial dismissal of a complaint. Where an agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in 29 C.F.R. § 1614.107(a), the agency must notify the complainant in writing of its determination, set forth its rationale for that determination, and notify the complainant that the allegations will not be investigated. The agency must place a copy of the notice in the investigative file. The agency should advise the complainant that an Administrative Judge shall review its dismissal determination if s/he requests a hearing on the remainder of the complaint, but the complainant may not appeal the dismissal until a final action is taken by the agency on the remainder of the complaint. See 29 C.F.R. § 1614.107(b).

1. Where a Hearing Is Requested

If the complainant requests a hearing from an Administrative Judge, the Administrative Judge will evaluate the agency’s reasons for believing that a portion of the complaint met the standards for dismissal before holding the hearing. If the Administrative Judge believes that all or part of the agency’s reasons are not well taken, the entire complaint or all of the portions not meeting the standards for dismissal will continue in the hearing process. The parties may conduct discovery to develop the record for all portions of the complaint continuing in the hearing process. The

Administrative Judge's decision on the partial dismissal will become part of the Administrative Judge's final decision on the complaint and may be appealed by either party after final action is taken on the complaint.

2. Where a Final Decision by the Agency Is Requested

Where a complainant requests a final decision by the agency without a hearing, the agency will issue a decision addressing all claims in the complaint, including its rationale for dismissing claims, if any, and its findings on the merits of the remainder of the complaint. The complainant may appeal the agency's decision, including any partial dismissals, to the Commission.

Agency decisions shall include the following:

- a. findings of fact and conclusions of law on the merits of each issue in the complaint;
- b. appropriate remedies and relief in accordance with subpart E of part 1614 when discrimination is found;
- c. notice of right to appeal to the Commission (with EEOC Form 573, Notice of Appeal/Petition attached), unless the complaint involves a mixed case, where the agency should provide notice of right to appeal to the MSPB (not the Commission) within thirty (30) days of receipt of the agency final decision;
- d. notice of right to file a civil action in a U.S. District Court;
- e. the name of the proper defendant in any such lawsuit; and
- f. the applicable time limits for appeals and lawsuits.

D. Allegations of Dissatisfaction Regarding Processing of Pending Complaints

1. If a complainant is dissatisfied with the processing of his/her pending complaint, whether or not it alleges prohibited discrimination as a basis for dissatisfaction, including that agency counsel/representatives improperly interfered during the investigation of the complaint, s/he should be referred to the agency official responsible for the quality of complaints processing. Agency officials should earnestly attempt to resolve dissatisfaction with the complaints process as early and expeditiously as possible.

2. The agency official responsible for the quality of complaints processing must add a record of the complainant's concerns and any actions the agency took to resolve the concerns, to the complaint file maintained on the underlying complaint. If no action was taken, the file must contain an explanation of the agency's reason(s) for not taking any action.
3. A complainant must always raise his/her concerns first with the agency, in the above manner. However, in cases where the complainant's concerns have not been resolved informally with the agency, the complainant may present those concerns to the Commission at either of the following stages of processing:
 - a. Where the complainant has requested a hearing, to the Commission's Administrative Judge when the complaint is under the jurisdiction of the Administrative Judge; or
 - b. Where the complainant has not requested a hearing, to the Commission's Office of Federal Operations (OFO) on appeal.

A complainant must raise any dissatisfaction with the processing of his/her complaint before the Administrative Judge issues a decision on that complaint, the agency takes final action on the complaint, or either the Administrative Judge or the agency dismisses the complaint. The complainant has the burden of showing improper processing. No concerns regarding improper processing raised after a decision will be accepted by the agency, the Administrative Judge, or OFO.

Where the Administrative Judge or OFO finds that an agency has improperly processed the original complaint and that such improper processing has had a material effect on the processing of the original complaint, the Administrative Judge or OFO may impose sanctions on the agency as deemed appropriate. For example, where the complainant asserts that the agency's investigation of the complaint was improper, the Administrative Judge may determine whether the complainant has properly characterized the investigation and whether the agency's failure properly to investigate the complaint had a material effect on the processing of the complaint. Or, for example, where the complainant asserts that agency counsel or representatives improperly directed, or interfered with, the investigation of the complaint, the Administrative Judge may determine whether the Agency did, in fact, interfere in the investigation, and whether such interference so undermined the neutrality of the investigation that it materially affected the processing of the complaint. If the Administrative Judge finds that the processing of the

complainant's complaint was materially affected by the agency's actions, the Administrative Judge shall issue an appropriate order addressing the deficiencies in the investigation. If the Administrative Judge finds that although the agency's actions were inconsistent with its requirements under the 29 C.F.R. Part 1614 regulations, but had no material effect on the processing of the complaint, the Administrative Judge, in the exercise of his/her discretion, may suggest that the complainant submit a letter to the following Commission office for consideration regarding the agency's conduct:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M Street, NE
Washington, DC 20507

Electronic submission may be made using email transmission of documents to federalsectoreeo@eoc.gov or by using the Commission's electronic document submission portal.

Where the complainant contends that an agency improperly denied him/her official time and the Administrative Judge or OFO finds in the complainant's favor, the Administrative Judge or OFO may order the agency to restore such personal leave as the complainant may have used in lieu of official time.

V. CONDUCTING THE INVESTIGATION

A. Agency Retains Responsibility

Agencies are responsible for conducting an appropriate investigation of complaints filed against them. An agency may contract out an investigation or may arrange for another agency to conduct the investigation, but the agency remains responsible for the content and timeliness of the investigation.

B. Investigations Must Be Timely Completed

Investigations must be completed within **180 days**¹⁰ of filing a complaint or within the time period contained in an order from the Office of Federal

¹⁰ If the complaint is a mixed case, the investigation must be finished within 120 days. MSPB

Operations to investigate a complaint following an appeal from a dismissal, unless the EEO Director or designee and the complainant agree in writing to an extension of not more than an additional **ninety (90) days**. Where a complaint has been amended or consolidated with another complaint, the investigation must be completed within the earlier of 180 days after the filing of the last complaint or not later than 360 days after the filing of the original complaint. A complainant has the right to file a civil action or request a hearing, even in the case of consolidated complaints, after 180 days have passed since the filing of the original complaint, even if the agency's investigation has not been completed.

Agencies are required to complete investigations within the earlier of 180 days after filing last complaint or 360 days after the filing of the original complaint. Regardless of amendment of or consolidation of complaints, the investigation shall be complete in not more than 360 days.

For example, if a complainant amends a complaint or files another complaint the agency will consolidate on day 179 of the originally filed complaint, and then the investigation must be complete by the 359th day.

If the complainant wants to add another amendment on the 358th day of the investigation, the agency will have only 2 days to investigate that amendment. If the agency is unable to conduct an impartial and appropriate investigation in 2 days it should not consolidate or accept the amendment; rather, the agency should advise the complainant to seek counseling on the newest matter and process it as a new complaint.

C. Failure to Complete Investigation within Time Limit

If the investigation is not completed within the 180-day time limit, the agency must send a notice to complainant informing him/her that the investigation is not complete, providing an estimated date by which it will be complete and explaining that s/he has a right to request a hearing from a Commission Administrative Judge or to file a civil action in the appropriate U.S. District Court. The notice must be in writing, must describe the hearing process including some explanation of discovery and burdens of proof, and must acknowledge that its issuance does not bar complainant from seeking sanctions. A sample notice is provided at Appendix K.

regulation 5 C.F.R. § 1201.154(b)(2).

D. What Must Be Done for an Investigation to Be Considered Appropriate

A timely completed investigation means that within the applicable time period the agency must complete several actions:

1. The complaint must be appropriately investigated in a manner consistent with Chapter 6 of this Management Directive. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.
2. Copies of the investigative file, including a summary of the investigation must be provided to the complainant(s)¹¹; and
3. The agency must give complainant a notice of his/her right to request a hearing (if it is not a mixed case), within 30 days from receipt of the investigative file, , or of the right to request a final action by the agency pursuant to 29 C.F.R. § 1614.110.

VI. FINAL ACTIONS

There are two types of final actions by agencies. One is a final action by an agency following a decision by an Administrative Judge. The other is a final action in all other circumstances.

A. Final Action by Agency Following an Administrative Judge's Decision

When an Administrative Judge issues a decision under 29 C.F.R. §§ 1614.109 (b), (g), or (i), or § 1614.204(d)(7), the agency shall take final action on the complaint by issuing an order **within forty (40) days** of the date of its receipt of the Administrative Judge's decision. The agency's final order shall inform the complainant as to whether the agency will fully implement that decision. The term "fully implement" means that the agency adopts without modification the decision of the Administrative Judge. The agency's final order shall further inform the complainant of his/her right to file an appeal with the Commission, the right to file a civil action in a U.S. District Court, the name of the proper defendant in such appeal or civil action, and the applicable time limits for such appeals or civil actions. If the agency's final order does not fully implement the decision of the Administrative Judge, the agency shall file an appeal with the Commission in accordance with 29 C.F.R. § 1614.403, appending a copy of its

¹¹ See Chapter 6 of this Management Directive for the nature and content of an investigative summary.

appeal to the final order, simultaneously with its issuance of a decision to the complainant. A copy of EEOC Form 573, Notice of Appeal/Petition - Complainant, shall be attached to the final order.

When an Administrative Judge issues a decision under 29 C.F.R. § 1614.204(j), the agency shall take final action on the complaint by issuing an order **within sixty (60) days** of the date of its receipt of the Administrative Judge's decision. The agency's final order shall inform the class agent as to whether the agency will fully implement that decision. The term "fully implement" means that the agency adopts without modification the decision of the Administrative Judge. The agency's final order further shall inform the class agent of his/her right to file an appeal with the Commission, the right to file a civil action in a U.S. District Court, the name of the proper defendant in such appeal or civil action, and the applicable time limits for such appeals or civil actions. If the agency's final order does not fully implement the decision of the Administrative Judge, the agency shall file an appeal with the Commission in accordance with 29 C.F.R. § 1614.403, appending a copy of its appeal to the final order, simultaneously with its issuance of a decision to the class agent. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the final order.

B. Final Actions in All Other Circumstances

When an agency dismisses an entire complaint under 29 C.F.R. § 1614.107(a), receives a request for an immediate final decision, or does not receive a reply to the notice issued under 29 C.F.R. § 1614.108(f), the agency will take final action by issuing a final decision. The final decision consists of findings by the agency on the merits of each claim in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies, and relief in accordance with subpart E of Part 1614. The agency will issue the final decision within sixty (60) days of receiving notification that a complainant has requested an immediate final decision from the agency, or within 60 days of the end of the thirty (30)-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested a hearing or a decision. The final decision shall contain notice of the right to appeal the final action to the Commission, the right to file a civil action in a U.S. District Court, the name of the proper defendant in any such lawsuit, and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the final decision/determination.

CHAPTER 6 DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

I. INTRODUCTION

Section 1614.108(b) of Title 29 C.F.R. requires that “the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint.” An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Pursuant to that regulation, this Chapter prescribes the Equal Employment Opportunity Commission’s standards for impartiality and appropriateness in factual findings on formal complaints of discrimination. Further, because continuing education and training for employees working in federal EEO is vitally important, this Chapter also establishes a mandatory minimum training requirement for all investigators, including contract and collateral-duty investigators.

This Chapter is intended to ensure that federal agencies consistently develop sound factual bases for findings on claims raised in equal employment opportunity complaints while retaining the maximum flexibility in the use of fact-finding techniques and in the use of established dispute resolution plans. This Management Directive is not intended as an exhaustive guide for conducting investigations, but represents the standard that the Commission expects in an investigation.

II. MINIMUM TRAINING REQUIREMENTS FOR ALL INVESTIGATORS

All new EEO Investigators, including contract and collateral-duty investigators, must have completed at least thirty-two (32) hours of investigator training before conducting investigations. In addition to the training requirement for new investigators, all investigators are required to receive at least eight hours of continuing investigator training every fiscal year. The Commission has developed training courses to satisfy this requirement and offers them to agencies through its Revolving Fund Program on a fee-for-service basis. Agencies may also develop their own courses to satisfy this requirement or contract with others to provide training, as long as the training meets the standards provided below.

A. Standards for New Investigator Training Requirement

The agency should provide training on the following:

1. An overview of the entire EEO process pursuant to 29 C.F.R. Part 1614. This segment must emphasize important time frames in the EEO process, including relevant time frames for investigation.
2. The role and responsibility of an EEO Investigator, as described in this Management Directive.
3. A thorough presentation of the relevant statutes, including Title VII of the Civil Rights Act of 1964, as amended (includes the Pregnancy Act of 1978), the Rehabilitation Act of 1973, as amended, the Americans with Disabilities Act, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Equal Pay Act of 1963, as amended, and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq. This module must explain the theories of discrimination relevant to these statutes, including disparate treatment, adverse impact, and reasonable accommodation theories. This module must provide detailed instruction concerning issues attendant to fragmentation. See Chapter 5, Section III of this Management Directive.
4. Case management issues, including information on practical techniques concerning the timely investigation of complaints.
5. Remedies, including compensatory damages, attorney's fees, and costs. This module must provide investigators with practical information on how to gather relevant information in cases where remedies, attorney's fees, and costs are at issue.
6. Investigative techniques, such as the gathering and analysis of evidence. Participants should be provided with an opportunity to get practical, hands-on experience during this module on topics such as interviewing witnesses, making credibility determinations, and the gathering and reviewing of documentary and electronic evidence. Participants should be provided with case studies to work with so that investigative skills can be effectively developed.

B. Standards for Continuing Investigator Training

The continuing eight hours of investigator training every fiscal year is intended to keep EEO Investigators informed of developments in EEO practice, law, and guidance, as well as to enhance and develop investigatory skills. Agencies are encouraged to conduct a needs assessment to determine specific investigative staff training needs. The Commission anticipates that these eight hours of continuing investigator training will include segments on legal and policy updates, regulatory and statutory changes, and investigative skills development.

III. RESPONSIBILITIES**A. Director of Equal Employment Opportunity**

The Director of Equal Employment Opportunity shall ensure that 1) all new investigators receive at least thirty-two (32) hours of introductory investigator training before conducting investigations and that all investigators receive at least eight hours of continuing investigator training every year; 2) the claim(s) in a complaint are thoroughly investigated; 3) all employees of the agency cooperate in the investigation; and 4) witness testimony is given under oath or affirmation and without a promise that the agency will keep the testimony or information provided confidential. See 29 C.F.R. § 1614.102(c)(5).

The EEO Director will also ensure that individual complaints are properly and thoroughly investigated and that all final actions are issued in a timely manner in accordance with 29 C.F.R. § 1614.110. The EEO Director also must ensure that there is no conflict of interest or appearance of conflict of interest in the investigation of complaints. See Chapter 1 Section 4 of this Management Directive for more information.

B. Equal Employment Opportunity Investigator

The Equal Employment Opportunity Investigator is a person officially designated and authorized to conduct inquiries into claims raised in EEO complaints. The authorization includes the authority to administer oaths and to require employees to furnish testimony under oath or affirmation without a promise of confidentiality. The investigator does not make or recommend a finding of discrimination.

A new investigator must have received, at a minimum, thirty-two (32) hours of investigator training before s/he conducts an investigation; experienced investigators must receive eight hours of training every fiscal year thereafter.

C. Complainant

The complainant must cooperate in the investigation and keep the agency informed of his/her current address. If an agency is unable to locate the complainant, the agency may dismiss the complaint, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within fifteen (15) days of the notice of proposed dismissal. 29 C.F.R. § 1614.107(a)(6).

Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, coupled with a 15-day notice of proposed dismissal, a failure to respond could result in dismissal of the complaint. See 29 C.F.R. § 1614.107(a)(7); Chapter 5, Section IV.B.1 of this Management Directive.

IV. INVESTIGATION

An investigation of a formal complaint of discrimination is an official review or inquiry, by persons authorized to conduct such review or inquiry, into claims raised in an EEO complaint.

The investigative process is non-adversarial. That means that the investigator is obligated to collect evidence regardless of the parties' positions with respect to the items of evidence.

A copy of the complaint shall be provided to the investigator prior to the commencement of the investigation.

Models for the analysis of common types of discrimination cases appear at Appendix J to this Management Directive.

A. Methods of Investigation

Investigative inquiries may be made using a variety of fact-finding models, such as the interview or the fact-finding conference, and a variety of devices, such as requests for information, position statements, exchange of letters or memoranda,

interrogatories, and affidavits. The inquiry/review process may also incorporate some of the features of a dispute resolution plan.

B. Purpose of the Investigation

The purpose of the investigation is 1) to gather facts upon which a reasonable fact finder may draw conclusions as to whether an agency subject to coverage under the statutes that the Commission enforces in the federal sector has violated a provision of any of those statutes; and 2) if a violation is found, to have a sufficient factual basis from which to fashion an appropriate remedy.¹

C. General Investigative Requirements

The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred; the treatment of members of the complainant's group as compared with the treatment of other similarly situated employees, if any;² and any policies and/or practices that may constitute or appear to constitute discrimination, even though they have not been expressly cited by the complainant.

¹ The Commission enforces: (1) Section 717 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16; (2) Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791 and 794a; (3) Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a; (4) the Equal Pay Act, Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 296(d); and (5) Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq.

² Investigators are reminded that even where the complainant is unable to provide comparative data and the investigator similarly cannot obtain any such information, the investigator still must determine whether there is other evidence that may establish unlawful discrimination. In O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996), the Supreme Court ruled that comparative evidence is not an essential element of a prima facie case of discrimination, but the complainant must come forward with sufficient evidence to create an inference of discrimination; that is, enough evidence that, if not rebutted, would support an inference that the agency's actions resulted from discrimination. Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978). The Commission has issued enforcement guidance on O'Connor, entitled "EEOC Enforcement Guidance on O'Connor v. Consolidated Coin Caterers Corp.," (September 18, 1996), which is available on the Commission's website at http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm, in the "Enforcement Guidance and Related Documents" section.

D. Failure to Complete Investigation within Time Limit

Agencies are required to complete investigations within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint. Regardless of amendment of or consolidation of complaints, the investigation shall be complete in not more than 360 days, unless there is a written extension of not more than 90 days.

For example, if a complainant amends a complaint or files another complaint the agency will consolidate on day 179 of the originally filed complaint, then the investigation must be complete by the 359th day.

If the complainant wants to add another amendment on the 358th day of the investigation, the agency will have only 2 days to investigate that amendment unless the complainant agrees in writing to an extension of not more than 90 days. When no written extension exists and the agency is unable to conduct an impartial and appropriate investigation in 2 days it should not consolidate or accept the amendment rather, the agency should advise the complainant to seek counseling on the newest matter and process it as a new complaint.

See Chapter 5, Section V.C of this Management Directive regarding an agency's failure to complete the investigation in a timely manner.

V. THE ROLE OF THE INVESTIGATOR**A. Collecting and Discovering Factual Information**

The role of the investigator is to collect and to discover factual information concerning the claim(s) in the complaint under investigation and to prepare an investigative summary.

B. Variety of Methods Available

The investigator may accomplish his/her mission in a variety of ways. The investigator may function as:

1. a presiding official at a fact-finding conference;
2. an examiner responsible for developing material evidence;

3. an issuer of requests for information in the form of requests for the production of documents, interrogatories, and affidavits;
4. a face-to-face interviewer in on-site visits; and/or,
5. any other role so long as appropriate investigative techniques/methods are utilized.

C. Investigator Must Be Unbiased and Objective

In whatever the mix of fact-finding activity selected for a particular case, the investigator must be and must maintain the appearance of being unbiased, objective, and thorough. S/he must be neutral in his/her approach to factual development. The investigator is not an advocate for any of the parties or interests and should refrain from developing allegiances to them. In addition, the following rules must be observed:

1. The person assigned to investigate shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose.
2. The investigator, if a contract investigator, shall not have been hired by or be obligated to the person(s) involved in the claims giving rise to the complaint. For example, where the contract monitor of EEO investigation contracts is alleged to have been involved in discriminatory activity, the use of the usual contract investigator would create an apparent bias because there is at best the appearance that the contract investigator could not be impartial.
3. An agency is prohibited, in some situations, from using its own immediate investigative resources, even though the investigation of discrimination complaints in the federal service is primarily an agency function and responsibility. In such cases the agency shall use alternatives, such as contract investigators or other outside sources. See Chapter I, Section IV of this Management Directive for additional information regarding conflict of interest cases. Such situations include, but are not limited to:
 - a. Particularly sensitive cases involving high-level officials (for example, complainant is an immediate subordinate of the head of the agency and the head of the agency is alleged to have taken discriminatory action).

- b. Potential conflict of interest (for example, complainant is an employee in the EEO office and names the EEO Director as the person taking the wrongful action).
- c. A small agency unable to carry out an unexpected EEO workload (for example, an agency with fewer than 450 employees, has a staff of part-time or ad hoc EEO Investigators, and is unable to absorb an additional investigative caseload).

D. Investigator Must Be Thorough

This means identifying and obtaining all relevant evidence from all sources regardless of how it may affect the outcome. Investigators need not expend the same amount of investigatory effort on each case, however. The proper scope of an investigation is dictated by the facts at issue. Investigators should not take a cookie-cutter, one-size-fits-all approach, as that wastes resources and delays resolution of the complaint. The investigation and the amount of effort expended should be appropriate to determine the claims raised by the complaint. An appropriate investigation is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred.

An investigator should ensure that his/her questions are answered by a witness with personal knowledge of the facts rather than by a party's representative. The investigator need not concern himself/herself with balancing the amount of evidence supporting the complainant as compared with the amount of evidence supporting the agency. To ensure a balanced record, it is necessary only to exhaust those sources likely to support the complainant and the respondent. An investigation conducted in this manner might reveal that there is ample evidence to support the complainant's claims and no evidence to support the agency's version of the facts, or vice versa. Nevertheless, this investigation would be thorough. The best type of investigations allow for complainant to provide rebuttal evidence with sufficient time for the investigator to address any issues raised within the regulatory time frames.

VI. EVIDENCE

A. Quality of Evidence

Evidence will be gathered from the complainant, witnesses, and other sources. In order to support findings and, ultimately, decisions, this evidence should be material to the complaint, relevant to the issue(s) raised in the complaint, and as reliable as possible.

1. Material Evidence

Evidence is material when it relates to one or more of the issues raised in the complaint or raised by the agency's answer to it. To determine whether evidence is material, one must look to the claims of discriminatory conduct and resultant harm contained in the complaint and the agency's answers to the claims. If the evidence relates to one or more of those claims, then it relates to the issues presented in the complaint, and it is material.

2. Relevant Evidence

Evidence is relevant if it tends to prove or disprove a material issue raised by a complaint. Relevancy and materiality are often used interchangeably. Generally, relevance is the more important concept in an investigation. If evidence is not relevant, whether it is material is of little consequence. A test of relevance is to ask, "What does this evidence tend to prove?" If the answer is that it tends to prove or disprove a proposition that is related to the complaint, then the evidence is relevant.

3. Reliable Evidence

Evidence is reliable if it is dependable or trustworthy. Evidence should not be ignored because it is of questionable reliability. Such evidence may lead to evidence that is reliable.

Some factors to consider in determining whether testimony is reliable are: whether the witness's testimony is based on his/her own experience and personal knowledge, or based on rumor, hearsay, or innuendo; whether the testimony is a statement of fact or is merely a conclusion; and whether witnesses have an interest in the outcome of the complaint, or are otherwise biased.

Some factors to consider in determining whether documents are reliable are: whether they were prepared in response to the investigation or whether they are maintained in the ordinary course of business; whether they are obtained from the custodian of records or the author of the document; and whether the documents are signed and/or dated.

The federal rules of evidence were designed to set limits on the reliability of documents and testimony entered in evidence in court. Such formal rules will not be strictly applied in the collection of evidence for the investigation of federal equal employment opportunity complaints. Such rules may be used, however, as a guide in assessing the evidentiary weight to be given particular items of evidence.

B. Types of Evidence

There are many types of evidence which can be obtained on the issues raised in an equal employment complaint. The three basic types of evidence are direct evidence, circumstantial evidence, and statistical evidence.

1. Direct Evidence

Direct evidence is evidence that proves a fact without resort to inference or presumption. Black's Law Dictionary (9th ed. 2009). For example, in the morning the ground is covered with snow. If you looked out the window the night before and saw it snowing then, you have direct evidence that it snowed during the night. You need not draw any inference to reach the factual conclusion that it snowed during the night.

Direct evidence is relevant in cases involving disparate treatment where the question is whether the employer intentionally treated employees differently because of a protected factor. It is also relevant in cases involving the effect of policies where the question is whether the policy disparately treats all employees in the protected class.

Direct evidence is rare. The statement, "I would never hire you for that job because you are a woman," is direct evidence of discrimination on the basis of sex in hiring, but would not be direct evidence if the issue involved a performance appraisal, for example.

Agencies must take care to distinguish between direct evidence of bias and direct evidence of discrimination. Direct evidence of bias may be strong but circumstantial evidence of discrimination in a particular case. For

example, the statement, “I would never hire a woman for that job,” is direct evidence of bias, as not directed towards any specific person. See [Heim v. State of Utah](#), 8 F.3d 1541, 1546 (10th Cir. 1993). In contrast, a statement to a complainant that you “may be getting too old to understand the store’s new computer programs” was deemed direct evidence of discrimination in [Wright v. Southland Corp.](#), 187 F.3d 1287, 1304 (11th Cir. 1999) because it was directed at a specific person.

2. Circumstantial Evidence

Circumstantial evidence is evidence based on inference. [Black’s Law Dictionary](#) (9th ed. 2009). In other words, the fact finder must draw an inference from the evidence to reach a factual conclusion.

For example, if you looked out the window at night and the ground was bare, but when you look out the window the next morning, there is snow on the ground, the snow on the ground is circumstantial evidence that it snowed during the night. From the presence of snow on the ground, you reasonably may infer that it snowed during the night. You have drawn an inference to reach the factual conclusion that it snowed during the night.

There are different types of circumstantial evidence. For example, comparative evidence must be sought in every case alleging disparity in treatment on a basis protected by a law enforced by the Commission. Comparative evidence is evidence regarding how similarly situated persons outside of the complainant’s protected groups were treated.

In general, similarly situated means that the persons who are being compared are so situated that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision. It is important to remember that individuals may be similarly situated for one employment decision, but not for another. For example, a female GS-4 clerk-typist may be similarly situated to a male GS-7 paralegal in a discrimination case involving the approval of annual leave where the same rules are applied to both employees by the same supervisor or where both are in the same unit or subject to the same chain of command. The investigator would be obligated to find out whether there were persons, not named by the complainant but similarly situated, whose treatment could be compared to the complainant’s treatment.³ Both

³ While comparative evidence is important, it is not always available, and an investigator may be able to obtain other evidence of discrimination. So while the investigator should make an effort to obtain comparative evidence, s/he also should make an effort to determine whether there may be other evidence

the complainant and the responding management official should provide a list of comparators for the challenged action.

Other types of circumstantial evidence may include general statements indicative of bias (see the example in “Direct Evidence,” above), conduct (for example, a selecting official repeatedly has selected only males for job vacancies, despite the availability of best-qualified female candidates), or environment (for example, an absence of Hispanics in the workplace despite their availability in the relevant labor force). Circumstantial evidence may overlap with statistical evidence.

3. **Statistical Evidence**

Statistical evidence or a survey of the general environment may be conducted as appropriate. For example, this evidence may be probative when claims involve the comparative treatment of groups, as in a claim of a pattern or practice of discrimination, or the adverse effect of an agency policy or practice.

C. Sources of Evidence

1. **The Complainant**

The complaint will generally provide the initial information concerning the bases, issues, and incidents that gave rise to the complaint of discrimination. The complaint may also indicate the reason, if any was given, for any adverse employment decision. Additional background and detailed information must be obtained from the complainant and recorded through written questions and answers (interrogatories), recorded interviews (using handwritten notes or verbatim transcription), an exchange of letters or memoranda, or a fact-finding conference. This information should include medical documentation, where necessary. Witness testimony intended to be made a part of the complaint file should be made under oath or affirmation or penalty of perjury.

Volume II of the Commission’s Compliance Manual will assist in developing inquiries. That volume contains substantive topics arranged in sections. Most sections contain advice on what questions to ask when certain issues are raised. The Commission’s Compliance Manual is

equally probative of discrimination.

published commercially and is available at many libraries and at the Commission's district, area, and field offices. In addition, newly issued sections of the Compliance Manual and Commission policy guidance on issues such as reprisal, definition of disability, reasonable accommodation, and sexual harassment are available on the Commission's website at: <http://www.eeoc.gov/laws/guidance/compliance.cfm>.

2. The Agency

Information from the agency may be obtained initially through a request for information. Consult the agency EEO Director for instructions concerning to whom to direct the request.

Follow-up information should be obtained in a variety of ways, including further requests, affidavits, interrogatories, or a fact-finding conference.

In most instances, the individual who initiated or enforced the decision or engaged in the action about which the complaint was filed should be interviewed early in the investigation. His/her reasons for the action will often open other avenues to explore.

For this reason, a management official's explanation of a challenged action should be detailed and specific. In a non-selection type case, stating the person selected was better qualified or a better fit for the position is insufficient standing alone. Interview notes and any explanation should include a narrative as to why the management official believes the selectee was a better candidate.

3. Witnesses

Witnesses can be identified by asking the complainant, the official involved in the alleged discriminatory action, or other obvious witnesses if they are aware of other persons who might have information related to the complaint. Witnesses need not be employees at the respondent agency.

- a. The EEO staff may be of some assistance in discovering other witnesses, but they should rarely be witnesses themselves. Their information will usually be hearsay and their participation as witnesses would compromise their objectivity. Information should be obtained from its primary source.
- b. Witness bias should be noted when it is discovered. The following should be noted: 1) favorable feelings toward a party based on a

mutual alliance, family ties, or close friendship; 2) hostility to a party, because of a past disagreement; and 3) self-interest in the outcome of the complaint are some indicators of potential bias. The indicators should be made a part of the record, and efforts should be made to corroborate the testimony. The weight accorded the evidence by the fact finder adduced from such witnesses will be governed by the degree to which it can be determined that the bias colored the testimony.

4. Documentary Evidence

All relevant documents should be obtained. The complainant, the supervisor, the manager who took the personnel action, or the personnel office of the agency may be sources to help identify relevant documents.

Statistical evidence usually can be obtained through the EEO Office or the personnel office of the agency.

D. Evidence on the Question of Remedies

The investigator should gather evidence that will allow for an appropriate remedy to be fashioned. This essentially means that a determination of the parameters of relief should be made and the appropriate inquiries developed. Agencies should be aware that, during the investigative process, they need to address evidence that may be used in connection with framing remedies. Evidence on the question of remedies may include evidence of a complainant's interim earnings or subsequent promotions (in a discharge or non-promotion case), compensatory damages, or other mitigating factors. For a source of information concerning compensatory damages, see [Enforcement Guidance; Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991](#), N-915.002 (July 14, 1992).⁴

⁴ The Commission prepared this Enforcement Guidance for use in both public and private EEO litigation. The discussion in the Enforcement Guidance concerning punitive damages does not apply to federal sector EEO.

VII. WITNESSES AND REPRESENTATIVES IN THE FEDERAL EEO PROCESS

The procedures outlined here relate specifically to the processing of individual complaints of discrimination under 29 C.F.R. § 1614.108. The principles reflected in these procedures, however, should also guide the processing of class complaints of discrimination under 29 C.F.R. § 1614.204.

A. Disclosure of Investigative Material to Witnesses

1. To the Complainant

The complainant must receive a copy of the complaint file and a transcript of the hearing, if a hearing is held. The complainant should be given the opportunity to receive a copy of the complaint file and hearing transcript in an electronic format as an alternative to the paper files/documents. The complainant should receive the same copy of the complaint file as the agency counsel does and where a hearing was requested as the Administrative Judge does.

2. To Other Witnesses

During the investigation, the investigator may disclose information and documents to a witness who is a federal employee where the investigator determines that the disclosure of the information or documents is necessary to obtain information from the witness, for example, to explain the claims in a complaint or to explain a manager's articulated reason for an action in order to develop evidence bearing on that reason. Explanations of a witness' credibility are helpful, and the investigator should include observations on credibility without making a final conclusion as to credibility.

B. Travel Expenses**1. Witness Employed by the Federal Government**

Section 1614.605(f) of 29 C.F.R. requires that a witness be in an official duty status when his/her presence is required or authorized by agency or Commission officials in connection with a complaint. A witness is entitled to travel expenses. If a witness is employed at an agency other than the one against which the complaint is brought and must travel to provide the attestation or testimony, the witness is entitled to reimbursement for travel expenses. The current employing agency of a federal employee must initially authorize and pay the employee's travel expenses and is entitled to reimbursement from the responding agency, which is ultimately responsible for the cost of the employee's travel. [John Booth - Travel Expenses of Witness - Agency Responsible](#), File: B-235845, 69 Comp. Gen. 310 (1990). An agency would not be responsible for paying the travel expenses of non-federal witnesses.

2. Complainant or Applicant Not Employed by Federal Government

The agency is not responsible, however, for paying the travel expenses of a complainant or applicant who is not employed by the federal government. Although the complainant who, for purposes of his/her complaint is a witness, may once have been employed by the agency against whom s/he complains, the termination of the employment status with the federal government also terminates any federal obligation to pay travel expenses associated with prosecution of the complaint. [Expenses of Outside Applicant Complainant to Travel to Agency EEO Hearing](#), File: B-202845, 61 Comp. Gen. 654 (1982).

C. Official Time

Section 1614.605 of 29 C.F.R. provides that individuals/complainants are entitled to a representative of their choice during the administrative EEO pre-complaint counseling and at all stages of the administrative EEO complaint process. Both the complainant and the representative, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information, if otherwise on duty. 29 C.F.R. § 1614.605(b). Former employees of an agency who initiate the EEO process concerning an adverse action relating to their prior employment with the agency are employees within the meaning of 29 C.F.R. § 1614.605, and their representatives, if they are current employees of the agency,

are entitled to official time. Witnesses who are federal employees, regardless of whether they are employed by the respondent agency or some other federal agency, shall be in a duty status when their presence is authorized or required by Commission or agency officials in connection with the complaint.

1. **Reasonable Amount of Official Time**

“Reasonable” is defined as whatever is appropriate, under the particular circumstances of the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to agency requests for information. The actual number of hours to which complainant and his/her representative are entitled will vary, depending on the nature and complexity of the complaint and considering the mission of the agency and the agency’s need to have its employees available to perform their normal duties on a regular basis. The complainant and the agency should arrive at a mutual understanding as to the amount of official time to be used prior to the complainant’s use of such time. Time spent commuting to and from home should not be included in official time computations because all employees are required to commute to and from their federal employment on their own time.

2. **Meeting and Hearing Time**

Most of the time spent by complainants and their representatives during the processing of a typical complaint is spent in meetings and hearings with agency officials or with the Commission Administrative Judges. Whatever time is spent in such meetings and hearings is automatically deemed reasonable. Both the complainant and the representative are to be granted official time for the duration of such meetings or hearings and are in a duty status regardless of their tour of duty. If a complainant or representative has already worked a full week and must attend a hearing or meeting on an off day, that complainant or representative is entitled to official time, which may require that the agency pay overtime. The complainant should notify the agency of the meeting and hearing schedule as soon as possible.

3. **Preparation Time**

Since presentation of a complaint involves preparation for meetings and hearings, as well as attendance at such meetings, conferences, and hearings, complainants and their representatives are also afforded a reasonable amount of official time, as defined above, to prepare for meetings and hearings. They are also to be afforded a reasonable amount of official time to prepare the formal complaint and any appeals that may be filed with the Commission, even though no meetings or hearings are involved. However, because investigations are conducted by agency or Commission personnel, the regulation does not envision large amounts of official time for preparation purposes. Consequently, “reasonable,” with respect to preparation time (as opposed to time actually spent in meetings and hearings), is generally defined in terms of hours, not in terms of days, weeks, or months. Again, what is reasonable depends on the individual circumstances of each complaint. See [Murry v. General Services Administration](#), EEOC Appeal No. 0120093069 (July 26, 2012).

4. **Aggregate Time Spent on EEO Matters by Representative**

The Commission considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Therefore, an agency may restrict the overall hours of official time afforded to a representative, for both preparation purposes and for attendance at meetings and hearings, to a certain percentage of that representative’s duty hours in any given month, quarter, or year. Such overall restrictions would depend on the nature of the position occupied by the representative, the relationship of that position to the mission of the agency, and the degree of hardship imposed on the mission of the agency by the representative’s absence from his/her normal duties. The amount of official time to be afforded to an employee for representational activities will vary with the circumstances.

Moreover, 29 C.F.R. § 1614.605(c) provides that in cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. At all times, the complainant is responsible for proceeding with the complaint, regardless of whether s/he has a designated representative.

The Commission does not require agencies to provide official time to employee representatives who are representing complainants in cases

against other federal agencies. However, the Commission encourages agencies to provide such official time.

5. Requesting Official Time

The agency must establish a process for deciding how much official time it will provide a complainant. Agencies further must inform complainants, their representatives, and others who may need official time, such as witnesses, of the process and how to claim or request official time.

6. Denial of Official Time

If the agency denies a request for official time, either in whole or in part, the agency must include a written statement in the complaint file noting the reasons for the denial. If the agency's denial of official time is made before the complaint is filed, the agency shall provide the complainant with a written explanation for the denial, which it will include in the complaint file if the complainant subsequently files a complaint. Where a request for official time is denied in whole or part while an Administrative Judge is presiding over the matter, a copy of the agency's denial of official time with the requisite explanation should be provided to the Administrative Judge when provided to the requestor.

D. Duty Status/Tour of Duty

For purposes of these regulations, "duty status" means the complainant's or representative's normal hours of work.

It is expected that the agency will, to the extent practical, schedule meetings during the complainant's normal working hours and that agency officials shall provide official time for complainants and representatives to attend such meetings and hearings.

If meetings, conferences, and hearings are scheduled outside of the complainant's or the representative's normal work hours, agencies should adjust or rearrange the complainant's or representative's work schedule to coincide with such meetings or hearings, or grant compensatory time or official time to allow an approximately equivalent time off during normal hours of work. The selection of the appropriate method for making the complainant or representative available in any individual circumstance shall be within the discretion of the agency.

Any reasons for an agency's denial of official time should be fully documented and made a part of the complaint file, and if an Administrative Judge is presiding over the matter at the time of the request, then it should be provided to the Administrative Judge at the same time as it is provided to the requestor.

Witnesses, who are federal employees, regardless of their tour of duty and whether they are employed by the respondent agency or another federal agency, must be in a duty status when their presence is authorized or required by Commission or agency officials in connection with a complaint.

E. Use of Government Property

The complainant's or complainant's non-attorney representative's use of government property (copiers, telephones, word processors, computers, internet, printers, and email) must be authorized prior to their use by the agency and must not cause undue disruption of agency operations.

VIII. COMPLAINT FILE

A. Contents of the Complaint File

The complaint file must include all various documents and information acquired during the fact-finding under this Directive. The complaint file will be assembled as an electronic document, unless the agency has demonstrated good cause as to why the agency cannot produce a digital copy of the file, in which case a paper file may be submitted. While cost alone does not constitute good cause why an agency cannot submit files in a digital format, OFO will consider facts such as undue cost, undue burden, national security concerns, and other reasonable bases. The complaint file must contain all documents pertinent to the complaint, and be in the form and format as provided in Appendix L, as demonstrated in the sample complaint file available on the Commission's website at www.eeoc.gov/federal/.

B. Complaint Files Should Not Include

The complaint file should not include confidential documentation concerning the substance of attempts to resolve the complaint during informal counseling or during any alternative dispute resolution procedure.

C. Redactions

Agencies should not place non-relevant information in complaint files. Where names, social security numbers, home addresses, and any other personal identifying information are not relevant, that information should be redacted before the document containing them is included in the compliant file. Relevant information that should not be redacted includes management and/or comparative employees'/applicants' names. Once a document is included in the complaint file, the complainant has a right to the entire file. All parties including the agency representative, the complainant and his/her counsel, and the Administrative Judge should all have the same complaint file, either without redactions or containing the same redactions.⁵

D. Features of the Complaint File

The digital complaint file shall have the following features:

1. File should be image over text or run through OCR text recognition such that it is a searchable document.
2. It should contain digital bookmarks identifying key documents, exhibits, and sections of the file as specified below. Bookmarks should be labeled in a manner that clearly identifies the key documents, (for example, EEO Counselor's Report, rather than generic labels) within each identified section.⁶
3. It should contain a typed summary of the investigation signed and dated by the investigator and containing a discussion and analysis of the evidence. See Section IX of this Chapter.

E. Organization of the Complaint File

Agencies should organize complaint files in the following manner, with digital bookmarks specifically identifying the section and key documents therein.

⁵ Except for Memorandums of Understandings (MOUs) currently in place for national security purposes, any previous information from the Commission's offices regarding redactions, upon which agencies are relying to redact complaint files, is hereby obsolete.

⁶ Where an agency has shown good cause as to why it cannot submit the complaint file in a digital format and received an exception letter to file a paper file, the agency should substitute the word "tab" for "section" in the below guidance.

- Title Page - should contain at a minimum the information set forth in the sample at Appendix L.
- Section 1 - should contain the formal complaint (bookmarked) and documents submitted by the complainant.
- Section 2 - should contain the EEO Counselor's report (bookmarked) and all documents generated in the informal process pursuant to 29 C.F.R. § 1614.105(c). Included here should be the notice of right to file a complaint (bookmarked) pursuant to 29 C.F.R. § 1614.105(d).
- Section 3 - should contain the agency's notice of claims to be investigated (bookmarked) pursuant to Section IV.A.1 of this Chapter. Copies of any other documents bearing on delineation of the claims to be investigated should also be included. Documents pertaining to the partial dismissal of claim(s) (bookmarked) and/or the notice of late investigation should be included in this tab.
- Section 4 - should contain documented attempts at resolution; including any settlement agreement reached on any aspect of the complaint (bookmarked); however, documentation should not include the substance of such attempts.
- Section 5 - should contain any documentation of appellate activity and any decisions affecting the processing of the complaint if any (bookmarked).
- Section 6 - should contain the summary of investigation/summary analysis of the facts (bookmarked). The summary should cite to exhibits and evidence (bookmarked) and be signed and dated by the investigator.
- Section 7 - should contain the investigative evidence and documents in a logical order. The notice of incomplete investigation pursuant to 29 C.F.R. § 1614.108(g), if one was issued, should be included.
- Section 8 - (if applicable) should contain all pre-hearing submissions, including those relevant to summary judgment, and all discovery documentation, and motions, orders, exhibits (bookmarked), and transcripts (bookmarked).

Section 9 - (if applicable) should contain all submissions from an administrative hearing, including motions, exhibits (bookmarked), and transcripts (bookmarked).

Section 10 - (if applicable) should contain the decision(s) of the Commission's Administrative Judge (bookmarked).

Section 11 - should contain the Final Agency Action (bookmarked) and any documentation related to service on the parties.

Section 12 - should contain any miscellaneous material.

If an agency has submitted a digital complaint file to a Commission Administrative Judge documents added after the original complaint file was compiled may be submitted in a separate PDF file that must contain a title page and bookmarks to the applicable sections of the original file where the documents belong.

F. Availability of Complaint Files

The complainant and his/her representative shall be entitled to one copy each of the complaint file and investigative summary either at the time that the investigation is completed or when the agency sends the complainant the notice required by 29 C.F.R. § 1614.108(f), whichever is earlier. The complainant and his/her representative should be given the option to receive these documents in a digital and/or paper medium.

G. Disposition of Complaint Files

1. Effective December 8, 1998, the National Archives and Records Administration (NARA) revised [General Records Schedule \(GRS\) 1, Item 25, titled Equal Employment Opportunity Records](#), provides:

Equal Employment Opportunity Records.

a. Official Discrimination Complaint Files.

Originating agency's file containing complaints with related correspondence, reports, exhibits, withdrawal notices, copies of decisions, records of hearings and meetings, and other records. Cases resolved within the agency, by the Commission, or by a U.S. Court.⁷

Authorized Disposition

Destroy four years after resolution of case.

2. The agency originating the equal employment opportunity case will retain the original ("official") file during the appeals process and send only duplicate copies of documents to the Commission for use in the appeal. The agency sending the duplicates will certify that the file contains everything that is in the original.
3. The Commission will create documents relating to the appeal, but will file such documents apart from the materials sent by the originating agency. After resolution of the appeal, the Commission will destroy all duplicate materials, but will retain the appeals documentation for four years. The originating agency will retain the original file for four years after resolution of the case. The Commission will retain the appeals documentation and will answer Freedom of Information Act requests on the appeals file. The Commission will maintain the security of documents as required by Federal Statutes and Executive Orders.
4. The originating agency will be responsible for retiring the original case file to the Federal Records Center, and answering Freedom of Information Act requests on the original file. Requests for disclosure, which the Commission determines are requests for the agency's complaint file, will be forwarded to the agency for a response.
5. Further information concerning the disposition of records under this section may be obtained by reviewing [NARA GRS 1](#), which is available on the NARA website at www.nara.gov or by contacting:

⁷ See Section VIII of this Chapter for a description of the documents contained in the complaint file. This schedule applies regardless of whether case files are in paper or electronic format.

