

AO MANUAL

Volume 4: Human Resources

Chapter 3: Fair Employment Practices

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§ 310 General

- (a) Chapter 3 contains the official antidiscrimination policy for the AO and provides a framework for how that policy is enforced.
- (b) The AO is committed to providing equal employment opportunity for all employees and applicants for employment.
- (c) All AO employees have a personal responsibility to:
 - abide by equal opportunity principles,
 - honor the diversity of their coworkers, and
 - behave at work in a fair, respectful, and inclusive manner.
- (d) All AO employees are entitled to work in an environment free from disparate treatment or harassment based on:

- race,
- color,
- religion,
- age,
- gender,
- sexual orientation,
- national origin,
- political affiliation,
- marital status,
- disability, or
- retaliation.

§ 310.10 Authorities

- (a) Legal authority that applies to the AO:
 - [AO Personnel Act of 1990](#) (codified in part at [28 U.S.C. § 602](#));
- (b) Comparable legal authorities applied by the AO in principle:
 - Title VII of the Civil Rights Act of 1964, as amended ([42 U.S.C. § 2000e-16](#));
 - Age Discrimination in Employment Act of 1967 (ADEA), as amended ([29 U.S.C. § 633a](#));
 - Rehabilitation Act of 1973, as amended ([29 U.S.C. § 791](#)), applying standards of Title 1 of the Americans with Disabilities Act of 1990 (ADA);
 - [Alternative Dispute Resolution Act of 1996 \(ADRA\)](#) ([5 U.S.C. chapter 5, subchapter IV](#));
 - [Equal Pay Act of 1963](#), as amended ([29 U.S.C. § 206](#)); and
 - Merit principles from [5 U.S.C. §§ 7201, 7202, and 7204](#).

§ 310.20 Definitions	
Aggrieved individual	A person who suffers present harm or loss with respect to a term, condition, or privilege of employment as a result of workplace discrimination for which there is a remedy at the AO.

§ 310.20 Definitions	
Applicant	A person who follows relevant, proper procedures to apply for a position at the AO.
Complainant	An allegedly aggrieved individual who invokes the Fair Employment Practices-Complaint Process (FEP-CP) set forth in this chapter. An informal complainant is one participating in informal counseling. A formal complainant is one who has filed a formal complaint. Under the AO Personnel Act of 1990 , this term does not and cannot include the AO's Director or Deputy Director or a person holding a position of a confidential or policy-making character made exempt by the Director.
Employee	An individual who holds a full-time, part-time, or temporary position at the AO.
Personnel Management System (PMS)	The set of merit-based procedures, which includes the FEP-CP, established by the Director of the AO under 28 U.S.C. § 602 , for appointment, pay, evaluation, promotion, assignment, and other personnel actions.
Pre-Act employee	An individual who is currently an employee of the AO and has been continuously since October 29, 1990 (the day before the AO Personnel Act of 1990 took effect) and as of October 29, 1990 was entitled to: <ul style="list-style-type: none"> (a) appeal a reduction in grade or removal to the Merit Systems Protection Board (MSPB) under 5 U.S.C. chapter 43; (b) appeal an adverse action such as a termination, demotion, or suspension of more than 14 calendar days to the MSPB under 5 U.S.C. chapter 75; or (c) file an appeal as an "aggrieved individual" with the Equal Employment Opportunity Commission (EEOC) against the AO for workplace discrimination under 29 CFR part 1613 (as of 1990) [<i>later repealed by 60 Fed. Reg. 43371 (1995)</i>].
Post-Act employee	An individual who is currently an employee of the AO and who entered on duty beginning on a date on or after October 30, 1990.

§ 310.30 Applicability

Under the [AO Personnel Act of 1990](#), the following employees are prohibited from using FEP-CP:

- (a) the Director,
- (b) the Deputy Director, or
- (c) any individual holding a position that has been designated as exempt by the Director because it involves confidential, policy-making duties.

