



U.S. Equal Employment Opportunity Commission QUESTIONS & ANSWERS

Final Federal Sector Complaint Processing Regulations 29 C.F.R. Part 1614

The civil rights laws enforced by the Commission, which prohibit employment discrimination on the bases of race, color, religion, national origin, sex, age and disability, as well as retaliation, apply to employment discrimination by the federal government. While the substantive protections for federal employees are the same as those for all other workers, the procedures for resolving complaints of federal employees differ from the procedures which govern claims by employees in the private sector. The federal sector procedural rule approved by the Commission updates and improves the procedures which govern how the discrimination claims of federal employees are processed administratively.

1. Why did the Commission issue these regulations?

- The Commission issued these regulations as part its ongoing effort to improve the effectiveness of its operations. The federal sector program had come under criticism based on a number of factors:
 - The process was too long and contained too many layers of review;
 - Agencies could revise decisions of administrative judges regarding whether the agency had violated the law, leading to widespread perceptions of a process that was not impartial; and
 - The process led to the fragmentation of complaints, bogging down the system and making it difficult for federal employees to prove that they had been discriminated against.

2. Did the EEOC consult with its stakeholder communities in determining how to improve its federal sector operations?

- Throughout the entire development of the rule, the EEOC consulted extensively with the full range of federal sector stakeholders and incorporated many of their suggestions and comments. From the beginning of the process, EEOC invited both agency and employee representatives to meet and discuss the federal sector process and their ideas for improving it.
- After approving a Notice of Proposed Rulemaking (NPRM), EEOC circulated the proposed rule to all agencies for their comments and then submitted it to OMB for its coordination and clearance process.
- Following publication of the NPRM, EEOC received and carefully considered over 60 public comments on the proposed rule.
- Based on those comments, EEOC approved a proposed final rule which was also

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circulated to all the federal agencies before its submission to OMB for additional coordination and clearance.

3. Who is affected by the changes?

- The federal sector complaint processing regulations apply to federal employees and applicants for employment in the federal government as well as to the agencies that employ and hire them.

4. Has EEOC expanded the role of alternative dispute resolution (ADR) programs in the federal sector process?

- Consistent with its commitment to the use of ADR in its private sector programs, EEOC will require agencies to establish or make available an ADR program which will be available both during the pre-complaint process and the formal complaint process. Agencies will have substantial flexibility in how they structure their ADR programs so long as they incorporate principles of confidentiality, neutrality, voluntariness, and enforceability. ADR may function as an alternative to counseling.

5. Will agencies continue to be able to reverse or modify decisions issued by administrative judges?

- Under the previous rule, AJ's issued recommended decisions regarding whether an agency violated the law which the agency was then free to reverse or modify. While agencies won most hearings, they reversed or modified the AJ decisions in about two-thirds of the cases which they lost. The final regulation provides that AJ decisions will continue to be submitted to the agencies for final action. However, the agencies will not have the opportunity to rewrite the AJ decisions. Rather, they will issue an order providing only whether or not they will fully implement the AJ decision. If they choose to not implement the AJ decision, they must simultaneously file an appeal with the EEOC.

6. How much time will agencies have to issue final orders?

- Agencies will have 40 days to determine whether or not to implement the AJ decision and, if they choose not to implement the decision, another 20 days to file their brief on appeal. This corresponds to the 60 day period that agencies previously had to review an AJ decision and issue their final decision.

7. Will an agency have to provide the complainant with the relief ordered by the administrative judge if the agency chooses not to implement the AJ decision and appeals?

- If the AJ decision involved restoration of the complaining party into a job, the agency must comply with the order pending the appeal. The agency may refuse to return the individual to his or her job if the agency determines that the individual's presence in the workplace would be unduly disruptive. If this occurs, however, the agency must provide pay and benefits until the appeal is completed. The agency is not required to pay any other monetary benefit ordered by the AJ pending the outcome of the appeal but must pay interest on such sum if the complaining party ultimately prevails.

8. What standard of review will EEOC apply on appeal?

- On appeal, the EEOC will review legal issues and factual findings by the agencies under a

de novo standard while using a substantial evidence standard to review AJ findings of fact. It is appropriate to provide a deferential standard of review to the factual findings by AJ's who are independent decision makers and had the opportunity to directly evaluate the credibility of witnesses.