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, D C 20013

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IX. THE INVESTIGATIVE SUMMARY

The investigative summary is a narrative document that succinctly states the issues and delineates the evidence addressing both sides of each issue in the case. The summary should state facts (supported in the complaint file) sufficient to sustain a conclusion(s). The summary should cite to evidence and the exhibits collected.

X. COMPLAINANTS' OPPORTUNITY TO REVIEW THE INVESTIGATIVE FILE

Within the appropriate time frame for finishing an investigation under 29 C.F.R. § 1614.108(e), and prior to issuance of the notice required by 29 C.F.R. § 1614.108(f), agencies are encouraged to allow complainants and their designated representatives an opportunity to examine the investigative file and to notify the agency, in writing, of any perceived deficiencies in the investigation prior to transferring the case to the Commission for a hearing or prior to taking a final action without a hearing. A copy of the complainant's notification to the agency of perceived deficiencies must be included in the investigative file together with a written description by the agency of the corrective action taken.

If the agency agrees with alleged deficiencies in the investigation as identified by the complainant, the agency must immediately correct them. If the investigation period has ended or is about to end, the agency should request agreement from the complainant to extend the investigation period pursuant to 29 C.F.R. § 1614.108(e). If the agency does not agree with the complainant's claimed deficiencies in the investigative file, the agency will prepare a statement explaining the rationale for the disagreement and include it in the investigative file along with the complainant's notice of claimed deficiencies.

When the agency affords the complainant the opportunity to review the draft report of investigation, it should also afford the agency representative the same option.

XI. SANCTIONS FOR FAILURE TO COOPERATE DURING THE INVESTIGATION

Agencies and complainants each have a duty to cooperate with the investigator during the investigation. See 29 C.F.R. § 1614.108(c)(1). Pursuant to 29 C.F.R. § 1614.108(c)(3), a party to a complaint - the complainant as well as the agency - may be subject to sanctions where it fails without good cause shown to respond fully and in a timely fashion to a request of the investigator for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses. The investigator shall make a note in the investigative file concerning the party's failure without good cause shown to comply with a request for information or the attendance of witnesses, and the decision maker (Administrative Judge during the hearing process or the agency where the complainant requests a final agency decision) or the Commission on appeal may, in appropriate circumstances:

1. draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
2. consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
3. exclude other evidence offered by the party failing to produce the requested information or witness;
4. issue a decision fully or partially in favor of the opposing party; or
5. take such other actions as it deems appropriate.

An investigator should inform the party from which it seeks documents, records, comparative data, statistics, affidavits, or the attendance of witnesses that failure to comply with the request may lead to the imposition of sanctions from the decision maker or the Commission on appeal. An investigator may, in an initial request for information or the attendance of witnesses, advise the party that, absent good cause shown, the party has a duty to respond fully and in a timely fashion to the investigator's request and that failure to do so may result in the imposition of the sanctions set forth at 29 C.F.R. § 1614.108(c)(3). Where the investigator does not so inform the party upon making the request, s/he may advise the party upon the party's failure to comply with the request. If the investigator properly advised the party that a failure to comply with the request may result in the sanctions set forth at 29 C.F.R. § 1614.108(c)(3), the decision maker or Commission on appeal may impose such sanctions upon receipt and review of the complaint/appeal file.

XII. SANCTIONS FOR FAILURE TO DEVELOP AN IMPARTIAL AND APPROPRIATE FACTUAL RECORD

Section 1614.108(b) of 29 C.F.R. requires that an agency develop an impartial and appropriate factual record upon which to make findings on the claims raised in the written complaint. The Commission's regulations explain that an appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." 29 C.F.R. § 1614.108(b). The Commission's Administrative Judges and the Office of Federal Operations have the authority to issue sanctions against an agency for its failure to develop an impartial and appropriate factual record in appropriate circumstances.⁸

Where it is clear that the agency failed to develop an impartial and appropriate factual record, an Administrative Judge may exercise his/her discretion to issue sanctions. In such circumstances, the sanctions listed in 29 C.F.R. § 1614.109(f)(3) are available. See [Petersel v. U.S. Postal Service](#), EEOC Appeal No. 0720060075 (Oct. 30, 2008)(Administrative Judge properly drew an adverse inference against the agency when the investigative report failed to include any comparative data on other employees); [Royal v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 0720070045 (September 25, 2009)(finding that the agency's delay in completing the investigation within the 180-day regulatory period is no small noncompliance matter and warrants a sanction). Even when an agency eventually completes the investigation during the hearing stage an Administrative Judge may issue sanctions in appropriate circumstances.⁹

Before an Administrative Judge may sanction an agency for failing to develop an impartial and appropriate factual record, the Administrative Judge must issue an order to

⁸ The Commission recognizes that agencies will not always meet their regulatory burden to conduct such comprehensive investigations, such as when amendments to complaints or consolidation of complaints occur late in the process. It is the Commission's intent that where a hearing is properly requested and where there has been no investigation or there is an incomplete or inadequate investigation, the record in the case shall be developed under the supervision of the Administrative Judge assigned to the case. See, for example, [Menoken v. Social Security Administration](#), EEOC Appeal No. 01A32052 (Jan. 3, 2005); but see also [Cox v. Social Security Administration](#), EEOC Appeal No. 0720050055 (Dec. 24, 2009) (finding that the purpose of discovery in the hearing process is to perfect the record, but it is not a substitute for an appropriate investigation; moreover, not every complainant chooses the option of requesting a hearing).

¹⁰ See [Myvett v. Court Services & Offender Supervision Agency](#), EEOC Appeal No. 0120103671 (Feb. 8, 2011), request for reconsideration denied, EEOC Request No. [0520110349](#) (Nov. 21, 2011) (upholding Administrative Judge's sanctions where agency submitted complaint file without a report of investigation and almost nine months later submitted a report of investigation to the Administrative Judge after failing to reply to two Orders to Complete the Investigation).

the agency or request the documents, records, comparative data, statistics, or affidavits. 29 C.F.R. § 1614.109(f)(3). Such order or request shall make clear that sanctions may be imposed and the type of sanction that could be imposed for failure to comply with the order unless the agency can show good cause for that failure. See [Rountree v. Dep't. of the Treasury](#), EEOC Appeal No. 07A00015 (July 17, 2001). The notice to show cause to the agency may, in appropriate circumstances, provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record. This may include curing the defects in the investigation caused by improper interference by the agency's general counsel, if possible; and/or disqualifying counsel from continuing to represent the agency before the Commission. The Administrative Judge also shall provide the agency with a reasonable period of time within which to take the action that the Administrative Judge has deemed necessary. Only on the failure of the agency to comply with the Administrative Judge's order or request and the notice to show cause may the Administrative Judge impose a sanction or the sanctions identified in the order or request.¹⁰

XIII. OFFER OF RESOLUTION

The Commission encourages the resolution of complaints at all times in the complaint process through a variety of settlement mechanisms. Section 1614.109(c) of 29 C.F.R. provides for one of these mechanisms by permitting agencies to make an "offer of resolution" to complainants. The Commission believes that this provision will provide incentive for agencies and complainants to resolve complaints and that it will conserve agency resources where settlement reasonably should occur. If a complainant does not accept an offer of resolution made in accordance with the requirements of 29 C.F.R. § 1614.109(c) and subsequently obtains less relief than had been offered, the complainant's attorney's fees will be limited, as described below. It should be emphasized that the offer of resolution is only one mechanism by which complaints may be settled.

A. Elements of the Offer

An offer of resolution made pursuant to 29 C.F.R. § 1614.109(c) can be made to a complainant who is represented by an attorney at any time after the filing of a formal

¹⁰ Where an agency did not complete an investigation of late-filed amendments to complaints or late-consolidated complaints because the complainant either requested a hearing before the full investigatory period ended or the amendments and consolidation occurred late in the process, sanctions for inadequate records would be inappropriate. Sanctions only would be appropriate where a party subsequently fails to comply with an order or request of the Administrative Judge that puts the party on notice of the type of sanction that may be imposed for noncompliance.

complaint until thirty (30) days before a hearing. If, however, the complainant is not represented by an attorney, an offer of resolution cannot be made before the case is assigned to an Administrative Judge for a hearing. (These time and representation provisions apply only to offers of resolution and do not restrict the parties from discussing settlement or engaging in an alternate dispute resolution process in an effort to resolve an EEO complaint.)

Complainants have 30 days from receipt of an offer of resolution to consider the offer and decide whether to accept it. Offers of resolution must be in writing and must explain to the complainant the possible consequences of failing to accept the offer. The agency's offer, to be acceptable, must include attorney's fees and costs, and must specify any non-monetary relief. The agency may offer a lump sum payment that includes all forms of monetary liability, including attorney's fees and costs, or the payment may itemize the amounts and types of monetary relief being offered. Complainant's acceptance of the offer must also be in writing. Upon acceptance, the complaint is settled in full and processing ceases.

If a complainant decides not to accept the offer, the agency takes no immediate action, and the complaint continues to be processed normally. After the hearing is completed, if the Administrative Judge (or the Commission on appeal) concludes that discrimination has occurred, but provides for less relief than the amount offered by the agency earlier in its offer of resolution, then the agency may use complainant's decision not to accept its offer of resolution to argue for a reduction in its obligation to pay complainant's attorney's fees. In general, if a complainant fails to accept a properly made offer, and the relief ordered on the complaint is not more favorable than the offer, then the complainant will not receive payment from the agency for attorney's fees or costs incurred after the expiration of the 30-day acceptance period.

It should be noted, however, that an exception to this general rule exists where the interests of justice would not be served. An example of an appropriate use of the interests of justice exception is where the complainant received an offer of resolution, but was informed by a responsible agency official that the agency would not comply in good faith with the offer (for example, would unreasonably delay implementation of the relief offered). If the complainant did not accept the offer for that reason, and then obtained less relief than was obtained in the offer, it would be unjust to deny attorney's fees and costs.

A complainant's failure to accept an offer of resolution does not preclude the agency from making other offers of resolution or either party from seeking to negotiate a settlement of the complaint at any time.

When comparing the relief offered in an offer of resolution with that actually obtained, the Commission intends that non-monetary as well as monetary relief be considered.

Although a comparison of non-monetary relief may be inexact and difficult in some cases, non-monetary relief can be significant and cannot be overlooked. Attorney's fees and costs incurred after the offer of resolution may not be included in the amount actually obtained for comparison purposes. For guidance, parties may wish to refer to court cases deciding issues involving an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure. See, for example, [Marek v. Chesney](#), 473 U.S. 1 (1985). While not identical, the Commission's offer of resolution provision was modeled on the Rule 68 offer of judgment process.

B. Model Language for the Offer

The preamble to the Commission's regulations noted that this Management Directive would include model language for agency use in extending offers of resolutions:

This offer of resolution is made in full satisfaction of the claims of employment discrimination that you have made against [name of agency] in [identify the complaint by number or other clear and unambiguous designation]. This offer includes all of the monetary and/or non-monetary relief to which you are entitled, including attorney's fees and costs.

[For complainants who are not represented by counsel include this paragraph:]

Your acceptance of this offer must be made in writing and postmarked or received in this office **within thirty (30) days** of your receipt of the offer. If you accept this offer, please indicate your acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent to your name. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[For complainants represented by counsel, substitute the following paragraph:]

The complainant's acceptance of this offer must be made in writing and postmarked or received in this office **within thirty (30) days** of **your** receipt of the offer. If the complainant accepts this offer, please indicate **your** acceptance on the enclosed original offer by signing on the line appearing above your name and include the date of your acceptance on the line appearing adjacent

to your name. Please also obtain the signature of the complainant, which should be placed on the line appearing above [his/her] name and include the date of [his/her] acceptance on the line appearing adjacent to [his/her] name. This offer will not be deemed to have been accepted without the signature of both you and the complainant. You should send or deliver your acceptance of the offer to the undersigned at the address specified below.

[The following paragraphs must be included in offers sent to ALL complainants:]

If you do not accept this offer of resolution and the relief that you are eventually awarded by the Administrative Judge, or the Equal Employment Opportunity Commission on appeal, is less than the amount offered, you will not receive payment for the attorney's fees or costs that you incur after the expiration of the 30-day acceptance period for this offer. The only exception to this rule is where the Administrative Judge or Commission rules that the interests of justice require that you receive your full attorney's fees and costs.

CHAPTER 7 HEARINGS

I. INTRODUCTION

The hearing is an adjudicatory proceeding that completes the process of developing a full and appropriate record. A hearing provides the parties with a fair and reasonable opportunity to explain and supplement the record and, in appropriate instances, to examine and cross-examine witnesses. Hearings are governed by 29 C.F.R. § 1614.109.¹ An Administrative Judge from the Commission adjudicates claims of discrimination and issues decisions. Unless the agency issues a final order within forty (40) days of receipt of the Administrative Judge's decision in a non-class action pursuant to 29 C.F.R. § 1614.110(a), the Administrative Judge's decision becomes the final action of the agency. A complainant may appeal an agency's final action or dismissal of a complaint. An agency may appeal as provided in 29 C.F.R. § 1614.110(a). 29 C.F.R. §§ 1614.401(a) & (b).

Section 1614.108(f) of 29 C.F.R. generally provides, among other things, that within 180 days from the complainant's filing of his/her complaint, an agency shall provide the complainant with a copy of the investigative file and shall notify the complainant that within thirty (30) days of the complainant's receipt of the investigative file that the complainant has the right to request a hearing and decision from an Administrative Judge or a final agency decision from the agency.² Regardless of whether the investigation is complete, the agency's duty to send this notice and the complainant's right to receive it are not dependent on the agency's completion of the investigation.

If the agency does not send the notice required in 29 C.F.R. § 1614.108(f) within the applicable time limits, it must send a notice informing the complainant that it has not yet finished the investigation and providing an estimate as to when the investigation will be completed. See 29 C.F.R. § 1614.108(g). The notice should notify the complainant that they do not have to wait for the investigation to be completed and may request a hearing or file a civil action in an appropriate U.S. District Court. Further, the notice will contain information regarding the hearing process.

¹ Additional information regarding hearings and the hearing process can be found in the [U.S. Equal Opportunity Commission's Handbook for Administrative Judges](#), July 1, 2002.

² Section 1614.108(f) of 29 C.F.R. specifically provides that the agency has a duty to send the notice within 180 days of the filing of the complaint or, where a complaint has been amended, the earlier of 180 days from the date of the last amendment or 360 days from the filing of the first complaint, whichever is earlier; within a time period set forth in an order from the Commission; or within any period of extension provided under 29 C.F.R. § 1614.108(e).

A complainant must submit the hearing request directly to the Commission's district or field office having jurisdiction over the geographic area in which the complaint arose, as set forth in Appendix N of this Management Directive, and provide a copy of the request to the agency. See 29 C.F.R. § 1614.108(h). (The Commission has prepared a hearing request form that agencies may provide to complainants for their use in requesting a hearing, which advises complainants that they are to send a copy of the request to the agency. See Appendix M.) Upon receipt of the request for a hearing, the Commission's district or field office will assign the case to an Administrative Judge who will issue Orders/Notices as appropriate to the case and provide the parties with a Commission Hearings Unit No. or docket number, and if the agency did not receive a copy of the complainant's request for a hearing, will require that the agency forward a copy of the complaint file within fifteen (15) days.

In an agency's written acknowledgment of receipt of a complaint or an amendment to a complaint, the agency shall advise the complainant of the Commission's office and address where a hearing request is to be sent as well as the agency office to which the copy of the request should be sent. In the absence of the required notice from the agency, the complainant may request a hearing at any time after 180 days have elapsed from the filing of the complaint by submitting his/her written hearing request directly to the appropriate Commission district or field office indicated in the agency's acknowledgment letter. 29 C.F.R. § 1614.108(h). In the case of accepted class complaints, a Commission Administrative Judge will, pursuant to 29 C.F.R. § 1614.204(h), conduct a hearing on the complaint in accordance with 29 C.F.R. §§ 1614.109(a) - (f).

Generally, an Administrative Judge will conduct a hearing on the merits of a complaint unless: 1) the parties mutually resolve the complaint and the hearing request is withdrawn; 2) the hearing request is otherwise voluntarily withdrawn; 3) the Administrative Judge dismisses the complaint; or 4) the Administrative Judge determines that material facts are not in genuine dispute and issues an order limiting the scope of the hearing or issues a decision without a hearing pursuant to 29 C.F.R. § 1614.109(g). The Administrative Judge will issue a decision on a complaint and shall order appropriate remedies and relief when discrimination has been found within 180 days of his/her receipt of the complaint file from the agency, unless the Administrative Judge makes a written determination that, in his/her discretion, good cause exists for extending the time for issuing a decision. 29 C.F.R. § 1614.109(i).³

³ A decision issued within 180 days may include a finding of discrimination, an order that the agency provide relief, and pay the complainant's attorney's fees. The Administrative Judge then would issue a second decision subsequent to the end of this 180-day period concerning the quantum of relief and attorney's fees. In this situation, the agency's 40-day period for taking final action on the Administrative Judge's decision and determining whether it will implement the decision begins on its receipt of the second decision and the hearing file. 29 C.F.R. § 1614.110(a).

II. THE ROLE OF THE AGENCY AT THE HEARING STAGE

A. Forward Complaint File to the Commission

Within fifteen (15) days of its receipt of a copy of the complainant's request for a hearing sent to a Commission district or field office, the agency shall send a copy of the complaint file, including the investigative file, to the district or field office. The agency also shall send a copy of the complaint and investigative file(s) to the complainant and his/her representative, if it has not previously done so. The complaint file sent to the complainant or his/her representative must be identical to the complaint file sent to the Commission's district or field office. See Chapter 6, Section VIII of this directive for more information regarding the complaint file. The complainant and his/her representative shall be given the option of receiving these documents in paper or digital format.

B. Hearing Room and Production of Witnesses

The agency is responsible for arranging for an appropriately sized room in which to hold the hearing and must ensure that all approved witnesses who are federal employees are notified of the date and time of the hearing and the approximate time that their presence will be required. This includes making space available with appropriate virtual conferencing equipment for hearings and/or other proceedings as required by the Administrative Judge. The agency is responsible for ensuring the appearance and travel arrangements to the hearing site of approved witnesses who are federal employees. Note: the Administrative Judge may order the agency to provide any reasonable accommodations for parties, witnesses, or representatives appearing before the Commission as well as any required foreign language interpreters.

C. Hearings Are Closed to the Public

Access to the hearing room and the record of the hearing shall be restricted in accordance with the Commission's regulation. See 29 C.F.R. § 1614.109(e).

D. Verbatim Hearing Transcripts and Court Reporters

The agency shall arrange and pay for a verbatim transcript (provided in electronic format for the Administrative Judge and the complainant, unless otherwise requested) of the hearing proceedings pursuant to 29 C.F.R. § 1614.109(h)

regardless of whether the Administrative Judge issues a decision. All exhibits submitted to the Administrative Judge and admitted into evidence shall become a part of the complaint file and at the discretion of the Administrative Judge may be referred to the court reporter to be appended to the transcript. Agencies should instruct reporters with whom they contract to submit bills to the agency. The Administrative Judge may require the court reporter to submit the original and all copies (usually two) of the transcript to the Administrative Judge, who can provide verification of transcript receipt and the number of pages in the transcript. Contracts with court reporting firms must require delivery of the transcript to the Administrative Judge within a customary time frame determined by the court reporting firm within the jurisdiction, not to exceed twenty-one (21) days unless the Administrative Judge requires delivery of the transcript by a certain date after the close of the hearing. If the Administrative Judge identifies a problem with timely delivery of the transcript or any other difficulty, s/he should contact the agency directly to resolve the dispute. The agency shall take any steps necessary to ensure that the transcript is provided as expeditiously as possible. Absent a specific memorandum of understanding with the Commission, the agency may not use employees of that agency to transcribe the proceedings.

As a matter of information, the General Services Administration maintains a list of court reporters available to agencies in the [GSA eLibrary](#).

E. The Site of the Hearing

Appendix N of the Management Directive is a list of the addresses of the Commission district and field offices, their geographic jurisdictions, and where federal employees and applicants should send hearing requests. Hearing requests are sent to the district office having jurisdiction over the agency facility where the complaint arose. In an agency's written acknowledgment of a complaint or an amendment to a complaint, the agency must advise the complainant of the Commission office and its address where a request for a hearing shall be sent. Where two or more complaints have been consolidated and the Commission district or field offices identified in the agency's complaint acknowledgment letter differ, the office identified in the last filed complaint will govern the location of the office to which the hearing request shall be made. Should the agency's organizational component where the complaint arose not fall within one of the geographical jurisdictions shown in Appendix N, the agency should contact the following office for guidance:

Equal Employment Opportunity Commission
Office of Field Programs
Attention: Hearings Coordinator
131 M Street, NE.
Washington, DC 20507

Email at: info@eoc.gov

Upon receipt of a hearing request, the Administrative Judge assigned to hear the complaint will determine the site of the hearing. Within his/her discretion, the Administrative Judge is authorized to conduct the hearing in the Commission district or field office, in a Commission area or local office, at the agency's organizational component where the complaint arose or at such other location or by virtual conference as s/he may determine appropriate within a local commuting distance from the agency's component unless otherwise agreed to by the parties. In determining the hearing site, the Administrative Judge should consider factors such as the location of the parties; the location of the Commission district, area, and local offices; the number and location of witnesses; the location of records; travel distances for the Administrative Judge, the parties, and witnesses; travel costs; the availability of sources of transportation; and other factors as may be appropriate including the availability of appropriate virtual conferencing equipment.

Similarly, where an Administrative Judge is considering whether the hearing should be held by video conferencing, there are a number of factors that should be considered before electing to proceed. These factors include the availability and proximity to the participants of the video-conferencing facilities;⁴ the adequacy of the available video-conferencing facilities, including any technological issues; the cost to the respondent agency (if any) balanced against the savings in travel time for all parties and the Administrative Judge; the number of expected participants; and the objections of the parties, if any. Should a party object to conducting the hearing by video conference, the Administrative Judge will document for the record both the nature of the objection and his/her ruling on the objection,

⁴ "Proximity" in this instance refers to whether the facility is within reasonable commuting distance for the hearing participants. The Commission notes, however, that considerations of proximity will generally exclude the use of video conferencing when all participants and the Administrative Judge are located within commuting distance of an appropriate location for an in-person hearing. But cf. Louthen v. U.S. Postal Service, EEOC Appeal No. 01A44521 (May 17, 2006) (telephone hearing inappropriate where, inter alia, all participants including the Administrative Judge were present in same city on hearing date).

including the reasons therefore.⁵ See [Allen v. U.S. Postal Service](#), EEOC Appeal No. 01A51259 (Aug. 21, 2006).

If the Administrative Judge sets a hearing by video conference or a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable video-conferencing costs if any, or travel expenses of complainants, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of the complainant or the complainant's witnesses or representatives if they are not federal employees.

F. Request for Change in Venue

Should either party desire that a hearing be held within the jurisdictional area of another Commission district office, it must submit a request, in writing, to the other party and to the Administrative Judge assigned to the case in the appropriate Commission district or field office having jurisdiction over the agency's organizational component where the complaint arose. In its request, the party must set out, in detail, its reasons and justification for the requested change. The other party may have an opportunity to respond to the change in venue. The Administrative Judge will rule on the request only after the directors of the concerned Commission district offices or their designees have conferred on the matter.

G. Agency Costs

The agency's obligation is limited to those costs that are legally payable in advance by the agency. See [Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing](#), File: B-202845, 61 Comp. Gen. 654 (1982). See also [John Booth--Travel Expenses of Witness -- Agency Responsible](#), File: B-235845, 69 Comp. Gen. 310 (1990).

⁵ In this regard, the Commission contemplates that the Administrative Judge will provide the parties advance notice of his/her intention to proceed by video conference, allowing opportunity for the parties to object prior to the time the hearing is convened. Objections to video conference raised on appeal will be reviewed by the Commission under the abuse of discretion standard, on a case-by-case basis. See [Louthen](#), EEOC Appeal No. 01A44521.

III. THE ROLE OF THE ADMINISTRATIVE JUDGE

Once an Administrative Judge is appointed, the Administrative Judge has full responsibility for the adjudication of the complaint. 29 C.F.R. § 1614.109(a). The agency cannot dismiss a case that has been referred to the Commission for a hearing. 29 C.F.R. § 1614.107(a).

A. Administrative Judge's Review of the Record

An Administrative Judge shall review the record developed by the agency and determine whether additional documentation is necessary. If a determination is made that additional documentation is necessary, the Administrative Judge may order the appropriate party to produce the additional documentation.

If after reviewing the file, the Administrative Judge determines that the investigation is inadequate due to the agency's failure to complete the investigation within the time limits set forth in 29 C.F.R. § 1614.108(e), or the agency has not cooperated in the discovery process as required by 29 C.F.R. § 1614.109(f)(3), the Administrative Judge may take the following actions:

1. Subject the agency to adverse inference findings in favor of the complainant;
2. Consider the issues to which the requested information or testimony pertains to be favorable to the complainant;
3. Exclude other evidence offered by the agency;
4. Permit the complainant to obtain a summary disposition in his/her favor (that is, default judgment) on some or all of the issues without a hearing; or
5. Take other action deemed appropriate, including, but not limited to, requiring the agency to pay any costs incurred by the complainant in taking depositions or in conducting any other form of discovery.

The Commission has the authority to issue sanctions in the administrative hearing process because it was granted, through statute, the power to issue such rules and regulations that it deems necessary to enforce the prohibition on employment discrimination. See [Waller v. Dep't. of Transportation](#), EEOC Appeal No. 0720030069 (May 25, 2007), [request for reconsideration denied](#), EEOC Request No. 0520070689 (Feb. 26, 2009). In this respect, the Commission has determined "that delegating to its Administrative Judges the authority to issue sanctions

against agencies, and complainants, is necessary and is an appropriate remedy which effectuates the policies of the Commission.” Id.

However, before an Administrative Judge may sanction an agency for failing to develop an impartial and appropriate factual record or for not cooperating in the discovery process, the Administrative Judge must issue an order to the agency or request the documents, records, comparative data, statistics, or affidavits. 29 C.F.R. § 1614.109(f)(3). Such order or request shall make clear that sanctions may be imposed and the type of sanction that could be imposed for failure to comply with the order unless the agency can show good cause for that failure. See Rountree v. Dep’t. of the Treasury, Appeal No. 07A00015 (July 17, 2001). In appropriate circumstances, the order or request may provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record within a specified reasonable period of time. Only on the failure of the agency to comply with the Administrative Judge’s order or request and the notice to show cause may the Administrative Judge impose a sanction or the sanctions identified in the order or request.

B. Developing the Record in Complaints with Inadequate Records

Section 1614.108(h) of 29 C.F.R. authorizes a complainant to request a hearing before an Administrative Judge where the respondent agency has not completed the investigation within the required time limit and where the complainant has not agreed in writing with the agency to extend the time for completing the investigation.⁶ This provision reflects the Commission’s intent that complainants be permitted to move their cases forward in the complaint process where an agency has not complied with the regulation by completing a timely investigation. Further, it is the Commission’s intent that where a hearing is properly requested and where there has been no investigation or there is an incomplete or inadequate investigation, the record in the case shall be developed under the supervision of the Administrative Judge assigned to the case. The record can be developed through the parties’ use of discovery and/or through the Administrative Judge’s orders for the production of documents and witnesses.

⁶ Where an agency did not complete an investigation of late-filed amendments to complaints or late-consolidated complaints because the complainant either requested a hearing before the full investigatory period ended or the amendments and consolidation occurred late in the process, sanctions for inadequate records would be inappropriate. Sanctions only would be appropriate where a party subsequently fails to comply with an order or request of the Administrative Judge that puts the party on notice of the type of sanction that may be imposed for noncompliance.

Section 1614.109(a) of 29 C.F.R. provides that upon appointment, the Administrative Judge will assume full responsibility for adjudication of the complaint, including overseeing the development of the record. The Commission intends that the Administrative Judge will take complete control of the case once a hearing is requested. Administrative Judges will preside over any necessary supplementation of the record in the hearing process without resort to remands of complaints to agencies for additional investigations. If an Administrative Judge determines that there is an incomplete or inadequate investigation, s/he may, however, issue an order directing the agency to complete its investigation within a specified period of time set forth in the order or directing that the agency show cause for its failure to complete the investigation within the 180-day period.

Where an agency has not completed a timely investigation or has prepared an inadequate investigation, the Administrative Judge may issue an order on his/her own initiative or upon request by either party requiring a party to produce documents, records, comparative data, statistics, or the attendance of witnesses. Such order or request shall make clear that sanctions may be imposed and the type of sanction that could be imposed for failure to comply with the order within the specified time set forth in the order without good cause shown.⁷ See, for example, [Rountree v. Dep't. of the Treasury](#), EEOC Appeal No. 07A00015 (July 17, 2001). Where the agency or complainant fails without good cause shown to respond fully and in a timely fashion to the Administrative Judge's order and/or the party has not otherwise cooperated in the discovery process, the Administrative Judge may impose sanctions pursuant to 29 C.F.R. § 1614.109(f)(3).⁸ A showing that the noncomplying party acted in bad faith is

⁷ Where the Administrative Judge's order or request does not put a party on notice that it could be sanctioned for noncompliance or does not put the party on notice of the type of sanction that the Administrative Judge intends to impose, the Administrative Judge must issue a separate notice to show cause to the party for an explanation as to why the sanction should not be imposed and provide an opportunity to cure the noncompliance before imposing the sanction. This rule applies in all instances where the Administrative Judge intends to impose a sanction on a party for a failure to comply with an order or request that does not make clear what sanction(s) may be imposed for noncompliance.

⁸ See for example, [Johnson v. Dep't. of the Air Force](#), EEOC Appeal No. 0120090115 (May 6, 2010), request for reconsideration denied, EEOC Request [0520100394](#) (July 30, 2010)(OFO affirmed Administrative Judge's dismissal of complainant's request for a hearing as a sanction for the failure to respond to discovery requests); [Cox v. Social Security Administration](#), EEOC Appeal No. 0720050055 (Dec. 24, 2009)(OFO affirmed Administrative Judge's default judgment against the agency based upon the Administrative Judge's finding that the agency failed to: adequately develop the factual record prior to hearing; respond to the complainant's initial request for admissions and subsequent written discovery requests; comply with the Administrative Judge's Order to Produce witnesses for depositions and timely

not required. See [Kramer v. Dep't. of Justice](#), EEO Appeal No. 07A10108 (September 11, 2003), request for reconsideration denied, EEOC Request No. [05A40050](#) (Dec. 8, 2003); [Cornell v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 01974476 (Nov. 24, 1998). Additionally, the Administrative Judge may, as a result of a discovery order issued pursuant to 29 C.F.R. § 1614.109(f)(3)(v), require the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation timely as required by 29 C.F.R. § 1614.108(e) or has failed to investigate the allegations adequately pursuant to Chapter 6 of this Management Directive.⁹ See also Section IV.F of this Chapter.

If either party is requested by the Administrative Judge to produce additional documents, that party shall also furnish a copy of those documents to the opposing party at the time they are submitted to the Administrative Judge.

C. Dismissal of Complaint by Administrative Judge

The Administrative Judge may dismiss complaints within his/her jurisdiction pursuant to 29 C.F.R. § 1614.107(a) on his/her own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint. (See 29 C.F.R. § 1614.109(b) and Chapter 5, Section IV of this Management Directive.) Before dismissing a complaint, the Administrative Judge must ensure that the claim has not been fragmented inappropriately into more than one complaint. A series of subsequent events or instances involving the same claim should not be treated as separate complaints, but should be added to and treated as part of the first claim. See Chapter 5, Section III of this Management Directive for an extended discussion on fragmentation.

D. Administrative Judge's Authority

The Administrative Judge has full responsibility for the adjudication of the complaint, which includes, but is not limited to, the following:

1. Issue decisions on complaints.

respond to the Administrative Judge's Order to Show Cause why a default judgment should not be entered against the agency).

⁹ See for example, [Waller v. Dep't. of Transportation](#), EEOC Appeal No. 0720030069 (May 25, 2007), (finding that Administrative Judges may award attorney's fees and costs as a sanction against federal agencies for the violation of an Administrative Judge's Order and that awarding attorney's fees and costs as a sanction ensures the integrity and efficiency of the administrative process).

2. Administer oaths.
3. Regulate the conduct of hearings.
4. Limit the number of witnesses so as to exclude irrelevant and repetitious evidence.
5. Order discovery or the production of documents and witnesses by serving orders on both parties.

The Administrative Judge has independent authority under 29 C.F.R. § 1614.109(f) to order the production of information, documents, records, comparative data, statistics, affidavits, or the attendance of witnesses.

6. Issue protective orders not to disclose information.
7. Exclude any person who is disruptive from the hearing or who is a witness so that s/he cannot hear the testimony of other witnesses.¹⁰
8. Issue summary judgment (decisions without a hearing) if there are no genuine issues of material fact in dispute.
9. Limit the hearing to the issues in dispute.
10. Impose appropriate sanctions on parties who fail to comply with orders or requests.

The Administrative Judge has the authority to impose sanctions on a party if s/he fails to comply without good cause with orders or requests. See 29 C.F.R. § 1614.109(f)(3). In addition, the Administrative Judge may impose sanctions where a party fails to appear or be prepared for a conference (for example, for status or settlement discussions) or hearing pursuant to an order of the

¹⁰ The Administrative Judge may apply Rule 615 of the Federal Rules of Evidence to the exclusion of witnesses:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a person authorized by statute to be present.

Administrative Judge.¹¹ Sanctions may be imposed on the agency for failure to produce an approved witness who is a federal employee.¹² Sanctions may be imposed for failure to comply with orders to compel, requests for information, documents, or admissions where the information is solely in the control of that party.¹³ Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request and the information is solely in the control of that party, the Administrative Judge may impose sanctions.¹⁴ Sanctions for failing to comply with the orders or requests discussed above include, but are not limited to, the authority to:

- (a) draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
- (b) consider the issues to which the requested information pertains to be established in favor of the opposing party;
- (c) exclude other evidence offered by the party failing to produce the requested information;
- (d) enter a decision fully or partially in favor of the opposing party; and
- (e) take such other actions as appropriate.¹⁵

¹¹ See for example, [Council v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 0120080321 (Apr. 9, 2010)(OFO affirmed the Administrative Judge's dismissal of complainant's request for a hearing as a sanction for her failure to prosecute her case when she failed to timely submit a previously ordered Pre-Hearing Statement or otherwise proceed with her complaint).

¹² See also [LeBlanc v. U.S. Postal Service](#), EEOC Appeal No. 01981419 (May 5, 1999)(upholding sanctions against an agency for its failure to even attempt to produce a former employee for hearing).

¹³ See for example, [Johnson v. Dep't. of the Air Force](#), EEOC Appeal No. 0120090115 (May 6, 2010) (OFO affirmed Administrative Judge's dismissal of complainant's request for a hearing as a sanction for the failure to respond to discovery requests).

¹⁴ See for example, [Johnson](#), (OFO upheld the Administrative Judge's dismissal of complainant's hearing request, stating that when the complainant responded to the Administrative Judge's order to show cause, he did not explain his failure to respond to discovery as he was ordered to do, but instead argued the merits of his case).

¹⁵ See Section III.D of this Chapter in this Management Directive, for a discussion of placing a party on notice that sanctions may be imposed before ordering their imposition. However, see also [Council v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 0120080321 (Apr. 9, 2010) in which OFO

11. Calculate compensatory damage awards.

Before holding a hearing, the Administrative Judge may require the complainant, after receipt of an agency motion or otherwise, to declare whether or not s/he is seeking compensatory damages as relief for the discrimination or retaliation alleged in the complaint, and to proffer or produce evidence demonstrating entitlement to compensatory damages. If a complainant fails to proffer or produce such evidence, the Administrative Judge may, in his/her discretion, deem the claim for damages to be waived.

Where the complainant has claimed compensatory damages and where the Administrative Judge determines, on the merits of the complaint, entitlement to compensatory damages because of intentional discrimination or retaliation, the Administrative Judge will calculate the amount of compensatory damages to be awarded by the respondent agency. In complaints where compensatory damages have been claimed and a hearing is held, the Administrative Judge may, in his/her discretion, develop the record on the compensatory damages claim during the hearing on the merits of the complaint or may bifurcate the proceeding and develop the record on the compensatory damages claim after a finding of discrimination.

12. Order a medical examination.

Administrative Judges have the authority to order, in very limited circumstances, as detailed below, that a complainant undergo a medical examination on motion of the agency. A request by the agency that a complainant undergo a medical examination must notify the complainant, the complainant's representative, and the Administrative Judge, of the proposed time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The Administrative Judge must approve all such requests.

In making a determination of whether to order a medical examination, an Administrative Judge may be guided by the principles and cases arising under Rule 35 of the Federal Rules of Civil Procedure governing the physical and mental examinations of persons. The burden of proof in

upheld the Administrative Judge's dismissal of the complainant's hearing request even when an order to show cause had not been issued, pointing out that when the Administrative Judge issued the Acknowledgement and Order it advised the parties that failure to follow Orders may result in sanctions pursuant to 29 C.F.R. 1614.109(f)(3).

supporting a request for such an examination requires an affirmative showing that each condition as to which examination is sought is genuinely in controversy and that good cause exists for ordering each particular examination. Such requests must be narrowly tailored to elicit only the evidence necessary to develop the record with regard to the specific issue.

The agency requesting the examination has the burden of proving that the examination is reasonably necessary. For example, merely showing that the complainant has made a claim for compensatory damages is not sufficient to meet the agency's burden of proof. In determining whether such a request is reasonable, the Administrative Judge will consider: whether the complainant has asserted a claim for compensatory damages sufficient to place his/her mental or physical condition in controversy; and whether the request is made for good cause shown, that is, that the examination is reasonably necessary to determine the existence and extent of an asserted injury. The Commission has held that evidence from a health care professional is not a mandatory prerequisite to establishing entitlement to compensatory damages. [Sinnott v. Dep't. of Defense](#), EEOC Appeal No. 01952872 (September 19, 1996); [Lawrence v. U.S. Postal Service](#), EEOC Appeal No. 01952288 (1996); [Carpenter v. Dep't. of Agriculture](#), EEOC Appeal No. 01945652 (July 17, 1995). A complainant's own testimony, along with the circumstances of a particular case, may suffice to sustain the complainant's burden in this regard. Therefore, independent medical examinations will not be appropriate in every case in which a claim for compensatory damages is made. See "Requests for Private Information Should Be Limited" at Section IV.B.4 in this Chapter of this Management Directive for more information.

Some factors to be considered in determining whether an agency has shown that a complainant has asserted a claim for damages sufficient to place his/her mental or physical condition in controversy include: 1) the type and extent of mental or physical harm claimed; 2) whether the harm alleged is ongoing or is merely a past harm with no current effects on the complainant; 3) whether the complainant has offered expert testimony concerning the nature and/or extent of the alleged harm or intends to offer such testimony; and 4) whether the complainant has sufficiently asserted a connection between the asserted harm and the alleged discrimination sufficient to establish a causal relationship between the harm and the alleged discrimination.

Some factors to be considered in determining whether an agency requesting a mental or physical examination has shown good cause for

such examination include: 1) the nature and severity of the alleged harm and the likelihood that the requested examination will elicit relevant evidence as to the existence and/or extent of the alleged harm; 2) whether there is already sufficient evidence in the record as to the nature and extent of the asserted harm; and 3) whether the information sought could be obtained through other less intrusive discovery techniques, such as interrogatories, depositions, or requests for the production of witnesses or documents.

Even where the above criteria may have been satisfied by the agency requesting the examination, the decision to order such examination at the hearing stage is solely within the discretion of the Administrative Judge.

Upon receipt of a request from the agency for a medical examination, the complainant may file a motion for a protective order, stating objections to the request or order. See Section IV.D.2.b of this Chapter. The decision to order such examination at the hearing stage remains solely within the discretion of the Administrative Judge.

13. Calculate and award the amount of attorney's fees or costs.

Where a party is represented by an attorney, an Administrative Judge is authorized to award a complainant reasonable attorney's fees and costs (including expert witness fees) incurred in the processing of a complaint where the Administrative Judge issues a decision finding discrimination in violation of Title VII and/or the Rehabilitation Act, the Administrative Judge issues an order sanctioning the agency, or where the award of attorney's fees or costs may otherwise be appropriate and authorized. Any award of attorney's fees or costs shall be paid by the respondent agency. Where the Administrative Judge determines that a complainant is entitled to an award of attorney's fees or costs, the Administrative Judge will calculate the amount of such award in accordance with 29 C.F.R. § 1614.501(e)(2)(ii)(B) and Chapter 11 of this Management Directive.

When the Administrative Judge determines an entitlement to attorney's fees or costs, the complainant's attorney must submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the Administrative Judge within thirty (30) days of receipt of the decision, unless otherwise directed, and must submit a copy of the statement to the agency. A statement of attorney's fees and costs must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. The agency may respond to a statement of attorney's fees and costs within thirty (30) days of its receipt.

The verified statement, accompanying affidavit, and any agency response shall be made a part of the complaint file. The Administrative Judge will issue a decision determining the amount of attorney's fees and costs due within sixty (60) days of receipt of the statement and affidavit.

14. Engage the parties or encourage the parties to engage in settlement discussions.

The Administrative Judge may engage the parties in discussion aimed at reaching a settlement agreement or may allow the parties such time as they may need to discuss settlement. The Administrative Judge further may hold a hearing in abeyance to allow the parties to engage in alternate forms of dispute resolution. (For a more detailed discussion of alternative dispute resolution, see Chapter 3 of this Management Directive.)

15. Issue an order determining full relief.

Administrative Judges shall issue an order awarding full relief where the agency unilaterally and unconditionally promises in writing to provide the full and complete remedy as defined by the Administrative Judge. To permit him/her to determine the appropriate remedy for the complaint, the Administrative Judge may require the parties to submit statements of full relief, may receive evidence including testimony, and/or require oral argument. After issuing the order and a determination of the appropriate remedy, the Administrative Judge shall return the hearing file to the agency, which shall have forty (40) days to take final action. 29 C.F.R. § 1614.110(a). Once the agency takes final action, the complainant will have thirty days within which to file an appeal. 29 C.F.R. § 1614.402(a). If the agency fails to provide the full and complete remedy as promised, the complainant may seek compliance from the agency and, failing that, file an appeal with the Commission. See 29 C.F.R. § 1614.504(a); see also [Miller v. Dep't. of the Treasury](#), EEOC Request No. 05980345 (July 20, 1998); [Perlingiero v. Dep't. of the Navy](#), EEOC Appeal No. 01941176 (Feb. 24, 1995); [Poirrier v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 01933308 (May 5, 1994).

16. Hold a hearing in abeyance.

An Administrative Judge may hold a hearing in abeyance in the event that a party is unable to proceed with the hearing for reasons such as illness, military assignment, or other good cause shown.

E. Summary Judgment (Decisions without a Hearing)

1. On Motion of a Party

A party who believes that some or all material facts are not in genuine dispute may file a motion for summary judgment with the Administrative Judge at least fifteen (15) days prior to the hearing, or at such earlier time as required by the Administrative Judge. The Administrative Judge may, in the acknowledgment order, specify a date for filing such a motion and provide for extending that time in certain circumstances. A copy of any such motion shall be served on the opposing party.

The opposing party will have 15 days from the receipt of the statement in which to file any opposition to the statement.

After considering the request and the opposing submission, if any, the Administrative Judge may deny the request, order that discovery be permitted on the facts involved, limit the hearing to the issues remaining in dispute (if any), issue a decision without a hearing, or make such other rulings as are appropriate.

2. On Administrative Judge's Determination

If the Administrative Judge determines that some or all of the material facts are not in genuine dispute, s/he may, after giving notice to the parties and providing them an opportunity to respond within 15 days of receipt of the notice, issue an order limiting the scope of the hearing or issue a summary judgment decision without conducting a hearing.

3. Oral Argument or Testimony on Summary Judgment Motion

At his/her discretion, the Administrative Judge may provide notice requiring the parties to appear and present oral argument or testimony on a motion for summary judgment.

4. Legal Standard for the Use of Summary Judgment

Summary judgment is proper when “material facts are not in genuine dispute.” 29 C.F.R. § 1614.109(g). Only a dispute over facts that are truly material to the outcome of the case should preclude summary judgment. [Anderson v. Liberty Lobby, Inc.](#), 477 U.S. 242, 248 (1986) (only disputes over facts that might affect the outcome of the suit under the governing law, and not irrelevant or unnecessary factual disputes, will preclude the entry of summary judgment). For example, when a complainant is unable to set forth facts necessary to establish one essential element of a prima facie case, a dispute over facts necessary to prove another element of the case would not be material to the outcome. [Celotex v. Catrett](#), 477 U.S. 317, 322-323 (1986).