§ 320 Office of Fair Employment Practices

- (a) The Office of Fair Employment Practices is responsible for coordination of fair employment practices and principles in the AO workplace. The FEP office is managed by the Fair Employment Practices Officer (FEP Officer).
- (b) The FEP Officer or designee is responsible for:
 - (1) providing AO managers and employees with information, training, and awareness of opportunities regarding equal employment opportunity rights, antidiscrimination mandates, and the Fair Employment Practices Complaint Process (FEP-CP);
 - (2) coordinating, organizing, and managing all phases of the FEP-CP;
 - (3) requiring, as appropriate, the cooperation of all AO managers and employees with the FEP-CP;
 - (4) ensuring that the FEP-CP is carried out in accordance with any applicable law, AO policy, and principles of equity;
 - (5) ensuring privacy and confidentiality within the FEP-CP, to the greatest extent possible;
 - (6) designating FEP-CP counselors, Alternative Dispute Resolution (ADR) professionals, and hearing officers;
 - (7) extending time periods or deadlines required by the FEP-CP, as appropriate;
 - (8) collecting, consolidating, and analyzing trends, statistical data, or other information relevant to fair employment practices;
 - (9) reporting best practices within and outside of the AO for achieving equal employment opportunity and protecting against employment discrimination;
 - (10) making referrals, as necessary and proper, to other forums or processes where a claim is brought to the FEP office in error; and
 - (11) taking all other actions, as necessary and proper, to carry out the mission and functions of the FEP office.

§ 330 Fair Employment Practices Complaint Process (FEP-CP)

- (a) The FEP office uses the FEP-CP to prevent, identify, and remedy discrimination in the workplace.
- (b) The [AO Personnel Act of 1990](#) required the development of a Personnel Management System (PMS), comprised of merit-based procedures, of which FEP-CP is one, to apply to AO personnel actions. **See:** [§ 310.20 \(Definitions\)](#).
- (c) The AO prohibits discrimination on the basis of:
 - race,
 - color,
 - religion,
 - age,
 - gender,
 - sexual orientation,
 - national origin,
 - political affiliation,
 - marital status, or
 - disability.
- (d) Retaliation (based on prior FEP-CP activity) is also prohibited as a matter of AO policy.
- (e) FEP-CP complaints must be resolved in a fair, equitable, neutral, prompt, and lawful manner.
- (f) FEP-CP may be used by an aggrieved individual who alleges discrimination in the AO workplace and is:
 - (1) an AO employee,
 - (2) an applicant for employment, or
 - (3) a former employee.
- (g) Such aggrieved individuals include full-time, part-time, or temporary employees of the AO.

§ 330.10 Informal Counseling

- (a) An employee who believes he or she has been discriminated against must first:
 - (1) notify the FEP-CP Equal Employment Opportunity Specialist (FEP-CP EEO Specialist) in the FEP office within 30 calendar days of the date of the alleged discriminatory action, and
 - (2) request and complete counseling.
- (b) Informal FEP-CP counseling is designed to gather the minimal facts necessary for the counselor to assess whether a discrimination claim is being raised and whether early conciliation is possible.
- (c) FEP-CP counseling must be completed within 30 calendar days of the employee's initial contact with the FEP office. An extension may be granted by the FEP Officer, if deemed appropriate.
- (d) Upon receipt of a timely request for counseling, the FEP Officer (or designee) must:
 - (1) acknowledge the employee's request in writing, and
 - (2) assign an AO FEP-CP Counselor.
- (e) At any time during the informal counseling process, an AO FEP-CP Counselor may:
 - (1) conduct informal resolution procedures; or
 - (2) refer a matter to the FEP Officer (or designee) for one of the ADR methods set forth in [§ 340](#).
- (f) The "Notice of Completion of FEP-CP Counseling," issued to the informal complainant, must include:
 - (1) the date of initial contact with the FEP office;
 - (2) date(s) of informal counseling session(s);
 - (3) ADR methods used, if any;
 - (4) the date of the final informal counseling session; and