9. How do the changes address the problem of the fragmentation of cases?

- A significant problem in the current system arises from the fragmentation of cases. Fragmentation -- breaking cases down into their constituent parts and then processing the parts separately -- substantially adds to the number of cases and the overall burden in the system. It also makes it more difficult to prove some cases, such as harassment cases, which are dependent on a "critical mass" of facts. The final regulation includes a number of provisions to address this problem:
 - **Partial Dismissals:** The regulations eliminate interlocutory appeals from partial dismissals. Instead, the case will continue to be processed and appeals will be preserved until the rest of the case is ready for appeal.
 - **No more remands:** AJ's will no longer remand issues to agencies for counseling or other processing. Once a case is before an AJ the AJ is fully responsible for processing it.
 - **Amendment of complaints:** Complaining parties will have greater rights to amend their complaints with like and related claims and independent claims brought by the same complaining party will be consolidated for processing so they will be handled together.
 - **Spin off complaints:** The rule adds provisions providing for the dismissal of spin-off complaints which are complaints about the processing of existing complaints.

10. Are there changes to the class complaint process?

- Although there are certainly instances of class-wide discrimination in the federal government, under the prior rule only a tiny number of class cases were brought within the administrative system. Most class cases were either diverted into the federal courts or they were simply not brought at all. The new rule includes several reforms to the treatment of class actions which will make it more feasible for class claims to be brought and resolved in the administrative system.
 - A class complainant may now move for class certification at any reasonable point in the process, usually no later than the conclusion of discovery. This recognizes that complaining parties do not have access to discovery until they are before an AJ and therefore may not have sufficient information when they file their case to determine whether or not class issues are raised.
 - AJ decisions regarding class certification will be treated the same way as other AJ decisions. Agencies will take final action on certification by issuing a final order, and, if it does not fully implement the AJ decision, appealing to EEOC.
 - AJ's will review class settlements under the same "fair and reasonable" standard which federal judges use to review class settlements.

11. Can agencies still dismiss complaints for failure to accept a certified offer to full relief?

- The regulation eliminates the provision which permitted agencies to dismiss complaints for

failure to accept a certified offer of full relief. This provision has not been used very much since the introduction of damages since short of a hearing it is virtually impossible to determine when an offer of damages constitutes an offer for full relief.

12. Has EEOC provided another mechanism to encourage complaints to seriously consider settlement offers?

- The regulations create a new offer of resolution procedure, based on the offer of judgment rule in the Federal Rules of Civil Procedure, to encourage settlement. Under this procedure, agencies may make offers of resolution, which are settlement offers, to complaining parties. If the complaining party does not accept the offer and ultimately obtains no more relief than what was offered, no attorney's fees or costs will be payable for work done after the offer was not accepted.

13. Can parties still request reconsideration of an EEOC appellate decision?

- Under the final rule, reconsideration of EEOC appellate decisions will no longer be available as of right. Instead, EEOC will exercise its discretion in determining whether to reconsider its appellate decisions. This is similar to the process used by the Merit Systems Protection Board.

14. Who will decide the amount of attorney's fees when the complainant requests a hearing?

- AJ's will decide the amount of fees to be awarded to prevailing complaining parties. There will be a strong presumption that traditional lodestar analysis (hours reasonably expended multiplied by a reasonable hourly rate) will determine the appropriate fee.

15. Will attorney's fees be available for work performed during the pre-complaint process?

- Fees will be available for legal work done before a complaint is filed in the limited circumstance where a complaining party prevails in a hearing, the agency chooses not to fully implement the AJ decision, and the EEOC finds in favor of the complaining party. This will provide an incentive to agencies to assess carefully whether they will decline to fully implement an AJ decision which is adverse to them. At the same agencies and complaining parties may include attorney's fees for pre-complaint work in a settlement agreement.

16. When will the changes become effective?

- The regulation will take effect on November 9, 1999, 120 days after publication in the Federal Register. It will apply to pending cases. Agencies will be required to have their ADR programs in effect by January 1, 2000.

17. Will EEOC issue additional guidance to assist the agencies and federal employees come into compliance with the new regulation?

- EEOC will issue revisions to its Management Directive 110 to assist both agencies and federal employees better understand their rights and responsibilities.