Moreover, a mere recitation that there is a factual dispute is insufficient. The party opposing summary judgment must identify the disputed facts in the record with specificity or demonstrate that there is a dispute by producing affidavits or records that tend to disprove the facts asserted by the moving party. In addition, the non-moving party must explain how the facts in dispute are material under the legal principles applicable to the case. 29 C.F.R. § 1614.109(g)(2); [Celotex](#), 477 U.S. at 322-324; [Patton v. U.S. Postal Service](#), EEOC Request No. 05930055 (July 1, 1993) (summary judgment proper where complainant made only a general pleading that his job performance was good but set forth no specific facts regarding his performance and identified no specific inadequacies in the investigation).

F. **Transmittal of the Decision and Hearing Record**

At the conclusion of the hearing stage the Administrative Judge shall send to the parties (the agency representative, the agency EEO Director or EEO Office, the complainant, and the complainant’s representative) copies of the record produced at the hearing stage of the process, including the transcript of the hearing, if any, as well as the decision.

The Administrative Judge may, when necessary, release the transcript prior to the issuance of the decision, for example, when the transcript is needed to prepare a post-hearing brief or to prepare for a hearing on relief.

The Administrative Judge may issue a decision from the bench after the conclusion of the hearing, in lieu of issuing a written decision.

IV. DISCOVERY

A. Introduction

1. General

The purpose of discovery is to enable a party to obtain relevant information for preparation of the party's case. Both parties are entitled to reasonable development of evidence on issues raised in the complaint, and the Administrative Judge may limit the quantity and timing of discovery.

A reasonable amount of official time shall be allowed to prepare requests for discovery and to respond to discovery requests. (See Chapter 6, Section VII.C of this Management Directive.)

2. Avoidance of Delay

The discovery instructions that follow are intended to provide a simple method of discovery. They will be interpreted and applied so as to avoid delay and to facilitate adjudication of the case. The parties are expected to initiate and complete needed discovery with a minimum of intervention by the Commission's Administrative Judge. The parties are further expected to use discovery judiciously for its intended purpose only.

B. Right to Seek Discovery

1. Notice of Right to Seek Discovery

The Administrative Judge shall send the parties an acknowledgment order advising the parties that they may commence discovery. It is the Commission's policy that the parties are entitled, pursuant to 29 C.F.R. § 1614.109(b), to the reasonable development of evidence on the issues raised in the complaint.

2. Discovery Is Designed to Supplement the Record

It is anticipated that discovery will ordinarily involve supplementing the existing record. There may be situations in which the record does not have to be supplemented.

3. **Discovery Time Frames Will Be Strictly Regarded**

Discovery must be completed by such time ordered by the Administrative Judge. Parties may request to extend the time for discovery beyond the time limit set. The Administrative Judge may modify the time frame for completing discovery either by extending it or by curtailing it as the Administrative Judge may determine. To be considered, any request for extension must be made prior to the expiration of the time limit by motion and accompanied with a proposed order and shall state whether the opposing party agrees or objects to the motion or order.

4. **Requests for Private Information Should Be Limited**

Agency requests for the medical records of complainants should only occur to establish or challenge disability status or the right to reasonable accommodation in Rehabilitation Act cases, or when a complainant is asserting a claim for compensatory damages and has sought medical treatment for one or more stress-related conditions. In such instances, agency requests for medical records shall be narrowly tailored to the condition(s) and temporal scope at issue. As discussed in detail in Chapter 11, Section VII, complainants are not required to prove compensatory damages through medical records or other expert evidence. See [Lawrence v. U.S. Postal Service](#), EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing [Carle v. Dep't. of the Navy](#), EEOC Appeal No. 01922369 (Jan. 5, 1993)).

Where a complainant is pro se, agencies must request the Administrative Judge's prior permission before making requests for medical information, and the Administrative Judge shall advise the parties of this provision at the initial status conference. The Administrative Judge shall also explain that a complainant should contact the Administrative Judge to request a protective order if the complainant believes agency counsel is seeking overly broad or intrusive medical records through discovery requests.

Similarly, agency requests for wage information should only occur when the complainant is making a back pay claim and has received compensation for subsequent employment. Agencies are not authorized and must request prior permission from the Administrative Judge before making requests for production of a complainant's tax records except with respect to W-2 (earned income) and Schedule C (profit or loss) documents.

C. Methods of Discovery**1. Evidence may be developed using a variety of methods, including:****a. Interrogatories**

Absent specific authorization from the Administrative Judge, a party may submit no more than one set of interrogatories and a set of interrogatories shall not exceed thirty (30) in number including all discrete subparts.

b. Depositions

Generally the party requesting depositions will pay for them. A failure to appear at a properly scheduled deposition may result in the non-appearing party bearing the cost of the missed session. Agencies must make federal employees available for depositions and such depositions shall be taken on official time. The agency may be liable for costs incurred if such persons are not made available on the clock for depositions or other discovery or if such persons fail to appear.

c. Stipulations

Stipulations are strongly encouraged.

d. Requests for Admissions

Absent specific authorization from the Administrative Judge, a request for admissions shall not exceed 30 in number including all discrete subparts. This limit does not apply, however, to admissions relating to the authenticity or genuineness of documents.

e. Requests for the Production of Documents

Absent specific authorization from the Administrative Judge, requests must be specific, identifying the document or types of documents requested. A set of document requests shall not exceed 30 in number including all discrete subparts.

2. **Where possible, more informal methods of discovery should be employed**

In many instances, discovery should proceed on an informal basis, including unrecorded meetings and conference calls designed to exchange information. For example, if a primary purpose of discovery is to determine the scope and content of a material witness's testimony, it may be sufficient that there be a meeting scheduled with the witness and that the discovery be conducted on an informal basis. If that method proves unsatisfactory, a more formal method of discovery may be used.

When information gathering and hearing preparation takes place outside the scope of formal discovery, agencies may not restrict access to non-management employees who voluntarily cooperate with informal discovery.

- a. The parties may agree that a witness be made available for questioning without the production of a transcript or tape recording where the purpose is to discover the availability of other evidence, either documentary or testimonial.
- b. The parties may agree to the questioning of witnesses using a tape-recording device, provided that any such tape will not be accepted in evidence without authentication. Such authentication can be presumed where the opposing party is provided a copy of the tape at the close of the discovery session and it is identical to the tape proffered in evidence.

D. Discovery Procedures

1. **Commencing Discovery**

a. **Requests for authorization to commence**

Unless the Administrative Judge requires that a party request authorization to commence discovery, parties may begin discovery upon receipt of the Administrative Judge's acknowledgment order.

If the Administrative Judge requires that a party request authorization to commence discovery, the request must state the method(s) and scope of discovery requested and its relevance to the issue(s) in the complaint.

b. Exchange of requests

Upon receipt of the Administrative Judge's authorization to begin discovery or acknowledgment order that does not require the parties to seek authorization, the parties must, within twenty (20) calendar days or such period of time ordered by the Administrative Judge, exchange initial requests for discovery. If a party does not submit an initial discovery request to opposing party within that period, the Administrative Judge may determine that the party has waived its right to pursue discovery.

The parties must cooperate with each other in honoring requests for relevant, non-repetitive documentary and testimonial evidence. The parties shall not use any form of discovery or discovery scheduling for harassment, for unjustified delay, to increase litigation expenses, or for any improper purpose. The Administrative Judge will resolve discovery disputes only after the parties have made a good faith effort to resolve the dispute.

(1) Where to address discovery

Requests for discovery should be addressed to the agency representative, complainant, and complainant's representative of record, and not to the Administrative Judge, unless requested by the Administrative Judge. Where a party addresses a request for discovery to the Administrative Judge, the Administrative Judge may, at his/her discretion, return the request to the party submitting the discovery request with instructions to serve it on the appropriate party, or may forward the request to the appropriate party. Where a party inappropriately submits a discovery request to the Administrative Judge, the required time frame for submitting the request to the appropriate party will not stop running unless the Administrative Judge rules otherwise. Copies of discovery requests should not be provided to the Administrative Judge unless a motion to compel or a response to a motion to compel is being filed or if otherwise directed by the Administrative Judge.

(2) Criteria for requests

The request should be: 1) as specific as possible and 2) reasonably calculated to discover non-repetitive, material evidence.

2. Response to Discovery Request

Unless otherwise ordered, the opposing party/representative must serve his/her response to the request for discovery within thirty (30) calendar days from the date of service of the request. If service of the request was by mail, the opposing party/representative may add five days to the date that the response is due. A response means:

- a. Compliance with the request - voluntary cooperation with discovery requests is encouraged;
- b. Written opposition to the request/motion for a protective order - such opposition shall set forth a basis for finding that the request is irrelevant, overburdening, repetitious, or privileged;
- c. Written agreement or stipulation obviating the request - stipulations of fact are favored as a means of resolving discovery issues;
- e. Request for extension of time - extension of time to comply or to produce a written agreement shall not exceed 15 calendar days.

3. Failure to Respond to Request for Discovery

- a. Failure to fully respond to a request for discovery within 30 calendar days of receipt of the request, or as otherwise ordered by the Administrative Judge, shall form the basis for a motion to compel discovery, provided the parties have made a good faith effort to resolve the dispute. Parties engaging in good faith settlement efforts may request an extension from the Administrative Judge.
- b. A motion to compel must be filed within ten (10) calendar days after the expiration date for responding to a request for discovery, or as otherwise ordered by the Administrative Judge. When filing a motion, the moving party must certify that s/he conferred with the opposing party, or made a good faith effort to do so, to attempt

to resolve the discovery dispute. See [Fed. R. Civ. P. 37\(a\)\(1\)](#); [Apex Oil Co. v. Belcher Co.](#), 855 F.2d 1009, 1020 (2d Cir. 1988) (failure to confer in good faith over discovery disputes multiplied the proceedings and justified sanctions).

- c. A motion to compel compliance with a request for discovery must be addressed to the Administrative Judge and the moving party must certify that a copy was served on the opposing party.
- d. Any statement in opposition to the motion must be filed within ten (10) calendar days of service of the motion and the responding party must certify that a copy was served on the moving party.
- e. A party's failure to raise an objection to a discovery request within the time period to respond to it may be determined by the Administrative Judge to be a waiver of that party's ability to object to the request at a later date.

4. Administrative Judges Will Rule Expeditiously on Discovery Issues

Following the filing of an opposition, if any, to the motion to compel discovery, the Administrative Judge will rule expeditiously on the request for discovery. In the alternative, the Administrative Judge may, in the interest of expediting the hearing, order that the document(s), witness(es), or other evidence at issue be produced at the hearing. Where the Administrative Judge finds that the request for discovery that is the subject of the motion to compel is irrelevant, overburdening, repetitious, or privileged, the Administrative Judge will deny the motion to compel and may, upon the request of the party opposing the motion to compel, or upon the Administrative Judge's own initiative, issue such protective orders as the Administrative Judge determines appropriate.

5. Administrative Judge's Orders to Comply

- a. In considering a motion to compel compliance, the Administrative Judge will consider whether the following factors apply:
 - (1) the discovery is calculated to produce or lead to the production of material evidence that is not repetitious of facts or documents already in the complaint file,
 - (2) the discovery does not concern privileged or restricted information, and
 - (3) the discovery is not overly burdensome.
- b. Where a motion to compel discovery is approved, in whole or in part, the Administrative Judge shall issue a written order to comply with the request. The parties shall have 15 calendar days or such other time period ordered by the Administrative Judge to comply with a discovery order.

6. Failure to Respond or Comply with Administrative Judge's Order May Result in Sanctions

A failure to respond or follow an order to comply with a request for discovery may result in sanctions. See Section III.D.10 of this Chapter.

E. Failure to Request Discovery Implies Waiver of Subsequent Requests for Documents

It is the intention of the Commission that the parties utilize the informal or formal discovery procedures provided for in this Chapter to develop the record in the complaint or that the record be developed to the extent necessary through the Administrative Judge's orders for documents, information, and witnesses. Under previous Commission guidance, the failure to request discovery did not imply a waiver of the opportunity of the parties to make requests for documents and witnesses at the hearing. Allowing parties this opportunity at the time of the hearing, regardless of whether the discovery process was invoked, is not consistent with sound administrative economy and with the expeditious processing of complaints. Accordingly, where a party has not timely requested discovery or has not otherwise timely requested that the Administrative Judge order the opposing party to produce documents, the party's request for documents for the first time at the time of the hearing, or at a pre-hearing conference held just

prior to the hearing, will be disallowed unless the Administrative Judge, in his/her discretion, rules otherwise.

F. Cost of Discovery

The parties shall initially bear their own costs with regard to discovery, unless the Administrative Judge requires the agency to bear the costs for the complainant to obtain depositions or any other discovery because the agency has failed to complete its investigation timely as required by 29 C.F.R. § 1614.108(e) or has failed to investigate the allegations adequately pursuant to Chapter 6 of this Management Directive.

V. EXCLUSION AND DISQUALIFICATION

All participants in the EEO hearing process have a duty to maintain the decorum required for a fair and orderly proceeding and to obey orders of the Administrative Judge. Any person who engages in improper behavior or contumacious conduct (as defined in Section V.A.3 of this Chapter) at any time subsequent to the docketing of a complaint for a hearing is subject to sanction. Section 1614.109(e) of 29 C.F.R. provides that persons may be excluded from the hearing for contumacious conduct or misbehavior that obstructs the hearing. It further provides that if the complainant's or agency's representative engages in misconduct or refuses to obey an order of the Administrative Judge, the Commission may suspend or disqualify the representative from future hearings, refer the matter to an appropriate licensing authority, or both.

A. Exclusion from a Hearing

An Administrative Judge has the power to regulate the conduct of a hearing and to exclude any person from a hearing for contumacious conduct or misbehavior that obstructs the hearing. See 29 C.F.R. § 1614.109(e). The Administrative Judge may exclude any disruptive person, including the complainant, an agency official, or a representative, including agency or complainant counsel. This sanction generally applies to conduct occurring in the Administrative Judge's presence at any point during the hearing process, including prehearing proceedings and teleconferences as well as the hearing itself. It also applies to a representative's refusal to obey orders of the Administrative Judge. The exclusion bars the individual, for the duration of the hearing process, from further participation in the case in which the misconduct occurs. (In contrast, a disqualification of a representative applies to future hearings. The procedure for disqualification is in Section V.B below.)

The authority of an Administrative Judge to impose an exclusion under 29 C.F.R. § 1614.109(e) derives from the judicial doctrine of the “inherent powers” of the forum. For example, courts have certain implied powers that are necessary to the exercise of all others. [Chambers v. NASCO, Inc.](#), 501 U.S. 32 (1991). “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” *Id.* at 43 (quoting [Anderson v. Dunn](#), 19 U.S. 224 (Wheat.) 227 (1821)). “These powers are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Id.* (quoting [Link v. Wabash R. Co.](#), 370 U.S. 626, 630-31 (1962)).

Inherent powers must be exercised with restraint and discretion. *Id.* In considering the imposition of sanctions, Administrative Judges must take steps to ensure fairness to the parties and the effectiveness of the sanction in furthering the orderly conclusion of the hearing process. Sanctions should be proportional to the nature and degree of the improper conduct. Administrative Judges may look to rules of ethics, common law, statutes, and case law to determine the propriety and nature of a sanction. With respect to sanctions against a representative, the Administrative Judge should be mindful that a party to the EEO process is entitled to be represented by an individual of that party’s choice, and the representative is expected to be an advocate for the party’s interests. Nonetheless, by virtue of their position, all representatives also have a particular responsibility to respect the order and authority of the EEO process. See subsection 4 below.

1. Relationship to other sanctions

In addition to exclusion under 29 C.F.R. § 1614.109(e) for misconduct, other sanctions may be imposed for failure to obey orders of an Administrative Judge. Section 1614.109(f)(3) of 29 C.F.R. provides that when the complainant, the agency, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an Administrative Judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, the Administrative Judge shall impose sanctions in appropriate circumstances.

Sanctions under 29 C.F.R. § 1614.109(f) may be evidentiary, monetary, or both. The failure of a party to produce evidence or obey an order may support the drawing of an adverse inference about a matter in dispute, the exclusion of other evidence offered by that party, or a decision on the merits in favor of the other party. Monetary sanctions include attorney’s fees and the costs of discovery. See 29 C.F.R. § 1614.109(f)(3).

2. Preventive measures

To lessen the need for resort to exclusion or other sanctions, Administrative Judges may instruct the parties in the initial order and/or at the outset of the hearing to maintain professional conduct and speech. The parties should be informed that engaging in improper conduct or failing to comply with orders of the Administrative Judge or Commission regulations may result in sanctions under 29 C.F.R. § 1614.109. Giving such a warning is within the Administrative Judge's discretion however. Any asserted failure to advise the parties of the potential for sanctions does not limit the Administrative Judge's authority to impose a sanction.

3. General standard for exclusion

A person's conduct is contumacious when it is "willfully stubborn and disobedient." Black's Law Dictionary (6th ed. 1990). Contumacious behavior or disruptive conduct may include any unprofessional or disrespectful behavior; degrading, insulting, or threatening verbal remarks or conduct; the use of profanity; or conduct engaged in for the purpose of improperly delaying the hearing.¹⁶ A finding of contumacious conduct or disruptive behavior may be based on a series of disruptive incidents, a pattern of acts, or a single sufficiently obstructive episode.¹⁷ Normally, any pattern should be manifest within a single case. However, the Administrative Judge may take into consideration other improper conduct engaged in by the individual on any previous occasion before that judge, if

¹⁶ In [Bradley v. U.S. Postal Service](#), EEOC Appeal Nos. 01952244, 01963827 (September 18, 1996), the Commission rejected the complainant's contention that he was denied a fair hearing because the Administrative Judge had complainant and his representative escorted from the hearing room under guard and terminated the hearing. The Commission found that complainant's representative "engaged in contumacious conduct of the worst kind: asking questions which the witnesses could not comprehend, then berating the witnesses for failing to answer; repeatedly testifying rather than asking questions; vociferously arguing on the record with the agency representative and the Administrative Judge; defying the authority of the Administrative Judge with regard to evidentiary rulings and the conduct of the hearing; and threatening the Administrative Judge over an evidentiary ruling." Misconduct does not have to rise to this level to be subject to sanction. Any one of the types of misconduct noted in [Bradley](#) would alone be sufficient.

¹⁷ See [In re Chaplain](#), 621 F.2d 1272, 1276 (4th Cir. 1980) ("contempt of court may be found based on the cumulative impact of a series of actions, no one of which standing alone would be sufficient: 'It is only necessary that a contumacious act be 'a volitional [one] done by one who knows or should reasonably be aware that his conduct is wrongful.'") (citations omitted).

the Administrative Judge had clearly described the misconduct for the record in the earlier proceeding or the misconduct is otherwise clearly apparent from the record.

In addition, there may be situations in which a decision to exclude a person may take into consideration prior misconduct before a different Administrative Judge or the Commission. For example, in the first instance of misconduct, the Administrative Judge, in his/her discretion and as part of the sanction, may publicize the sanction to other Administrative Judges or require the sanctioned individual to disclose the sanction to other Administrative Judges. This should be done in appropriate circumstances, taking into account the nature and degree of the misconduct. If the sanctioned individual engages in further improper conduct in a subsequent hearing before the same or a different Administrative Judge, the prior sanction should be considered in determining whether to exclude the individual from the subsequent hearing. To that end, the Administrative Judge also may ask an individual, on the record, to disclose whether or not s/he ever had previously been sanctioned in any way before the Commission.

4. Standard for exclusion of representative

Representatives may also be excluded for refusal to follow the orders of an Administrative Judge or other improper conduct, in addition to “contumacious conduct or misbehavior that obstructs the hearing.” Representatives have a special duty to maintain the dignity of the EEO process and to preserve the order and authority of the EEO forum and must act accordingly.

If a party’s representative engages in repetitive misconduct or conduct justifying exclusion, the Commission also will consider imposing a suspension or disqualification through the procedure described in Section B below. If the representative is an attorney, s/he also may be referred to the appropriate bar association for disciplinary action as provided in Section C below.

5. Procedure for exclusion

Unless the improper conduct is so egregious as to compromise the order required for a fair and orderly proceeding, the Administrative Judge normally should first warn the offending person to stop the conduct. The warning should give notice that if the conduct continues, the person will be excluded from the hearing.

When imposing the sanction, the Administrative Judge must ensure that the record includes a clear and specific description of the nature of the misconduct. The record must include the particular details of what the person said or did, rather than a conclusory characterization.¹⁸ The Administrative Judge may place the information on the record through a statement at the hearing or, if the misconduct occurred in a teleconference or other proceeding without a court reporter, by inclusion in a prehearing conference memorandum or order or through a written statement provided to the individual. Any gestures or actions that would not be apparent from the hearing transcript should be clearly described for the record. If the person used profanity or other improper or threatening language before the Administrative Judge while off the record or at a proceeding that is not being transcribed, the Administrative Judge should relate the particular language used in a statement on the record or other written statement made a part of the record.

An Administrative Judge's decision to exclude a person from a hearing is final. There is no right to an interlocutory appeal of an exclusion decision. A party may raise the issue as part of an appeal of the final order on the case when the party asserts it has been deprived the opportunity for a fair hearing.

If the complainant engages in obstructive misconduct or contumacious conduct, the Administrative Judge should warn the complainant as described above and consider recessing the hearing for a short time to restore order. If the complainant's misconduct is extreme or persistent, the Administrative Judge may, pursuant to 29 C.F.R. §§ 1614.109(b) and 1614.107(a)(7), dismiss the case for failure to cooperate or issue a decision if the record is sufficient to permit adjudication. 29 C.F.R. § 1614.109(g).

If the complainant's representative is excluded, the complainant should be given the option of proceeding without his/her representative. If the agency's representative is excluded, the Administrative Judge must notify the agency of the exclusion. In either case, the Administrative Judge may, in his/her discretion, continue the hearing to allow time for the designation of a new representative or, in appropriate circumstances, terminate the

¹⁸ For example, the description might state that the party's representative, despite a warning to remain at his seat, "repeatedly rose out of his chair, walked around the hearing room, and pointed his finger close to the witness's face while berating the witness in a loud voice and cutting short the witness's answers, making the following statements to the witness:"

hearing, and decide the case based on the record if the record is sufficient to permit adjudication.

The Administrative Judge also may impose an evidentiary sanction against either party as provided in 29 C.F.R. § 1614.109(f)(3). For example, when misconduct has prevented or hindered the development of evidence, the Administrative Judge may draw an adverse inference; consider the matter to be established in favor of the opposing party; exclude other evidence; or issue a decision fully or partially in favor of the opposing party. See 29 C.F.R. § 1614.109(f)(3). The standard for imposing such a sanction must be the same for both complainants and agencies. A sanction should be proportional to the level of the misconduct and reflect the degree to which the misconduct has impeded a full and fair hearing.

B. Disqualification of a Representative from Future Hearings

1. Standard for suspension and disqualification¹⁹

In the case of repeated or flagrant improper conduct by a representative, the Administrative Judge or the Commission may take further action. Section 1614.109(e) of 29 C.F.R. provides that the Commission, after notice and an opportunity to be heard, may suspend or disqualify from representing complainants or agencies in future Commission hearings any representative who refuses to follow the Administrative Judge's orders or otherwise engages in improper conduct. These provisions apply not only to conduct at the hearing stage of the case but also to all other actions taken by a representative in the course of an EEO proceeding, including the appeal. A disqualification applies to future representation of a party before the Commission, at both the hearing and appellate stages.

2. Procedure for suspension and disqualification

Before suspension or disqualification from future hearings, the representative must be given:

¹⁹ In addition to disqualification under 29 C.F.R. § 1614.109(e) for misconduct, the term "disqualification" is also used when the representation of a complainant or agency would conflict with the official or collateral duties of the representative. Under 29 C.F.R. § 1614.605(c), in that circumstance, the Commission or the agency may, after giving the representative an opportunity to respond, disqualify the representative. In contrast to disqualification for misconduct, a disqualification for conflict of interest under 29 C.F.R. § 1614.605(c) applies only to the particular case. Parties shall disclose and reasonably attempt to avoid all conflicts of interest.

- a. notice of the specific conduct that is the basis for the proposed disqualification;
- b. notice of the proposed sanction; and
- c. the opportunity to be heard.

A show cause order accomplishes this notice. The show cause order must describe in detail the incident(s) constituting the grounds for suspension or disqualification,²⁰ describe the proposed sanction, and give the representative a period of time in which to explain in writing why s/he should not be suspended or disqualified.

For improper conduct or a refusal to follow orders at the hearing stage, the Administrative Judge will issue the show cause order and certify the matter to the Director, Office of Federal Operations, for a determination. In addition, the Administrative Judge may, separately or simultaneously, issue an order excluding the representative from the hearing process in the case at bar, in accordance with the provisions discussed above. If the representative is an attorney, referral to the appropriate bar association normally should be considered as well, pursuant to Section C below.

For improper conduct during the appeal, the Office of Federal Operations will issue the show cause order. In all cases, the representative must submit his/her response to the Director of the Office of Federal Operations. The Director or his/her designee will issue a final order, which is not appealable.

An order suspending or disqualifying a representative from future hearings must specify the time period the penalty will be in effect, which must be commensurate with the severity of the conduct.

When the Administrative Judge or the Commission proposes to suspend or disqualify the agency's representative, a copy of the show cause order and subsequent decision must be provided to the agency's EEO Director.

²⁰ The conduct must be described with specificity and detail, as explained in Section A. 5 above with respect to exclusion.

C. Referral of Attorney Representatives to Bar Association

Section 1614.109(e) of 29 C.F.R. provides that the Administrative Judge or the Commission may refer to the disciplinary committee of the appropriate bar association any attorney who refuses to follow the orders of an Administrative Judge or who otherwise engages in improper conduct. This may be done independently of, or in conjunction with, any proposed or final exclusion, suspension, or disqualification.

CHAPTER 8 COMPLAINTS OF CLASS DISCRIMINATION IN THE FEDERAL GOVERNMENT

I. INTRODUCTION

Section 1614.204 of Title 29 C.F.R. provides for processing class complaints of discrimination. A class is defined as a group of employees, former employees, or applicants who are alleged to have been adversely affected by an agency personnel policy or practice which discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, genetic information, or disability. A class complaint is a written complaint of discrimination filed on behalf of the class by the agent of the class, alleging that the class is so numerous that a consolidated complaint by the members of the class is impractical, that there are questions of fact common to the class, that the claims of the agent of the class are typical of the claims of the class, and that the agent of the class and, if represented, the representative will fairly and adequately protect the interests of the class.

The regulatory requirements for class complaints at 29 C.F.R. § 1614.204 provide a structure different from that for individual complaints. For class complaints, there is a four-stage process. The first stage is the establishment of a class complaint. At this stage, the class agent is required to seek counseling from an agency EEO Counselor and file a complaint. The second stage is a determination from a Commission Administrative Judge, subject to agency final action, implementing or appealing the Administrative Judge's decision on class certification. The third stage, assuming that the complaint has been certified as a class action, involves a final decision from an Administrative Judge on the merits of the class complaint. The agency can either fully implement or appeal. If the agency appeals the Administrative Judge's final decision, it only has to appeal the parts of the decision that it is contesting. The fourth stage, where there has been a finding of class-based discrimination, is the determination of the claims for relief of the individual class members.

II. PRE-CERTIFICATION PROCEDURES

A. Pre-Complaint Processing

Section 1614.204(b) of 29 C.F.R. provides that, as with an individual complainant, an employee who seeks to represent a class of employees must seek counseling and undergo pre-complaint processing in accordance with 29 C.F.R. § 1614.105 and Chapter 2 of this Management Directive, with one exception, discussed below. Section 1614.105(a)(1) of 29 C.F.R. requires that an employee must seek counseling within forty-five (45) days of the discriminatory event. The

agency shall extend the 45-day time limit when the individual shows that s/he was not notified of the time limits and was not aware of them, that s/he did not know and reasonably should not have known that the discriminatory practice or personnel action occurred, that despite due diligence s/he was prevented by circumstances beyond his/her control from contacting the EEO Counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission. See 29 C.F.R. § 1614.105(a)(2). The time period may be waived by the agency and is subject to estoppel and equitable tolling. See 29 C.F.R. § 1614.604(c). If the complaint is not resolved on the thirtieth (30th) day following initial EEO counseling, the EEO Counselor must give the agent written notice that s/he has **fifteen (15) days** from receipt of the notice to file a formal complaint. 29 C.F.R. § 1614.204(c)(2).

The counseling period may be extended up to an additional **sixty (60) days** if, prior to the expiration of the 30-day period, the aggrieved person agrees with the agency in writing to postpone the final interview.

The one exception to the mandatory counseling prerequisite allows a complainant to move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. 29 C.F.R. § 1614.204(b).¹ The Commission intends that “reasonable point in the process” be interpreted to allow a complainant to seek class certification when s/he knows or suspects that the complaint has class implications, that is, the complaint potentially involves questions of law or fact common to a class and the complainant’s claim is typical of that of the class. Undue delay in moving for certification will lead to denial of the class certification by the Administrative Judge. If a complainant moves for class certification after completing the pre-complaint process contained in 29 C.F.R. § 1614.105, no additional counseling is required. See 29 C.F.R. § 1614.204(b). Instead, the agency or the Administrative Judge, as appropriate, must advise the complainant of his/her rights and responsibilities as the class agent.

B. Filing and Presentation of the Class Complaint

As with an individual complaint, a class complaint must be filed with the agency that allegedly discriminated against the putative class. 29 C.F.R. § 1614.106(a). A class complaint must be signed by the class agent (the complainant) or a class representative and must identify the policy or practice adversely affecting the

¹ The term “move” in this context means that the complainant must make his/her intention to process the complaint as a class action clear. A complainant may make his/her intention clear through a letter, a formal motion, or any means that effectively informs the agency or Administrative Judge of the complainant’s intent to pursue a class action.

class as well as the specific action or policy affecting the class agent. 29 C.F.R. § 1614.204(c)(1).

Within thirty (30) days of an agency's receipt of a class complaint, including the agency's receipt of the class complaint during its investigation of the aggrieved person's individual complaint, an agency must designate an agency representative and forward the complaint, along with a copy of the EEO Counselor's Report and any other relevant information about the complaint, to the Commission. 29 C.F.R. § 1614.204(d)(1). When **any** complaint is filed, an agency must take care to preserve any and all evidence with potential relevance to the class complaint. This is a continuing obligation that begins as soon as the complaint is filed, even before the class has been certified, and continues throughout the processing of the complaint.

The agency must forward the class complaint to the Commission district office having jurisdiction over the agency facility where the complaint arose. Appendix N to this Management Directive is a list of the addresses of the Commission district and field offices, their geographic jurisdictions, and where federal employees and applicants should submit hearing requests.

Should the agency's organizational component where the complaint arose not fall within one of the geographical jurisdictions shown, the agency should contact the following office for guidance:

Equal Employment Opportunity Commission
Office of Field Programs
Attn: Hearings Coordinator
131 M Street, NE
Washington, DC 20507

Email at: info@eoc.gov

III. INDIVIDUAL COMPLAINTS FILED ON BASES AND ISSUES IDENTICAL TO CLASS COMPLAINTS

When a complainant who is a potential member of a class action files an individual complaint between the time a class complaint is filed and a final certification decision is issued, the agency must determine whether there are claims in the individual complaint that are identical to those that are presented in the class complaint. If the agency determines that claims in the individual and class complaints are identical, then the agency shall issue a written decision notifying the complainant that the portion of the complaint raising claims identical to the class complaint will

be held in abeyance during the pendency of the decision to accept or reject the class complaint.² The agency decision shall notify the complainant of his/her right to appeal the abeyance determination to the Commission.³ The agency decision must also contain, at a minimum, a description of the individual claims at issue; a description of the class complaint with the definition of the putative class; the class complaint counseling report; and the status of the class action, including the Commission field office to which the class complaint has been sent for a determination on certification, if applicable.

If, however, the agency finds that the claim in the individual complaint is not identical to the class claim then the individual complaint shall continue to be processed by the agency.

The Administrative Judge may dismiss a class complaint, or any portion, because it does not meet the prerequisites for certification or for any of the procedural grounds listed in §1614.107. If a potential class complaint is dismissed by the Administrative Judge, the Agency's final order adopting the dismissal shall include notification to the class agent(s) that his/her complaint will be processed as an individual complaint, or that the individual complaint is also dismissed in accordance with §1614.107. In addition, **within forty (40) days** of receipt of an Administrative Judge's decision dismissing a putative class complaint the agency shall issue an acknowledgment of receipt of an individual complaint as required by 29 C.F.R. §1614.106(e) and process each individual complaint that was held in abeyance because of the class complaint.

If a class complaint is certified, all individual complaints that raise claims identical to the definition of the class claim(s) shall be subsumed within the class complaint. When the class claim proceeds to a hearing on the merits, the subsumed individual claim(s) may be presented during the liability stage by the class agent, or at the remedy stage by the individual complainant. If class-wide discrimination is **not found, the agency shall process each individual claim that** was subsumed into the class complaint. See 29 C.F.R. §1614.204(1)(2).

- (a) For an individual claim to be subsumed in an accepted class complaint, it must be identical in all respects to the class claim(s), including the issue and basis of discrimination alleged. When an individual complaint raises multiple claims, only those claims that are identical to those raised in the class complaint will be subsumed in it. The non-identical claims in the individual complaint shall be processed separately under the individual complaint process.

² As a point of clarification, claims that are held prior to class certification are stated to be held in "abeyance" and claims that are referenced as being "subsumed" are claims that become part of the class action following class certification. When an individual complaint raises multiple claims, only those claims that are identical to those in the class complaint with respect to basis and issue are properly held in abeyance or subsumed. The non-identical claims in the individual complaint shall be processed separately by the agency under the individual complaint process.

³ See [Roos v. U.S. Postal Service](#), EEOC Request No. 05920101 (Feb. 13, 1992).

(b) When an agency makes a decision not to process an individual claim because it is identical to and subsumed by an accepted class complaint, it shall issue a decision advising the individual complainant of his/her right to appeal to OFO for a ruling on whether the individual claim should be subsumed in the accepted class claim(s). The agency decision must also contain, at a minimum, a description of the individual complaint at issue and a description of the certified class complaint and underlying certification decision(s).

IV. CERTIFICATION OR DISMISSAL - 29 C.F.R. § 1614.204(d)

The Commission will assign an Administrative Judge (or in some limited circumstances a complaints examiner from another agency may be assigned) to issue a decision on certification of the complaint. 29 C.F.R. § 1614.204(d).

A. Class Complaint Criteria

A class complaint will be dismissed if:

1. The complaint does not meet all of the prerequisites of a class complaint under 29 C.F.R. § 1614.204(a)(2) (that is, numerosity, commonality, typicality, and adequacy of representation);
2. The claims lack specificity and detail pursuant to 29 C.F.R. § 1614.204(d)(4);
3. The complaint meets any of the criteria for dismissal pursuant to 29 C.F.R. § 1614.107(a), "Dismissals of Complaints."

The Administrative Judge shall deny class certification when the complainant has unduly delayed in moving for certification. See 29 C.F.R. § 1614.204(b).

B. Developing the Evidence for Purpose of Certification Determination

The Administrative Judge may direct the complainant or agency to submit additional information relevant to the issue of certification. See 29 C.F.R. § 1614.204(d)(1).

V. CERTIFICATION DECISION - 29 C.F.R. § 1614.204(d)(7)**A. Administrative Judge Issues Decision on Certification**

The Administrative Judge shall issue a decision on whether to certify or dismiss a class complaint. When appropriate, the Administrative Judge may decide to certify a class conditionally, for a reasonable period of time, until a complainant finds representation. For example, if the record on a class complaint satisfies the numerosity, typicality, and commonality requirements for class certification, the Administrative Judge may “conditionally” certify the class for a reasonable period of time so that the class agent may secure adequate representation. Administrative Judges should refer complainants to any attorney referral systems that may be operating in the Commission district offices or other attorney referral services for assistance in obtaining adequate legal representation.

Even after a class is certified, the Administrative Judge remains free to modify the certification order or dismiss the class complaint in light of subsequent developments. See [General Telephone Co. v. Falcon](#), 457 U.S. 147, 160 (1982). The Administrative Judge has the authority, in response to a party’s motion or on his/her own motion, to redefine a class, subdivide it, or dismiss it if the Administrative Judge determines that there is no longer a basis for the complaint to proceed as a class complaint. [Hines v. Dep’t. of the Air Force](#), EEOC Request No. 05940917 (Jan. 29, 1996).

B. Transmittal of Decision

The Administrative Judge shall transmit his/her decision to accept or dismiss a class complaint to the agency and the agent. The agency shall take final action by issuing a final order within forty (40) days of receipt of the Administrative Judge’s decision. The final order shall notify the agent whether the agency will implement the decision of the Administrative Judge. If the final order does not fully implement the decision of the Administrative Judge, the agency shall simultaneously appeal the Administrative Judge’s decision in accordance with 29 C.F.R. § 1614.403 and append a copy of the appeal to the final order. The Commission has prepared a form that agencies may use to file appeals with the Commission. A copy of that form is attached as Appendix O.

If the decision is to accept (certify) the class complaint, Commission regulations require the agency to notify all class members. 29 C.F.R. § 1614.204(e)(1). The agency must use all reasonable means to notify all class members of the acceptance of the complaint within 15 days of receipt of the Administrative Judge’s decision or within a reasonable time frame specified by the Administrative Judge. (See Section VI.A, below.)

An Administrative Judge's decision to dismiss the class complaint at the certification stage will inform the agent that the complaint is being filed on that date as an individual complaint and will be processed under subpart A, that the complaint is also dismissed as an individual complaint in accordance with 29 C.F.R. § 1614.107(a), or, in the case of a complaint forwarded to the Administrative Judge during the agency's investigation of the complaint, that the complaint is being returned to the agency and will continue from the point that processing ceased with the referral of the complaint to the Administrative Judge.

C. **Right to Appeal the Administrative Judge's Decision**

The Administrative Judge's decision whether to accept or dismiss the class complaint is subject to final agency action. The Administrative Judge shall transmit his/her decision to the agency, with a copy to the complainant and the complainant's representative, if any. The agency has forty (40) days from receipt of the Administrative Judge's decision to take final action by issuing a final order informing the complainant as to whether the agency will fully implement the decision. If the agency informs the complainant that it does not intend to fully implement the decision, the agency must simultaneously file an appeal with the Commission and append a copy of the appeal to the final order served on the complainant. The agency may use the form appended hereto as Appendix O to file its appeal with the Commission. The complainant will have thirty (30) days from receipt of the final order to file an appeal and the agency shall provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition - Complainant (Appendix P).

VI. **NOTIFICATION - 29 C.F.R. § 1614.204(e)**

A. **Timing and Method of the Notice**

Within **fifteen (15) calendar days** of the agency's receipt of the Administrative Judge's decision certifying a class complaint or such time frame specified by the Administrative Judge, the agency shall use reasonable means, such as hand delivery, mailing to the last known address, or distribution (such as through inter-office mail or email) to notify all class members of the certification of the class complaint. An agency may file a motion with the Administrative Judge seeking a stay in the distribution of the notice for the purpose of determining whether it will fully implement or appeal the Administrative Judge's decision.

The "reasonable means" used by agencies for notification should be those most likely to provide an opportunity for class members to know about the complaint. Conspicuous posting on bulletin boards to which all potential class members have easy access may constitute adequate notice in some situations.

B. Content of the Notice

The notice must contain:

1. the name of the agency or organizational segment, its location, and the date of acceptance of the complaint;
2. the definition of the class and a description of the issues accepted;
3. an explanation of the binding nature of the decision or resolution of the complaint on class members;
4. the name, address, and telephone number of the class representative; and
5. a copy of the Administrative Judge's decision certifying the class.

C. Individuals May Not Opt Out

The class members may not "opt out" of the defined class; however, they do not have to participate in the class or file a claim for individual relief. All class members will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found.

D. Settlement Notice

All class members must receive notice of any settlement or decision on the class complaint whether or not they participated in the action. See Section VII of this Chapter.

VII. DEVELOPING THE EVIDENCE - 29 C.F.R. § 1614.204(f)**A. The Process of Developing the Evidence**

The Administrative Judge shall advise both parties that they will have at least sixty (60) days to develop evidence. 29 C.F.R. § 1614.204(f)(1). They can do this in the same manner as in individual cases, that is, through interrogatories, depositions, requests for admissions, stipulations, or production of documents. The parties may object to production on the grounds that the information sought is irrelevant, overly burdensome, repetitious, or privileged. The Administrative Judge has the authority to impose sanctions on a party if that party fails to comply without good cause with rulings on requests for information, documents, or

admissions. An adverse inference may be appropriate where the information is solely in the control of that party. Similarly, if a party fails to provide an adequate explanation for the failure to respond fully and in a timely manner to a request, the Administrative Judge may impose sanctions. Adverse inferences are appropriate when the information is solely in the control of that party. These sanctions include, but are not limited to, the authority to:

1. draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;
2. consider the issues to which the requested information pertains to be established in favor of the opposing party;
3. exclude other evidence offered by the party failing to produce the requested information; and/or
4. recommend that a decision be entered in favor of the opposing party.⁴

B. Use of Agency Resources and Facilities by Class Agent

The class agent and his/her non-attorney representative should be permitted reasonable access to and/or use of agency facilities (copiers, telephones, computers, internet, fax machines, email, printers, etc.) for preparation of the case as long as there is no undue disruption of agency operations. The class agent and/or non-attorney representative may not use agency resources and facilities in the preparation of the class case without obtaining the prior approval of the designated agency official.

⁴ The Administrative Judge's order to the parties should make clear what sanctions or other actions may be imposed for a failure to comply with the order within the time set forth therein. Where an order did not put a party on notice that it could be sanctioned for a noncompliance or did not put the party on notice of the type of sanction that the Administrative Judge now seeks to impose, the Administrative Judge must issue a notice to show cause to the party for an explanation why the sanction should not be imposed and provide an opportunity to cure the noncompliance before imposing the sanction.

VIII. RESOLUTION - 29 C.F.R. § 1614.204(g)**A. Resolution by the Parties**

The complaint may be resolved by agreement of the agency and the agent at any time pursuant to the notice and approval procedure contained in 29 C.F.R. § 1614.204(g)(4).

B. Notice of Proposed Resolution

If a resolution is proposed, notice must be given to all class members in the same manner as the notification of certification of the class was given. The notice must include a copy of the proposed resolution, set out the relief, if any, that the agency will grant, and inform the class members that the resolution will bind all members of the class. The notice must also inform class members of the right to submit objections to the settlement. The notice further must inform the parties of the name and address of the Administrative Judge assigned to the complaint.

The agency shall provide the Administrative Judge with a copy of the proposed resolution and the notice sent to the parties.

C. Administrative Judge Shall Review Resolution

1. The Administrative Judge shall review and issue a decision concerning the fairness, adequacy, and reasonableness of the proposed resolution. Within **thirty (30) days** of the date of a class member's receipt of the notice of proposed resolution, the class member may file a petition with the Administrative Judge noting objections to the settlement if the petitioner (class member) believes that the settlement benefits only the class agent or is otherwise not fair, adequate, and reasonable to the class as a whole. The Administrative Judge will review the proposed resolution after the expiration of the 30-day period allowed for petitions and consider any petitions received. If the judge determines that the resolution is not fair, adequate, and reasonable, s/he will vacate the proposed resolution and may replace the class agent with the petitioner or other class member who is eligible to serve as class agent.
2. An Administrative Judge's decision that a resolution is not fair, adequate, and reasonable vacates the agreement between the class agent and the agency. The decision must inform the class agent, the petitioner, class members, and the agency of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573,

Notice of Appeal/Petition (Appendix P). The agency may use the separate form at Appendix O for filing its appeal with the Commission.

3. An Administrative Judge's decision that a resolution is fair, adequate, and reasonable binds all members of the class. The decision must inform the petitioner of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P).

IX. HEARING - 29 C.F.R. §§ 1614.204(h) and (i)

A. Hearing Procedures

Hearing procedures in certified class complaints are the same as those applied to hearings in individual complaints of discrimination and are set out in 29 C.F.R. § 1614.109.

B. Site of the Class Hearing

The Administrative Judge assigned to hear the certified class complaint will, upon expiration of the period allowed for preparation of the class case, set a date for a hearing and determine the site of the hearing. Within his/her discretion, the Administrative Judge is authorized to conduct the hearing in the Commission district office, in a Commission area or local office, at the agency's organizational component where the complaint arose, or at such other location as s/he may determine appropriate. In determining the hearing site, the Administrative Judge should consider factors such as the location of the parties; the location of the Commission district, area, and local offices; the number and location of witnesses; the location of records; travel distances for the Administrative Judge, the parties, and witnesses; travel costs; the availability of sources of transportation; and other factors as may be appropriate.

Should an agency desire that a hearing be held at a location within the jurisdictional area of another Commission district office, it must submit a request, in writing, to the Commission office that determined the class certification issue. In its request, the agency must identify the location of the desired place of hearing and must set out, in detail, its reasons and justification for the requested change. The Administrative Judge will rule on the request only after the directors of the concerned Commission district offices have conferred on the matter.

C. Travel Expenses

If the Administrative Judge sets a hearing site that is outside the local commuting area of the agency's organizational component where the complaint arose, the agency must bear all reasonable travel and per diem expenses of class agents, their authorized representatives, agency representatives, and all witnesses approved by the Administrative Judge, except that an agency does not have the authority to pay the travel expenses of complainant's witnesses who are not federal employees.

The agency's obligation is limited to those costs which are legally payable in advance by the agency. See [Expenses of Outside Applicant/Complainant to Travel to Agency EEO Hearing](#), File: B-202845, 61 Comp. Gen. 654 (1982); see also [John Booth \(Travel Expenses of Witness \(Agency Responsible](#), File: B-235845, 69 Comp. Gen. 310 (1990).

D. Official Time for Agency Employees

Any employee testifying at a hearing is entitled to official time for the time s/he spends testifying as well as a reasonable amount of time for travel to and from the hearing. The class agent and agent's representative, if employees of the agency where the complaint arose and was filed, are entitled to official time for actual time spent at the hearing and for a reasonable amount of time spent preparing for the hearing.

An agency may permit its employees to use official time in preparing and presenting a class complaint which arose in another agency.

X. ADMINISTRATIVE JUDGE'S DECISION ON THE MERITS OF THE CLASS COMPLAINT

The Administrative Judge shall transmit his/her decision on the complaint to the parties. If there is a finding of discrimination, the decision shall include systemic relief for the class, and any individual relief, where appropriate, with regard to the personnel action or policy that gave rise to the complaint. The decision shall be sent to the agency together with the entire record, including the transcript.

If the Administrative Judge finds no class relief appropriate, s/he shall determine if any finding of individual discrimination is warranted and, if so, shall issue a decision on the appropriate relief to be provided by the agency. 29 C.F.R. § 1614.204(i).

XI. AGENCY FINAL ACTIONS - 29 C.F.R. §§ 1614.204(j) and (k)**A. Action on Administrative Judge's Decision**

Within sixty (60) days of receipt of the Administrative Judge's decision, the agency must issue a final order either fully implementing or simultaneously appealing the Administrative Judge's decision. If the agency does not issue the final order within sixty (60) days of receipt of the Administrative Judge's decision, the Administrative Judge's decision becomes the final action of the agency. 29 C.F.R. § 1614.204(j)(2).

The agency must transmit its final order to the class agent within five days of the expiration of the 60-day period.

B. Agency Final Action Requirements

The agency's final order on a class complaint must be in writing; notify the class agent whether the agency will fully implement the decision of the Administrative Judge; and contain a notice of the right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action, and the applicable time limits. If the final order does not fully implement the decision of the Administrative Judge, the agency shall simultaneously file an appeal in accordance with 29 C.F.R. § 1614.403 and append a copy of the appeal to the final order. See 29 C.F.R. § 1614.204(j)(1).

C. Binding Nature of Agency Final Action Implementing Administrative Judge's Decision

The final agency action implementing the Administrative Judge's decision finding discrimination will be binding on all members of the class and on the agency. A final agency action implementing the Administrative Judge's decision finding no discrimination is not binding on a class member's individual complaint. Class members may not "opt out" of the class action while it is pending. See Section V.C of this Chapter.

D. Notification of Agency Final Action

The agency shall notify class members and the class representative of its final action through the same media employed to give notice of the existence of the class complaint. The notice, where appropriate, shall include information concerning the rights of class members to seek individual relief and of the procedures to be followed. Notice shall be given by the agency within ten (10) days of the transmittal of its final action to the agent.

XII. RELIEF FOR INDIVIDUAL CLASS MEMBERS - 29 C.F.R. § 1614.204(I)**A. Claims for Individual Relief by Class Members Where Discrimination Is Found**

Where a finding of discrimination against a class is made, there is a presumption of discrimination as to each member of the class. The agency has the burden of proving by clear and convincing evidence that a class member is not entitled to relief. See 29 C.F.R. § 1614.204(1)(3).

Within thirty (30) days of receipt of notification of the final agency action implementing the Administrative Judge's decision, a class member who believes that s/he is entitled to individual relief must file a written claim with the head of the agency, or with the agency's EEO Director.

The claim must include a specific, detailed showing that:

1. The claimant is a class member who was affected by the discriminatory policy or practice; and
2. The discriminatory action occurred within the period of time for which the Administrative Judge found class-wide discrimination in his/her decision.

B. Timing of Agency Decision on Individual Claims for Relief

Within **ninety (90) calendar days** of receiving an individual claim, the agency must issue a final decision on that claim. The agency's final decision must include a notice of the right to file an appeal or a civil action within the applicable time limits. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P).

C. Oversight of Individual Claims for Relief

1. Where an Administrative Judge finds that the agency discriminated against the class, the Administrative Judge should include in his/her order a provision that establishes a mechanism for review of individual claims pursuant to 29 C.F.R. § 1614.204(1)(3). Under that section, a class member must file a claim with the agency within thirty (30) days of his/her receipt of notification from the agency of its final order and the agency must issue a final order within ninety (90) days of its receipt of the claim. That section further provides that Administrative Judges retain jurisdiction over the complaint in order to resolve any disputed claims of class members and may hold hearings or otherwise supplement the record on a claim filed by a class member.
2. To implement this section, an Administrative Judge's order should advise the agency to inform him/her in writing within sixty (60) days of the agency's receipt of a claim from a class member that it intends to dispute the class member's claim, and provide a copy of such notice to the class member. Once the agency informs the Administrative Judge and the class member of its intent to dispute the class member's claim, the Administrative Judge will issue an order tolling the 90-day period within which the agency is required to issue a decision on the class member's claim.
3. The Administrative Judge's order will advise the agency to provide a statement in support of its decision to dispute the class member's claim and any supporting evidence within fifteen (15) days of the agency's receipt of the Administrative Judge's order, providing a copy of any such submission to the class member. The class member will have 15 days from the date of service of the agency's submission to respond to the agency's submission and may file a statement and documents in support of his/her claim, providing a copy of any such submission to the agency. If service of the submission was by mail, the class member may add three days to the date that the response is due. The Administrative Judge has the discretion to enlarge the 15-day period at the written request of either party or on his/her own motion. If a party seeks an enlargement of the 15-day period, that party must provide a copy of its written request to the other party.
4. The Administrative Judge thereafter may determine whether s/he needs additional information or should hold a hearing in order to further develop the record regarding the class member's claim. At the conclusion of fact finding, the Administrative Judge will issue a decision concerning the class member's claim and forward the decision to the class member and

the agency. The decision will advise the agency that the 90-day period for issuing a final order on the claim will resume upon its receipt of the Administrative Judge's decision. The agency must issue a final order regarding the class member's claim within the 90-day period. If the agency does not issue the final order within the 90-day period, the Administrative Judge's decision will become the final order of the agency.

5. The agency's final action on a class member's claim must inform the class member of the right to appeal the decision to the Office of Federal Operations or to file a civil action, and it must include EEOC Form 573, Notice of Appeal/Petition (Appendix P).

D. Limits on the Duration of a Finding of Class-Wide Discrimination

The agency or the Commission may find class-wide discrimination and order remedial action for any policy or practice in existence within forty-five (45) days of the class agent's initial contact with the EEO Counselor. Relief may be ordered for the time the policy or practice was in effect. Under the pattern of discrimination theory, incidents occurring earlier than 45 days before contact with the EEO Counselor must also be remedied provided the initial contact with the EEO Counselor was timely and the earlier incidents were part of the same continuing policy or practice found to have been discriminatory. Where contact with the EEO Counselor is timely as to one of the events comprising the continuing violation, then the counseling contact is timely as to the entire violation. See 29 C.F.R. § 1614.204(1)(3). This 45-day time period does not limit the two-year time period for which back pay can be recovered by a class member.

E. Where Class-Wide Discrimination Is Not Found

The agency shall, **within sixty (60) calendar days** of issuance of the final decision, acknowledge receipt of an individual complaint as required in 29 C.F.R. § 1614.106(d) and process in accordance with the provisions of subpart A each individual complaint that was subsumed into the class complaint.

If it is found that the class agent or any other member of the class is a victim of discrimination, the relief provisions of 29 C.F.R. § 1614.501 shall apply.

XIII. REPRISAL

Federal employees who are agents, claimants, representatives of agents or claimants, witnesses, or agency officials having responsibility for processing class complaints may file individual discrimination complaints if they believe they have been subjected to restraint, interference, coercion, or reprisal because of their involvement in the presentation and/or processing of a class complaint. EEO counseling must precede the filing of such complaints.

Retaliation claims can be the subject of class actions where the plaintiffs establish a general practice of retaliation against employees who oppose discriminatory practices or exercise rights protected under Title VII. See, [Holsey v. Armour & Co.](#), 743 F.2d 199, 216-217 (4th Cir. 1984), cert denied, 470 U.S. 1028 (1985). The Commission has held that reprisal is an appropriate basis for a class when there is a showing that specific reprisal actions were taken against a group of people for challenging agency policies, or where reprisal was routinely visited on the class members. See [Levitoff v. Dep't. of Agriculture](#), EEOC Appeal No. 01913685 (Mar. 17, 1992), request to reopen denied, EEOC Request No. [05920601](#) (Sept. 10, 1992); as cited in [Powell, et. al. v. Dep't. of the Navy](#), EEOC Appeal No. 01974349 (Aug. 2, 2000).

CHAPTER 9 APPEALS TO THE COMMISSION

I. INTRODUCTION

Sections 1614.401(a)-(e) of 29 C.F.R. identify those entitled to file appeals to the Commission. 29 C.F.R. § 1614.402(a) provides that appeals to the Commission must be filed by complainant **within thirty (30) days**¹ of receipt of an agency's final action - that is, a dismissal, final agency decision (FAD), final order, or final determination. If an attorney of record represents the complainant, the 30-day time limit shall begin to run from the date of receipt by the attorney of the agency's final action. If an agency determines not to implement the decision of an Administrative Judge either in full or in part, it must notify the complainant of its determination in a final order issued **within forty (40) days** of its receipt of the Administrative Judge's decision and it must simultaneously file an appeal with the Commission, in a digital format acceptable to the Commission, absent a good showing why the agency cannot submit digital records. See Chapter 6, Section VIII for more information on what constitutes good cause shown. The complainant may file an appeal with the Commission in either a digital format acceptable to the Commission or by mail. For information regarding appeals submissions see Section IV of this Chapter.

The complainant shall furnish a copy of the appeal to the agency at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made on the agency.

The individual complainant should use EEOC Form 573, Notice of Appeal/Petition. A copy of the Form is attached as Appendix P to this Management Directive. The agency shall attach a copy of EEOC Form 573 to all final actions and dismissals of equal employment complaints. The Commission has prepared a separate form that agencies may use to file appeals with the Commission. A copy of that form is attached as Appendix O.

¹ All time limits stated in this Management Directive are in calendar days. The time limits in Part 1614 are subject to waiver, estoppels, and equitable tolling. 29 C.F.R. § 1614.604(c). For further guidance, see [EEOC Compliance Manual](#), Section 2 "Threshold Issues," IV-D, Timeliness.

II. ADVISING THE PARTIES OF THEIR APPEAL RIGHTS

A. Rights Following Administrative Judge Issuance of a Decision

1. Merits/Class Certification Cases

- a. In a decision on the merits of a non-class complaint or concerning the issue of certification of a class action, the Administrative Judge shall advise the parties that the agency has forty (40) days from the date of its receipt of the Administrative Judge's decision to review the decision and to take final action on the decision by issuing a final order. The 40-day period within which the agency must take final action does not commence until the Administrative Judge issues an order advising the agency that the decision of the Administrative Judge is the final decision and that the agency must take final action within 40 days of its receipt thereof. Where an Administrative Judge issues a decision finding discrimination, the 40-day period will not commence until the Administrative Judge issues a final decision regarding remedies and attorney's fees.²
- b. In a decision on the merits of a class complaint, the Administrative Judge shall advise the parties that the agency has sixty (60) days from the date of its receipt of the Administrative Judge's decision to review the decision and to take final action on the decision by issuing a final order. The 60-day period within which the agency must take final action does not commence until the Administrative Judge issues an order advising the agency that the decision of the Administrative Judge is the final decision and that the agency must take final action within 60 days of its receipt thereof.³
- c. The Administrative Judge should inform the complainant of the following:

² If service of the Administrative Judge's decision was by mail without the use of certified mail/return receipt, the agency may add five days to the date that the final action is due. This rule, adding five days to the date of service, shall apply in all instances where the party being served has the right to take an action within a period of time following such service, except where the serving party uses certified mail/return receipt and can establish the date of actual receipt.

³ Due to the potential complexity of class complaints that proceed through litigation, the 60-day period is intended to provide agencies adequate time to review the Administrative Judge's decision on liability and relief.

- (1) where the agency's final action/final order advises the complainant that the agency accepts the Administrative Judge's decision, the agency will advise the complainant that s/he has thirty (30) days from the date the complainant receives the agency's final order to file an appeal of the final order.
- (2) the agency's failure to take final action by issuing a final order within this 40- or 60-day review period will be deemed acceptance of the Administrative Judge's decision;
- (3) the complainant's 30-day period for filing an appeal of the agency's final order/Administrative Judge's decision begins at the conclusion of the agency's 40- or 60-day review period;
- (4) where the agency's final action/final order advises the complainant that the agency has determined not to fully implement the Administrative Judge's decision, the agency must file an appeal of the Administrative Judge's decision simultaneously with notifying the complainant of its determination (providing the complainant with a copy of the appeal) and advise the complainant of his/her right to file a separate appeal of the Administrative Judge's decision within 30 days of the complainant's receipt of the agency's final order.

2. Procedural Dismissal

When the Administrative Judge issues a procedural dismissal, s/he must advise the complainant that the complainant will have the right to file an appeal of the agency's final order within 30 days of the complainant's receipt thereof.

3. Class Action Settlement Agreements

A petition to vacate a resolution may be filed with the Administrative Judge asserting that the resolution favors only the class agent or is not fair, adequate, and reasonable to the class as a whole. An Administrative Judge's decision that a class action settlement agreement is fair, adequate, and reasonable binds all members of the class. The decision must inform the petitioner of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition.

An Administrative Judge's decision that a resolution is not fair, adequate, and reasonable vacates the agreement between the class agent and the agency. The decision must inform the class agent, the petitioner, class members, and the agency, of the right to appeal the decision to the Commission. The decision must include a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P). The agency may use the separate form at Appendix O for filing its appeal with the Commission.

B. Agency Final Action

1. Agency Final Action

An agency final action involves agency issuance of a final order to the complainant. The final order informs the complainant whether the agency will fully implement the decision of the Administrative Judge and contains notice of the complainant's right to appeal to the Commission. The term "fully implement" means that the agency adopts without modification the decision of the Administrative Judge. If the agency's final order advises the complainant that the agency will not fully implement the decision of the Administrative Judge, the agency must file an appeal of the decision with the Commission simultaneously with issuing the final order to the complainant. In this way, an agency will take final action on a complaint referred to an Administrative Judge by issuing a final order, but it will not be provided with the opportunity of introducing new evidence or writing a new decision in the case. The agency may use the form attached hereto as Appendix O to file its appeal with the Commission. Whether the agency's final order advises the complainant that the agency will or will not fully implement the Administrative Judge's decision, the agency must provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P).

2. Notice of Rights

a. Full Implementation

Where the agency issues a final order in which it agrees to fully implement the Administrative Judge's decision, the order must inform the complainant that s/he has the right to file an appeal of the Administrative Judge's decision and agency's final order.

The agency further must inform the complainant that s/he must file an appeal within 30 days of his/her receipt of the agency's final order and the agency must provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P).

b. Less than Full Implementation

Where the agency issues a final order through which it informs the complainant that it does not intend to fully implement the Administrative Judge's final decision, the agency's final order must inform the complainant that the agency, simultaneously with the issuance of its final order to the complainant, has filed an appeal of the Administrative Judge's decision with the Commission. The agency may use the form appended hereto at Appendix O to file its appeal with the Commission.

The agency must provide the complainant with a copy of the appeal. The final order further must inform the complainant of the following:

- (1) the complainant may file a separate appeal of the agency's final order;
- (2) the Commission, as a general rule and in the absence of a separate appeal from the complainant, will review only the agency's decision not to fully implement the Administrative Judge's decision; and
- (3) if the complainant contends that the Administrative Judge erred either in any rulings made during the pendency of the action or in the decision, the complainant must file a separate appeal from the agency's final order to challenge such errors.

The final order must inform the complainant that any such appeal must be filed within 30 days of the complainant's receipt of the final order, and the agency must provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P).

C. Agency Final Decision

In any case where the agency issues a final decision (for example, where the complainant elects to have the agency issue a final decision following completion of the investigation), the agency must inform the complainant of his/her right to file an appeal with the Commission and provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P). The agency further must inform the complainant that any such appeal must be filed within 30 days of complainant's receipt of the agency's final decision.

D. Agency Procedural Decision

Where the agency issues a decision dismissing a complaint in its entirety pursuant to 29 C.F.R. § 1614.107(a), the agency must inform the complainant of his/her right to file an appeal with the Commission and provide the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P). The agency further must inform the complainant that any such appeal must be filed within 30 days of complainant's receipt of the agency's dismissal decision.

E. Mixed Case Complaints

The agency must advise the complainant that s/he may appeal a final agency decision on a mixed case complaint by filing the appeal with the **Merit Systems Protection Board (not the Commission)**. The agency further must inform the complainant that any such appeal must be filed within 30 days of his/her receipt of the agency's decision. For a fuller discussion concerning the processing of mixed cases, see Chapter 4, Section II of this Management Directive.

III. PERSONS WHO MAY APPEAL

The Commission's regulations governing appeals to the Commission are located at subpart D of 29 C.F.R. Part 1614. Section 1614.401 of 29 C.F.R. sets out who may appeal to the Commission when an issue of employment discrimination is raised either alone or in connection with a grievance, settlement, or a Merit Systems Protection Board (MSPB) claim.

A. A Complainant May Appeal

1. An agency's dismissal of or final action on a complaint.⁴

⁴ An agency's final action on a complaint may include either 1) a dismissal, see 29 C.F.R. § 1614.107(a); 2) a final order from the agency stating whether it will fully implement the decision of the Administrative Judge, see 29 C.F.R. § 1614.110(a); 3) a final agency decision on the merits of the complaint where the complainant requested an immediate final decision pursuant to 29 C.F.R. § 1614.108(f); or 4) an agency's final determination on its alleged noncompliance with a settlement agreement in accordance with 29 C.F.R. § 1614.504. See 29 C.F.R. § 1614.110(b). The regulations further provide that the agency must file an appeal with the Commission at the same time it serves the final order on the complainant following receipt of a decision from an Administrative Judge where it does not intend to fully implement the decision. The agency's filing of an appeal of an Administrative Judge's decision that it does not intend to fully implement will result in the Commission's review of the agency's decision not to fully implement the Administrative Judge's decision. The complainant need not file a separate appeal to have the Commission review the agency's actions. Where, however, the complainant contends that the Administrative Judge erred either in any rulings made during the pendency of the action

B. An Agency Must Appeal

1. If it determines not to fully implement an Administrative Judge's decision to dismiss or on the merits of a complaint, in an appeal filed simultaneously with the final order served on the complainant.⁵
2. If it determines, in a class complaint, not to fully implement an Administrative Judge's certification decision or a decision on the merits, in an appeal filed simultaneously with the final order served on the agent.

The agency may use the form appended hereto at Appendix O to file its appeal with the Commission.

C. An Agency May Appeal

An Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole. The agency may use the form appended hereto at Appendix O to file its appeal with the Commission

D. A Class Agent May Appeal

1. An Administrative Judge's decision accepting or dismissing all or part of a class complaint.⁶

or in the decision, the complainant would need to file an appeal from the agency's final order to challenge such errors.

If an agency fails to take any action during the 40-day period, the Administrative Judge's decision would be deemed ratified and the complainant would be entitled to file an appeal of the Administrative Judge's decision as ratified after the expiration of the 40-day period. The agency would not be permitted to cross-appeal or challenge any aspect of the Administrative Judge's decision in this situation.

⁵ If the agency issues a final order to the complainant stating that it does not intend to fully implement the decision of the Administrative Judge but fails to file an appeal, the agency's final order has no effect on the Administrative Judge's decision. If the agency fails properly to issue a final order and file an appeal simultaneously with the issuance of the order, the Administrative Judge's decision will be deemed ratified by the agency upon the expiration of the agency's 40-day period for accepting or not accepting the Administrative Judge's decision.

⁶ Included is a dismissal of a complaint that does not meet the prerequisites of a class complaint as enumerated in 29 C.F.R. § 1614.204(a)(2) where the decision to dismiss informs the class agent that the complaint is being filed as an individual complaint. The Office of Federal Operations, Appellate Review Programs, will provide expedited consideration (within 90 days of receipt of appeal) of class complaints that are dismissed for failure to meet the prerequisites of a class complaint. See 29 C.F.R. § 1614.405(b).

2. An agency final action on the merits of the complaint.
3. An Administrative Judge's decision to vacate a proposed resolution of a class complaint on the grounds that it is not fair, adequate, and reasonable to the class as a whole.⁷
4. An agency's alleged noncompliance with a settlement agreement in accordance with 29 C.F.R. § 1614.504.

E. A Class Member or Petitioner May Appeal

1. An Administrative Judge's decision finding a proposed resolution fair, adequate, and reasonable to the class as a whole if the class member filed a petition to vacate the resolution; or finding that the petitioner is not a member of the class and did not have standing to challenge the resolution.
2. An Administrative Judge's decision that a proposed resolution is not fair, adequate and reasonable to the class as a whole.⁸
3. An agency's final action on a claim for individual relief under a class complaint.
4. An agency's alleged noncompliance with a resolution in accordance with 29 C.F.R. § 1614.504.

F. A Grievant May Appeal

1. A final decision of the agency.
2. A final decision of the arbitrator.

⁷ See 29 C.F.R. § 1614.204(g)(4). A petition to vacate a resolution may be filed with the Administrative Judge asserting that the resolution favors only the class agent or is not fair, adequate, and reasonable to the class as a whole. The petitioner may file an appeal with the Commission if the Administrative Judge finds the resolution fair, adequate, and reasonable to the class as a whole. If the Administrative Judge finds the agreement not fair, adequate, and reasonable, the class agent, class members, and the agency may file an appeal.

⁸ As noted above, where the Administrative Judge finds the agreement not fair, adequate, and reasonable, the class agent, class members, and the agency may file an appeal. If the Administrative Judge finds that the agreement is fair, adequate, and reasonable, only the petitioner may file an appeal.

3. A final decision of the Federal Labor Relations Authority (FLRA) on the grievance.
4. **Exception:** A grievant may not appeal under subpart D of Part 1614, when the dispute initially raised in the negotiated grievance procedure is:
 - a. still ongoing in that process,
 - b. in arbitration,
 - c. before the FLRA,
 - d. appealable to the Merit Systems Protection Board (MSPB), or
 - e. if 5 U.S.C. § 7121(d) is inapplicable to the involved agency.

IV. FILING THE APPEAL AND RESPONSE

A. How to Appeal

1. The complainant, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal by mailing the appeal to:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013
Fax: (202) 663-7022

As an alternative the appeal may be submitted through facsimile or the Commission's electronic document submission portal.

The complainant should use EEOC Form 573, Notice of Appeal/Petition – Complainant (Appendix P) and should indicate what is being appealed.

2. Unless it has shown good cause why it is unable to do so,⁹ the agency must file an appeal with the Commission in digital format, either by using the Commission's electronic document submission portal or by some other approved method. See 29 C.F.R. § 1614.403(g). The agency may file its

⁹ For a showing of good cause the agency must submit a written request to the Director of the Office of Federal Operations identifying why they cannot meet the digital filing requirements and when they expect to be able to meet the digital filing requirements.

appeal by using the form appended hereto at Appendix O to file its appeal with the Commission and/or by providing the Commission with a copy of the order it sends to the complainant.

3. Where an agency files an appeal simultaneously with providing the complainant with a final order indicating that it does not intend to fully implement the decision of the Administrative Judge, the complainant need not file a separate appeal as a prerequisite to Commission review of the propriety of the agency's decision not to implement the Administrative Judge's decision. If, however, the complainant believes that other issues presented in his/her complaint and addressed by the Administrative Judge were wrongly decided, or if the complainant believes that the Administrative Judge's decision contained errors, the complainant should file an appeal from the agency's final order in order to ensure that the Commission will address these issues as well. Although the Commission has the right to review all of the issues in a complaint on appeal, it also has the discretion not to do so and may focus only on the issues specifically raised on appeal.

B. Service of Notice of Appeal

The complainant on appeal shall furnish a copy of the appeal to the agency at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made on the agency.

The agency must certify to the Commission that it has provided the complainant with a copy of the order in which it advised the complainant that it did not intend to fully implement the Administrative Judge's decision, that it informed the complainant of his/her right to file an appeal of its decision and provided the complainant with information as to how s/he may file an appeal, and that it provided the complainant with a copy of EEOC Form 573, Notice of Appeal/Petition (Appendix P).

C. Appeal Will Be Acknowledged

OFO will docket and acknowledge in writing the receipt of an appeal. Where both the agency and the complainant file appeals based on the same complaint following the agency's issuance of an order stating that it does not intend to fully implement the decision of the Administrative Judge, the Commission shall consolidate the appeals under a single Commission Appeal No. and consider both appeals simultaneously.

D. Dismissal of Appeal

If a party files an appeal beyond the applicable time limits, the Commission may dismiss the appeal. The agency should advise the complainant in its dismissal decision or final order that if s/he files his/her appeal beyond the thirty (30)-day period set forth in the Commission's regulations, s/he should provide an explanation as to why his/her appeal should be accepted despite its untimeliness. If the complainant cannot explain why his/her untimeliness should be excused in accordance with 29 C.F.R. § 1614.604, the Commission may dismiss the appeal as untimely.

E. Briefs and Supporting Documents

The complainant may file a brief or statement in support of his/her appeal with the Office of Federal Operations. The optional brief or statement must be filed within thirty (30) days of filing the notice of appeal and a copy of it must be sent to the other party.

The agency may file a brief or statement in support of its final action. The brief or statement must be filed within twenty (20) days of filing its appeal, and in accordance with 29 C.F.R. § 1614.403(g), must be filed in a digital format acceptable to the Commission (see Appendix L).

F. Statements in Opposition to an Appeal

Any statement or brief in opposition to an appeal must be submitted to OFO and served on the opposing party within thirty (30) days of receipt of the statement or brief supporting the appeal. Where both the complainant and the agency file appeals and briefs or statements in support of their appeals, both parties may file statements in opposition to the appeal of the other party. If no brief or statement supporting the appeal is filed, the party opposing the appeal must file its opposition within sixty (60) days of the receipt of the appeal.

G. Submission of Case File

Absent notice from the Commission that it has the case file from the hearing on the same matter, the agency must submit the complaint file to OFO within thirty (30) days of notification that the complainant has filed an appeal or within thirty (30) days of submission of an appeal by the agency. If the complaint was adjudicated by an Administrative Judge, the complaint file must include copies of all documents issued by or served on the Administrative Judge, including, but not limited to, all correspondence to and from the Administrative Judge, orders from

the Administrative Judge, and motions and briefs of the parties. Agencies should develop internal procedures that will ensure the prompt submission of complaint files upon a determination not to fully implement an Administrative Judge's decision or notice that a complainant has filed an appeal.

The agency must submit appeals and complete complaint case file(s) to the Commission's Office of Federal Operations in a digital format unless they can show good cause for not doing so. Complainants and their representative(s), if applicable, are strongly encouraged to file all documents in a digital format. See, 29 C.F.R. §1614.403(g). All documents may be uploaded to the Commission's electronic document submission portal. If a CD is used, it is preferred that all documents be provided in a PDF format.

The electronic complaint file must at a minimum have the following features:

- Electronic bookmarks corresponding to the file index and section dividers of the paper file, if a paper file was created;
- Sequentially numbered pages starting with the first page of the file. **All pages** in the report of investigation must be accounted for in the page numbering of the document, including the cover page and any administrative documents, in order for the numbers in the paper file to match precisely the numbers in the electronic file. An individual entering page number 150 into Adobe Acrobat should come to the exact same page as an individual turning to page 150 of the paper file. Administrative documents added after the paper file was compiled may be submitted in a separate PDF file.

H. Signatures on Electronic Documents

It is the Commission's policy to support, encourage, and in the case of agency submissions on appeal, mandate the use of digital documents in lieu of paper for documentation sent to the Commission specifically under the authority of 29 C.F.R. § 1614.403(g). A digital document used by a person, agency, or other entity shall have the same force and effect as those documents not produced by electronic means.

In support of the policy, the Commission considers electronic signatures on such submissions as having the same force and effect as signatures and records produced by hand or other non-electronic means. "Electronic signature" means any digital symbol, sound, or process attached to or logically associated with a digital record and executed or adopted by a person with the intent to sign the record. The Commission will accept an array of digital objects to serve as an

electronic signature. These objects can range from keyboarded characters (for example, “/s/Jane Doe”), a graphical image of a handwritten signature, or an authenticated process that creates an electronic signature. An electronic signature is considered attached to or logically associated with a digital record if the electronic signature is linked to the record during transmission and storage.

V. APPELLATE PROCEDURE

A. Where Record Is Complete

Where the record is complete, OFO shall issue a decision in accordance with 29 C.F.R. § 1614.405.

B. Where Record Requires Supplementation

While the Commission retains the right to supplement the record on appeal, it is intended that this right will be exercised only in rare instances to avoid a miscarriage of justice.

1. Where the record requires supplementation, OFO may require additional information from one or both of the parties. OFO may supplement the record by an exchange of letters, memoranda, or investigation. Each party shall provide copies of such supplemental information to the other party at the time it is submitted to OFO.
2. Where the record is so incomplete as to require remand to the agency in order to complete the investigation, the Commission shall designate a time period between **thirty (30)** and **ninety (90) days** within which the agency must complete the investigation. During the period of remand, the appeal will be held in abeyance and the complaint will be monitored by OFO. Upon completion of the investigation, the agency must provide the complainant with a copy of its supplemental record and findings and return the completed record to OFO. The complainant may, **within fifteen (15) days** of receipt of the supplemental record, submit a statement concerning the supplemental record to OFO. Upon receipt by OFO, the supplemental record will be included in the appeal file and the appeal will be processed appropriately.

C. Sanctions

Absent good cause shown, there is no legitimate basis for either party to an appeal to fail to comply with the appellate procedures in 29 C.F.R. § 1614.404 or to fail to respond fully and in a timely fashion to a request for information. Accordingly, where either party to an appeal fails to comply with the appellate procedures in 29 C.F.R. § 1614.404 or fails to respond fully and in a timely fashion to requests for information, without good cause shown, OFO shall, in appropriate circumstances, impose any of the following sanctions:

1. draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;¹⁰
2. consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
3. issue a decision fully or partially in favor of the opposing party; or
4. take such other actions as appropriate.

See 29 C.F.R. § 1614.404(c). OFO will aggressively utilize sanctions if parties fail, without good cause shown, to comply with the appellate procedures or to respond fully and timely to information requests.¹¹ Sanctions may be used to effectuate the policies of the Commission by both deterring the non-complying party from similar conduct in the future and by providing an equitable remedy to the opposing party.

Before OFO issues sanctions on either party to an appeal, it will provide the party with a notice to show cause why the sanctions identified in the notice should not be imposed. The notice to show cause will identify the specific conduct that is the

¹⁰ See for example, [Smith v. Dep't. of Transportation \(Federal Aviation Administration\)](#), EEOC DOC 0320080085, (Mar. 21, 2012) (finding that because the agency failed to comply with OFO's explicit order to produce comparative evidence, the agency was subject to sanctions for its noncompliance, including the drawing of an adverse inference that the requested comparative evidence would have reflected unfavorably on the agency).

¹¹ The Commission has exercised its inherent authority to enforce its Part 1614 regulations by ordering sanctions in response to various violations. See for example, [Vu v. Social Security Administration](#), EEOC Appeal No. 0120072632 (Jan. 20, 2011)(finding that the agency was subject to sanctions for its failure to submit the complete complaint file); [DaCosta v. Dep't. of Education](#), EEOC Appeal No. 01995992 (Feb. 25, 2000)(Commission issued sanction against agency for failure to complete timely investigation).

basis for the finding of noncompliance and will describe the proposed sanction(s) to be imposed. The notice to show cause will further provide the non-complying party with an opportunity to cure its noncompliance within a reasonable period of time, to be noted in the order. If the party fails to cure its noncompliance or to otherwise show good cause why sanctions should not be imposed, OFO shall impose the sanctions identified in its notice.¹²

D. Appeals Decisions Are Final

An appellate decision issued under 29 C.F.R. § 1614.405(a) is final pursuant to 29 C.F.R. § 1614.407 unless a timely request for reconsideration is filed by a party to the case. A party may request reconsideration **within thirty (30) days** of receipt of a decision of the Commission, which the Commission in its discretion may grant, if the party demonstrates that 1) the appellate decision involved a clearly erroneous interpretation of material fact or law, or 2) the decision will have a substantial impact on the policies, practices, or operations of the agency. See 29 C.F.R. § 1614.405(c); Section VII of this Chapter.

¹² Sanctions usually will be contained in the decision of the Commission on appeal. If the sanction is contained in a separate order and not the decision on the appeal, the sanction is not immediately reviewable. Once OFO issues a decision on an appeal, the sanctioned party may request reconsideration pursuant to 29 C.F.R. § 1614.405(c). If the sanction is issued while a matter is pending review under 29 C.F.R. § 1614.405(c) or is contained in a 29 C.F.R. § 1614.405(c) decision, there is no administrative review available.

VI. STANDARDS OF REVIEW ON APPEAL

Generally, standards of review delineate the nature of the inquiry on appeal by establishing the extent to which the reviewing body will substitute its own judgment for that of the prior decision-maker. The Commission has essentially employed a de novo standard of review in issuing appeals decisions since it took over the federal sector EEO function from the Civil Service Commission pursuant to Reorganization Plan No. 1 of 1978.

The decision on an appeal from an agency's dismissal or final action shall be based on a de novo review, except that the review of the factual findings in a decision by an Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(i) and 29 C.F.R. § 1614.204(i) shall be based on a substantial evidence standard of review. This Section of the Management Directive will ensure a degree of uniformity and predictability in assessing case development and in processing appeals.

A. Review of Final Decisions Issued by the Agency

Appeals of final decisions or actions issued by agencies, duly filed pursuant to 29 C.F.R. § 1614.401(a), (d), or (e) will be considered by the Commission in the following manner:

1. Agency dismissals pursuant to 29 C.F.R. § 1614.107 and final decisions on the merits of individual complaints pursuant to 29 C.F.R. § 1614.110(b) shall be reviewed de novo.
2. The de novo standard requires that the Commission examine the record without regard to the factual and legal determinations of the previous decision maker. On appeal the Commission will review the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and the Commission will issue its decision based on the Commission's own assessment of the record and its interpretation of the law.
3. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the investigation or during the hearing process. The Commission may request supplementation of the record. See 29 C.F.R. § 1614.404(b).
4. Following de novo review, the Commission will issue decisions on the appeals of decisions issued pursuant to 29 C.F.R. § 1614.110(b) based on a preponderance of the evidence.

5. Where appropriate, and after the requisite analysis, the Commission may adopt the findings and conclusions of the final decision issued by the agency. Such an adoption does not short-cut the review process, but merely serves to expedite communication of the result of the review.

B. Review of Decisions Issued by Administrative Judges

The Commission shall consider an appeal by either an agency or a complainant following a final action based on a decision from an Administrative Judge issued pursuant to 29 C.F.R. § 1614.109(g) (summary judgment decisions), 29 C.F.R. § 1614.109(i) (decisions on individual complaints), and 29 C.F.R. §§ 1614.204(d) and (i) (decisions on class complaints), duly filed pursuant to 29 C.F.R. § 1614.401 et seq., in the following manner:

1. The review of the post-hearing factual findings in an Administrative Judge's decision shall be based on a substantial evidence standard of review. In [Universal Camera Corp. v. National Labor Relations Board](#), 340 U.S. 474, 477 (1951), the Supreme Court noted that substantial evidence "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It 'must do more than create a suspicion of the existence of the fact to be established. [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.'" [Citations omitted.]
2. Applying the substantial evidence review standard, the Commission will give deference to an Administrative Judge's post-hearing factual findings based on evidence in the record. Factual determinations will be distinguished from legal determinations, and the Administrative Judge's factual determinations will be given deference. For example, a credibility determination of an Administrative Judge based on the demeanor or tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony of the witness or the testimony of the witness otherwise so lacks in credibility that a reasonable fact finder would not credit it.
3. A finding of discriminatory intent will be treated as a factual finding subject to the substantial evidence review standard. See [Pullman-Standard Co. v. Swint](#), 456 U.S. 273, 293 (1982).

4. Legal determinations will be reviewed de novo on appeal.
 - a. Legal determinations in decisions, whether made by an Administrative Judge or by the agency, will be reviewed using a de novo standard. There will be no presumption that the previous decision-maker was correct in his/her interpretation or application of the law.
 - b. An Administrative Judge's decision to issue a decision without a hearing pursuant to 29 C.F.R. § 1614.109(g) will be reviewed de novo. The substantial evidence standard of review will apply only to decisions rendered following a hearing and will not apply to decisions issued on summary judgment or to decisions issued without a hearing with the consent of the parties.
5. As a general rule, no new evidence will be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available prior to or during the hearing. The Commission may request supplementation of the record. See 29 C.F.R. § 1614.404(b).

C. The Responsibility of the Parties

1. On appeal, the burden is squarely on the party challenging the Administrative Judge's decision to demonstrate that the Administrative Judge's factual determinations are not supported by substantial evidence. This burden does not exist in a de novo review. The appeals statements of the parties, both supporting and opposing the Administrative Judge's decision, are vital in focusing the inquiry on appeal so that it can be determined whether the Administrative Judge's factual determinations are supported by substantial evidence.
2. In an appropriate case, and in instances where a party fails to submit a statement or brief in support of his/her appeal, the Commission may issue a summary decision.

VII. RECONSIDERATION

A. Reconsideration Is Not an Appeal

A request for reconsideration is not a second appeal to the Commission. A party may request reconsideration within **thirty (30) days** of receipt of a Commission decision. The Commission, in its discretion, may grant the request if the party demonstrates that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The decision will have a substantial impact on the policies, practices, or operations of the agency. 29 C.F.R. §§ 1614.405(c)(1) & (2).

The Commission reserves the right to reopen any decision on its own motion. See [Parnell v. Dep't. of Veterans' Affairs](#), EEOC Request No. 0520100031 (Dec. 7, 2009).

B. Reconsideration Procedures

1. Requests for reconsideration and any supporting statement or brief must be filed with the Office of Federal Operations (OFO) **within thirty (30) days** of receipt of a decision of the Commission and a statement or brief in opposition to a request for reconsideration must be filed **within twenty (20) days** of receipt of another party's timely request for reconsideration. OFO will accept statements or briefs in support of the request from complainants by fax transmittal, provided they are no more than ten (10) pages long. Agency briefs must be submitted in an approved digital format. The request must also include proof of service on the opposing party.
2. The requesting party must submit any supporting documents or brief at the time the request is filed. The burden is on the requesting party to make a substantial showing that its request meets one of the two prerequisites for a granting of reconsideration.
3. The opposing party shall have **20 days** from receipt of another party's timely request for reconsideration in which to submit any brief or statement in opposition. Such brief or statement must be served on the requesting party and proof of service must be included with the submission to OFO. OFO will accept briefs or statements in opposition to the request from complainants by fax transmittal, provided they are no more than 10 pages long. Agency briefs must be submitted in an approved digital format.
4. Failure to provide a proof of service or to submit comments within the prescribed time frame will result in the denial of the request, or the option not to consider the party's untimely statement or brief.

C. Reconsideration Decision Is Final

The Commission's decision on a request for reconsideration is final, and there is no further right by either party to request reconsideration. If the decision remands the complaint for further agency consideration, the parties retain the rights of appeal and reconsideration with respect to any subsequent decision.

VIII. REMEDIES**A. An Agency Shall Provide Full Relief after a Finding of Discrimination**

When the agency or the Commission finds that the agency has discriminated against an applicant or employee, the agency shall provide an appropriate remedy as explained in 29 C.F.R. Part 1614, subpart E.

B. Clear and Convincing Standard Needed to Limit Relief; Duty to Cure Discrimination Remains

1. When an Administrative Judge, agency, or the Commission finds that discrimination existed, but also finds by clear and convincing evidence that the agency would have made the same employment decision even absent the discrimination, the agency shall nevertheless take all steps necessary to eliminate the discriminatory practice and ensure that it does not recur.
2. Back pay, computed in the manner prescribed by 5 C.F.R. § 550.805, shall be awarded from the date the individual would have entered on duty, assumed the duties of the position at issue, or not been removed from the position unless clear and convincing evidence indicates that the applicant or employee would not have been selected for, placed into, or removed from the position even absent discrimination. The complainant has the obligation to mitigate damages.

C. Relief in Individual Cases

A discussion of the relief available in individual cases is set forth in Chapter 11 of this Management Directive.

D. Relief in Class Cases

A discussion of the relief available in class cases is set forth in Chapter 8, Section XI, of this Management Directive.

IX. COMPLIANCE**A. Relief Ordered in a Decision on Appeal**

1. Compliance with Orders of the Equal Employment Opportunity Commission in final federal appeals decisions is mandatory. Section 717(b) of Title VII, 42 U.S.C. § 2000e-16(b) provides that the Commission shall have authority to enforce prohibitions against discrimination in the federal government “through appropriate remedies, including reinstatement or hiring of employees with or without back pay as will effectuate the policies of this section and shall issue rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities.”
2. The ordered relief shall be provided in full not later than one hundred twenty (120) days after receipt of the final decision unless otherwise ordered in the decision. A decision is considered final when it is issued. The 120-day period includes the 30-day period in which the complainant can file a request for reconsideration, as well as the 90-day period in which the complainant can file a civil action.
3. A complainant may petition OFO to seek enforcement of a Commission Order. 29 C.F.R. § 1614.503(a). The petition shall be submitted to OFO and shall set forth the basis for the complainant’s assertion that the agency is not complying with the decision. If a petition is docketed acknowledgment letters will be sent to both parties identifying the new docket number and advising them of the right to submit a brief or to comment on the issue(s) in dispute.
4. Where the Director of OFO is unable to obtain satisfactory compliance with the final decision, the Director shall submit appropriate findings and recommendations for enforcement to the Commission pursuant to 29 C.F.R. § 1614.503(d). Among other things, the Commission may certify the matter to the Office of Special Counsel pursuant to a memorandum of understanding. See 29 C.F.R. § 1614.503(f) or issue a notice to show cause for noncompliance to the head of an agency that has failed to comply with a Commission order pursuant to 29 C.F.R. § 1614.503(e).

5. Where the Commission has determined that an agency is not complying with a prior decision and wishes to complete administrative efforts, the Commission shall notify the complainant of his/her right to seek judicial review of the agency's refusal to order the relief or commence a de novo proceeding. See 29 C.F.R. § 1614.503(g).

B. Interim Relief

1. Interim relief where the agency files a request for reconsideration of a decision regarding removal, separation, or suspension continuing beyond the date of the request for reconsideration:
 - a. When the agency requests reconsideration and the case involves removal, separation, or suspension continuing beyond the date of the request for reconsideration, and when the decision orders retroactive restoration, the agency shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified by the Commission, pending the outcome of the agency's request for reconsideration. 29 C.F.R. § 1614.502(b).
 - b. The agency must notify the complainant that his/her restoration is temporary or conditional at the same time it seeks reconsideration. Failure of the agency to provide notification will result in the dismissal of the agency's request. 29 C.F.R. § 1614.502(b)(3).
 - c. When the agency seeks reconsideration of a decision that included an award of payments of amounts owed, the agency may delay such payment provided it advises the complainant of its delay and further informs the complainant that it will pay interest on any award ultimately determined to be owed to the complainant. 29 C.F.R. § 1614.502(b)(2).
2. Interim relief where an agency appeals from a decision of an Administrative Judge in a case involving separation, or suspension continuing beyond the date of the appeal, and when the Administrative Judge's decision orders retroactive restoration:
 - a. The agency shall comply with the decision to the extent of the temporary or conditional restoration of the employee to duty status in the position specified in the decision, pending the outcome of the agency appeal. The employee may decline the offer of interim relief. 29 C.F.R. § 1614.505(a)(1).

- b. An agency may decline to return a complainant to his/her place of employment if it determines that the return or presence of the complainant will be unduly disruptive to the work environment. However, the agency must provide prospective pay and benefits. 29 C.F.R. § 1614.505(a)(5).
- c. An agency also may delay the payment of other amounts, exclusive of pay and benefits, when it files an appeal of an Administrative Judge's decision. If an agency declines to make such payments, it will be required to pay interest on these amounts from the date of the decision until payment is made if the outcome of the appeal requires the agency to make the payment. 29 C.F.R. § 1614.505(a)(3).
- d. An agency must inform the Commission and the complainant in writing that it will delay making required payments at the same time that it files its appeal that it will delay making the payments of any amounts owed pending resolution of the appeal. See 29 C.F.R. § 1614.505(a)(4). If an agency fails to inform either the complainant or the Commission and fails further to make the payments required by the decision being appealed, the Commission will dismiss the appeal. The complainant must file a request for dismissal with the Commission within twenty-five (25) days of the date of service of the agency's appeal and provide the agency with a copy of the request. The agency will have fifteen (15) days from receipt of the complainant's request to file a response. 29 C.F.R. § 1614.505(b).

C. Sanctions

1. There is no legitimate basis for delay in complying with a Commission order, particularly in those cases where the Commission has ordered relief after a finding of discrimination.
2. OFO will aggressively utilize sanctions if the agency fails to implement the relief ordered.
3. OFO may recommend that the Commission take enforcement action where an agency does not comply with a Commission order, or, as directed by the Commission, refer the matter to another appropriate agency. See 29 C.F.R. § 1614.503(d). The Commission may issue a show cause notice to the head of the federal agency that is in noncompliance or refer the matter to the Office of Special Counsel for enforcement action. See 29 C.F.R. §§ 1614.503(e) and (f).

4. OFO may issue a notice to the complainant that the administrative process for securing compliance has been exhausted. See 29 C.F.R. § 1614.503(g). Such a notice will inform the complainant of the right to file a civil action for enforcement of the Commission decision and to seek judicial review of the agency's refusal to implement the relief ordered by the Commission, or of the right to commence proceedings pursuant to the appropriate statute.
5. An OFO notice to the complainant advising that the administrative process for securing compliance has been exhausted may be issued after the Commission determines an agency is not complying with a prior decision, when an agency fails or refuses to submit a report of compliance required by the Commission, or upon receipt of a request from the complainant. In determining whether to issue such a notice, OFO will consider such factors as whether the agency is making reasonable efforts to comply with the Commission order or, if the notice is requested by the complainant, whether the complainant has legal representation to secure enforcement in court. After issuing such a notice, the Commission ordinarily will terminate its administrative processing of the complaint. Processing will continue, however, if the Director of OFO determines that continued processing would effectuate the purposes of the laws enforced by the Commission.

D. Priority Consideration for Cases Remanded for Investigation

Agencies should give priority to cases remanded for an investigation if this is necessary to comply with the time frames contained in a Commission order. OFO will issue sanctions against agencies when it determines that agencies are not making reasonable efforts to comply with a Commission order to investigate a complaint.

E. Remand of Dismissed Claims

Where a complainant's appeal includes a dismissed claim that the Administrative Judge has affirmed but that OFO reverses either on appeal or on reconsideration, OFO shall remand the dismissed claim to the Administrative Judge for further processing in accordance with 29 C.F.R. § 1614.109. Where a complainant appeals from an agency final decision that includes a dismissed claim that OFO reverses, OFO shall remand the dismissed claim to the agency and include an order directing the agency to process the matter in accordance with 29 C.F.R. § 1614.108, except that OFO may order the completion of the investigation within a time period shorter than 180 days.

F. Complainant May File an Appeal Alleging a Breach of a Settlement Agreement

Where a complainant files an appeal alleging a breach of a settlement agreement and the Commission determines that the agreement was breached, the complainant may request enforcement of the settlement agreement or may request reinstatement of the underlying complaint at the point at which the processing of the complaint was stopped. See Chapter 10, Section II (A)(3) for more information about settlement agreement appeals. Where a complaint is reinstated for further processing, both the agency and the complainant would be returned to the status quo ante at the time that the parties entered into the settlement agreement, which would require the complainant to return any benefits received pursuant to the agreement. See [Christensen v. Dep't. of Homeland Security](#), EEOC Appeal No. 0120081918 (September 17, 2008) (citing [Armour v. Dep't. of Defense](#), EEOC Appeal No. 01965593 (June 24, 1997)).

G. Complainant May Appeal to the Commission for Enforcement of an Agency Final Action

A complainant may file an appeal with the Commission for enforcement of an agency's final action through which the agency has accepted the decision of an Administrative Judge. 29 C.F.R. §§ 1614.504(a) - (c). The complainant first must notify the agency's EEO Director of the agency's alleged noncompliance with the final action within thirty (30) days of when the complainant knew or should have become aware of the agency's noncompliance. If the agency has not responded to the complainant's notice within thirty-five (35) days, the complainant may file an appeal with the Commission. If the agency has responded to the complainant's notice before the complainant files an appeal with the Commission, the complainant must file an appeal within 30 days of his/her receipt of the agency's response.

H. Compliance Reports Required by Commission Appellate Decisions Containing Orders for Corrective Action

The implementation paragraph found in Commission appellate decision orders provides that a compliance report shall be submitted within thirty (30) calendar days of the completion of all ordered corrective action.

The compliance report must contain 1) supporting documentation for all ordered corrective action, and 2) evidence that copies of all submissions in support of compliance were sent to the complainant. See Appendix Q for a Quick Reference Chart describing the documentation required to satisfy compliance with the most common orders found in the Commission appellate decisions.

Compliance reports, like all other agency submissions on appeal, must be submitted in a digital format acceptable to the Commission (see Appendix L) unless an agency has shown good cause why they are unable to submit in a digital format. Submissions may be made using the Commission's electronic submission portal, or by copying the digital file onto a CD and submitted to:

(The designated Compliance Officer)
Office of Federal Operations
Equal Employment Opportunity Commission
Post Office Box 77960
Washington, DC 20013

All submissions must reference the compliance docket number assigned to the compliance action.

X. CIVIL ACTIONS

Filing a civil action terminates Commission processing of an appeal. See 29 C.F.R. § 1614.409.

XI. NOTICE REQUIREMENTS

Agencies are required to notify complainants of their rights to appeal to the Commission and to file a civil action within the specified limitations periods. Agencies must also notify complainants of their statutory right to request court appointment of counsel for representation in connection with the filing of civil actions, which arise from Title VII, GINA, and the Rehabilitation Act. See [Hilliard v. Volcker](#), 659 F.2d 1125 (D.C. Cir. 1981). Therefore, agencies subject to 29 C.F.R. Part 1614 are required to include the appropriate language in every decision on complaints which allege discrimination. Sample language is provided in Chapter 10, Section IV of this Management Directive.

CHAPTER 10
ADMINISTRATIVE APPEALS, CIVIL ACTIONS,
AND APPOINTMENT OF COUNSEL

I. INTRODUCTION

Aggrieved persons must be made aware of administrative and civil action time limitations which potentially may bar an aggrieved person's ability to file appeals and civil actions. All time periods set out in this Management Directive are stated in calendar days unless otherwise indicated. The first day counted is the day after the event from which the time period begins to run and the last day of the period shall be included unless it falls on a Saturday or Sunday or federal holiday, in which case the period shall be extended to include the next business day. All time periods are subject to waiver, estoppel and equitable tolling.

All parties should be aware that attorney's fees may be awarded at the administrative level and beyond under Title VII of the Civil Rights Act of 1964 (see 42 U.S.C. § 2000e-16), Title II of the Genetic Information Nondiscrimination Act of 2008, (42 U.S.C. § 2000ff), and the Rehabilitation Act of 1973, (see 29 U.S.C. § 791), but that attorney's fees are not available at the administrative level under the Age Discrimination in Employment Act, (29 U.S.C. § 633a) or the Equal Pay Act, (29 U.S.C. § 206(d)).

Finally, the agency must advise complainants that they can request that a U.S. District Court appoint counsel for them after they file suit in that court.

II. ADMINISTRATIVE APPEALS

A. Time Limits for Appeals to the Commission - 29 C.F.R. § 1614.402

The following time limits apply for filing an appeal to the Commission:

1. Appeals limits for complainant's appeal of an agency's final action on or dismissal of individual complaints of discrimination: Within thirty (30) days of receipt of the dismissal or final action. See 29 C.F.R. § 1614.401(a).
2. Appeals limits for decisions on class complaints of discrimination under 29 C.F.R. § 1614.402(a):
 - a. a class agent or an agency may appeal an Administrative Judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final action on a class complaint; a class

member may appeal a final action on a claim for individual relief under a class complaint; and

- b. a class member, a class agent, or an agency may appeal a final decision on a petition pursuant to 29 C.F.R. § 1614.204(g)(4). See 29 C.F.R. § 1614.401(c). Appeals filed by class agents or class members described in 29 C.F.R. § 1614.401(c) must be filed within thirty (30) days of receipt of the final action or final decision on a petition pursuant to 29 C.F.R. § 1614.204(g)(4). Appeals filed by agencies on an Administrative Judge's decision accepting or dismissing all or part of a class complaint must be filed within (30) days of receipt of the hearing file and decision. Appeals filed by agencies on an Administrative Judge's decision on the merits of a class complaint must be filed within sixty (60) days of receipt of the hearing file and decision.
3. Appeals limits for allegations of noncompliance with a settlement agreement or an Administrative Judge's decision that has not been appealed to the Commission or been the subject of a civil action under 29 C.F.R. § 1614.504:
 - a. Within thirty (30) days of the complainant's receipt of an agency's determination on an allegation of noncompliance.
 - b. Thirty-five (35) days after the complainant serves the agency with an allegation of noncompliance, if the agency has not issued a determination.

Notice to the EEO Director of noncompliance is a prerequisite to the filing of an appeal alleging breach of a settlement agreement.¹

4. Appeals limits on final grievance decisions in employment discrimination claims where [5 U.S.C. § 7121\(d\)](#) applies to the agency: Within 30 days of receipt of the final decision of an agency, an arbitrator, or the Federal Labor Relations Authority when employment discrimination was raised.

¹ As a prerequisite to the agency determination, 29 C.F.R. § 1614.504(a) provides :

If the complainant believes that the agency has failed to comply with the terms of a settlement agreement or final decision, the complainant shall notify the EEO Director, in writing, of the alleged noncompliance within 30 days of when the complainant knew or should have known of the alleged noncompliance.

5. Limits on petitions for consideration of final decisions of the MSPB on mixed case appeals and mixed case complaints (5 C.F.R. § 1201.151 et seq. and 5 U.S.C. § 7702):²
 - a. Within 30 days of receipt of the final MSPB decision.
 - b. Within 30 days after the decision of a MSPB field office becomes final.
6. Appeals limits for an agency's appeal if the agency's final order following a decision by an Administrative Judge does not fully implement the decision of the Administrative Judge:
 - a. Within forty (40) days of receipt of the Administrative Judge's decision.
 - b. Under 29 C.F.R. § 1614.401(b), an agency is required to file an appeal to the Commission if the agency's final order does not fully implement the decision of the Administrative Judge. The Commission's use of the word "may" in 29 C.F.R. § 1614.401(b) is not inconsistent with this requirement. The agency has the option to appeal if it is not satisfied with the Administrative Judge's decision. If the agency chooses not to appeal, however, it must fully implement the Administrative Judge's decision. In other words, when the agency decides whether it will fully implement the Administrative Judges' decision, it is also deciding whether to appeal; a decision to fully implement means that it is not appealing while a decision not to fully implement means that it is appealing.

B. Appeals to the Commission Regarding Compliance with Settlement Agreements and Final Action - 29 C.F.R. § 1614.504(a)

In addition to providing for appeals to the Commission by complainants alleging breach of a settlement agreement, 29 C.F.R. § 1614.504(a) provides that a complainant may file an appeal alleging agency noncompliance with a final action through which the agency has accepted the decision of an Administrative Judge. The complainant first must present his/her allegations of noncompliance to the EEO Director. The complainant thereafter may appeal:

² The Commission will only accept petitions for review of final MSPB decisions.

1. Within thirty (30) days of the complainant's receipt of an agency's determination on the allegation of noncompliance; or
2. Thirty-five (35) days after the complainant serves the agency with the allegation of noncompliance, if the agency has not issued a determination.

C. Petitions to Consider MSPB Decisions

A petition to the Commission to consider a final MSPB decision on a mixed case appeal or on the appeal of a final decision on a mixed case complaint, under 29 C.F.R. § 1614.303 and 29 C.F.R. § 1614.304, must be in writing and must include:

1. The name and address of the petitioner and of petitioner's representative (if any);
2. A statement of the reasons why the decision of the MSPB is alleged to be incorrect, only with regard to the issues of discrimination based on race, color, religion, sex, national origin, age, disability or genetic information;
3. A copy of the decision issued by the MSPB; and
4. The signature of the petitioner or representative, if any. See Chapter IX Section IV.H of this management directive for information on electronic signatures.

D. Appeal to MSPB on Mixed Case Complaint

At the time the agency issues its final decision on a mixed case complaint the agency shall advise the complainant of the right to appeal the decision to the MSPB (not the Commission) within thirty (30) days of receipt of the agency's final decision provided at 29 C.F.R. § 1614.302(d)(3).

III. CIVIL ACTIONS**A. Time Limits for Civil Actions**

1. Title VII, Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, Rehabilitation Act - 29 C.F.R. § 1614.407.

A complainant who has filed a non-mixed individual complaint, an agent who has filed a class complaint, or a claimant who has filed a claim for individual relief in a class action complaint may file a civil action in an appropriate U.S. District Court:

- a. Within ninety (90) days of receipt of an agency's final action on an individual complaint, or final decision on a class complaint, if no appeal has been filed.
- b. After 180 days from the date of filing an individual or class complaint if no appeal has been filed and no final action on an individual complaint or no final decision on a class complaint has been issued.
- c. Within 90 days after receipt of the Commission's final decision on appeal.
- d. After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

2. The Equal Pay Act - 29 C.F.R. § 1614.408

Regardless of whether the individual complainant pursued any administrative complaint processing, a complainant may file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, within three years of the date of the alleged violation of the Equal Pay Act. Recovery of back wages is limited to two years prior to the date of filing suit, or to three years if the violation is willful; liquidated damages in an amount equal to lost back wages may also be awarded. The filing of an administrative complaint does not toll the time for filing a civil action.

B. Termination of the Commission Processing

Filing a timely civil action under any of these statutes terminates Commission processing of an appeal. See 29 C.F.R. § 1614.409. If a civil action is filed after an appeal has also been filed, the parties are requested to notify the Commission of this event in writing.

C. Mixed Case Complaints

The Civil Rights Act of 1991 did not extend the time limit for filing a civil action in mixed case complaints. See 29 C.F.R. § 1614.310, which sets forth the statutory rights to file a civil action in mixed case complaints.

IV. NOTICE OF COMPLAINANT'S RIGHT TO REQUEST COURT APPOINTMENT OF COUNSEL AND STATEMENT OF RIGHT TO APPEAL

Consistent with the court's holding in [Hilliard v. Volcker](#), 659 F.2d 1125 (D.C. Cir. 1981), it is the Commission's policy to require all federal agencies subject to the Management Directive to inform complainants, in writing, of their statutory right to request court appointment of counsel for representation in connection with the filing of civil actions that arise under Title VII, the Genetic Information Nondiscrimination Act, and the Rehabilitation Act.

In [Hilliard](#), the court held that agencies must inform complainants unsuccessful in the administrative process that, in the event they file a civil action, the court has discretionary authority to appoint counsel for them. A litigant who fails to request counsel should not be penalized because an agency has been remiss in its duty to inform the complainant of the court's authority.

Therefore, all federal agencies subject to 29 C.F.R. Part 1614 **must** include the following language in **every** final action or final decision on complaints which allege discrimination of race, color, religion, sex, national origin, age, disability, genetic information, and/or retaliation:

Within 30 days of your receipt of the final action or final decision (as appropriate), you have the right to appeal this final action or final decision to:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

You also have the right to file a civil action in an appropriate U.S. District Court. If you choose to file a civil action, you may do so

- within 90 days of receipt of this final action or final decision (as appropriate) if no appeal has been filed, or

- within 90 days after receipt of the EEOC's final decision on appeal, or
- after 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

You must name the person who is the official agency head or department head as the defendant. Agency or department means the national organization, and not just the local office, facility, or department in which you might work. Do not name just the agency or department. In your case, you must name _____ as the defendant. [The Administrative Judge or agency must supply the name of the proper person.] You must also state the official title of the agency head or department head. Failure to provide the name or official title of the agency head or department head may result in dismissal of your case.

If you decide to file a civil action, under Title VII or under the Rehabilitation Act, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. **The grant or denial of the request is within the sole discretion of the Court.** Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN NINETY (90) CALENDAR DAYS of the date you receive the final action or final decision (as appropriate) from the agency or the Commission.

CHAPTER 11 REMEDIES

I. INTRODUCTION

In federal EEO law, there is a strong presumption that a complainant who prevails in whole or in part on a claim of discrimination is entitled to full relief which places him/her in the position s/he would have been in absent the agency's discriminatory conduct. See [Albermarle Paper Co. v. Moody](#), 422 U.S. 405, 418-419 (1975).

This Chapter of the Management Directive sets forth guidance for use by agencies and persons seeking remedial relief in a variety of areas, including: back pay, front pay, attorney's fees and costs, awards of compensatory damages, and other forms of equitable relief. This guidance applies only to the federal sector administrative process.

II. NON-DISCRIMINATORY PLACEMENT

When an agency or the Commission finds that an employee of the agency was discriminated against, the agency shall provide the individual with non-discriminatory placement into the position s/he would have occupied absent the discrimination. For cases in which the employee is not selected for a position or promotion due to discrimination, this would include an offer of placement into the position sought, or a substantially equivalent position. See [Carson v. Dep't. of Justice](#), EEOC Appeal No. 0120100078 (Feb. 16, 2012).

The offer should be made retroactive to the date of the selection in question. The individual should receive all step or pay increases and monetary benefits associated with the position. See [Stewart v. Dep't. of Homeland Security](#), EEOC Request No. 0520070124 (Nov. 14, 2011). A "substantially equivalent position" is a position within the same commuting area. [Bakken v. Dep't. of Transportation](#), EEOC Appeal No. 0120093529 (Aug. 8, 2011).

When the relief ordered includes the offer of a position or a promotion, the offer shall be made to the complainant in writing, providing the complainant fifteen (15) days from receipt of the offer to notify the agency of the acceptance or rejection. Failure to respond within the 15-day time limit shall be construed as a declination. Any back pay liability shall cease to accrue with either the actual placement of the complainant into the position in question, or with the date the offer was declined.

In cases involving a discriminatory termination, the agency should offer to reinstate the complainant to his/her former position retroactive to the date of the termination. See [Oni v. Dep't. of the Treasury](#), EEOC Appeal No. 0720100015 (Oct. 11, 2011). The complainant should also receive all applicable benefits and step or pay increases.

In some cases, there is evidence that discrimination was one of multiple motivating factors for an employment action. In these “mixed motive” cases, the agency does not have to offer complainant the position sought if it can demonstrate by clear and convincing evidence that it would have taken the same action even absent the discrimination. See [Montante v. Dep’t. of Transportation](#), EEOC Appeal No. 0120110240 (Nov. 9, 2011), request for reconsideration denied, EEOC Request No. 0520120259 (June 8, 2012). If the agency is able to make this demonstration, the complainant is not entitled to personal relief such as reinstatement, hiring, or promotion. The complainant may still be entitled to declaratory relief, injunctive relief, and/or attorneys’ fees and costs. Id.

When an individual accepts an offer of employment as a remedy for discrimination, s/he shall be deemed to have performed service for the agency during the period he would have served but for the discrimination for all purposes except for meeting service requirements for completion of a required probationary or trial period.

III. BACK PAY

A. Back Pay Issues

When an agency or the Commission finds that an employee of the agency was discriminated against, the agency shall provide the individual with non-discriminatory placement into the position s/he would have occupied absent the discrimination, with back pay computed in the manner prescribed by 5 C.F.R. § 550.805. See 29 C.F.R. § 1614.501(c)(1). The purpose of a back pay award is to restore to the complainant the income he would have otherwise earned but for the discrimination. See [Albemarle Paper Co. v. Moody](#), 422 U.S. at 418-419 (1975); [Davis v. U.S. Postal Service](#), EEOC Petition No. 04900010 (Nov. 29, 1990). A number of discriminatory personnel actions can generate back pay. The most common actions generating back pay are: removals, suspensions, denials of promotions, and failure to hire.

Interest on back pay shall be included in the back pay computation. The back pay computation should also include any applicable step increases or pay differentials. See [Morrow v. U.S. Postal Service](#), EEOC Appeal No. 0720070058 (Nov. 13, 2009) (ordering the agency to provide complainant with a back pay award which included interest, overtime, and night pay differential). Under Title VII, GINA, and the Rehabilitation Act, back pay is limited to two years prior to the date the discrimination complaint was filed.

B. Determining Gross Back Pay

Back pay includes all forms of compensation and reflects fluctuations in working time, overtime rates, penalty overtime, Sunday premium and night work, changing rates of pay, transfers, promotions, and privileges of employment. The Commission also construes “benefits” broadly to include annual leave, sick leave, health insurance, and retirement contributions. [Vereb v. Dep’t. of Justice](#), EEOC Petition No. 04980008 (Feb. 26, 1999); [Holly v. U.S. Postal Service](#), EEOC Petition No. 04A50003 (Nov. 2, 2005).

[T]he Commission recognizes that precise measurement cannot always be used to remedy the wrong inflicted, and therefore, the computation of back pay awards inherently involves some speculation. [Hanns v. U.S. Postal Service](#), EEOC Petition No. 04960030 (September 18, 1997). The Commission has held that uncertainties involved in a back pay determination should be resolved against the agency that has already been found to have committed acts of discrimination. *Id.* See also [Davis v. U.S. Postal Service](#), EEOC Petition No. 04900010 (Nov. 29, 1990); and [Besemer v. U.S. Postal Service](#), EEOC Petition No. 04890005 (Dec. 14, 1989).

C. Overtime or Premium Pay as a Component of Back Pay

Back pay will be required to cover any overtime or premium pay that would have been worked absent discrimination. The parties often disagree over whether overtime would have been worked and to what extent overtime could have been earned. The overtime component of a back pay award should generally be calculated based upon the average amount of overtime worked by similarly situated employees. [Haines v. U.S. Postal Service](#), EEOC Petition No. 04A50018 (Nov. 23, 2005); [Holly v. U.S. Postal Service](#), EEOC Petition No. 04A50003 (Nov. 2, 2005). If the position is unique, such that a comparison with a similarly situated employee is not possible, the agency should calculate overtime based on the actual overtime worked by the person who was selected for the position. See, for example, [Bowman v. U.S. Postal Service](#), EEOC Appeal No. 0120112333 (Oct. 3, 2011), [request for reconsideration denied](#), EEOC Request No. [0520120091](#) (Mar. 16, 2012).

D. Retirement Deductions and Back Pay

The Commission has held that make whole relief requires the agency to make retroactive tax-deferred contributions to the complainant’s retirement account for the relevant period. To the extent complainant would have received agency contributions to a retirement fund as a component of her salary, she is entitled to have her retirement benefits adjusted as part of her back pay award, including sums which the account would have earned during the relevant period. The

agency should provide its calculations of the amount of contributions to the agency's retirement system that both it and complainant would have made during her absence, as well as the earnings which would have accrued. See [Kretschmar v. Dep't. of the Navy](#), EEOC Petition No. 04A40044 (Mar. 25, 2005).

E. Interim Earnings Deducted from Back Pay

If the complainant lost a job or did not receive a position due to discrimination, the complainant has the responsibility of mitigating the harm by looking for other work. [Ghannam v. Agency for International Development](#), EEOC Appeal No. 01990574 (June 22, 2004). Wages earned by the employee while separated from the agency are commonly called "interim wages." The agency should deduct the interim wages earned by the complainant from the amount of back pay owed to the complainant as provided for in Title VII. [42 U.S.C. § 2000e \(5\)\(g\)](#). If the agency believes that the complainant did not do enough to mitigate lost wages, it must prove so by a preponderance of the evidence. See [McNeil v. U.S. Postal Service](#), EEOC Request No. 05960436 (Dec. 9, 1999).

However, income that the complainant could have earned while still holding the position at the agency should not be subtracted or offset from back pay. "Moonlight" employment is employment that the employee could have engaged in even while federally employed. See 5 C.F.R. § 550.805(e)(1). See [Paulk v. U.S. Postal Service](#), EEOC Petition No. 04A10026 (Oct. 4, 2001) (Commission found that petitioner's overtime earnings were earned from his working 65-80 hours per week in a position he acquired during the period subsequent to his termination from the agency, and thus petitioner could not have held both the supplemental job and the job he lost because of discrimination, and therefore, the agency properly offset these earnings from complainant's back pay award).

F. Worker's Compensation Benefits May Be Partially Deductible from Back Pay

A Federal Employees' Compensation Act (FECA) award is meant to compensate for lost wages and/or reparation for physical injury. A claim of back pay against a Federal agency during the same time period covered by a FECA claim would have the potential for a double recovery of back pay. Any portion of a FECA award attributable to lost wages during the back pay period in a discrimination finding will be deducted from the back pay award. The portion of the FECA award that is paid as reparation for physical injuries is not related to wages earned and should not be deducted.

If the agency contends that receipt of workers' compensation would result in double recovery, the agency must determine what portion of the FECA benefits, if any, applied to back pay, leave and other benefits, and what portion of

complainant's FECA benefits applied to reparation for physical injuries. [See Ulloa v. U.S. Postal Service](#), EEOC Petition No. 04A30025 (Aug. 3, 2004).

G. Availability for Work – Prerequisite for Receipt of Back Pay

The applicable regulations provide that the amount of back pay awarded shall be reduced by the amounts earnable with reasonable diligence by the person discriminated against. Thus, the complainant has a duty to mitigate or lessen damages by making a reasonable good faith effort to find other employment. This means that the complainant must seek a substantially equivalent position, that is, a position that affords virtually identical compensation, job responsibilities, working conditions, status, and promotional opportunities as the position he was discriminatorily denied. [See Knott v. U.S. Postal Service](#), EEOC Appeal No. 0720100049 (July 5, 2010).

As a general rule, a complainant must be ready, willing, and able to work during the period of back pay recovery in order to receive back pay. The Commission has stated that if an agency can present persuasive evidence that complainant was not able to work during the back pay period, back pay would not be awarded; however, the agency has the burden of proof. [Morman v. Dep't. of Defense \(Defense Commissary Agency\)](#), EEOC Petition No. 04A10006 (July 31, 2002). The back pay regulation 5 C.F.R. § 550.805(c) provides that periods of unavailability may not be included in the back pay period unless such periods of time are the result of an illness or injury related to an unjustified or unwarranted personnel action. When a complainant receives workers' compensation due to an agency's failure to provide reasonable accommodation, this does not preclude a back pay award. The receipt of workers' compensation benefits does not indicate that a person was unable to work during the back pay period. [See McClendon v. U.S. Postal Service](#), EEOC Petition No. 04960013 (May 22, 1997).

H. Unemployment Compensation Not Deducted from Back Pay – the Collateral Source Rule

Unemployment compensation is an interim source of income, but it is a collateral source in the sense that it comes from the state – not the federal employer. An employer cannot set off or mitigate its damages through a collateral source – in this case the state's payment of unemployment compensation even though the employer might have contributed to the source.

When a back payment is made where unemployment had been received, in theory the unemployment compensation represents an overpayment from the state and is due to the state. [See Morra-Morrison v. U.S. Postal Service](#), EEOC Petition No. 04980023 (June 2, 1999). This process of recoupment is generally a matter between the complainant and the state.

I. Tax Consequences of a Lump Sum Payment of Back Pay

The Commission has recognized that an agency is liable for any increased tax liability resulting from receipt of a lump sum of back pay in a single tax year. When an individual receives back pay as a lump sum payment, s/he is entitled to a tax offset payment for the tax year in which she received the payment. Additionally, the individual will have the burden of establishing the amount of his/her increased federal income tax liability to the agency. See [Mohar v. U.S. Postal Service](#), EEOC Appeal No. 0720100019 (Aug. 29, 2011); [Teresita Lorenzo v. Dep't. of Defense Education Activity](#), EEOC Petition No. 01A61644 (September 29, 2005); [Warren Goetze v. Dep't. of the Navy](#), EEO Appeal No. 01991530 (Aug. 23, 2001).

J. Liquidated Damages (ADEA and EPA only)

Liquidated damages in Fair Labor Standards Act cases are generally monetary awards equal to, and in addition to, the back pay due to the complainant when a violation is found to be willful or in reckless disregard of the statutes.

In Equal Pay Act cases, willfulness is not a required factor for liquidated damages. Such damages are available for a violation of the EPA unless the agency can prove that it acted in “good faith” and reasonably believed that its actions did not violate the EPA. A finding of willfulness under the EPA, however, may extend the limitations period on back pay from two (2) years to three (3) years.

Since an EPA claim may also be brought as a sex-based wage discrimination claim under Title VII, compensatory damages may also be available if the claim is brought under both statutes.

While liquidated damages for willful violations of the ADEA are available in the private sector under 29 U.S.C. Sec. 626(b), they are not available under the federal sector provisions at Sec. 633a (b). See [Jacobson v. Shalala](#), EEO Request No. 05930689, (June 2, 1994); [Falks v. Rubin](#), EEOC Request No. 05960250, (September 6, 1996); [Amaro v. Potter](#), EEOC Appeal No. 0120020929, (May 29, 2003).

K. Restoration of Leave

Where there has been a finding of discrimination, the complainant is entitled to back pay for time lost from work during the applicable periods, as well as the restoration of any leave used because of the agency’s discriminatory actions. [Cox v. Social Security Administration](#), EEOC Appeal No. 0720050055 (Dec. 24, 2009). For example, the restoration of leave taken for purposes of avoiding or

recovering from a discriminatory hostile work environment is a valid component of equitable relief. See [Burton v. Dep't. of Justice](#), EEOC Appeal No. 0720090046 (June 9, 2011); see also [Lamb v. Social Security Administration](#), EEOC Appeal No. 0120103232 (Mar. 21, 2012) (leave restoration ordered where denial of reasonable accommodation resulted in leave usage); [Complainant v. Dep't. of Defense](#), EEOC Appeal No. 0120084008 (June 6, 2014) (leave restoration ordered where leave used in lieu of improperly denied official time).

IV. FRONT PAY

Front pay is an equitable remedy that compensates an individual when reinstatement is not possible in certain limited circumstances. The Commission has held that front pay may be awarded in lieu of reinstatement when: (1) no position is available; (2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. [Brinkley v. U.S. Postal Service](#), EEOC Request No. 05980429 (Aug. 12, 1999). The fact that front pay is awarded in lieu of reinstatement implies that the complainant is able to work but cannot do so because of circumstances external to the complainant. See [Cook v. U.S. Postal Service](#), EEOC Appeal No. 01950027 (July 17, 1998).

The Commission has held that front pay is an equitable remedy to be awarded for a reasonable future period required for the victim of discrimination to reestablish his rightful place in the job market. See [Deidra Brown-Fleming v. Dep't. of Justice](#), EEOC Petition No. 0420080016 (Oct. 28, 2010).

V. OTHER FORMS OF EQUITABLE RELIEF

As appropriate, the agency shall also:

1. Cancel an unwarranted personnel action and restore the employee to the status s/he occupied prior to the discrimination;
2. Expunge any adverse materials relating to the discriminatory employment practice from the agency's records;¹ and

¹ See [Sipriano v. Dep't. of Homeland Security](#), EEOC Appeal No. 0120103167 (Jan. 20, 2011), request for reconsideration denied, EEOC Request No. [0520110313](#) (May 12, 2011) (ordering the agency to expunge all documentation relating to a discriminatory termination from complainant's records); [Farrington v. Dep't. of Homeland Security](#), EEOC Appeal No. 0720090011 (Jan. 19, 2011), request for reconsideration denied, EEOC Request No. [0520110295](#) (May 12, 2011) (ordering the agency to expunge evaluation reports and documents referencing a discriminatory investigation).

3. Provide the individual with a full opportunity to participate in the employee benefit that was denied - for example, training, preferential work assignments, or overtime scheduling.²

When the finding of discrimination involves a performance appraisal, the appropriate relief should include raising the rating to that which the individual would have received absent the discrimination. [McKenzie v. Dep't. of Justice](#), EEOC Appeal No. 0120100034 (July 7, 2011); [Hairston v. Dep't. of Education](#), EEOC Appeal No. 0120071308 (Apr. 15, 2010). In addition, the individual is entitled to all benefits and awards that s/he would have received if she had achieved the higher performance appraisal rating. [Cook v. Dep't. of Labor](#), EEOC Appeal No. 0720080045 (Feb. 22, 2010).

It is also appropriate to order training for agency personnel found to have engaged in discrimination, and to consider taking disciplinary action against those officials who engaged in the discrimination.³ See [James v. Dep't. of Agriculture](#), EEOC Appeal No. 0120073831 (September 22, 2009), request for reconsideration denied, EEOC Request No. [0520100086](#) (Mar. 22, 2010) (ordering the agency to provide the Selecting Official who discriminated against complainant 16 hours of EEO training and to consider taking disciplinary action against the official). The Commission does not consider training to be “discipline.” See [Morrow v. U.S. Postal Service](#), EEOC Appeal No. 0720070058 (Nov. 13, 2009).

For example, in [Burton v. Dep't. of Justice](#), EEOC Appeal No. 0720090046 (June 9, 2011), one of the responsible management officials found to have engaged in unlawful discrimination and retaliation was a high-level management official who set the leadership tone for the entire facility, and, thus, requiring five hours of EEO training for all facility management and supervisory staff was appropriate. See also [Kitson v. Dep't. of Justice](#), EEOC Appeal No. 0720100052 (Feb. 15, 2011), request for reconsideration denied, EEOC Request No. [0520110312](#) (June 10, 2011) (ordering the agency to provide training for upper-level employees at an agency facility following a finding of discriminatory non-selection); [Wagner v. Dep't. of Transportation](#), EEOC Appeal No. 0120103125 (Dec. 1, 2010) (ordering the agency to provide EEO training to all employees at an agency facility following a finding that agency managers and employees subjected complainant to a hostile work environment).

The Commission has also found that, in cases involving discriminatory policies or practices, the appropriate relief includes ordering the agency to “cease and desist” from adhering to that policy or practice. For example, in [Smith v. Dep't. of the Navy](#), EEOC

² See 29 C.F.R. § 1614.501(c).

³ In fact, the Commission strongly urges that agencies include consideration of disciplinary action in all agency orders on findings of intentional discrimination. In certain circumstances, training may be ordered for additional agency managers and staff.

Appeal No. 0120082983 (Feb. 16, 2010), request for reconsideration denied, EEOC Request No. [0520100287](#) (July 9, 2010), the Commission ordered the agency to cease and desist from requiring that all contact with EEO Counselors be arranged by management officials.

Following a finding of discrimination, the agency should take steps to ensure that the same type of action does not recur. In Cheeks v. Dep't. of the Army, EEOC Appeal No. 0120091345 (Feb. 1, 2012), the agency was found to have engaged in racial harassment. The agency was ordered to take all necessary steps to ensure that complainant had no contact with the supervisor responsible for the harassment, as well as to provide complainant with a designated management official to whom he could report any subsequent acts of harassment. See also Ighile v. Dep't. of Justice, EEOC Appeal No. 0720110010 (Apr. 13, 2012) (ordering the agency to cease and desist from all hostile conduct directed to complainant, and take appropriate action to ensure that his co-workers cease and desist from any hostile conduct).

VI. ATTORNEY'S FEES AND COSTS

A. Introduction

Attorney's fees and costs shall be awarded in accordance with 29 C.F.R. § 1614.501(e).

In federal EEO law, there is a strong presumption that a complainant who prevails in whole or in part on a claim of discrimination is entitled to an award of attorney's fees and costs. More specifically, complainants who prevail on claims alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, and the Rehabilitation Act of 1973, as amended, are presumptively entitled to an award of attorney's fees and costs, unless special circumstances render such an award unjust. 29 C.F.R. § 1614.501(e)(1). (Complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended, are not entitled to attorney's fees at the administrative level.) Only where a Title VII, GINA, or Rehabilitation Act complainant rejects an offer of resolution made in accordance with 29 C.F.R. § 1614.109(c) and does not obtain more relief than the agency had offered, or in the rarest of other circumstances, might an agency limit or deny an award of fees.

B. Determination of Prevailing Party Status

1. A "prevailing party," within the meaning of Section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), is a complainant who has succeeded on any significant issue that achieved some of the benefit the complainant sought in filing the complaint. Texas State Teachers Ass'n v. Garland I.S.D., 489

U.S. 782 (1989). The Commission has relied on a two-part test set forth in [Miller v. Staats](#), 706 F.2d 336 (D.C. Cir. 1983), for determining whether a complainant is a prevailing party. [Baldwin v. Dep't. of Health & Human Services](#), EEOC Request No. 05910016 (Apr. 12, 1991). To satisfy the first part of the test, the complainant must have substantially received the relief sought. *Id.* To satisfy the second part of the test, there must be a determination that the complaint was a catalyst motivating the agency to provide the relief. *Id.* (citing [Miller](#), 706 F.2d at 341). A purely technical or *de minimis* success is insufficient to confer “prevailing party” status. [Texas State Teachers Ass’n](#), at 792.

2. The touchstone is whether the actual relief on the merits materially alters the legal relationship between the parties by modifying the agency’s behavior in a way that directly benefits the complainant. [Farrar v. Hobby](#), 506 U.S. 103 (1992); [Bragg v. Dep’t. of the Navy](#), EEOC Appeal No. 01945699 (Mar. 7, 1996). Even an award of nominal monetary damages may be sufficient to meet this standard. [Farrar](#). Monetary relief is not required; non-monetary relief such as reinstatement or a higher performance rating is sufficient. *Id.*
3. An attorney who represents himself is not entitled to an award of fees. [Kay v. Ehrler](#), 499 U.S. 432 (1991). Neither a non-attorney nor a federal employee (including attorneys) who represents a complainant is entitled to an award of fees. 29 C.F.R. § 1614.501(e)(1)(iii).

C. Presumption of Entitlement

1. A prevailing complainant is presumptively entitled to fees and costs unless special circumstances render such an award unjust. 29 C.F.R. § 1614.501(e)(1)(i); [New York Gaslight Club, Inc. v. Carey](#), 447 U.S. 54 (1983); [Thomas v. Dep’t. of State](#), EEOC Appeal No. 01932717 (June 10, 1994). Special circumstances should be construed narrowly. The following arguments are not sufficient to show special circumstances:
 - a. the complainant did not need an attorney;
 - b. the complainant’s attorney worked for a public interest organization;
 - c. the complainant’s attorney accepted the case pro bono;
 - d. the complainant’s attorney was paid from some private fee agreement;
 - e. the complainant was able to pay the costs of the case;

- f. the agency acted in good faith;
- g. the agency took prompt action in remedying the discrimination;
- h. the financial burden of any fee would fall to the taxpayers;
- i. the agency has limited funds.

See [Blanchard v. Bergeron](#), 489 U.S. 87 (1989); [Roe v. Cheyenne Mountain Conference Resort, Inc.](#), 124 F.3d 1221 (10th Cir. 1997); [Jones v. Wilkinson](#), 800 F.2d 989 (10th Cir. 1986); [Fields v. City of Tarpon Springs](#), 721 F.2d 318 (11th Cir. 1983); [Copeland v. Marshall](#), 641 F.2d 880 (D.C. Cir. 1980); see also [Wise v. Dep't. of Veterans Affairs](#), EEOC Request No. 05920056 (Apr. 1, 1992).

2. Agencies are not required to pay for attorney's fees for services rendered during the pre-complaint process unless an Administrative Judge issues a decision finding discrimination, the agency issues a final order that does not implement the decision, and the Commission upholds the Administrative Judge's decision on appeal. If the agency agrees to fully implement the Administrative Judge's decision, it cannot be compelled to pay attorney's fees for fees incurred during the pre-complaint process, except that fees may be recovered for a reasonable period of time for services performed in reaching the decision whether to represent the complainant. 29 C.F.R. § 1614.501(e)(1)(iv). The agency and the complainant can agree, however, that the agency will pay attorney's fees for pre-complaint process representation. Id.
3. No attorney's fees may be awarded under the Age Discrimination in Employment Act, see [Coomer v. Social Security Administration](#), EEOC Appeal No. 0720120010 (Oct. 12, 2012), or Equal Pay Act, see [Jacobsen v. Dep't. of the Navy](#), EEOC Appeal Nos. 0720100046 and 0720100047 (September 7, 2012), for services performed at the administrative level. [Lowenstein v. Baldrige](#), 38 Fair Empl. Prac. Cas. (BNA) 466 (D.D.C. 1985); 29 C.F.R. § 1614.501(e)(1).

D. Awards to Prevailing Parties in Negotiated Settlements

1. A complainant who prevails through a negotiated settlement is entitled to attorney's fees and costs under the same standards as any other prevailing party. [Maher v. Gagne](#), 448 U.S. 122 (1980); [Copeland v. Marshall](#), 641 F.2d 880 (D.C. Cir. 1980); [EEOC v. Madison Community Unit Sch. Dist. 12](#), 818 F.2d 577 (7th Cir. 1987); [Cerny v. Dep't. of the Navy](#), EEOC Request No. 05930899 (Oct. 19, 1994). A settlement agreement that fails, however, to preserve the issue of fees and costs will operate as an implicit waiver of fees and costs. [Wakefield v. Matthews](#), 852 F.2d 482 (9th Cir. 1988); [Elmore v. Shuler](#), 787 F.2d 601 (D.C. Cir. 1986). The Commission strongly encourages parties to resolve fee and cost issues by negotiated settlement.⁴
2. The Administrative Judge will not review a negotiated fee agreement for fairness or reasonableness, except in class cases. [Foster v. Boise-Cascade, Inc.](#), 577 F.2d 335 (5th Cir.) (per curiam), [reh'g denied](#), 581 F.2d 267 (5th Cir. 1978); [Jones v. Amalgamated Warbasse Houses, Inc.](#), 721 F.2d 881 (2d Cir. 1983), [cert. denied](#), 466 U.S. 944 (1984). In class cases, the Administrative Judge should review the agreement to ensure that the negotiated fee is fair and reasonable to all parties.

E. Awards of Costs and Fees for Expert and Non-Lawyer Services

1. A prevailing complainant is entitled to recovery of his/her costs. Costs include those costs authorized by 28 U.S.C. § 1920. 29 C.F.R. § 1614.501(e)(2)(ii)(C). These include: witness fees; transcript costs; and printing and copying costs. In addition, reasonable out-of-pocket expenses may include all costs incurred by the attorney that are normally charged to a fee-paying client in the normal course of providing representation. [Hafiz v. Dep't. of Defense](#), EEOC Petition No. 04960021 (July 11, 1997). These costs may include such items as mileage, postage, telephone calls, and photocopying.
2. A prevailing complainant is entitled to expert fees as part of recoverable attorney's fees. 42 U.S.C. § 1988. The fee is not limited to per diem expenditures, but includes all expenses incurred in connection with the

⁴ Where the parties enter into a settlement agreement that provides for but does not quantify the amount of attorney's fees and costs, the attorney should submit his/her statement of fees and costs and supporting documentation to the agency for determination of the amount due. The agency should issue a decision on fees within 60 days of receipt of the statement and supporting documentation. [See](#) 29 C.F.R. § 1614.501(e)(2)(ii)(A). If the complainant disputes the amount awarded, s/he may file an appeal with the Commission.

retention of an expert. Id. Recovery is generally limited to testifying experts, but fees may be awarded for non-testifying experts if the complainant can show that the expert's services were reasonably necessary to the case.

3. A prevailing complainant is entitled to compensation for the work of law clerks, paralegals, and law students under the supervision of members of the bar, at market rates, 29 C.F.R. § 1614.501(e)(1)(iii), but not for clerical services. [Missouri v. Jenkins](#), 491 U.S. 274 (1989).
4. Reasonable costs incurred directly by a prevailing complainant (for example, one who is unrepresented or who is represented by a non-lawyer) are compensable. Hafiz, supra. Costs must be proved in the same manner as fees are, and the complainant must provide documentation, such as bills or receipts.
5. Witness fees shall be awarded in accordance with 28 U.S.C. § 1821, except that no award shall be made for a federal employee who is in a duty status when made available as a witness. 29 C.F.R. § 1614.501(e)(2)(iii).

F. Computation of Attorney's Fees

1. Attorney's fees will be computed by determining the "lodestar." The "lodestar" is the number of hours reasonably expended multiplied by a reasonable hourly rate. [Hensley v. Eckerhart](#), 461 U.S. 424, 434 (1983). By regulation, the Commission uses the same basis for calculating the amount of attorney's fees. 29 C.F.R. § 1614.501(e)(2)(ii)(B).
 - a. All hours reasonably spent in processing the complaint are compensable. Fees shall be paid for services performed by an attorney after the filing of a written complaint, provided that the attorney provides reasonable notice of representation to the agency, Administrative Judge, or Commission, except that fees are allowable for a reasonable period of time prior to the notification of representation for any services performed in reaching a determination to represent the complainant. 29 C.F.R. § 1614.501(e)(1)(iv).
 - b. Fees for services rendered during the pre-complaint process may be awarded only under the circumstances set forth above in Section III.B. See 29 C.F.R. § 1614.501(e)(1)(iv).
 - c. An attorney is eligible for work performed at the appeals stage for an award of fees, provided the complainant prevails at this stage.

- d. The number of hours should not include excessive, redundant, or otherwise unnecessary hours. [Hensley](#), 461 U.S. at 434; [Bernard v. Dep't. of Veterans Affairs](#), EEOC Appeal No. 01966861 (July 17, 1998). The presence of multiple counsel at hearing or deposition may be considered duplicative in certain situations, such as where one or more counsel had little or no participation or where the presence of multiple counsel served to delay or prolong the hearing or deposition. [Hodge v. Dep't. of Transportation](#), EEOC Request No. 05920057 (Apr. 23, 1992). The presence of multiple counsel is not necessarily duplicative, however, and is often justifiable. Time spent on clearly meritless arguments or motions, and time spent on unnecessarily uncooperative or contentious conduct may be deducted. [Luciano v. Olsten Corp.](#), 109 F.3d 111 (2d Cir. 1997); [Clanton v. Allied Chemical Corp.](#), 416 F. Supp. 39 (E.D. Va. 1976).
- e. A reasonable hourly rate is a rate based on “prevailing market rates in the relevant community” for attorneys of similar experience in similar cases. [Cooley v. Dep't. of Veterans Affairs](#), EEOC Request No. 05960748 (July 30, 1998) (quoting [Blum v. Stenson](#), 465 U.S. 886 (1984)). A higher rate for time spent at hearing may be reasonable if trial work would command a higher rate under prevailing community standards. Where multiple attorneys have worked on the case, the rate for each attorney should be determined separately. The limits on hourly rates contained in the Equal Access to Justice Act are not applicable.
- f. The applicable rate for fee awards to public interest attorneys is the prevailing hourly rate for the community in general. [Hodge v. Dep't. of Transportation](#), EEOC Request No. 05920057 (Apr. 23, 1992). In [Save Our Cumberland Mountains, Inc. v. Hodel](#), 857 F.2d 1516 (D.C. Cir. 1988), the court held that the prevailing market rate should also be used to determine fee awards to private, for-profit attorneys who represent certain clients at reduced rates, which reflect "non-economic" goals. See also [Cooley v. Dep't. of Veterans Administration](#), EEOC Request No. 05960748 (July 30, 1998); [Hatfield v. Dep't. of the Navy](#), EEOC Appeal No. 01892909 (Dec. 12, 1989).
- g. The hours spent on unsuccessful claims should be excluded in considering the amount of a reasonable fee only where the unsuccessful claims are distinct in all respects from the successful claims. [Hensley v. Eckerhart](#), 461 U.S. 424 (1983).

- h. The degree of success is an important factor in calculating an award of attorney's fees. [Farrar v. Hobby](#), 506 U.S. 103 (1992). In determining the degree of success, the relief obtained (including both monetary and equitable relief) should be considered in light of the complainant's goals. [City of Riverside v. Rivera](#), 477 U.S. 561 (1986); [Cullins v. Georgia Department of Transportation](#), 29 F.3d 1489 (1994). Where the complainant achieved only limited success, the complainant should receive only the amount of fees that is reasonable in relation to the results obtained. [Hensley v. Eckerhart](#), 461 U.S. 424 (1983); [Cerny v. Dep't. of the Navy](#), EEOC Request No. 05930899 (Oct. 19, 1994). However, a reasonable fee may not be determined by mathematical formula based on monetary relief obtained. [Riverside](#) at 563; [Cullins](#) at 1493. The determination of the degree of success should be made on a case-by-case basis. In many cases, an award of equitable relief only or a small award of monetary damages may reflect a high degree of success. Failure to obtain the maximum damages allowable or a large monetary award generally does not reflect limited success.
- 2. There is a strong presumption that the lodestar represents the reasonable fee. 29 C.F.R. § 1614.501(e)(2)(ii)(B). In limited circumstances, the lodestar figure may be adjusted upward or downward, taking into account the degree of success, the quality of representation, and long delay caused by the agency. The lodestar may be adjusted only under the circumstances described in this subpart.
 - a. An award of attorney's fees may be enhanced in cases of exceptional success. The complainant must show that such an enhancement is necessary to determine a reasonable fee. [City of Burlington v. Dague](#), 505 U.S. 557 (1992). Conversely, a fee award may be reduced in cases of limited success. [Texas State Teachers Ass'n v. Garland I.S.D.](#), 489 U.S. 782 (1989). However, there is no requirement that fee awards be proportional to the amount of monetary damages awarded. [City of Riverside v. Rivera](#), 477 U.S. 561 (1986).
 - b. An award of attorney's fees may be enhanced where the quality of representation is exceptional. [McKenzie v. Kennickell](#), 875 F.2d 330 (D.C. Cir. 1989). Conversely, the award of attorney's fees may be reduced where the quality of representation was poor, the attorney's conduct resulted in undue delay or obstruction of the process, or where settlement likely could have been reached much earlier but for the attorney's conduct. [Lanasa v. City of New](#)

Orleans, 619 F. Supp. 39 (E.D. La. 1985); Barrett v. Kalinowski, 458 F. Supp. 689 (M.D. Pa. 1978).

- c. The lodestar may not be enhanced to compensate for the risk of non-payment, risk of losing the case, or difficulty finding counsel. City of Burlington v. Dague, 505 U.S. 557 (1992).
 - d. A lodestar may be adjusted to compensate for a long delay where the delay is caused by the agency. Pennsylvania v. Delaware Valley Citizens' Council, 483 U.S. 711 (1987).
 - e. If the Administrative Judge or agency determines that an adjustment to the lodestar is appropriate, the Administrative Judge or agency may calculate the adjustment by either adding or subtracting a lump sum from the lodestar figure or by adding or subtracting a percentage of the lodestar. The Administrative Judge or agency has discretion to determine the amount of the adjustment. Normally, the adjustment should be no more or less than 75% of the lodestar figure. The Administrative Judge or agency must provide a detailed written explanation of why the adjustment was made, and what factors supported the adjustment. Coutin v. Young & Rubicam Puerto Rico, Inc., 124 F.3d 331 (1st Cir. 1997).
 - f. The party seeking to adjust the lodestar, either up or down, has the burden of justifying the deviation. Copeland v. Marshall, 641 F.2d 880, 892 (D.C. Cir. 1980); Brown v. Dep't. of Commerce, EEOC Appeal No. 01944999 (May 17, 1996).
3. Where a complainant rejects an offer of resolution and the final decision is not more favorable than the offer, attorney's fees and costs incurred after the expiration of the thirty (30)-day acceptance period are not compensable. 29 C.F.R. § 1614.109(c)(3). This regulation further provides that an Administrative Judge may award attorney's fees and costs despite the complainant's failure to accept an offer of resolution where "the interests of justice would not be served" by a denial of fees. An example of when fees would be appropriate is where the complainant received an offer of resolution, but was informed by a responsible agency official that the agency would not comply in good faith with the offer (for example, would unreasonably delay implementation of the relief offered). A complainant who rejected the offer for that reason, and who obtained less relief than was contained in the offer of resolution, would not be denied attorney's fees in this situation.

G. Contents of Fee Application and Procedure for Determination

1. When the decision-making authority, that is, the agency, an Administrative Judge, or the Commission, issues a decision finding discrimination, the decision normally should provide, under the standards set forth above, for the complainant's entitlement to attorney's fees and costs. The complainant's attorney then must submit a verified statement of attorney's fees (including expert witness fees) and other costs, as appropriate, to the agency or Administrative Judge within thirty (30) days of receipt of the decision and must submit a copy of the statement to the agency. 29 C.F.R. § 1614.501(e)(2)(i).⁵

A statement of attorney's fees and costs must be accompanied by an affidavit executed by the attorney of record itemizing the attorney's charges for legal services. A verified statement of fees and costs shall include the following:

- a. a list of services rendered itemized by date, number of hours, detailed summary of the task, rate, and attorney's name;
- b. documentary evidence of reasonableness of hours, such as contemporaneous time records, billing records, or a reasonably accurate substantial reconstruction of time records;
- c. documentary evidence of reasonableness of rate, such as an affidavit stating that the requested rate is the attorney's normal billing rate, a detailed affidavit of another attorney in the community familiar with prevailing community rates for attorneys of comparable experience and expertise, a resume, a list of cases handled, or a list of comparable cases where a similar rate was accepted; and
- d. documentation of costs.

[National Ass'n of Concerned Veterans v. Secretary of Defense](#), 675 F.2d 1319 (D.C. Cir. 1982). A fee award may be reduced for failure to provide adequate documentation. If seeking an adjustment to the lodestar figure, the fee application shall clearly identify the specific circumstances of the case that support the requested adjustment. Id.

⁵ Where the Commission finds discrimination in a case in which the agency takes final action under 29 C.F.R. § 1614.110(a), the Commission will remand the case to the Administrative Judge for a determination of attorney's fees. Where the decision on appeal originates from a case handled exclusively by the agency (that is, where the complainant elected a final agency decision under 29 C.F.R. § 1614.110(b)), the Commission will remand the case to the agency for a determination of attorney's fees.

2. The agency may respond to the statement of fees and costs within 30 days of its receipt. If the agency contests the fee request, it must provide equally detailed documentation in support of its arguments. Id.
3. Discovery into the reasonableness of the hours or rate is permissible, but discouraged. The Administrative Judge has discretion to grant or deny permission to conduct discovery by interrogatory or document request.
4. The Administrative Judge or agency will issue a decision determining the amount of attorney's fees or costs due within 60 days of receipt of the statement and affidavit. 29 C.F.R. § 1614.501(e)(2)(ii)(A). The decision should provide a written explanation of any award of fees and costs, including, as appropriate, findings of fact, analysis, and legal conclusions. 29 C.F.R. § 1614.501(e)(2)(ii)(A). The decision must include a notice of right to appeal to the Commission.
5. The Commission encourages the parties to resolve fee and cost issues by negotiated settlement during the 30-day period for filing a fee petition. The Administrative Judge will not review a negotiated fee agreement for fairness or reasonableness, except in class cases.
6. If the Administrative Judge decides to bifurcate the liability and damages determinations in a case, the decision on liability should provide for entitlement to attorney's fees and the subsequent decision on damages should also include the determination of the amount of the award of fees and costs. The complainant's attorney should be directed to submit the statement of fees and costs within 30 days of receipt of the decision finding liability. The attorney may submit a supplemental petition for fees incurred during the damages phase of the case.

H. Miscellaneous Issues

1. An Administrative Judge may award interim fees pendente lite⁶ where the complainant has prevailed on an important non-procedural allegation of discrimination in the course of the case. [Hanrahan v. Hampton](#), 446 U.S. 754 (1980); [Trout v. Garrett](#), 891 F.2d 332 (D.C. Cir. 1989). However, interim awards should be granted only under special circumstances, such as where a complainant's attorney has invested substantial time and resources into a case over a long period of time.

⁶ Pendente lite is Latin for awaiting the litigation (lawsuit). It is applied to court orders (such as temporary child support) which are in effect until the case is tried, or rights that cannot be enforced until the lawsuit is over.

2. A prevailing complainant is entitled to an award of fees for time spent on a fee claim including time spent defending the award on appeal. [Southeast Legal Defense Group v. Adams](#), 657 F.2d 1118 (9th Cir. 1981); [Lund v. Affleck](#), 587 F.2d 75 (1st Cir. 1978). However, the Administrative Judge may reduce or eliminate fees for time spent on litigating the fee award where fee claims are exorbitant or the time devoted to preparing a fee claim is excessive. [Gagne v. Maher](#), 594 F.2d 336 (2d Cir. 1979), *aff'd*, [448 U.S. 122](#) (1980). A reasonableness standard applies. [Black v. Dep't. of the Army](#), EEOC Request No. 05960390 (Dec. 9, 1998).
3. Even absent a finding of discrimination, the Administrative Judge has authority to impose attorney's fees and costs as an appropriate sanction for refusal to obey discovery or other orders. 29 C.F.R. § 1614.109(f)(3)(v). For example, a complainant may be entitled to attorney's fees when the agency fails without good cause shown to respond to discovery requests, [Shine v. U.S. Postal Service](#), EEOC Appeal No. 01972201 (Dec. 12, 1998), or falsifies documents or testimony, [Wichy v. Dep't. of the Air Force](#), EEOC Appeal No. 01962972 (September 25, 1998). Fees and costs may be awarded for work associated with efforts to secure discovery compliance, even when the complainant does not prevail on the merits. [Stull v. Dep't. of Justice](#), EEOC Appeal No. 01942827 (June 15, 1995).
4. Attorney's fees are available for work pursuing claim for damages. [Rivera v. National Aeronautics & Space Administration](#), EEOC Appeal No. 0120111416 (July 19, 2011).

VII. COMPENSATORY DAMAGES

Compensatory damages are awarded to compensate a complaining party for losses or suffering inflicted due to the discriminatory act or conduct. See *Carey v. Piphus* 435 U.S. 247, 254 (1978)(purpose of damages is to “compensate persons for injuries caused by the deprivation of constitutional rights”). Compensatory damages “may be had for any proximate consequences which can be established with requisite certainty.” 22 Am Jur 2d Damages § 45 (1965) Compensatory damages include damages for past pecuniary loss (out-of-pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). See [Goetze v. Dep’t. of the Navy](#), EEOC Appeal No. 01991530 (Aug. 23, 2001).

A. Entitlement to Seek Compensatory Damages

1. Pursuant to Section 102(a) of the Civil Rights Act of 1991, a complainant who establishes his/her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (that is, out of pocket expenses) and non-pecuniary losses (for example, pain and suffering, mental anguish). 42 U.S.C. § 1981a(b)(3). For an employer with more than 500 employees, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. Id. Complainants prevailing on claims under the Age Discrimination in Employment Act of 1967, as amended, and the Equal Pay Act of 1963, as amended, are not entitled to compensatory damages at the administrative level.
2. Under Section 102 of the Civil Rights Act of 1991, compensatory damages may be awarded for past pecuniary losses, future pecuniary losses, and non-pecuniary losses that are directly or proximately caused by the agency’s discriminatory conduct. However, Section 102 prohibits such awards for an employment practice that is unlawful because of its disparate impact. [Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992).
3. However, Section 102 also provides that an agency is not liable for compensatory damages in cases of disability discrimination where the agency demonstrates that it made a good faith effort to accommodate the complainant’s disability.

An agency can demonstrate a good faith effort by proving that it consulted with the individual with a disability and attempted to identify and make a reasonable accommodation. [Schauer v. Social Security Administration](#), EEOC Appeal No. 01970854 (July 12, 2001); compare [Luellen v. U.S. Postal Service](#), EEOC Appeal No. 01951340 (Dec. 23, 1996) (agency demonstrated good faith effort where it consulted with complainant and

her physicians in attempting to identify a reasonable accommodation, despite the fact that these efforts were not sufficient to afford complainant a reasonable accommodation); [Morris v. Dep't. of Defense](#), EEOC Appeal No. 01962984 (Oct. 1, 1998) (agency did not make a good faith effort to identify and provide a reasonable accommodation for complainant where it did not make any attempt to find an available office position for complainant in spite of his repeated requests.).

4. The Commission may set out the amount of compensatory damages to be awarded by the respondent agency in its decisions. Alternatively, the Commission may remand the matter to the agency for a determination of the amount of compensatory damages.

B. Legal Principles

1. Non-Pecuniary Damages

Non-pecuniary damages are losses that are not subject to precise quantification including emotional pain and injury to character, professional standing, and reputation. Compensatory damages are awarded to compensate for losses or suffering inflicted due to discrimination. Punitive damages are not available against the federal government.

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in the Commission Notice No. 915.002, [Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992). Briefly stated, the complainant must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Id.* at 11-12, 14; [Rivera v. Dep't. of the Navy](#), EEOC Appeal No. 01934157 (July 22, 1994).

The amount awarded should reflect the extent to which the agency's discriminatory action directly or proximately caused harm to the complainant and the extent to which other factors may have played a part. [The Commission Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992) at 11-12. The amount of non-pecuniary damages should also reflect the nature and severity of the harm to the complainant, and the duration or expected duration of the harm. *Id.* at 14.

In [Carle v. Dep't. of the Navy](#), the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by the complainant explaining how s/he was affected by the discrimination. EEOC Appeal No. [01922369](#) (Jan. 5, 1993). Non-pecuniary damages must be limited to

the sums necessary to compensate the injured party for the actual harm and should take into account the severity of the harm and the length of the time the injured party has suffered from the harm. [Carpenter v. Dep't. of Agriculture](#), EEOC Appeal No. 01945652 (July 17, 1995).

Objective evidence of compensatory damages can include statements from complainant concerning his emotional pain or suffering, inconvenience, mental anguish, loss of enjoyment of life, injury to professional standing, injury to character or reputation, injury to credit standing, loss of health, and any other non-pecuniary losses that are incurred as a result of the discriminatory conduct. *Id.* Statements from others including family members, friends, health care providers, or other EEO Counselors (including clergy) could address the outward manifestations or physical consequences of emotional distress, including sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self-esteem, excessive fatigue, significant weight loss or gain, or a nervous breakdown. *Id.* Complainant's own testimony, along with the circumstances of a particular case, can suffice to sustain his burden in this regard. *Id.* The more inherently degrading or humiliating the defendant's action is, the more reasonable it is to infer that a person would suffer humiliation or distress from that action. *Id.*

Evidence from a health care provider or other expert is not a mandatory prerequisite for recovery of compensatory damages for emotional harm. See [Lawrence v. U.S. Postal Service](#), EEOC Appeal No. 01952288 (Apr. 18, 1996) (citing [Carle v. Dep't. of the Navy](#), EEOC Appeal No. 01922369 (Jan.. 5, 1993)). The absence of supporting evidence, however, may affect the amount of damages appropriate in specific cases. *Id.*

Non-pecuniary damages must be limited to compensation for the actual harm suffered as a result of the agency's discriminatory actions. See [Carter v. Duncan-Huggans, Ltd.](#), 727 F.2d 1225 (D.C. Cir. 1994); [The Commission Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992) at 13. A proper award should take into account the severity of the harm and the length of time that the injured party suffered the harm. See [Carpenter](#), *supra*. Additionally, the amount of the award should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See [Jackson v. U.S. Postal Service](#), EEOC Appeal No. 01972555 (Apr. 15, 1999), citing [Cygnar v. City of Chicago](#), 865 F. 2d 827, 848 (7th Cir. 1989). Finally, we note that in determining non-pecuniary compensatory damages, the Commission has also taken into consideration the nature of the agency's discriminatory actions. See [Utt v. U.S. Postal Service](#), EEOC Appeal No. 0720070001 (Mar. 26, 2009); [Brown-Fleming v. Dep't. of Justice](#), EEOC Appeal No. 0120082667 (Oct. 28, 2010).

2. Past Pecuniary Damages

Compensatory damages may be awarded for pecuniary losses that are directly or proximately caused by the agency's discriminatory conduct. See [The Commission Notice No. 915.002, Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992) at 8. Pecuniary losses are out-of-pocket expenses incurred as a result of the agency's unlawful action, including job-hunting expenses, moving expenses, medical expenses, psychiatric expenses, physical therapy expenses, and other quantifiable out-of-pocket expenses. *Id.* Past pecuniary losses are losses incurred prior to the resolution of a complaint through a finding of discrimination, or a voluntary settlement. *Id.* at 8-9.

In a claim for pecuniary compensatory damages, complainant must demonstrate, through appropriate evidence and documentation, the harm suffered as a result of the agency's discriminatory action. [Riviera v. Dep't. of the Navy](#), EEOC Appeal No. 01934156 (July 22, 1994); [The Commission Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992), at 11-12, 14; [Carpenter v. Dep't. of Agriculture](#), EEOC Appeal No. 01945652 (July 17, 1995). Objective evidence in support of a claim for pecuniary damages includes documentation showing actual out-of-pocket expenses with an explanation of the expenditure. See [The Commission Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992) at 11-12; [Carle v. Dep't. of the Navy](#), EEOC Appeal No. 01922369 (Jan. 5, 1993). The agency is only responsible for those damages that are clearly shown to be caused by the agency's discriminatory conduct. *Id.* To recover damages, the complainant must prove that the employer's discriminatory actions were the cause of the pecuniary loss. [The Commission Notice No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991](#) (July 14, 1992) at 8.

3. Future Pecuniary Damages

Future pecuniary losses are losses that are likely to occur after resolution of a complaint. See [Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991](#), the Commission Notice No. 915.002 at 9 .

An award for the loss of future earning potential considers the effect that complainant's injury will have on her ability in the future to earn a salary comparable with what she earned before the injury. [Brinkley v. U.S. Postal Service](#), EEOC Request No. 05980429 (Aug. 12, 1999) citing [McKnight v. General Motors Corp.](#), 973 F.2d 1366, 1370 (7th Cir. 1992). Where complainant has shown that her future earning power has been diminished as a result of the agency's discrimination, the Commission has awarded future pecuniary damages for the loss of future earning capacity. See [Morrison v. U.S. Postal Service](#),

EEOC Appeal No. 07A50003 (Apr. 18, 2006) (citing [Brinkley, supra](#)); [Hernandez v. U.S. Postal Service](#), EEOC Appeal No. 07A30005 (July 16, 2004). Proof of entitlement to loss of future earning capacity involves evidence suggesting that the individual's injuries have narrowed the range of economic opportunities available to her. [Carpenter v. Dep't. of Agriculture](#), EEOC Appeal No. 01945652 (July 17, 1995). Generally, the party seeking compensation for loss of earning capacity needs to provide evidence which demonstrates with reasonable certainty or reasonable probability that the loss has been sustained. *Id.*, (citing [Annotation, Evidence of Impaired Earnings Capacity](#), 18 A.L.R. 3d 88, 92 (1968)). Such evidence need not prove that the injured party will, in the near future, earn less than she did previously, but that “[her] injury has caused a diminution in [her] ability to earn a living.” [Carpenter, supra](#), (citing [Gorniak v. Nat'l R.R. Passenger Corp.](#), 889 F.2d 481, 484 (3d Cir. 1989)).

CHAPTER 12 SETTLEMENT AUTHORITY

I. INTRODUCTION

Public policy favors the amicable settlement of disputes. It is clear that this policy in favor of settlement of disputes applies particularly to employment discrimination cases. See, for example, [Sears Roebuck & Co. v. Equal Employment Opportunity Comm.](#), 581 F.2d 941 (D.C. Cir. 1978); [Shaw v. Library of Congress](#), 479 F. Supp. 945 (D.D.C. 1979). Agencies are encouraged to seek resolution of EEO complaints through settlement at any time during the administrative or judicial process. Agencies and EEO complainants should be creative in considering settlement terms. In this Chapter, we discuss the authority for settlements of EEO disputes and various options for those settlements.

II. AUTHORITY

Title VII of the Civil Rights Act of 1964 expressly encourages the settlement of employment discrimination disputes without litigation. Courts have consistently encouraged the settlement of discrimination claims and have upheld those settlements when challenged. See, for example, [Occidental Life Insurance Co. v. Equal Employment Opportunity Comm.](#), 432 U.S. 355 (1977); [Alexander v. Gardner-Denver Co.](#), 415 U.S. 36 (1974).

The Supreme Court held in [Chandler v. Roudebush](#), 425 U.S. 840 (1976), that federal employees have the same rights under the employment discrimination statutes as private sector employees, thus recognizing the right of federal employees to enter into voluntary settlements with federal agencies. As a result, Section 717 of Title VII of the Civil Rights Act of 1964 authorizes agencies to fashion settlements of EEO disputes in resolution of such claims. The same analysis applies to disputes brought under Section 501 or 505 of the Rehabilitation Act of 1973, Section 15 of the Age Discrimination in Employment Act of 1967, and the Equal Pay Act. See [Matter of Albert D. Parker](#), 64 Comp. Gen. 349 (1985).

Conciliation and voluntary settlement are critical to efforts to eradicate employment discrimination, both in the public and private sectors. The legislative history of Section 717 of Title VII is unequivocal in stressing that the broadest latitude exists in determining the appropriate remedy for achieving this end.¹

¹ [1. S. Rep. No. 92-415](#), 92nd Cong., 1st Sess. 15 (1971), reprinted in Senate Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess., [Legislative History of the Equal Employment Opportunity Act of 1972](#), at 424 (Comm. Print 1972).

The Equal Employment Opportunity Commission's strong support for settlement attempts at all stages of the EEO complaint process is codified in 29 C.F.R. § 1614.603, which states, "Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage."² Settlement agreements entered into voluntarily and knowingly by the parties are binding on the parties. Settlements may not involve waiver of remedies for future violations. Settlements of age discrimination complaints must also comply with the requirements of the Older Workers Benefits Protection Act, 29 U.S.C. § 626, involving waivers of claims. That is, a waiver in settlement of an age discrimination complaint must be knowing and voluntary.³

The Department of Justice's Office of Legal Counsel has affirmed the broad authority of agencies to settle EEO disputes by applying remedies a court could order if the case were to go to trial. In an opinion interpreting the authority of an agency to settle a Title VII class complaint, the Department's Office of Legal Counsel advised that a complainant can obtain in settlement whatever the agency concludes, in light of the facts and recognizing the inherent uncertainty of litigation, that a court could order as relief in that case if it were to go to trial. In the case it reviewed, which alleged discrimination in classification decisions, the Office of Legal Counsel determined that the agency could agree not to reclassify positions of specific employees downward because a court could enjoin reclassification of the positions of those employees if the court found some cognizable danger of recurrent violation. The Office of Legal Counsel found the proposed settlement valid under Title VII, even though the Office of Personnel Management contended that the agency's authority to reclassify pursuant to applicable statutes, rules, and regulations cannot be superseded by settlement.

The relief provided by an agency to settle an EEO dispute cannot be greater than the relief a court could order if that particular dispute were to go to trial. For example, assume that a GS-9 employee files an EEO complaint alleging discrimination in the denial of a promotion to the level of a GS-11. If the employee has met the time-in-grade and any other job-related requirements, it is appropriate to offer in settlement a retroactive promotion to GS-11. It would not be appropriate, however, to propose a promotion to a GS-12 position for which the employee has not met the requirements. However, if an individual was denied promotion to a GS-11 position and one or more

² One of the mechanisms for settling complaints is the offer of resolution, which is set forth in 29 C.F.R. § 1614.109(c). Offers of resolution are not, however, the only way to settle complaints; they are a particular method, which, in certain circumstances, can limit an agency's liability for attorney's fees and costs.

³ Section (f)(2) of the OWBPA in conjunction with Sections (f)(1)(A) through (E) set forth the minimum standards. A settlement agreement is knowing and voluntary when the complainant is given a reasonable period of time to consider the settlement agreement, and the waiver is worded in a reasonably understandable way, specifically refers to rights or claims under the ADEA, and does not waive future rights. In addition, the settlement agreement must provide something of value in exchange for the waiver and must advise the complainant to consult with an attorney before signing the agreement.

individuals who got the promotion at that time were subsequently promoted to GS-12 based on a career ladder, then it may be appropriate to offer a GS-12 position in settlement of the complaint.

On the other hand, parties are encouraged to be creative in resolving an employment dispute and may agree to settle a complaint for relief that may be different than that which a court might order, as long as it is no greater than what a court might order. For example, an agency may settle a complaint involving the termination of an employee by agreeing to pay for or provide outplacement services to help the former employee find a new job, provided that the cost of the outplacement services does not exceed the total monetary relief a court could order if the complainant were to prevail in the case. In another example, an agency could agree to reassign a complainant to a different supervisor or office in a settlement of a complaint, alleging discriminatory failure to promote, where the complainant and the supervisor who made the promotion decision do not get along.

III. TITLE VII AUTHORITY INDEPENDENT OF BACK PAY ACT

The Comptroller General of the United States has considered objections to settlements of EEO disputes in a number of cases. In these decisions, the Comptroller General has confirmed the authority of agencies to enter into settlements of EEO claims and considered ancillary questions about settlements.

In one of these decisions, the Comptroller General affirmed that Title VII contains authority for remedying employment discrimination and this authority is independent of the authority contained in the Back Pay Act to provide back pay only where a finding has been made of “an unwarranted and unjustified personnel action.” 5 U.S.C. § 5596. “The connection between Title VII and the Back Pay Act arises only because the Commission has provided in its regulations on remedial actions that when discrimination is found, an award of back pay under Title VII is to be computed in the same manner as under the Back Pay Act regulations.” [Equal Employment Opportunity Commission, Informal Settlement of Discrimination Complaints](#), 62 Comp. Gen. 239, 242 (1983). The authority to award back pay is derived from Title VII; the regulations borrow the formula for calculating the amount of back pay owed from the Back Pay Act.

The independent Title VII authority to settle EEO claims is significant because, unlike the Back Pay Act, Section 717 of Title VII does not limit awards of back pay to situations where there has been a finding of an unjustified or unwarranted personnel action. Thus, there is no impediment to an award of back pay as part of a settlement without a finding of discrimination.

When evaluating the risk of litigation versus the cost of settlement, agencies should include the cost of a federal retirement annuity in their consideration, if an annuity would

become payable immediately. This reflects the actual cost to the government of the proposed settlement and should be considered when deciding whether the settlement is in the interest of the government. This calculation may lead an agency to explore alternative solutions, such as purchasing a private annuity. The purchase of a private annuity may not be desirable in all instances, but can be considered as a possible alternative. Following are some examples that reflect this calculation:

1. An employee at a GS-14, step 10, separates at age 50 with 25 years of service. His only annuity eligibility is for a deferred annuity at age 62. The present value of this deferred benefit (when the employee is age 50) is \$259,992. If, under the terms of a settlement agreement, his separation is changed to an involuntary separation (thus entitling him to an immediate discontinued service retirement benefit), the value of the benefit is \$691,546. Thus, the cost to the government resulting from the settlement is the difference, or an additional \$431,554.
2. An employee at a GS-14, step 10, separates at age 55 with 30 years of service, and therefore is eligible for an immediate annuity. The value of this annuity is \$843,800. If, in settlement, she is retroactively promoted to a GS-15, step 10, for three years, the value of her annuity becomes \$992,669. This means the settlement costs the government an additional \$148,869 in retirement annuities.
3. An employee at GS-14, step 10, separates at age 56 with 30 years of service and is eligible for an immediate annuity valued at \$825,588. If, pursuant to a settlement, he is retroactively considered a law enforcement officer for 20 years of his federal career, the value of his retirement benefit becomes \$1,027,344. Thus, the settlement adds \$201,756 to the government's cost of his retirement.
4. An employee at a GS-14, step 10, separates at age 50 with 25 years of service. When the employee is 55, the value of her deferred annuity payable at age 62 is \$364,653. If the employee is returned to the agency's rolls for five years, enabling her to retire immediately, her retirement benefit has a value of \$1,044,361. This settlement would add \$679,708 to the government's costs.
5. In settlement, the level of a GS-12, step 10, employee is retroactively changed to GS-14, step 10, for a period of three years. Assuming that she is entitled to an immediate annuity, the value of her retirement benefit is raised from \$582,132 to \$817,945. Thus, the additional cost to the government of this settlement is \$235,813.

IV. NO FINDING OF DISCRIMINATION NECESSARY FOR SETTLEMENTS

It has long been the practice in both the private sector and the federal sector for

employers and agencies to enter into settlements that contain cash payments where there has been neither a finding of discrimination, either judicially or administratively, nor an admission by the employer or agency of any wrongdoing.

The Comptroller General has supported these settlements, stating “it is beyond question that an agency has the general authority to informally settle a discrimination complaint and to award back pay with a retroactive promotion or reinstatement in an informal settlement without a specific finding of discrimination.” [Equal Employment Opportunity Commission, Informal Settlement of Discrimination Complaints](#), 62 Comp. Gen. 239, 242 (1983).

V. CASH AWARDS WITHOUT CORRESPONDING PERSONNEL ACTIONS

Settlements of EEO disputes may contain monetary payments that are independent of any personnel action, provided that the monetary payment does not exceed the amount of back pay, attorney’s fees,⁴ costs, or damages⁵ the employee would have been entitled to in the case if discrimination had been actually found.

The Comptroller General has considered settlements of EEO disputes comprised of monetary payments unconnected to personnel actions on at least two occasions and held that they were authorized and appropriate:

[W]e conclude that Federal agencies have the authority in informally settling discrimination complaints filed under Title VII of the Civil Rights Act of 1964, as amended, to make awards of backpay, attorney’s fees, or costs, without a corresponding personnel action and without a finding of discrimination, provided that the amount of the award agreed upon must be related to backpay and may not exceed the maximum amount that would be recoverable under Title VII if a finding of discrimination were made.

Id. at 244; [Matter of Albert D. Parker](#), 64 Comp. Gen. 349 (1985).

VI. PERSONNEL ACTIONS WITH LUMP SUM PAYMENTS

An agency may informally settle an EEO complaint by providing a lump sum payment as

⁴ Attorney's fees are not available during the administrative process of complaints brought under the Age Discrimination in Employment Act or the Equal Pay Act.

⁵ The Commission has the authority to award compensatory damages during the administrative process. [Gibson v. West](#), 527 U.S. 212 (1999). Agencies, therefore, are authorized to pay compensatory damages in a settlement during the administrative process. Compensatory damages should be calculated separately from back pay, other benefits, and fees and are limited to no more than \$300,000.

a retroactive personnel action in lieu of back pay. As long as the settlement does not exceed the relief to which the complainant would be entitled if a finding of discrimination had been made, it is authorized.

If the settlement provides for a retroactive personnel action, all appropriate contributions to the retirement funds must be made. Settlements may resolve claims actually made and also claims that could be made, provided that the factual predicate for the claims that could be made has occurred. For example, an agency may settle a complainant's formal complaint, alleging failure to promote and include relief for the complainant's retaliation claim, which has not been raised, except in the settlement discussions.

Since the Civil Rights Act of 1991 provided for award of compensatory damages in appropriate cases, settlements often provide for one lump sum amount covering monetary relief, even when there is a personnel action involved as well. In these cases, parties can agree to an overall figure in the settlement that represents damages, back pay, and attorney's fees. That figure can reflect the maximum amount a court could award, and need not be limited to an amount that the agency believes a complainant can prove in court. The settlement agreement does not need to contain a separate breakdown of the lump sum showing individual amounts of back pay, damages, and fees. The lump sum agreed to by the parties can be equal to or less than the total amount of back pay, damages, and fees that would be awarded if a finding of discrimination were made. A lump sum cannot, under any circumstances, exceed the amount that the agency concludes, in light of the facts and recognizing the inherent uncertainty of litigation, a court could award if a lawsuit were brought.

If a lump sum settlement is intended to award enhanced retirement benefits as part of its terms, the rates of basic pay or grade and step deemed to be received by the complainant, and the periods during which each rate of pay was received, must be specified in the settlement terms. OPM advises that if this specific information is not set out in the settlement document, the terms of the settlement will not be included in the calculation of the complainant's retirement benefits.

VII. IMPLEMENTING SETTLEMENT AGREEMENTS

There may be some instances where a proposed informal settlement appears to be at odds with normal personnel procedure or practice contained in regulations implementing Title 5 of the United States Code or processing guidance of the Office of Personnel Management. Such situations could arise where Office of Personnel Management regulations or guidance foresee personnel actions taken in the normal course of business and do not generally discuss personnel actions taken pursuant to court order or a settlement. Title VII provides authority to enter into settlements of EEO complaints,⁶

⁶ As noted earlier in this Chapter, the same analysis applies to EEO complaints filed under the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, and the Equal Pay Act of 1963.

and, likewise, Title VII provides authority for agencies to effectuate the terms of those settlements.

Chapter 32, Section 6(b) of OPM's [Guide to Processing Personnel Actions](#) describes the procedure for documenting personnel actions taken as the result of a settlement agreement, court order, or Commission or MSPB decision. The purpose of this procedure is to protect the privacy of the employee.

Rather than including personal and irrelevant settlement information on the employee's SF-50, the SF-50 may be processed with the computer code "HAM." ("HAM" is a computer code that prints on the SF-50 a citation to 5 C.F.R. § 250.101.) If an agency's computer system does not permit the use of the citation "HAM," then the SF-50 may cite to 5 C.F.R. § 250.101. This section of the Code of Federal Regulations indicates that the personnel action is processed under an appropriate legal authority.

**APPENDIX A EEO-MD-110
INTERAGENCY AGREEMENT
BETWEEN
THE U.S. [NON CONFLICT AGENCY]
AND
THE U.S. [AGENCY]**

A. Purpose, Authority, and Scope

The U.S. [Non Conflict AGENCY (hereinafter “NC Agency”) and the U.S. [AGENCY] (hereinafter “agency”) hereby agree that, in accordance with the terms of this Interagency Agreement (hereinafter “Agreement”) and the Economy Act, 31 U.S.C. § 1535, the NC agency shall assume responsibility for investigating the following Equal Employment Opportunity (EEO) complaint filed with the agency:

[Complainant] v. [AGENCY] [Case No.]

Through this interagency acquisition, the agency is obtaining needed investigative services from the NC agency on a reimbursable basis.

B. Responsibilities of the NC Agency

With respect to the matters identified in Part A of this Agreement, and pursuant to 29 C.F.R. § 1614.607, the agency herein officially delegates authority to the NC agency as follows:

1. The NC agency shall investigate the complaint in accordance with 29 C.F.R. § 1614.108(b)-(e).
2. The NC agency shall prepare an investigative file and an investigative summary.
3. Upon conclusion of the investigation, the NC agency shall forward the investigative file to the agency to continue processing in accordance with 29 C.F.R. Part 1614.

C. Responsibilities of Agency

With respect to the complaint identified under Part A of this Agreement, the agency agrees to assume the following responsibilities:

1. The agency shall transmit the complaint file to the NC agency for investigation within seven calendar days of the date that this Agreement is signed by the NC agency and received by the agency by fax or mail, whichever is earlier.
2. The agency shall cooperate fully with the NC agency staff assigned to the investigation of the complaint covered by this Agreement. This cooperation shall include, but not be limited to, the following:
 - a. making agency officials and employees available for interviews, conferences, and statements under oath with the NC agency at times and places designated by the NC agency, including any employees deemed by the NC agency to be witnesses necessary to furnish information pertinent to the complaint. This includes the obligation to provide official time to these employees and to pay their necessary travel expenses;
 - b. promptly responding to any written or oral requests for information received from the NC agency;
 - c. designating and making available an agency official who is authorized to discuss and enter into a voluntary settlement of the complaint; and
 - d. ensuring that the agency representative:
 - i. not request, or be provided with, any EEO complaint record document during the investigation;
 - ii. not be present when the investigator meets with a witness or a potential witness, except at the express request of the witness. Agency representatives may inform witnesses that they have the right to have an agency representative present when they meet with the investigator; and
 - iii. not speak to witnesses concerning their testimony prior to or during the investigation unless the contact with the agency representative was initiated by the witness.
3. Upon receipt of the investigative file from the NC agency, the agency will notify the complainant in accordance with 29 C.F.R. § 1614.108(f).

- a. The agency will reimburse the NC agency, as provided below and in accordance with Parts D and E of this Agreement, actual costs associated with the NC agency's investigation, to include the following:
 - i. Reimbursement to the NC agency for all time spent by the assigned NC agency personnel to investigate the complaint and prepare the investigative file;
 - ii. Reimbursement to the NC agency for all time spent by the NC agency clerical personnel for clerical work related to the investigation of the complaint and preparation of the investigative file; and
 - iii. Reimbursement to the NC agency of standard rate factor (28%) of the salary rates reimbursed in Sections (i) and (ii), above, for benefits and other costs associated with the administration of this Agreement.
- b. The agency will pay, as provided below and in accordance with Parts D and E of this Agreement the following costs:
 - i. Payment for all air, hotel, per diem, and other travel expenses as authorized by the Federal Travel Regulations for travel by the NC agency personnel required to investigate the complaint;
 - ii. Payment for all costs for the services of a qualified court reporter (not an agency employee) to take verbatim affidavits or statements and prepare transcripts in connection with any investigative proceeding;
 - iii. Payment for all copying services of a commercial vendor determined to be necessary to reproduce the investigative file; and
 - iv. Payment for all other actual costs agreed to by agency prior to incurrence of the cost, as may be necessary to the NC agency's investigation of the complaint.

D. NC Agency's Right to Determine Investigative Method

The NC agency reserves the right to determine the investigative techniques and procedures to be utilized in the investigation of the complaint identified in Part A of this Agreement. In the event that the NC agency elects to have verbatim affidavits or statements of the witnesses made at fact-finding conferences or other investigative

proceedings, the agency agrees, subject to a ten (10) working day advance request by the NC agency to take all necessary steps to procure the services of a qualified court reporter to transcribe investigative proceedings and to prepare transcripts of those proceedings. **The NC agency shall not arrange and provide court reporter services on a reimbursable basis.** All arrangements shall be made by the agency and all bills for transcription services and transcripts shall be sent directly to the agency. Such bills shall not be sent to the NC agency.

The agency is responsible for ensuring that a requested court reporter is available on the day and at the time and location specified by the NC agency. The original transcript of any proceeding and any copies ordered shall be sent directly to the NC agency within the time frame deemed necessary by the NC agency, but not later than **ten calendar days** from the date of the investigative proceeding.

E. Procedure for Reimbursement

1. Upon completion of the investigation, the NC agency shall present to the agency an itemized billing statement of the costs and expenses and the total hours expended by the assigned NC agency personnel for services related to the investigation of the complaint pursuant to Part C. 4. a. of this Agreement.

As appropriate, the itemized billing statement shall include a standard rate factor for employee benefits and administration (28%, as provided in Part C. 4. a. of this Agreement). The time expended by the assigned NC agency personnel investigating the complaint shall include time spent in a travel status and for other time spent on the investigation either during or after normal duty hours.

The statement shall also include a recitation of the total dollar amount to be reimbursed to the NC agency by the agency. Such amount shall be calculated by multiplying the total hours expended by the official hourly rate of the assigned NC agency personnel based on the individual’s official grade and step and in accordance with the applicable federal pay schedule.

Upon presentation of the itemized billing statement, collection shall be effected by the NC agency via the U.S. Treasury’s intra-governmental payment and collection system (IPAC) using the following agency accounting data:

Agency Location Code: _____
Appropriation Code: _____
DUNS/BPN Number: _____

Collection shall be made no later than **thirty calendar days** of the billing. The NC agency's liaison regarding billing is [Name], [phone number]. The agency’s

liaison regarding this Agreement is _____,
_____ [please insert name, phone number].

2. In the event that the complaint is settled, withdrawn by the complainant, or canceled by the agency prior to the NC agency's completion of the investigation, the NC agency shall present the agency an itemized billing statement for all hours expended by the assigned NC agency personnel up to such time as the complaint is settled, withdrawn, or canceled and costs incurred by the NC agency.

3. Travel expenses relating to the investigation shall be paid by the agency at General Schedule Administration rates as travel is performed. **Travel shall not be arranged and paid for by the NC agency on a reimbursable basis.** When the agency's designated contact person for the complaint is notified by the NC agency that travel arrangements are necessary with respect to the investigation of the complaint, the contact person shall arrange or cause to be arranged all round-trip travel arrangements to include all airline scheduling and tickets, lodging accommodations at the destination and authorized per diem.

Prior to travel, the agency shall deliver the necessary airline tickets (either by paper or notification of availability of electronic ticket), confirmation of lodging arrangements, and any travel advance as authorized by the Federal Travel Regulations to the designated NC agency personnel. Upon completion of the travel, the NC agency shall present the agency with the necessary information and documents for the agency to prepare a travel claim for the signature of the personnel investigating the complaint. The agency shall promptly process and settle such travel claims.

F. Agreement Effective Date, Term Modification, and Termination

This Agreement will become effective when signed by both the agency and the NC agency and will remain in effect until completion of the investigation and final payment of costs as set forth herein is made by the agency, the complaint is settled, withdrawn by the complainant or cancelled by the agency and final payment of costs as set forth herein is made by the agency. The NC agency and the agency may modify this Agreement by written consent. The NC agency or the agency may terminate this Agreement by giving 30 days advance written notice to the other.

Should a disagreement arise on the interpretation of the provisions of this agreement, or amendments and/or revisions thereto, that cannot be resolved at the operating level, the area(s) of disagreement shall be stated in writing by each party and presented to the other party for consideration. If agreement on interpretation is not reached within thirty (30) days, the parties shall forward the written presentation of the disagreement to respective higher officials for appropriate resolution.

G. Signatures and Date

FOR THE U.S. [AGENCY]:

[Name]

Date

[Title]

FOR THE U.S. [NC AGENCY]:

[Name]

Date

[Title]

APPENDIX B EEO-MD-110 EEO COUNSELING TECHNIQUES

This attachment can be used to develop or refine counseling techniques when traditional counseling is selected. Below are suggested methods to follow in each step of the counseling process.

EEO counseling consists of the following steps:

1. Preparing for the effort
2. Holding discussions
3. Assessing the situation
4. Determining appropriate resolution technique(s)
5. Using informal resolution technique(s)

In reviewing each step, the EEO Counselor must remember that each informal resolution situation will be different and each EEO Counselor will have his/her own style. There will probably be times when the EEO Counselor will need to make modifications to fit the situation.

A. Meeting with the Aggrieved Person

1. Initial Actions

- a. Upon contact by an aggrieved person, the EEO Counselor should record the date and set an appointment for the initial counseling session to discuss the dispute. Before the initial meeting, the EEO Counselor should advise the aggrieved person of his/her right to be accompanied, advised, and represented by a representative at any stage in the complaint process, including the counseling stage, and explain the reasonable accommodation(s) available throughout the EEO process.

Also, the EEO Counselor must advise the aggrieved person that the aggrieved person will remain anonymous during counseling unless s/he chooses not to remain anonymous. 29 C.F.R. § 1614.105(g).

- b. The EEO Counselor should begin the initial meeting with the aggrieved person by explaining the role of the EEO Counselor. The EEO Counselor should then give him/her an opportunity to explain the problem. The EEO Counselor should create an atmosphere which is open to good communication and dialogue.
- c. The EEO Counselor should listen attentively in order to get an understanding of the issues involved (the facts as the aggrieved person sees them and the action(s) alleged to be discriminatory). Once the aggrieved person has had the opportunity to relate the dispute fully, the EEO Counselor will be in a better position to define the claims(s) and

basis(es) involved, determine if the problem comes under the purview of the anti-discrimination laws, and determine if special procedures apply.

- d. The EEO Counselor should find out if the aggrieved person tried to resolve the problem or brought the problem to the agency's attention before seeking counseling and, if so, how. Part of the problem might be that s/he did not use the appropriate mechanisms to handle the problem prior to seeking counseling and, if properly handled, the problem may be easily resolved.
- e. The EEO Counselor should ask the aggrieved person whether s/he is willing to meet with agency officials.
- f. If the dispute is to be handled under Part 1614, the EEO Counselor should provide the aggrieved person with an overview of informal counseling and the discrimination complaint process under Part 1614, including required notifications and time frames, and answer any questions s/he may have about counseling and the complaint process.
- g. If a dispute involves employment discrimination and the aggrieved person chooses to have his/her case processed by the agency, the EEO Counselor must provide counseling, regardless of whether the EEO Counselor believes the case has merit.

2. Disputes Not Involving Discrimination

After listening to and asking questions of the aggrieved person, it may become apparent that s/he is not alleging discrimination on one or more of the bases protected by the anti-discrimination laws. For example, a person may allege that s/he was the target of reprisal for union activities. In the absence of facts to show that the union activities are related to participation in protected EEO activities or related to opposing discriminatory practices, the EEO Counselor can offer other alternatives for redress.

3. Disputes Involving Prohibited Discrimination

When the dispute involves an allegation of discrimination, the EEO Counselor should proceed with the initial counseling session and do the following:

- a. Determine whether special procedures apply (*i.e.*, mixed case, negotiated grievance procedure, or age). Also, advise the aggrieved individual how the agency's EEO alternative dispute resolution (ADR) process works in counseling and of the aggrieved person's option to choose EEO ADR during the counseling stage of the process where the agency agrees to offer EEO ADR in the particular case.

- b. Find out as many specifics as possible concerning the individual's reasons for believing discrimination has occurred.
- c. Ask the aggrieved person what it would take, in his/her view, to resolve the problem. For example: The aggrieved person alleges race discrimination in an agency's selection of trainees for a computer training program. The EEO Counselor should determine what the aggrieved person will accept to resolve the problem. Suppose the aggrieved person will accept being placed at the top of the agency's waiting list for the next available opening. The EEO Counselor may be able to resolve this dispute by presenting the offer to agency officials as a first step. If the agency agrees, the EEO Counselor has avoided the need to formulate a resolution strategy.

Learning early on exactly what it is that the aggrieved person is seeking may well provide the basis for a prompt resolution and save everyone time.

- d. Make sure the aggrieved person understands that s/he cannot be forced to agree to any proposed solutions or to reach an agreement with the agency and that s/he may file a formal complaint.
- e. Conclude the initial EEO counseling session by making sure that the procedural requirements of 29 C.F.R. Part 1614 were followed and that enough information was obtained to attempt resolution.

B. Meeting with Agency Officials

1. Explain the aggrieved person's allegations and summarize the reasons or facts s/he gave for believing there has been discrimination. The aggrieved person's name can be used only if anonymity has been waived in writing.
2. Explain or answer any questions about EEO counseling and the federal complaint process. Emphasize that the EEO Counselor's role is to attempt to resolve a dispute. If counseling is successful and resolution is reached, then the need to file a formal complaint is avoided.
3. Give the agency an opportunity to present its position on the matters raised by the aggrieved person and ask agency officials to suggest ways the problem might be resolved.
4. Try to get a sense of the relationship between the aggrieved person and the responding agency official (assuming the aggrieved person did not request anonymity). Is the relationship hostile, perhaps because of past dealings? Is the agency official interested in meeting with the aggrieved person?

5. Make sure that agency officials understand that the agency cannot be forced to enter into an agreement as a result of EEO counseling.

C. Considering Factors in Situation

The EEO Counselor's approach to a given situation will depend on several factors, including the following:

1. Nature of the alleged discriminatory acts and characteristics of the dispute between the parties.
2. Relationship between the aggrieved person and the agency.
3. Whether the EEO Counselor must gather facts beyond those provided by the aggrieved person and the agency.
4. Acceptance by the aggrieved person and the agency of various resolution techniques.
5. The EEO Counselor's willingness to participate in various resolution techniques.

D. Conducting the Inquiry

1. Focus on the Issue(s) and Basis(es)

The EEO Counselor may be required to interview witnesses and review agency records. An inquiry into an EEO dispute begins when the EEO Counselor attempts to gather information following the initial meeting with the aggrieved person. Upon completion of this initial meeting with the aggrieved person, the claim(s) raised should be clearly defined and the basis(es), *i.e.*, race, color, sex (including equal pay, pregnancy, transgender, and sex stereotypes), religion, national origin, age, reprisal, genetic information, and/or disability, identified. The EEO Counselor should keep in mind that the aggrieved person is best able to assist in defining the issue(s) since s/he is an involved party. The EEO Counselor should not conclude an initial interview with the aggrieved party without a clear understanding of the issue(s) and basis(es).

The direction the inquiry will take depends upon the EEO Counselor's understanding of the issue(s) and basis(es). If the issue(s) involves a personnel action, it will be necessary to identify the action with as much specificity as possible. For example, if the aggrieved person alleges discrimination in a promotion action, the EEO Counselor must at least determine the position applied for, and whether the aggrieved person was qualified, was on the list of best qualified candidates, was interviewed, and whether a selection was made. This information will help to focus the inquiry on the specific portion of the personnel action at issue. The EEO Counselor must include dates to ensure that the dispute

was raised in a timely manner. For those issues that involve actions other than personnel actions documented by an SF-50, the data gathering approach is the same, but gathering information can be more difficult.

2. Data Gathering from Witnesses and Agency Records

- a. Once the claims(s) and basis(es) are defined, the EEO Counselor will need to determine if it is necessary to gather information from sources other than the aggrieved person and agency representative in order to attempt resolution. Potential sources of information could include witnesses and written documentation or records.

If the EEO Counselor determines that witness interviews are necessary, s/he should attempt to interview witnesses who have direct knowledge of a particular situation. The EEO Counselor should limit witness interviews to those persons who can provide information that will help the EEO Counselor better understand the dispute so that resolution can be attempted. Sometimes witness interviews will be the only source of information other than information obtained from the aggrieved person and the agency. Such disputes would include allegations of harassment, either sexual or otherwise, or situations where the issue raised is one of inappropriate conduct or treatment based on a prohibited reason.

- b. Early in the process, the EEO Counselor must determine what documents control the action taken; *i.e.*, whether there is a written agency procedure that must be followed in certain situations. For example, if the issue involves a promotion action, the EEO Counselor should decide if it is necessary to review the applicable promotion plan and, if so, determine where the plan is maintained. The EEO Counselor may be able to obtain needed information from official personnel folders, supervisors' working files, or wherever the personnel action is maintained, such as a promotion folder. By making inquiries, the EEO Counselor will soon learn where such documents are kept and who maintains the records.

When looking at individual records, the EEO Counselor should keep in mind that his/her role is to achieve informal resolution at the lowest possible level, so the number of records reviewed should be kept to a minimum. Only records of the aggrieved person and of those who allegedly received different, more favorable treatment should be examined in an effort to achieve informal resolution.

The EEO Counselor's first contact may be at the personnel office, but the EEO Counselor may determine other sources for obtaining needed documents.

For situations which EEO Counselors encounter often, the following types of issues will require review of certain records:

- (1) Promotion - The promotion folder should include the vacancy announcement, job description, ranking/rating factors, and SF- 171 or applications of at least the aggrieved person and the selectee. The EEO Counselor should notify the personnel office that an EEO inquiry was made concerning a promotion action. The EEO Counselor should request that documents relating to the promotion action, which might ordinarily be destroyed, be retained while the inquiry is pending.
 - (2) Time and Attendance - Agency regulations/orders on time and attendance, time and attendance records of the aggrieved person and person(s) the aggrieved person is comparing himself/herself to, and how each is treated.
 - (3) Training - Agency procedures for requesting and recommending training, any forms required, and training approved or denied with reason(s).
 - (4) Appraisal/Rating - Agency regulations/orders on system implementation and administration, elements and standards, performance requirements, rating of the aggrieved person, and ratings prepared by same rating and/or reviewing official of similarly situated employees.
- c. In reviewing documentation, the EEO Counselor should copy only documents needed in the discussions that will follow the initial inquiry. Notes should be kept, but the identity of comparators should not be revealed to the aggrieved person. Review of documents should be restricted to those that relate to the issue(s) raised by the aggrieved person and are necessary to resolve the concerns informally at the lowest possible level.

EEO counseling will often involve the use of various techniques to bring about early resolution. For example, it may include:

- (1) Holding separate meetings, followed by joint meetings, and then telephone contact to work out details of an agreement;
- (2) Holding a joint meeting to set forth the facts as both sides see them, followed by separate meetings with the parties in which the various possibilities for resolution are explored; or
- (3) Conducting a conference call or separate telephone calls to the

parties during which the dispute is resolved. Care should be taken to protect anonymity unless waived.

E. Developing a Resolution Strategy for 30-Day Counseling Period

1. Joint Meetings (An aggrieved person must agree to a joint meeting)

a. Advantages:

- (1) Gives the aggrieved person and the agency an opportunity to present the facts as each sees them and to clarify points of confusion or misunderstanding.
- (2) Gives the parties an opportunity to explore directly with each other the means for resolving issues underlying the problems.
- (3) Helps the parties establish a more constructive working relationship by getting a better understanding of each other's concerns.
- (4) Enables the parties to "shake hands" on any agreements reached and to work together to put them in writing.
- (5) Allows the EEO Counselor better control of the process, making sure that the parties treat each other as equals and that threats or coercion are not used.

b. Disadvantages:

- (1) Risks a blow-up, a hardening of positions, and increased antagonism.
- (2) May require the parties to call a recess to explore changes in position with others (e.g., counsel).
- (3) May be difficult to schedule.
- (4) Can be costly when the parties are in different locations.

c. The EEO Counselor Should Use This Approach When:

- (1) The parties' positions are based on different facts or different perceptions of the same facts.
- (2) The parties have not had an opportunity to talk with each other or would like a way to reopen discussions.

- (3) The EEO Counselor is confident that s/he will be able to control the joint meeting.

2. Separate Meetings

a. Advantages:

- (1) Allows the EEO Counselor to learn more about the parties' specific concerns and priorities.
- (2) Allows the EEO Counselor to explore alternatives.
- (3) Allows the parties to ask questions they do not want to ask in front of the other party.
- (4) Prevents the possibility of intimidation.
- (5) May be easier to schedule than a joint meeting.

b. Disadvantages:

- (1) May lead the parties to wonder what the EEO Counselor is saying to the other side.
- (2) Unless the resolution reached through separate meetings is re-stated in a joint meeting or through a conference call, the parties do not have the opportunity to talk with each other to make sure each has the same interpretation of the agreement. It is easier for the parties to blame the EEO Counselor for any future misunderstanding about the resolution.
- (3) May put the EEO Counselor in the position of having to pass messages back and forth between parties. Misunderstanding of the messages may occur in their transmission.

c. The EEO Counselor Should Use This Approach When:

- (1) The parties' hostility and antagonism can get in the way of substantive discussions.
- (2) The EEO Counselor needs a better understanding of issues and priorities to be able to control a subsequent joint meeting.
- (3) The EEO Counselor needs to help one or both parties be realistic about possible solutions.

- (4) Scheduling is a problem.
- (5) The parties do not have a current relationship.
- (6) One party is afraid to meet with the other.

3. **Telephone Communication**

a. **Advantages:**

- (1) May be easier to schedule and quicker than joint meetings.
- (2) Less costly.
- (3) For advantages of conference calls, refer to advantages of joint meetings.
- (4) For advantages of separate calls, refer to advantages of separate meetings.

b. **Disadvantages:**

- (1) Impersonal communication resulting from the inability to see how the person is responding to what is said. Harder to gain the rapport needed to explore issues and alternatives.
- (2) For disadvantages of conference calls, refer to disadvantages of joint meetings. Note: It may be easier to hang up the telephone than leave a meeting chaired by an EEO Counselor.
- (3) For disadvantages of separate calls, refer to disadvantages of separate meetings.

c. **The EEO Counselor Should Use This Approach When:**

- (1) The parties are in different locales and are not logistically able to meet face to face.
- (2) The issues are comparatively easy to deal with, such as those based on a misunderstanding or incorrect information.
- (3) The EEO Counselor needs more information to determine if counseling is productive, and scheduling a meeting for this purpose is too time-consuming.

4. Attempting Resolution

When the EEO Counselor has a good grasp of the issues involved and has decided on which EEO counseling technique to use, s/he is ready to attempt resolution. Resolution of an EEO problem means that the aggrieved person and the agency come to terms with a problem and agree on a solution. The EEO Counselor should generally concentrate on resolving individual cases independently; but, when appropriate, the EEO Counselor should ask for assistance from the EEO Director in reaching a solution or correcting a problem. When asking the EEO Director for help, the EEO Counselor should relate what s/he has learned in the inquiry (using the aggrieved person's name only if s/he has given permission) and be prepared to recommend specific action.

There is no set formula for a EEO Counselor to follow in attempting a resolution using the techniques described. The EEO Counselor can attempt resolution by talking with the parties separately or together. The EEO Counselor can talk with them together only if the aggrieved person has given permission; otherwise, they must be spoken with separately.

The following subsections highlight barriers faced when attempting resolution and provide guidance on how to attempt resolution using the EEO counseling techniques of joint meetings, separate meetings, and telephone communication.

5. Obstacles to Informal Resolution

In order to resolve an EEO dispute, the agency and the aggrieved person must agree on a solution. However, only the agency has the authority to resolve an EEO dispute. Like most situations involving two parties, the EEO Counselor can expect obstacles to resolution of EEO disputes. These obstacles can be put up by both parties. The challenge is to overcome these obstacles and work out a solution.

Sometimes obstacles can be overcome by bringing the parties together and having them candidly discuss their attitude toward working out a solution. Other times, obstacles can be lessened by helping the parties explore possible outcomes if the dispute is escalated to the formal complaint level. However, the EEO Counselor must recognize that not all obstacles can be overcome and attempts at resolution should end when it is apparent that the parties are unable to come to an agreement.

a. Some agency obstacles are listed below:

- (1) "There was no discrimination so nothing should be done."
- (2) "The decision at issue was correctly made, procedures were correct, and nothing should be done for the aggrieved person."

- (3) “Resolution will encourage frivolous complaints.”
 - (4) “Subordinates and supervisors will lose respect for a manager who settles rather than fights.”
- b. Aggrieved persons may also impose obstacles to successful resolutions of problems. Such obstacles may include:
- (1) “Discrimination must be punished.”
 - (2) “My manager must be disciplined.”
 - (3) “My manager must apologize.”
 - (4) “No remedy is sufficient.”
 - (5) “The agency must pay punitive damages.”¹

F. Attempting Resolution Using the Joint Meeting Technique

This subsection outlines the steps and activities involved in arranging and conducting joint meetings. The EEO Counselor should make sure the aggrieved person has consented to joint meetings with the agency before arranging a joint meeting.

1. Arranging a Joint EEO Counseling Session

- a. The EEO Counselor should select a location convenient for both parties.
- b. The EEO Counselor should arrange a date and time convenient to both parties, but as soon as possible.
- c. If there does not seem to be a mutually acceptable time for the parties to meet, consider the following questions:
 - (1) Is there a suitable and feasible alternative to the joint meeting? If so, the EEO Counselor should use it.
 - (2) Does the scheduling problem appear to be real, or does it appear to be a delaying tactic?

¹Under the Civil Rights Act of 1991, punitive damages are not available against a federal employer.

- (3) If the scheduling problem appears to be real, how do the parties feel about postponing the meeting? Would a request for an extension make resolution within 30 days impossible?
 - (4) If the scheduling problem is more of a delaying tactic and if there is no suitable alternative to a joint meeting, the EEO Counselor should terminate counseling.
- d. The EEO Counselor should determine who will be attending the meeting and let all parties know who will be present.
 - e. The EEO Counselor should let the parties know the way the meeting will be run and suggest ways the parties can prepare for the meeting. Each party should understand that the EEO Counselor chairs the meeting but will not take a position on the merits of either party's position or the merits of any proposed solutions made by the parties, and that the EEO Counselor will not make decisions for the parties.
 - f. The EEO Counselor should explain that the purpose of the meeting is to provide each party with an opportunity to present the facts and problems as each sees them, to clarify the issues, to establish points of agreement and disagreement, and to explore the possibility of some form of voluntary resolution acceptable to both parties.
 - g. The EEO Counselor should suggest that the parties review the facts of the case as they know them and think about what it would take to resolve the problem as they see it.
 - h. The EEO Counselor should point out the confidentiality of discussions to both parties.
 - i. If, at the last minute, one of the parties calls to cancel, the EEO Counselor should try to determine if the reason is legitimate. If it appears it is, the EEO Counselor should reschedule the meeting as quickly as possible. If rescheduling becomes a problem, an alternative to the joint meeting **should** be explored. If there is a question about the reason for cancellation or if a party cancels more than one meeting, the EEO Counselor should decide whether informal resolution efforts should be terminated.

2. Conducting a Joint EEO Counseling Session

The EEO Counselor should:

- a. Start the meeting on time.

- b. Make sure everyone at the table knows everyone else and the reason each person is there.
- c. Set the tone and establish ground rules. This is the time to restate the purpose of the meeting, the EEO Counselor's role, and the role and responsibility of the parties.
- d. Work with the parties toward resolution.
- e. Prepare to handle the unexpected.
 - (1) If one party does not appear for the meeting, the EEO Counselor should find out why. Discuss the issues involved with the party who does appear. Try to get a sense of what it would take to resolve the dispute. See if the party is interested in continuing EEO counseling and is willing to reschedule the meeting.
 - (2) If one of the parties is about to break off discussions and leave in a huff, the EEO Counselor should try to calm the parties down and do the following:
 - Help both parties save face by getting them to put aside emotions and address the problem.
 - Talk to the parties separately, if necessary.
 - Not dwell on the incident if discussions resume, but remind the parties that a resolution does not have to be achieved and that it is okay to agree to disagree and to end informal resolution. The EEO Counselor can explain to the parties that a decision to end informal resolution efforts should be a conscious, deliberate one, not one simply made in a moment of anger.
- f. If one of the parties accuses the EEO Counselor of bias and asks the EEO Counselor to leave, the EEO Counselor should leave provided the other party is willing to continue the meeting without the EEO Counselor. If the other party is not willing to continue, the meeting should be adjourned.
 - (1) Later, if appropriate, the EEO Counselor can clarify what happened and try to regain acceptance.
 - (2) Apologize for any misconceptions that might have been created.
 - (3) Decide whether to terminate EEO counseling.

3. Ending the Joint EEO Counseling Session

A joint EEO counseling session can end in one of the following ways:

- a. With a resolution. The EEO Counselor should explain that s/he will draw up a written agreement to be signed by both parties.
- b. Without resolution but with an agreement to keep trying. The EEO Counselor should explain that she will arrange the next meeting. Keep in mind the requirement, pursuant to 29 C.F.R. § 1614.105(d), to conduct the final interview no later than the 30th day of initial contact by the aggrieved person, unless the aggrieved person and the EEO Director (or his delegate) agrees in writing to postpone the final interview. 29 C.F.R. § 1614.105(e).
- c. Without a resolution and with a decision to end EEO counseling. The EEO Counselor should explain to the aggrieved person that s/he will set up a final counseling session at which time the EEO Counselor will explain the next steps.

The EEO Counselor should make sure that each party agrees on the way the meeting is ending.

G. Attempting Resolution Using the Separate Meeting Technique

1. What Should Be Done Up Front

Separate EEO counseling sessions with each party can be used in place of or to supplement joint meetings. If separate meetings are to be used, the parties should know:

- a. That the EEO Counselor will be meeting separately with the parties.
- b. The purpose of the meetings.
- c. That what is said in the meetings is intended to be confidential.
- d. That the EEO Counselor will not serve as an advisor to the parties or comment directly on the substance of a proposal.

2. Handling Special Situations

The following paragraphs describe situations which may occur in separate meetings and suggest ways each situation might be handled.

- a. The agency concedes directly or indirectly that there may be some merit to what the aggrieved person sees as a problem.
 - (1) The EEO Counselor can explore alternative solutions to the problem, for example, suggesting that the agency consult with appropriate officials to review the dispute and merits with a view towards possible resolution. The EEO Counselor should consult with his/her EEO Director to discuss the dispute before a suggestion is made to the agency to consult with legal counsel.
 - (2) The EEO Counselor must be careful not to prejudge a case because a formal investigation may not find the situation to be as the parties described it.
 - (3) The EEO Counselor may assist the agency and the aggrieved person in reaching an acceptable resolution of the dispute.
- b. The aggrieved person concedes directly or indirectly that there may be no merit to the allegations. (S/he thinks that there was unfair treatment, but it may not have been in violation of the anti-discrimination laws and regulations.) In such a case, the EEO Counselor can examine alternative solutions to the problem.
- c. The parties may ask the EEO Counselor for his/her opinion regarding the strength of the allegation. The EEO Counselor should:
 - (1) Inform the parties that s/he cannot comment on the strength or weakness of a given situation.
 - (2) Let the parties judge the strength and weakness of an allegation.

H. Attempting Resolution Using Telephone Communication

The general procedures outlined for joint and separate meetings also apply to telephone conference calls and separate telephone calls to each party. However, at the start of the conversation the EEO Counselor should:

1. Ask if anyone else is on the line.
2. Remind parties that recording the conversation is prohibited.

**APPENDIX C EEO-MD-110
EEO COUNSELOR CHECKLIST**

At the initial counseling session, EEO Counselors must advise individuals in writing of their rights and responsibilities. At a minimum those rights include the following:

- a. The right to anonymity.
- b. The right to representation throughout the complaint process including the counseling stage. The EEO Counselor should make clear to the aggrieved person that the EEO Counselor is not an advocate for either the aggrieved person or the agency, but acts strictly as a neutral in the EEO process.
- c. The right to choose between the agency's EEO alternative dispute resolution (ADR) process or EEO counseling, where the agency agrees to offer EEO ADR in the particular case, and information about each procedure.
- d. The possible election requirement between a negotiated grievance procedure and the EEO complaint procedure. See Chapter 4, Section III of this Management Directive.
- e. The election requirement in the event that the claim at issue is appealable to the Merit Systems Protection Board (MSPB), i.e., the dispute is a mixed case. See Chapter 4, Section II of this Management Directive.
- f. The requirement that the aggrieved person file a complaint within 15 calendar days of receipt of the EEO Counselor's Notice of Right to File a Formal Complaint in the event s/he wishes to file a formal complaint at the conclusion of counseling or EEO ADR.
- g. The right to file a notice of intent to sue when age is alleged as a basis for discrimination and of the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to § 1614.201(a).
- h. The right to go directly to a court of competent jurisdiction on claims of sex-based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.¹

¹ Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. Equal Pay Act complaints may be processed administratively under Part 1614. In the alternative, a complainant in the EPA claim may go directly to a court of competent jurisdiction.

- i. The right to request a hearing before a Commission Administrative Judge, except in a mixed case, after 180 calendar days from the filing of a formal complaint or after completion of the investigation, whichever comes first.
- j. The right to an immediate final decision after an investigation by the agency in accordance with § 1614.108(f).
- k. The right to go to U.S. District Court 180 calendar days after filing a formal complaint or 180 days after filing an appeal.
- l. The duty to mitigate damages, for example, that interim earnings or amounts that could be earned by the individual with reasonable diligence generally must be deducted from an award of back pay.
- m. The duty to keep the agency and the Commission informed of his/her current mailing address and to serve copies of appeal papers on the agency.
- n. Where counseling is selected, the right to receive in writing within 30 calendar days of the first counseling contact (unless the aggrieved person agrees in writing to an extension) a notice terminating counseling and informing the aggrieved of:
 - (1) the right to file a formal individual or class complaint within 15 calendar days of receipt of the notice,
 - (2) the appropriate official with whom to file a formal complaint, and
 - (3) the complainant's duty to immediately inform the agency if the complainant retains counsel or a representative. Any extension of the counseling period may not exceed an additional sixty (60) calendar days.
- o. Where the aggrieved person agrees to participate in an established EEO ADR program, the written notice terminating the counseling period will be issued upon completion of the dispute resolution process or within ninety (90) calendar days of the first contact with the EEO Counselor, whichever is earlier.
- p. That only those claims raised at the counseling stage or claims that are like or related to those that were raised may be the subject of a formal complaint, and how to amend a complaint after it has been filed.

- q. The identity and address of the Commission field office to which a request for a hearing must be sent in the event that the aggrieved person files a formal complaint and requests a hearing pursuant to 29 C.F.R. § 1614.108(g).
- r. The name and address of the agency official to whom the aggrieved person must send a copy of the request for a hearing. The EEO Counselor should advise the aggrieved person of his/her duty to certify to the Administrative Judge that s/he provided the agency with a copy of a request for a hearing. See also Chapter 7, Section I of this Management Directive.
- s. The time frames in the complaint process.
- t. The class complaint procedures and the responsibilities of a class agent, if the aggrieved person informs the EEO Counselor that s/he wishes to file a class complaint. See Chapter 8, Section II of this Management Directive.
- u. That rejection of an agency's offer of resolution made pursuant to 29 C.F.R. § 1614.109(c) may result in the limitation of the agency's payment of attorney's fees or costs. See Chapter 6, Section XIII of this Management Directive.
- v. That the agency must consolidate two or more complaints filed by the same complainant after appropriate notice to the complainant. See 29 C.F.R. § 1614.606. The EEO Counselor should advise the complainant that when a complaint has been consolidated with one or more earlier complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint and that the complainant may request a hearing before a Commission Administrative Judge at any time after 180 days of the filing of the first complaint.
- w. The proper contact to request any needed reasonable accommodations to navigate the EEO process.

**APPENDIX D EEO-MD-110
INFORMATION ON OTHER PROCEDURES**

A. Negotiated Grievance Procedures in Collective Bargaining Agreements

1. Aggrieved Person Makes Election

At the initial counseling session, the EEO Counselor must inform the aggrieved person of the possible applicability of the election of remedies provisions from the Civil Service Reform Act of 1978, 5 U.S.C. § 7121(d), concerning negotiated grievance procedures.

- a. In order for an aggrieved person to be covered under 5 U.S.C. § 7121(d), both of the following conditions must be met:
 - (1) S/he must be employed in a federal agency subject to the provisions of 5 U.S.C. § 7121(d); and
 - (2) S/he must be covered by a collective bargaining agreement at the agency where the grievance arises. The agreement must also permit allegations of discrimination to be raised in the negotiated grievance procedure.
- b. If these conditions are met, then the EEO Counselor must inform the aggrieved person that 5 U.S.C. § 7121(d) applies. This means that the aggrieved person must be informed of the requirement that s/he choose one (not both) of the following:
 - (1) a right to have his/her allegations of discrimination addressed in the negotiated grievance procedure of the collective bargaining agreement with a caution that the opportunity to raise allegations of discrimination will be lost if not raised in the grievance process; or
 - (2) a right to have his/her allegations of discrimination addressed under 29 C.F.R. Part 1614.
 - (3) An election to proceed under Part 1614 is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process does not constitute an election to proceed under Part 1614.
 - (4) Allegations of discrimination that are raised by employees not covered by 5 U.S.C. § 7121(d) are to be processed as EEO complaints under Part 1614 regardless of whether they are also pursuing a grievance on the same claim (for example, a five-day

suspension from work) under a collective bargaining agreement not covered by 5 U.S.C. § 7121(d).¹

- (a) Under § 1614.301(c), the complaint may be held in abeyance while the grievance on the same claim is processed. The abeyance shall terminate without further notice upon the issuance of a final decision on the grievance. The complaint may be held in abeyance only if the aggrieved is provided written notice of the abeyance.
- (b) The notice of abeyance shall state that the abeyance is instituted pursuant to 29 C.F.R. § 1614.301(c) and that time limits for processing the complaint contained in 29 C.F.R. § 1614.106 and for appeal to the Commission contained in 29 C.F.R. § 1614.402 will also be held in abeyance until fifteen (15) days following the issuance of the final decision on the grievance.
- (c) If the EEO complaint is held in abeyance, the time limits for processing are tolled until a final decision is rendered in the grievance process.

2. Election Is Final

- a. Pursuant to 29 C.F.R. § 1614.301, EEO Counselors are required to inform an aggrieved person that once s/he decides which forum s/he will use the negotiated grievance procedure in a collective bargaining agreement covered by 5 U.S.C. § 7121(d) or Part 1614 the aggrieved person is precluded from using the other forum to address the same claim. This preclusion holds regardless of whether discrimination is actually raised. For example, if an aggrieved person elects to have a dispute involving a claim of discrimination addressed under the terms of a collective bargaining agreement by filing a grievance, s/he could not also file a formal complaint of discrimination under Part 1614 on the same claim. This bar to a subsequent formal EEO complaint would hold true even if the complainant failed to raise the discrimination claim in the grievance, as long as the grievance process could have addressed the discrimination allegations.
- b. If an agency issues a decision rejecting the grievance either because the individual is not covered by the collective bargaining agreement, the collective bargaining agreement does not contain a provision that allows allegations of discrimination to be raised in the grievance process, or the

¹Employees of the U.S. Postal Service, the Postal Regulatory Commission, and the Tennessee Valley Authority are not subject to 5 U.S.C. § 7121(d).

grievance was untimely filed, the agency shall include appeal rights to the Commission. The case shall be processed as a complaint under Part 1614. 29 C.F.R. § 1614.301(b).

3. Appeals

Unless the grievance is a mixed case, the complainant has the right to appeal a final decision on his/her grievance that contains a discrimination allegation to the Commission as provided in subpart D of 29 C.F.R. Part 1614. If the grievance is a mixed case, the complainant has the right to appeal to MSPB.

B. Mixed Cases

1. MSPB Mixed Case Complaints and Appeals

In addition to negotiated grievance procedures, an aggrieved person may present an allegation that constitutes a mixed case. A mixed case is one which alleges discrimination in connection with a claim which is also appealable to the MSPB. Two criteria determine whether a case is a mixed case.

- a. The employee has standing to file an appeal to the MSPB; and
- b. The allegations which form the basis of the discrimination complaint can be appealed to the MSPB.

For information on who can file and the actions that can be appealed to the MSPB, see 5 C.F.R. § 1201.3.

2. Choosing a Forum

If both criteria for a mixed case are met, the EEO Counselor must notify an aggrieved person that s/he must choose the forum in which s/he wishes to proceed. Where a negotiated grievance can also be filed, the EEO Counselor must explain that the aggrieved person must choose to proceed in one of three forums: the MSPB appeal process, the internal EEO process, or the negotiated grievance process (see Section A.1 above).

- a. The EEO Counselor is initially responsible for identifying mixed cases and for advising aggrieved persons of their right to pursue the claim as a mixed case complaint or as a mixed case appeal. The EEO Counselor must identify mixed cases early in order to ensure that aggrieved persons are fully informed of their complaint processing options.
- b. An aggrieved person may choose to raise allegations of discrimination in a mixed case either as an appeal to the MSPB (“mixed case appeal”) or as a discrimination complaint with the agency under 29 C.F.R. Part 1614

(“mixed case complaint”) but not both. Whichever action the employee files first is considered an election to proceed in that forum.

- c. An election to proceed under 29 C.F.R. Part 1614 is made when the aggrieved person files a formal complaint in writing. Use of the EEO counseling process is not an election to proceed under Part 1614.
- d. If an employee chooses to file an appeal with the MSPB on a mixed case, the agency must thereafter dismiss any subsequently filed complaint on the same claim, regardless of whether the allegations of discrimination are raised in the appeal to the MSPB. Upon dismissal, the agency must advise the employee to raise the allegations of discrimination in connection with his/her appeal to the MSPB.
- e. Where the agency disputes MSPB jurisdiction, (for timeliness, coverage, or any other reason), the agency shall notify the complainant that it is holding the mixed case complaint in abeyance until the MSPB Administrative Judge rules on the jurisdictional issue. During this period, all time limitations for processing or filing will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to the Commission.

If the MSPB Administrative Judge finds that the MSPB has jurisdiction over the claim, the agency shall dismiss the mixed case complaint under 29 C.F.R. § 1614.107(a)(4).

- f. If the employee elects to file a mixed case complaint under Part 1614, the agency must process the complaint in a manner substantially similar to any other discrimination complaint, except that the employee is not entitled to a hearing before a Commission Administrative Judge. An aggrieved person’s appeal rights will be to the MSPB, not the Commission. Following a final decision from the MSPB, an aggrieved person may petition the Commission to consider that decision as it pertains to the allegations of discrimination.

3. Constructive Discharge

A discriminatory constructive discharge occurs when the employer discriminatorily creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in the aggrieved person’s position would feel compelled to resign. In other words, the aggrieved person is essentially forced to resign under circumstances where the resignation is tantamount to the employer’s termination or discharge of the employee.

Similarly, in coerced or involuntary retirement cases, the aggrieved person alleges that s/he was essentially forced to retire, for example, because of age, and the

retirement decision was not voluntary. Discriminatory coercion or involuntary retirement allegations are, if supported, tantamount to the employer discharging the employee.

a. MSPB dismissal may “unmix” a case

An employee with MSPB appeal rights who alleges that s/he was constructively discharged or coerced into retirement because of discrimination should be advised to file a mixed case complaint or a mixed case appeal. Where the merits of the claim of discrimination cannot be reached for lack of jurisdiction, the case will be considered no longer mixed.

b. An unmixed appeal–referral to counseling

If an aggrieved person files a mixed case appeal with the MSPB and the MSPB dismisses the appeal for lack of jurisdiction, the agency shall promptly notify the individual in writing of the right to contact an EEO Counselor within forty-five (45) days of receipt of this notice and to file an EEO complaint, subject to 29 C.F.R. § 1614.107. The complaint will be processed as a non-mixed case. See 29 C.F.R. § 1614.302(b).

c. A complainant in a case that becomes an “unmixed” complaint after completion of the agency’s investigation and subject to the notice set forth at 29 C.F.R. § 1614.108(f) need not be referred back to EEO counseling and the 29 C.F.R. § 1614.108(f) notice should be issued.

d. When a mixed case complaint is “unmixed” by a finding by the MSPB of no jurisdiction, the individual has a right to elect between a hearing before a Commission Administrative Judge or an immediate final decision. See 29 C.F.R. § 1614.302(b).

C. **Age Discrimination in Employment Act Complaints**

When a person contacts an EEO Counselor with a complaint of age discrimination, the EEO Counselor must make the person aware of two important options:

1. The person may choose to file a formal complaint under 29 C.F.R. Part 1614; or
2. The person may bypass the administrative complaint process in Part 1614 and file a civil action directly in an appropriate U.S. District Court after first giving the Commission not less than thirty (30) days notice of intent to file such action. Such notice must be filed within 180 days after the date of the alleged discrimination. The notice may be mailed to the Commission Headquarters at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
P.O. Box 77960
Washington, DC 20013

hand delivered to:

Equal Employment Opportunity Commission
Office of Federal Operations
Federal Sector Programs
131 M Street N.E.
Suite 5SW12G
Washington, DC 20507

or sent by facsimile to:

(202) 663-7022

3. Because it is not clear which statute of limitations applies, an aggrieved person choosing to bypass the administrative process should initiate the civil action as soon as possible after the expiration of the 30-day waiting period that follows the notice of intent to sue.

D. Equal Pay Act

1. When a person contacts an EEO Counselor with a complaint of wage-based sex discrimination, the EEO Counselor should advise the person that s/he may file a civil action in a U.S. District Court within two years, or three years if the violation is willful, of the date of the alleged violation, regardless of whether s/he has pursued an administrative action against the agency. The EEO Counselor further should advise the person that the filing of an EEO complaint under Part 1614 alleging a violation of the EPA does not toll the time for filing a civil action.
2. The EEO Counselor further should advise the person that if s/he seeks to allege a violation of Title VII's prohibition against sex discrimination based on the same allegation, s/he must raise the Title VII allegation in the administrative process even if s/he files a civil action on the EPA allegation.
3. The EEO Counselor also should advise the person that notwithstanding the two/three-year limitations period applicable to the current action under the EPA, in order to present an administrative EPA claim, the aggrieved person must contact an EEO Counselor within forty-five (45) days of the date the aggrieved person becomes aware of or reasonably suspects a violation of the EPA.

E. Discrimination Based on Marital Status, Political Affiliation, Status as a Parent**1. Laws Enforced By the Commission -**

Discrimination based on an individual's status as a parent (prohibited under Executive Order 13152) is not a covered basis under the laws enforced by the Commission. However, there are circumstances where discrimination against caregivers may give rise to sex discrimination under Title VII or disability discrimination under the ADA. See [Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities](#).

Federal government employees may file claims of discrimination under the Part 1614 EEO process on any of the bases covered under the laws the Commission enforces, and/or may also utilize additional complaint procedures provided by their agency or described below.

- 2. Civil Service Reform Act** - The Civil Service Reform Act of 1978 (CSRA), as amended, also protects federal government applicants and employees from discrimination in personnel actions (see "[Prohibited Personnel Practices](#)") based on race, color, sex, religion, national origin, age, disability, marital status, political affiliation, or on conduct which does not adversely affect the performance of the applicant or employee -- which can include sexual orientation or transgender (gender identity) status. The [Office of Special Counsel \(OSC\)](#), and the [Merit Systems Protection Board \(MSPB\)](#), enforce the prohibitions against federal employment discrimination codified in the CSRA. For more information, see [Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment](#) and OPM's [Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace](#) and OSC's [Prohibited Personnel Practices and How to File a Complaint](#).
- 3. Executive Orders** - Additionally, federal agencies retain procedures for making complaints of discrimination on any bases prohibited by Executive Orders.

For Example,

Executive Order 13152 states that "status as a parent" refers to the status of an individual who, with respect to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is: a biological parent, an adoptive parent, a foster parent, a stepparent, a custodian of a legal ward, in loco parentis over such individual, or actively seeking legal custody or adoption of such an individual. The Executive Order authorized OPM to develop guidance on the provisions of the Order.

APPENDIX E EEO-MD-110
(SAMPLE)
NOTICE OF POSSIBLE APPLICABILITY OF
5 U.S.C. § 7121(D) TO ALLEGED DISCRIMINATORY ACTION
(29 C.F.R. PART 1614)

Section 1614.105 of the regulations of the U.S. Equal Employment Opportunity Commission requires that upon an aggrieved person's initial contact with the Equal Employment Opportunity (EEO) Counselor, or as soon thereafter as possible, the EEO Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. § 7121(d) to the alleged discriminatory action which caused the aggrieved person to seek EEO pre-complaint counseling. Further, the EEO Counselor must communicate to the aggrieved person the substance of 29 C.F.R. § 1614.301 concerning the election of remedies.

Section 1614.301 (Relationship to Negotiated Grievance Procedure) provides as follows:

- (a) When a person is employed by an agency subject to 5 U.S.C. § 7121(d) and is covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a claim of alleged employment discrimination must elect to raise the claim under either Part 1614 or the negotiated grievance procedure, but not both. An election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process as described in 29 C.F.R. § 1614.105 does not constitute an election for purposes of this section. An aggrieved employee who files a complaint under this part may not thereafter file a grievance on the same claim. An election to proceed under a negotiated grievance procedure is indicated by the filing of a timely written grievance. An aggrieved employee who files a grievance with an agency whose negotiated agreement permits the acceptance of grievances which allege discrimination may not thereafter file a complaint on the same claim under Part 1614 regardless of whether the agency has informed the individual of the need to elect or of whether the grievance has raised an issue of discrimination. Any such complaint filed after a grievance has been filed on the same claim shall be dismissed without prejudice to the complainant's right to proceed through the negotiated grievance procedure, including the right to appeal to the Commission from a final decision as provided in subpart D of this part. The notice of final action dismissing such a complaint shall advise the complainant of the obligation to raise discrimination in the grievance process and of the right to appeal the final grievance decision to the Commission.
- (b) When a person is not covered by a collective bargaining agreement that permits claims of discrimination to be raised in a negotiated grievance procedure, claims of discrimination shall be processed as complaints under this part.
- (c) When a person is employed by an agency not subject to 5 U.S.C. § 7121(d) and is covered by a negotiated grievance procedure, claims of discrimination shall be

processed as complaints under this part, except that the time limits for processing the complaint contained in 29 C.F.R. § 1614.106 and for appeal to the Commission contained in § 1614.402 may be held in abeyance during processing of a grievance covering the same claim as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

Accordingly, if you are alleging discrimination on the grounds of race, color, religion, sex, national origin, age, disability, genetic information and/or reprisal and if you wish to pursue the claim, you must make an election to pursue it either as a complaint with your agency under 29 C.F.R. Part 1614 or in a negotiated grievance procedure, if the following conditions apply:

1. You are an employee of a federal agency subject to the provisions of 5 U.S.C. § 7121(d), and
2. You are covered by a collective bargaining agreement which permits claims of discrimination to be raised in a negotiated grievance procedure.

If those two conditions apply to you, then you must elect one or the other procedure but not both. An election is made as follows:

1. By filing a grievance in writing (whether or not the grievance has raised a claim of discrimination), or
2. By filing a written formal EEO complaint with your agency under Part 1614. Use of the pre-complaint process (counseling) under 29 C.F.R. § 1614.105 does not constitute an election.

If you have further questions concerning the possible applicability of 5 U.S.C. § 7121(d) to you, you should immediately contact a representative of the employee organization which has a negotiated agreement with your agency or ask the EEO Counselor for further information and assistance.

APPENDIX F EEO-MD-110
SAMPLE RESOLUTION AGREEMENT

Aggrieved Person's Name
Aggrieved Person's Address

RE: Resolution of EEO Dispute

Dear [Aggrieved Person]:

This refers to the dispute which you first discussed with me on [DATE] when you alleged discrimination because of [IDENTIFY BASIS OF DISCRIMINATION] when on [IDENTIFY DATE OF ALLEGED DISCRIMINATORY EVENT] the following occurred: [IDENTIFY ALLEGED]

The purpose of this letter is to set out the terms of the informal resolution.

[INSERT TERMS OF RESOLUTION]

If you believe the agency has not complied with the terms of the informal resolution, you may, under 29 C.F.R. § 1614.504, notify the Director of Equal Employment Opportunity in writing within 30 days of the date of the alleged violation, requesting that the terms of the informal agreement be specifically implemented. Alternatively, you may request that the claim be reinstated for further processing from the point processing ceased.

The agency has signed the terms of the resolution as indicated by the signature of the agency official. Your signature and date below will verify your receipt of this letter and will signify your agreement with the terms of the informal resolution of this dispute as set out above. Enclosed is a duplicate copy of this letter. Please date and sign the original and the copy in the spaces provided and return the copy to me for inclusion in the counseling file. I will send a signed copy to the agency. You may keep the original.

Sincerely,

EEO Counselor

Date:

Agency Official

Date:

Aggrieved Person

Date:

Note: Be sure any agreement is put through the proper channels to ensure the agreement is enforceable and any other rights are also written in the agreement.

**APPENDIX G EEO-MD-110
NOTICE OF RIGHT TO FILE A DISCRIMINATION COMPLAINT
(SAMPLE)**

SUBJECT: Notice of Right to File a Discrimination Complaint

FROM: EEO Counselor

DATE:

TO: (Name of Person Counseled)

This is to inform you that because the dispute you brought to my attention has not been resolved to your satisfaction, you are now entitled to file an individual or class-based discrimination complaint based on race, color, religion, sex, national origin, physical or mental disability, age, genetic information, and/or reprisal. If you file a complaint, it must be in writing, signed, and filed within fifteen (15) calendar days after receipt of this notice, with any of the following officials authorized to receive discrimination complaints:

- Field Installation Head
(Provide name and address)
- Agency Director of Equal Employment Opportunity
(Provide name and address)
- Agency Head
(Provide name, title, and address)
- Other Official(s) as designated by the Agency, for example, an agency Equal Employment Opportunity Officer, the Hispanic Program Coordinator, the Disability Program Coordinator, or the Federal Women's Program Coordinator
[Provide name(s) and address(es)]

A complaint shall be deemed timely if it is received or postmarked before the expiration of the 15-day filing period, or in the absence of a legible postmark, if it is received by mail within five days of the expiration of the filing period.

If you file your complaint with one of the officials listed above (other than the EEO Director), it will be sent to the activity's EEO Director for processing. Therefore, if you choose to file your complaint with any of the other officials listed above, be sure to provide a copy of your complaint to the EEO Director to ensure prompt processing of your complaint.

The complaint must be specific and contain only those issues either specifically discussed with me or issues that are like or related to the issues that you discussed with me. It must also state whether you have filed a grievance under a negotiated grievance procedure or an appeal to the Merit Systems Protection Board on the same claims.

If you retain an attorney or any other person to represent you, you or your representative must immediately notify the EEO Director, in writing. You and/or your representative will receive a written acknowledgment of your discrimination complaint from the appropriate agency official.

If you file a complaint, you should name _____ (The EEO Counselor should provide the name and title of the agency head or department head. Agency or department means the national organization, and not just the local office, facility, or department in which the aggrieved person might work.)

(Signature Block)
EEO Counselor

NOTE:

A copy of this notice must be provided to the EEO Director with the EEO Counselor's Report and will be made a part of the complaint file.

You may contact _____(provide name and contact information) if a reasonable accommodation is needed to navigate the EEO process.

**APPENDIX H EEO-MD-110
EEO COUNSELOR'S REPORT
29 C.F.R. § 1614.105**

I. REQUIRED ELEMENTS

A. AGGRIEVED PERSON

Name: _____

Job Title/Series/Grade: _____

Place of Employment: _____

Work Phone No.: _____

Home Phone No.: _____

Home Address: _____

B. CHRONOLOGY OF EEO COUNSELING

Date of Initial Contact: _____

Date of Initial Interview: _____

Date of Alleged Discriminatory Event: _____

45th Day after Event: _____

Reason for delayed contact beyond 45 days, if applicable:

Date Counseling Report Requested: _____

Date Counseling Report Submitted: _____

C. BASIS(ES) FOR ALLEGED DISCRIMINATION

- 1) [] Race (Specify)_____
- 2) [] Color (Specify)_____
- 3) [] National Origin (Specify)_____
- 4) [] Sex (Male, Female, LGBT)_____
- 5) [] Pregnancy Discrimination_____
- 6) [] Age (Date of Birth)_____
- 7) [] Mental Disability (Specify)_____
- 8) [] Physical Disability (Specify)_____
- 9) [] Religion (Specify)_____
- 10) [] Equal Pay (Specify)_____
- 11) [] Genetic Information (Specify)_____
- 12) [] Reprisal (Identify earlier event and/or opposed practice, give date)_____

D. PRECISE DESCRIPTION OF THE ISSUE(S) COUNSELED

E. REMEDY REQUESTED

F. EEO COUNSELOR’S CHECKLIST - THE EEO COUNSELOR ADVISED THE AGGRIEVED PERSON IN WRITING OF THE RIGHTS AND RESPONSIBILITIES CONTAINED IN THE EEO COUNSELOR CHECKLIST.

II. SUMMARY OF INFORMAL RESOLUTION ATTEMPTS

A. IF THE EEO COUNSELOR ATTEMPTED RESOLUTION

- 1. Personal Contacts

- 2. Documents Reviewed

3. Summary of Informal Resolution Attempt

B. IF AGGRIEVED OPTED FOR EEO ADR, EEO COUNSELOR'S STATEMENT THAT THE EEO ADR PROCESS WAS FULLY EXPLAINED TO THE AGGRIEVED INDIVIDUAL/SUMMARY OF INFORMATION GIVEN TO THE AGGRIEVED INDIVIDUAL AND THE AGENCY BY THE EEO COUNSELOR

Name of EEO Counselor

Telephone Number

Signature of EEO Counselor

Office Address

Date

EEOC APPENDIX I EEO-MD-110

RESERVED

APPENDIX J EEO-MD-110

**MODEL FOR ANALYSIS
DISPARATE TREATMENT**

PRIMA FACIE CASE

- 1) Membership in protected group
- 2) Complainant treated differently from similarly situated employees not in protected group
 - a) Were compared employees in same chain of command as complainant?
 - b) Were compared employees in same work unit as complainant?

OR

In the absence of comparative evidence, is there other evidence that indicates that the agency's actions may have been motivated by discrimination?¹

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for its treatment of complainant and the compared employees/applicants? How did the agency respond to other evidence, if any, of discrimination?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of complainant is pretextual?

¹In this model and in the models set forth below, keep in mind the Supreme Court's decision in O'Connor v. Consolidated Coin Caterer's Corp., 517 U.S. 308 (1996), in which the Court ruled that comparative evidence is not an essential element of a prima facie case of discrimination. In the absence of such evidence, the complainant must come forward with other evidence sufficient to create an inference of discrimination.

APPENDIX J-2 EEO-MD-110

**MODEL FOR ANALYSIS
HIRING/PROMOTION**

PRIMA FACIE CASE

- 1) Complainant is a member of a protected group.
- 2) Was there a vacancy?
- 3) Did complainant apply?
- 4) Was complainant qualified; was complainant rejected?
- 5) Was the vacancy filled? If so, was the selectee a member of complainant's protected group?

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for rejecting complainant?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for rejecting complainant is pretextual?

APPENDIX J-3 EEO-MD-110

**MODEL FOR ANALYSIS
DISCHARGE/DISCIPLINARY ACTION**

PRIMA FACIE CASE

- 1) Complainant is a member of a protected group.
- 2) Was complainant qualified for the position s/he was performing?
- 3) Was the complainant satisfying the normal requirements of the position?
- 4) Was the complainant discharged or otherwise disciplined?
- 5) Was the complainant replaced by an employee outside the protected group or was s/he singled out for discharge or discipline while similarly situated employees were retained or not comparably disciplined?

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for disciplining complainant?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for discipline or discharge of complainant is pretextual? For example, did the agency treat other individuals with similar performance problems more favorably than complainant?

APPENDIX J-4 EEO-MD-110

**MODEL FOR ANALYSIS
RETALIATION**

PRIMA FACIE CASE

- 1) Had the complainant previously engaged in protected activity or opposed unlawful discrimination?
- 2) Was the agency aware of complainant's activity?
- 3) Was complainant contemporaneously or subsequently adversely affected by some action of the agency?
- 4) Does some connection exist between complainant's activity and the adverse employment decision (for example, the adverse employment decision occurred within such a period of time that a retaliatory inference arises)?

OR

Is there direct evidence that shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for the adverse employment decision?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for the employment decision is pretextual?

APPENDIX J-5 EEO-MD-110

MODEL FOR ANALYSIS
DISABILITY--REASONABLE ACCOMMODATION**PRIMA FACIE CASE -- Where Complainant Alleges a Failure to Provide a Reasonable Accommodation:**

- 1) Does complainant have a physical or mental impairment (for example, deafness; blindness; partially or completely missing limbs or mobility impairments requiring the use of a wheel chair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy) that is readily observable or where there is medical documentation of the impairment?
- 2) Does this impairment, when active and not taking into account any mitigating measures employed by the complainant, substantially limit complainant's ability to perform a major life activity (for example, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) or substantially limits a major bodily function? If not readily observable then provide evidence on the activities affected, how they are affected, and the degree to which they are affected (can't do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, *etc.*). The question of whether an individual meets the definition of disability under 29 C.F.R. § 1630.(c)(4) should not demand extensive analysis.
- 3) Does the agency know of the complainant's disability?
- 4) Is the complainant otherwise qualified (that is, does the complainant, with or without accommodation, meet the education, skills, and experience requirements of the job)?
- 5) What are the essential functions, (for example, the outcomes that must be achieved by a person in that position, not the methods by which those outcomes are typically achieved) of the complainant's job?
- 6) Did complainant request accommodation? What accommodation, if any, did the complainant suggest?
- 7) What action did the agency take to identify possible accommodation or attempt accommodation? Did the agency make an individualized assessment of the complainant,

comparing his/her qualifications and limitations with the job requirements? What actions did the agency take to consider the complainant's suggested accommodations?

- 8) If an accommodation has been identified, will this accommodation enable complainant to perform the essential functions of the job, that is, is it effective?
- 9) Did the agency provide an accommodation?
- 10) If the agency did not provide an accommodation, what reason has the agency given for its refusal?
- 11) If the agency contends that a particular accommodation would impose an undue hardship on its operations, are these reasons sufficient to establish an undue hardship defense given:
 - a) the overall size of the agency's program (the number of employees, number and type of facilities and size of budget);
 - b) the type of agency operation (composition and structure of work force);
 - c) the nature and net cost of accommodation.

APPENDIX J-6 EEO-MD-110

MODEL FOR ANALYSIS
DISABILITY--DISPARATE TREATMENT

PRIMA FACIE CASE -- Where Complainant Alleges Disparate Treatment

- 1) Does complainant have a physical or mental impairment (for example, deafness; blindness; partially or completely missing limbs or mobility impairments requiring the use of a wheel chair; intellectual disability (formerly termed mental retardation); autism; cerebral palsy; major depressive disorder; bipolar disorder; post-traumatic stress disorder; obsessive compulsive disorder; schizophrenia; cancer; diabetes; epilepsy; HIV infection; multiple sclerosis; and muscular dystrophy) that is readily observable or where there is medical documentation of the impairment?
- 2) Does this impairment, when active and not taking into account any mitigating measures employed by the complainant substantially limit complainant's ability to perform a major life activity (for example, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) or substantially limits a major bodily function? If not readily observable then provide evidence on the activities affected, how they are affected, and the degree to which they are affected (can't do the activity at all, can only do the activity with assistive devices or equipment, can only do the activity for a limited period of time, etc.). The question of whether an individual meets the definition of disability under 29 C.F.R. § 1630.(c)(4) should not demand extensive analysis.
- 3) Does complainant have a record or history of a substantially limiting impairment (from which complainant may have recovered in whole or in part)?

OR

Was complainant regarded as having such an impairment (whether or not the complainant has an impairment or a substantially limiting impairment)?

- 4) Does the agency know of complainant's disability?
- 5) Is complainant qualified to perform the essential functions of the job with or without reasonable accommodation:
 - a. Is complainant otherwise qualified (that is, does the complainant, with or without accommodation, meet the educational and experience requirements of the job)?

- b. What are the essential functions, (for example, the outcomes that must be achieved by a person in that position, not the methods by which those outcomes are typically achieved) of complainant's job?
 - c. Can complainant perform the essential functions of the job with or without accommodation? If an accommodation is necessary, see Model for Analysis -- Disability -- Reasonable Accommodation, Attachment J-5.
- 6) Was complainant treated differently from similarly situated employees who were not disabled or who had different disabilities?
- a. Were compared employees in the same chain of command?
 - b. Were compared employees in the same work unit?

OR

Is there direct evidence which shows discriminatory intent?

REBUTTAL

What did the agency say was the reason for treating complainant differently than other similarly-situated employees who were not disabled or who had different disabilities?

PRETEXT

Is there direct or circumstantial evidence that the agency's reason for its treatment of complainant is pretextual?

APPENDIX J-7 EEO-MD-110

**MODEL FOR ANALYSIS
RELIGIOUS ACCOMMODATION**

PRIMA FACIE CASE

- 1) Does complainant hold a religious belief which conflicts with employment requirements? (Note: only in the rarest of cases, where the evidence appears very clear that the complainant does not sincerely hold the religious belief or does not sincerely engage in the religious practices that may need an accommodation should an investigator challenge the sincerity of the belief or practice.)
- 2) Has complainant informed his/her superior of a conflict?
- 3) Has complainant been penalized for failing to comply with employment requirements?

REBUTTAL

- 1) Belief or practice not of religious nature.
- 2) Agency could not accommodate without undue hardship.

DUTY TO ACCOMMODATE -- RELIGIOUS COMPENSATORY TIME

To allow employees to work additional hours (overtime, compensatory time) to make up for the time required by their personal religious belief (Pub. L. No. 95-390, 5 U.S.C. § 5550a, "Compensatory Time Off for Religious Observances").

APPENDIX K EEO-MD-110
NOTICE OF INCOMPLETE INVESTIGATION
(SAMPLE)

Subject: Notice of Incomplete Investigation

FROM: [EEO Director]

DATE: [Insert]

TO: [Complainant/Complainant's Representative]

This Notice is to inform you that the investigation of [Agency Complaint No(s)] has not been completed within the 180-day time frame. Therefore, at this time, you have the right to request a hearing before a Commission Administrative Judge or to file a civil action in an appropriate U.S. District Court. You should send your request for a hearing before a Commission Administrative Judge to [insert correct address for the Commission District Office]. If you choose to file a civil action, that action should be styled [Complainant v. Agency Head]. You may also petition the U.S. District Court to appoint an attorney and to authorize commencement of the civil action without payment of fees, costs, or security. Whether your request is granted or denied is within the sole discretion of the U. S. District Judge.

Should you elect to request a hearing or file a civil action, you may have the opportunity to engage in discovery. Discovery is a pre-hearing and pre-trial device you can use to obtain facts and information from the agency. Tools of discovery include, but are not limited to, depositions, interrogatories, requests for production of documents, and requests for admissions. You are required to prove your case by a preponderance of the evidence which means the evidence of discrimination must be of greater weight than the evidence of non-discrimination.

In the alternative, you may wait until the investigation is complete, at which time, you will receive notice of the right to request a hearing before a Commission Administrative Judge or to request an immediate final agency decision. The estimated date of completion for the investigation is [insert date]. If you choose to wait for the investigation to be completed, you need not take any action at this time. The issuance of this Notice does not operate to waive your right to seek sanctions against the Agency for failing to complete the investigation within the required regulatory time frame.

(Signature Block)
EEO Director

**APPENDIX L EEO-MD-110
COMPLAINT FILE FORMAT**

Title Page

(Agency Letterhead)

(COMPLAINANT):
(Complainant’s Address):
(Complainant’s City, State, ZIP):

Complainant:

and

(AGENCY HEAD):
(Title):
(Agency Name):

(Agency Address)
(P.O. Box)
(City, State, ZIP)

Agency:

AGENCY CASE NO.____:

OTHER NUMBERS_____:

General Requirements

Adobe image over text (searchable portable document format (PDF) – To preserve document integrity while simultaneously providing additional functionality, the Commission requires that all agency submissions – whether for a hearing as directed from an EEOC Administrative Judge, or on appeal pursuant to 29 C.F.R. § 1614.403(g) – be in searchable PDF format. Searchable PDF documents still look like a copy of the scanned/converted document, but behind the image Adobe performs optical character recognition (OCR) to identify the letters, words, and numbers that are present in the image. This functionality allows someone to search for particular words or

terms in the PDF document, and to copy and paste verbatim language from the PDF document into a word processing document.

Saving or converting word processing documents to PDF automatically results in a searchable PDF document. For those documents that are scanned, typically there is a setting on the scanner that changes the output to searchable PDF. An image-only PDF document can also be converted to searchable PDF. See http://blogs.adobe.com/acrobat/acrobat_ocr_make_your_scanned/.

Digital bookmarks – Digital submissions comprised of multiple documents (for example, Reports of Investigation, Administrative Complaint Files, briefs/motions containing exhibits, etc.) must contain hyperlinked bookmarks for relevant/important documents therein. The bookmarks must be named in a manner that describes what the document is (for example, “EEO Counselor’s Report,” “Formal Complaint,” “Exhibit A – 2014 Performance Evaluation,” etc.), rather than a generic tab or table of contents designation. While more detailed bookmarking is always appreciated, the following documents (if applicable) must be bookmarked:

- Formal Complaint
- EEO Counselor’s Report
- Notice of Right to File a Complaint
- Notice of Claims to be Investigated
- Agency’s Partial Dismissal of Claims
- Settlement Agreements
- Prior Appellate Activity
- Report of Investigation Summary
- Exhibits/Evidence in the Report of Investigation
- Notice of Incomplete Investigation
- Pre-Hearing Submissions (including motions, orders, exhibits, and transcripts)
- Hearing Submissions (including motions, orders, exhibits, and transcripts)
- Administrative Judge’s Decision
- Final Agency Decision or Final Order

For instructions on how to add bookmarks to a PDF document, see <https://acrobatusers.com/tutorials/how-do-i-add-bookmarks-to-a-pdf-document>.

Consolidated Submissions on Appeal – Submissions on appeal to the Office of Federal Operations should be consolidated into as few PDF files as possible, mindful of the size restrictions imposed by the Commission’s document submission portal. If a file exceeds the size limitation, it may be divided into multiple files, but there should be as few as possible.

For instructions on how to consolidate multiple PDF files, see <http://www.adobe.com/video/feature-detail/acrobat/axi/merge-pdf-files-into-one->

[pdf.modaldisplay.s_content.s_dotcom.s_en.s_products.s_acrobat.s_merging-combining-pdf-files.html](#).

Sample Digital Complaint File

A sample digital complaint file will be posted on the FedSEP portal and the Commission's external web-site at a later date.

**APPENDIX M EEO-MD-110
REQUEST FOR A HEARING FORM**

To: The Commission Hearings Unit:

District/Field Office Name:	
Address:	
City, State, ZIP Code:	
Fax number (if applicable):	

Dear Sir/Madam:

I am requesting the appointment of an Equal Employment Opportunity Commission Administrative Judge pursuant to 29 C.F.R. § 1614.108(g). I hereby certify that either more than 180 days have passed from the date I filed my complaint or I have received a notice from the agency that I have thirty (30) days to elect a hearing or a final agency decision.

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code):	
Home or Mobile Phone # (with area code):	
E-mail address (if any):	
Agency Case Number:	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	
Fax Number (if any)	

I will require the following reasonable accommodation(s) to participate in the hearing process:

In accordance with Section 1614.108(g), I have sent a copy of this request for a hearing to the following person at the agency:

Agency EEO Office Representative Information:

Agency EEO Office Representative name:	
Address:	
City, State, ZIP Code:	
Fax number (if applicable):	
E-mail address (if any):	

Complainant's Signature:

Signature of complainant or complainant's attorney:	
Date:	

NOTE: Only Complainant or their attorney can sign the request for a hearing. Non-attorney representatives may not sign requests for a hearing. HEARING REQUESTS MUST BE SIGNED. UNSIGNED HEARING REQUESTS WILL NOT BE ASSIGNED A HEARING NUMBER OR AN ADMINISTRATIVE JUDGE.

**APPENDIX N EEO-MD-110
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICES AND GEOGRAPHIC JURISDICTIONS FOR
FEDERAL EMPLOYEE AND APPLICANT HEARING REQUESTS**

Toll Free 1-800-669-4000
Toll Free TTY 1-800-669-6820
info@eoc.gov

Atlanta District Office
EEOC
100 Alabama Street, S.W.
Suite 4R30
Atlanta, Georgia 30303-8704

Commercial No: 404/562-6930
Hearings Unit Phone No: 404/562-6928
Hearings Fax No: 404/562-6909
TTY No: 404/562-6801

Geographic Jurisdiction: The **State of Georgia** and **State of South Carolina counties of** Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Hampton, Jasper, and Williamsburg.

Baltimore Field Office
EEOC
City Crescent Building
10 South Howard Street, 3rd Floor
Baltimore, Maryland 21201-2529

Commercial No: 410/962-3932
Hearings Unit Phone No: 410/209-2782
Hearings Fax No: 410/209-2777
TTY No: 410/962-6065

Geographic Jurisdiction: The State of Maryland.

Birmingham District Office

EEOC

Ridge Park Place, Suite 2000

1130 22nd St., South

Birmingham, Alabama 35205-2870

Commercial No: 205/212-2104

Hearings Unit Phone No: 205/212-2139

Hearings Fax No: 205/212-2105

TTY No: 205/212-2112

Geographic Jurisdiction:

The State of Alabama; the State of Florida counties of Bay, Calhoun, Escambia, Franklin, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington; and the State of Mississippi except for the counties of Alcorn, Benton, Coahoma, DeSoto, Itawamba, Lafayette, Lee, Marshall, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo, Tunica, and Union which should be sent to the Memphis District office.

Charlotte District Office

EEOC

129 W. Trade St., Suite 400

Charlotte, North Carolina 28202-5306

Commercial No: 704/344-6682

Hearings Unit Phone No: 704/954-6428

Hearings Fax No: 704/954.6573

TTY No: 704/344-6684

Geographic Jurisdiction:

The States of North Carolina and South Carolina except for the counties of Allendale, Bamberg, Barnwell, Beaufort, Berkeley, Charleston, Colleton, Dorchester, Georgetown, Hampton, Jasper, and Williamsburg which should be sent to the Atlanta District Office; The State of Virginia except for the counties of Arlington, Clarke, Fairfax, Fauquier, Frederick, Loudoun, Prince William, Stafford, Warren, and the State of Virginia Independent Cities of Alexandria, Fairfax City, Falls Church, Manassas, Manassas Park, Winchester, Quantico, Dumfries, and Occoquan which should be sent to the Washington Field Office.

Chicago District Office
EEOC
500 West Madison Street, Suite 2000
Chicago, Illinois 60661-2506

Commercial No: 800-669-4000
Hearings Unit Phone No: 312/869-8114
Hearings Fax No: 312/869-8125
TTY No: 312/869-8001

Geographic Jurisdiction: **The State of Illinois except for the counties of Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, and Washington which should be sent to the St. Louis District Office.**

Cleveland Field Office
EEOC
1240 E. Ninth Street, Room 3001
Cleveland, Ohio 44199

Commercial No: 216/522-2001
Hearings Unit Phone No: 216/522-7325
Hearings Fax No: 216/522-7430
TTY No: 216/522-8441

Geographic Jurisdiction: **The State of Ohio counties of Ashland, Ashtabula, Athens, Belmont, Carroll, Columbiana, Coshocton, Crawford, Cuyahoga, Delaware, Erie, Fairfield, Franklin, Geauga, Guernsey, Harrison, Hocking, Holmes, Huron, Jefferson, Knox, Lake, Licking, Lorain, Mahoning, Marion, Medina, Meigs, Monroe, Morgan, Morrow, Muskingum, Noble, Perry, Portage, Richland, Stark, Summit, Trumbull, Tuscarawas, Vinton, Washington and Wayne.**

Dallas District Office
EEOC
207 S. Houston Street, 3rd Floor
Dallas, Texas 75202-4726

Commercial No: 214/253-2700
Hearings Unit Phone No: 214/253-2763
Hearings Fax No: 214/253-2739
TTY No: 214/253-2710

Geographic Jurisdiction: **The State of Texas counties of Anderson, Andrews, Archer, Armstrong, Bailey, Baylor, Bell, Borden, Bosque, Bowie, Brewster, Briscoe, Brown, Callahan, Camp, Carson, Cass, Castro, Cherokee, Childress, Clay, Cochran, Coleman, Collin, Collingsworth, Comanche, Cooke, Coryell, Cottle, Crane, Crosby, Culberson, Dallam, Dallas, Dawson, Deaf Smith, Delta, Denton, Dickens, Donley, Eastland, Ector, Ellis, El Paso, Erath, Falls, Fannin, Fisher, Floyd, Foard, Franklin, Freestone, Gaines, Garza, Glasscock, Gray, Grayson, Gregg, Hale, Hall, Hamilton,**

Hansford, Hardeman, Harrison, Hartley, Haskell, Hemphill, Henderson, Hill, Hockley, Hood, Hopkins, Howard, Hudspeth, Hunt, Hutchinson, Jack, Jeff Davis, Johnson, Jones, Kaufman, Kent, King, Knox, Lamar, Lampasas, Lamb, Leon, Limestone, Lipscomb, Loving, Lubbock, Lynn, McLennan, Marion, Martin, Midland, Milam, Mills, Mitchell, Montague, Moore, Morris, Motley, Navarro, Nolan, Ochiltree, Oldham, Palo Pinto, Panola, Parker, Parmer, Pecos, Potter, Presidio, Rains, Randall, Reagan, Red River, Reeves, Roberts, Robertson, Rockwall, Runnels, Rusk, Scurry, Shackelford, Sherman, Smith, Somervell, Stephens, Sterling, Stonewall, Swisher, Tarrant, Taylor, Terry, Throckmorton, Titus, Upshur, Upton, Van Zandt, Ward, Wheeler, Wichita, Wilbarger, Winkler, Wise, Wood, Yoakum, and Young; and the **State of New Mexico counties of Dona Ana, Eddy, Grant, Hidalgo, Lea, Luna, Otero, and Sierra.**

Denver Field Office
 EEOC
 303 E. 17th Avenue, Suite 510
 Denver, Colorado 80203-1258

Commercial No: 303/866-1300
 Hearings Unit Phone No: 303/866-1356
 Hearings Fax No: 303/866-1085
 TTY No: 303-866-1950

Geographic Jurisdiction: The States of Colorado and Wyoming. Hearing requests should be sent to the Phoenix District Office.

Detroit Field Office
 EEOC
 477 Michigan Avenue, Room 865
 Detroit, Michigan 48226-9704

Commercial No: 313/226-4600
 Hearings Unit Phone No: 313/226-4641
 Hearings Fax No: 313/226-4610
 TTY No: 313-226-7599

Geographic Jurisdiction: The State of Michigan and the State of Ohio counties of Allen, Defiance, Fulton, Hancock, Henry, Lucas, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert, Williams, Wood, and Wyandot.

Houston District Office

EEOC
1201 Louisiana Street, Suite 600

Houston, Texas 77002-8094

Commercial No: 713/651-4900
Hearings Unit Phone No: 713/651-4967
Hearings Fax No: 713-751-0675
TTY No: 713-651-4901

Geographic Jurisdiction:

The State of Texas counties of Angelina, Austin, Brazoria, Brazos, Calhoun, Chambers, Colorado, Fayette, Fort Bend, Galveston, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Lavaca, Liberty, Madison, Matagorda, Montgomery, Nacogdoches, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler, Victoria, Walker, Waller, Washington, and Wharton.

Indianapolis District Office

EEOC
101 West Ohio Street, Suite 1900
Indianapolis, Indiana 46204-4203

Commercial No: 317/226-7212
Hearings Unit Phone No: 317/226-6430
Hearings Fax No: 317-226-5571
TTY No: 317-226-5162

Geographic Jurisdiction:

The States of Indiana, Kentucky; the State of Ohio counties of Adams, Auglaize, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fayette, Gallia, Greene, Hamilton, Hardin, Highland, Jackson, Lawrence, Logan, Madison, Mercer, Miami, Montgomery, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Union, and Warren.

Los Angeles District Office

EEOC
255 E. Temple, 4th Floor
Los Angeles, California 90012-3334

Commercial No: 213/894-1000
Hearings Unit Phone No: 213/894-1064
Hearings Fax No: 213-894-5482
TTY No: 213-894-1121

Geographic Jurisdiction:

The State of California counties of Fresno, Imperial, Inyo, Kern, Kings, Los Angeles, Madera, Mariposa, Merced, Mono, Orange, Riverside, San Benito, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, Tulare, and Ventura; **The State of Hawaii and the State of Nevada counties of** Clark, Esmeralda, Lincoln, Mineral, and Nye; **The U.S. Possessions of American**

**Samoa, Guam, Northern Mariana Islands, and Wake Island.
Federal civilian employees at military installations in Japan,
Korea, Okinawa and other Pacific Islands.**

Memphis District Office EEOC 1407 Union Avenue, Suite 901 Memphis, Tennessee 38104-3629	Commercial No: 901/544-0116 Hearings Unit Phone No: 901/544-0073 Hearings Fax No: 901/544-0111 TTY No: 901/544-0112
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Geographic Jurisdiction: **The States of Arkansas and Tennessee, and the State of Mississippi counties of** Alcorn, Benton, Coahoma, DeSoto, Itawamba, Lafayette, Lee, Marshall, Panola, Pontotoc, Prentiss, Quitman, Tate, Tippah, Tishomingo, Tunica, and Union.

Miami District Office EEOC 100 SE 2nd Street, Suite 1500 Miami, Florida 33131	Commercial No: 305/808-1740 Hearings Unit Phone No: 305/808-1820 Hearings Fax No: 305/808-1835 TTY No: 305/808-1742
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Geographic Jurisdiction: **The Commonwealth of Puerto Rico and the U.S. Virgin Islands. The State of Florida counties of** Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Desoto, Dixie, Duval, Flagler, Gilchrist, Glades, Gadsden, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Miami Dade, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, Sarasota, Seminole, St. Johns, St. Lucie, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla.

Milwaukee Area Office EEOC 310 West Wisconsin Avenue, Suite 800 Milwaukee, Wisconsin 53203-2292	Commercial No: 414/297-1111 Hearings Unit Phone No: 414/297-1117 Hearings Fax No: 414/297-3146 TTY No: 414-297-1115
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Geographic Jurisdiction: **The States of Iowa, Minnesota, North Dakota, South Dakota and Wisconsin.**

New Orleans Field Office	Commercial No:	504/595-2825
EEOC	Hearings Unit Phone No:	504/595-2329
500 Poydras St., Suite 800	Hearings Fax No:	504/595-6861
New Orleans, Louisiana 70113	TTY No:	504/595-2958

Geographic Jurisdiction: **The State of Louisiana.**

New York District Office	Commercial No:	212/336-3620
EEOC	Hearings Unit Phone No:	212/336-3620
33 Whitehall Street	Hearings Fax No:	212/336-3621
New York, New York 10004-2112	TTY No:	212/336-3622

Geographic Jurisdiction: **The States of Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, and the State of New Jersey counties of Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren.**

Philadelphia District Office	Commercial No:	215/440-2600
EEOC	Hearings Unit Phone No:	215/440-2800
801 Market St, Suite 1300	Hearings Fax No:	215/440-2805
	TTY No:	215/440-2610

Philadelphia, Pennsylvania 19107

Geographic Jurisdiction: **The States of Delaware, Pennsylvania, and West Virginia. The State of New Jersey *except for the State of New Jersey counties of Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, and Warren* which should be sent to the New York District Office. The State of Ohio *except for the State of Ohio counties under the jurisdiction of the Cincinnati Area Office* (Adams, Auglaize, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fayette, Gallia, Greene, Hamilton, Hardin, Highland, Jackson, Lawrence, Logan, Madison, Mercer, Miami, Montgomery, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Union, and Warren; **and The State of State of Ohio counties of Allen, Defiance, Fulton, Hancock, Henry, Lucas, Ottawa, Paulding, Putnam, Sandusky, Seneca, Van Wert,****

Williams, Wood, and Wyandot. **and the State of Kentucky counties of** Bath, Boone, Bourbon, Boyd, Bracken, Breathitt, Campbell, Carter, Elliott, Fleming, Floyd, Gallatin, Grant, Greenup, Harrison, Johnson, Kenton, Knott, Lawrence, Letcher, Lewis, Magoffin, Martin, Mason, Menifee, Montgomery, Morgan, Nicholas, Pendleton, Perry, Pike, Powell, Robertson, Rowan, and Wolfe) **which should be sent to the Indianapolis District Office.**

Phoenix District Office	Commercial No:	602/640-5000
EEOC	Hearings Unit Phone No:	602/640-5039
3300 N. Central Avenue, Suite 690	Hearings Fax No:	602/640-4729
Phoenix, Arizona 85012-2504	TTY No:	602/640-5072

Geographic Jurisdiction: **The States of Arizona and Utah. The State of New Mexico *except for the State of New Mexico counties of* Dona Ana, Eddy, Grant, Hidalgo, Lea, Luna, Otero, and Sierra **which should be sent to the Dallas District Office.** Hearing requests for the states of **Colorado, and Wyoming should also be sent to the Phoenix District Office.****

St. Louis District Office	Commercial No:	314/539-7800
EEOC	Hearings Unit Phone No:	314/539-7800
The Robert A. Young Building	Hearings Fax No:	314/539-7894
1222 Spruce Street, 8th Fl., Rm.100	TTY No:	314/539-7803
St. Louis, Missouri 63103-2828		

Geographic Jurisdiction: **The States of Kansas, Missouri, Nebraska, Oklahoma, and the State of Illinois counties of** Alexander, Bond, Calhoun, Clinton, Greene, Jackson, Jersey, Macoupin, Madison, Monroe, Perry, Pulaski, Randolph, St. Clair, Union, and Washington.

San Antonio Field Office	Commercial No:	210/281-7600
EEOC	Hearings Unit Phone No:	210/281-7676
5410 Fredericksburg Road, Suite 200	Hearings Fax No:	210/281-2520
San Antonio, TX 78229-3555	TTY No:	210/281-7610

Geographic Jurisdiction: **The State of Texas counties of** Aransas, Atascosa, Bandera, Bastrop, Bee, Bexar, Blanco, Brooks, Bureson, Burnet, Caldwell, Cameron, Coke, Comal, Concho, Crockett, De Witt,

Dimmit, Duval, Edwards, Frio, Gillespie, Goliad, Gonzales, Guadalupe, Hays, Hidalgo, Irion, Jim Hogg, Jim Wells, Karnes, Kendall, Kennedy, Kerr, Kimble, Kinney, Kleberg, La Salle, Lee, Live Oak, Llano, McCulloch, McMullen, Mason, Maverick, Medina, Menard, Nueces, Real, Refugio, San Patricio, San Saba, Schleicher, Starr, Sutton, Terrell, Tom Green, Travis, Uvalde, Val Verde, Webb, Willacy, Williamson, Wilson, Zapata, and Zavala.

San Francisco District Office EEOC Phillip Burton Federal Building, Suite 5000 450 Golden Gate Avenue 5 West, P.O. Box 36025 San Francisco, California 94102-3661	Commercial No: 415/522-3000 Hearings Unit Phone No: 415/522-3023 Hearings Fax No: 415/522-3415 TTY No: 415/522-3152
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Geographic Jurisdiction: **The State of California counties of** Alameda, Alpine, Amador, Butte, Calaveras, Colusa, Contra Costa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Monterey, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Joaquin, San Mateo, Santa Clara, Santa Cruz, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba; and **the State of Nevada *except for the State of Nevada counties of* Clark, Esmeralda, Lincoln, Mineral, and Nye which should be sent to the Los Angeles District Office.**

Seattle Field Office EEOC Federal Office Building 909 First Avenue, Suite 400 Seattle, Washington 98104-1061	Commercial No: 206/220-6884 Hearings Unit Phone No: 206/220-6884 Hearings Fax No: 206/220-6911 TTY No: 206/220-6882
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Geographic Jurisdiction: **The State of Montana; The States of Alaska, Idaho, Oregon, and Washington.**

Washington Field Office
EEOC
131 M Street, NE, 4th Floor
Washington, DC 20507

Commercial No: 202/419-0700
Hearings Unit Phone No: 202/419-0713
Hearings Fax No: 202/419-0740
TTY No: 202/419-0702

Geographic Jurisdiction: **The District of Columbia and the State of Virginia counties of Arlington, Clarke, Fairfax, Fauquier, Frederick, Loudoun, Prince William, Stafford, Warren, and the State of Virginia Independent Cities of Alexandria, Fairfax City, Falls Church, Manassas, Manassas Park, Winchester, Quantico, Dumfries, and Occoquan.**

**NOTICE OF APPEAL – AGENCY
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS**

1. Agency (please print or type):

2. Address:

3. Name of agency representative:

4. Telephone (including area code):

E-Mail address:

5. Name, address, telephone no. of complainant:

6. If the complainant is represented, name, address, and telephone no. of representative:

7. Agency complaint number:

8. Name of Administrative Judge, District/Field Office location, and the Commission Hearings Unit No.:

9. Date of agency final action (include a copy):

10. To your knowledge, does the complainant have any appeals pending at OFO? If so, please indicate the Commission Appeal Nos.:

11. Signature of agency representative:

Date:

NOTICE: Before mailing this appeal, please be sure to **attach a copy** of the final action and the Administrative Judge's decision from which you are appealing. Please serve a copy of this appeal form on the complainant, with a copy of your final action. **Any statement or brief in support of this appeal shall be submitted within twenty (20) days of the date this appeal is filed. Agencies must forward the complaint file to the Commission within thirty (30)**

FOR the Commission USE ONLY:

OFO DOCKET NO.:

**NOTICE OF APPEAL/PETITION - COMPLAINANT
TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS
P.O. Box 77960
Washington, DC 20013**

Complainant Information: (Please Print or Type)

Complainant's name (Last, First, M.I.):	
Home/mailling address:	
City, State, ZIP Code:	
Daytime Telephone # (with area code)	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's complaint number:	
Location of the duty station or local facility in which the complaint arose:	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	<input type="checkbox"/> Yes Date Received _____ (Remember to attach a copy) <input type="checkbox"/> No <input type="checkbox"/> This appeal alleges a breach of a settlement agreement
Has a complaint been filed on this same matter with the Commission, another agency, or through any other administrative or collective bargaining procedures?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	<input type="checkbox"/> No <input type="checkbox"/> Yes (Attach a copy of the civil action filed)

NOTICE: Please **attach a copy of the final decision or order** from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the Commission Administrative Judge's decision. Any comments or brief in support of this appeal **MUST** be filed with the Commission and with the agency **within 30 days** of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, submitted, or faxed to the Commission at the address above.

Please specify any reasonable accommodations you will require to participate in the appeal process:

Signature of complainant or complainant's representative:	
Date:	
Method of Service on Agency:	
Date of Service:	

**PRIVACY ACT STATEMENT ON REVERSE SIDE.
EEOC Form 573 REV 2/09
PRIVACY ACT STATEMENT**

(This form is covered by the Privacy Act of 1974. Public Law 93-597. Authority for requesting the personal data and the use thereof are given below)

1. **FORM NUMBER/TITLE/DATE:** EEOC Form 573, Notice of Appeal/Petition, February 2009
2. **AUTHORITY:** 42 U.S.C. § 2000e-16
3. **PRINCIPAL PURPOSE:** The purpose of this questionnaire is to solicit information to enable the Commission to properly and effectively adjudicate appeals filed by federal employees, former federal employees, and applicants for federal employment.
4. **ROUTINE USES:** Information provided on this form may be disclosed to: (a) appropriate federal, state, or local agencies when relevant to civil, criminal, or regulatory investigations or proceedings; (b) a Congressional office in response to an inquiry from that office at your request; and (c) a bar association or disciplinary board investigating complaints against attorneys representing parties before the Commission. Decisions of the Commission are final administrative decisions, and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information may also be used in depersonalized form as a database for statistical purposes.
5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION:** Since your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Commission with the requested information could hinder timely processing of your case, or even result in the rejection or dismissal of your appeal.

You may send your appeal to:

**The Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013**

Fax it to (202) 663-7022 or submit it through the Commission's electronic submission portal.

**APPENDIX Q EEO MD-110
QUICK REFERENCE CHART
DOCUMENTATION REQUIRED TO CLOSE COMPLIANCE WITH THE MOST COMMON OFO ORDERS**

TYPE OF ORDER OR EVENT	DOCUMENTATION REQUIRED
<p>Attorney Fees</p> <p>Dollar amount is adjudicated and ordered.</p> <p>[Not general attorney fee entitlement]</p>	<ol style="list-style-type: none"> 1. Copy of an agency payment order, print screen of electronic funds transfer or check issued to complainant (and attorney) for fees. 2. A narrative statement by an appropriate agency official - one to know with reasonable certainty that payment was made. 3. Documentation must include total monies paid, to whom, and when, or 4. A Final Agency Decision on contest of fees
<p>Awards</p>	<ol style="list-style-type: none"> 1. A narrative statement by an appropriate agency official, stating the dollar amount and the criteria used to calculate the award. An appropriate agency official must be one to know with reasonable certainty that the payment was made. 2. Documentation must include total monies paid, to whom, and when.
<p>Back Pay</p> <p>5 C.F.R. § 550.805</p> <p>Interest</p> <p>5 C.F.R. § 550.806</p>	<ol style="list-style-type: none"> 1. Computer printouts or payroll documents delineating gross back pay before mitigation and interest, and 2. Copies of any cancelled checks issued; or a copy of a print screen showing an electronic funds transfer. 3. Narrative statement by an appropriate agency official of total monies paid. An appropriate agency official must be one to know with reasonable certainty that the payment was made. (Last resort) 4. Documentation must include total monies paid, to whom, and when.

TYPE OF ORDER OR EVENT	DOCUMENTATION REQUIRED
Breach of Settlement or Noncompliance with a Final Agency Action (Remand – reinstatement / processing or specific performance of agreement/FAD)	For reinstatement at the point processing ceased - <u>see</u> documentation required for “ Remand [of a] previously dismissed complaint,” For an order of specific performance, submit proof that specific performance was completed.
Civil Action Terminations	A complete copy of the civil action complaint demonstrating that it was filed in a federal court and that it covers the same issues as the compliance matter.
Compensatory Damages (Remand for determination)	FAD determining complainant’s entitlement or non-entitlement to compensatory damages, with appeal rights to the Commission/OFO.
Compensatory Damages (Orders to pay)	Evidence of payment - Copies of any cancelled checks issued; a copy of a print screen showing an electronic funds transfer; or a narrative statement by an appropriate agency official of total monies paid. An appropriate agency official must be one to know with reasonable certainty that the payment was made. Documentation must include total monies paid, to whom, and when.
Disciplinary Action Consideration of	Documentation of oral or written counseling or a copy of any written notice of reprimand, suspension, or other action taken against any of the identified responsible management officials or statement of reason for not taking action. Note: The Commission does not consider training as a form of disciplinary action.
Final Agency Decision (FAD)	Copy of the FAD with appropriate appeal rights.
Personnel Actions (for example Reinstatement, Promotion, Hiring, Reassignment)	Copy of Standard Forms (SF) 50, or comparable notice of official action.
Petition for Enforcement (Terminating compliance)	A petition for enforcement may be requested by a complainant when s/he believes that the Commission’s Order has not been followed. The Compliance Officer will attempt to resolve the matter and may exercise appropriate discretion in having the matter docketed. Compliance will be suspended if the issue is critical to the remaining action(s) and the petition for enforcement is docketed.

TYPE OF ORDER OR EVENT	DOCUMENTATION REQUIRED
Posting a Notice of Violation	The original signed and dated notice, reflecting the dates that the notice was posted. A copy may suffice, if the original is not available.
Remand (for example, Reinstatement of complaint – from dismissal or breach of settlement) (Reversal of Administrative Judge summary judgment)	1. Copy of agency acknowledgment of remanded claims. 2. Copy of appropriate notice of rights to a hearing or FAD w/in 60days of receipt of notice and right to file a civil action w/in 90 days. A Final Agency Decision will be required to close compliance when no hearing elected. 3. Copy of letter transmitting the investigative file to an Administrative Judge where hearing is requested or on reversal of an Administrative Judge summary judgment.
Restoration of Leave	A printout or statement by an appropriate agency official, identifying the amount and type of leave restored.
Settlement Agreements (Which terminate compliance)	Written agreement signed and dated by both parties, containing specific dollar amounts and/or other applicable provisions. Should be followed up with documentation of relief provided. <u>Settlement agreements will not relieve an agency from a Commission Order to post a Notice of Violation.</u>
Supplemental Investigation	1. Copy of the letter acknowledging to the complainant, receipt of their remanded case from OFO. 2. Signed copy of the letter transmitting the Investigative File and appropriate notice of rights to the complainant – may be order-specific. 3. Copy of the request for a hearing or a FAD. (Complainant’s request for a hearing, agency transmittal of the complaint file to the appropriate Commission District/Field/Area Office, or a copy of the FAD.)

TYPE OF ORDER OR EVENT	DOCUMENTATION REQUIRED
<p>Training</p>	<ol style="list-style-type: none"> 1. Attendance roster at training session(s) or a narrative statement by an appropriate agency official confirming training hours, course titles and content, if necessary. 2. Course description providing some indication that the training was appropriate for the discrimination found or commensurate with the order.

NOTE: This appendix is not an exhaustive list of the documents that may be submitted to prove compliance.