- (5) a “Notice of the Right to File a Formal Complaint” within seven calendar days of receipt of the “Notice of Completion of FEP-CP Counseling.”
- (g) AO FEP-CP Counselors must:
- (1) be nominated by management;
 - (2) be interviewed and approved by the FEP office;
 - (3) be trained and certified to serve in this capacity; and
 - (4) serve on a voluntary, collateral duty basis.
- (h) AO FEP-CP counselors are responsible for:
- (1) Scheduling a counseling session with the employee as soon as practicable after assignment by the FEP Officer (or designee);
 - (2) Advising the employee in writing of their rights and responsibilities under the FEP-CP;
 - (3) Providing to the employee a clear explanation of the major stages of the FEP-CP;
 - (4) Identifying those situations where a dispute exists due to a mistake or misunderstanding, and making efforts to clarify the misunderstanding and resolve the dispute;
 - (5) Identifying any issues that may confirm whether discrimination has occurred, and referring the matter to the FEP Officer (or designee) for a formal determination;
 - (6) Analyzing the basis(es) for the claim(s) raised by the employee;
 - (7) Conducting any necessary inquiries to obtain relevant information for use in resolution efforts;
 - (8) Documenting all counseling actions; and
 - (9) Issuing a written “Notice of Completion of FEP-CP Counseling” to the employee.

§ 330.20 Formal Complaint

- (a) Should an employee wish to continue the FEP-CP after counseling, the employee must file a formal complaint within seven calendar days of receipt of the “Notice of Completion of Counseling.”
- (b) The employee should use the FEP office’s “Formal Complaint” form, and state simply and concisely the facts underlying the discrimination claim, including a description of the personnel action, employment practice, or workplace policy that is alleged to be discriminatory.
- (c) After a formal complaint is filed, the FEP-CP counselor must immediately prepare and file a “Report of Informal Counseling,” documenting all counseling actions taken.
- (d) Upon receipt of the employee's formal complaint, the FEP Officer (or designee) will review the filing for:
 - legal sufficiency of allegations,
 - timeliness, and
 - compliance with other FEP-CP procedures.
- (e) If the formal complaint is deemed legally sufficient, the FEP Officer (or designee) must issue a "Letter of Acceptance" articulating the:
 - factual allegations, and
 - basis for the claim under applicable law and AO policies.
- (f) The “Letter of Acceptance” must include:
 - (1) the next steps in the FEP-CP;
 - (2) a plain language explanation of the different procedures for pre-Act and post-Act complainants, using relevant citations from:
 - (A) [§ 330 \(Fair Employment Practices System\)](#) of this chapter, or
 - (B) [29 CFR part 1614 \(Federal Sector Equal Employment Opportunity\)](#).
- (g) The FEP Officer at any time during the FEP-CP may dismiss a complaint, in whole or in part.

- (1) The basis for dismissal of a claim may include, but is not limited to:
 - (A) untimely counselor contact;
 - (B) untimely filing of the formal complaint;
 - (C) failure to state a claim;
 - (D) failure to prosecute or abuse of process;
 - (E) duplication of a claim that is pending or has been decided in a prior FEP-CP proceeding;
 - (F) collateral attack or spin off complaint;
 - (G) issue has been decided (collateral estoppel);
 - (H) the filing is a proposal or preliminary step;
 - (I) mootness; or
 - (J) duplication of an allegation being processed through another AO forum.
- (2) Dismissals must be in writing and must clearly explain the basis for dismissal of the claim.
- (3) The FEP Officer must report to the AO Director on a yearly basis the number of complaints that have been dismissed at any stage during the FEP-CP. A written copy of each and every dismissal must be made available for the Director's review at the time of the FEP Officer's annual statistical report.

§ 330.30 Investigation

- (a) Upon acceptance of a formal complaint, the FEP Officer (or designee) must initiate, plan, and coordinate an independent, lawful investigation.
- (b) The investigation must be conducted by a trained, neutral investigator after submission of a written investigative plan to the FEP Officer (or designee).
- (c) The investigative plan must:

- (1) be tailored to obtain legally relevant information in an efficient, thorough, and lawful manner; and
 - (2) take into consideration:
 - due process,
 - privacy,
 - employment, and
 - other rights and entitlements of those involved.
- (d) The FEP Officer (or designee) must provide the investigator with written authorization to:
- (1) investigate the FEP-CP complaint;
 - (2) obtain cooperation, where needed, from witnesses who are AO employees; and
 - (3) obtain documentary evidence related to the FEP-CP complaint.
- (e) The investigator must normally complete the investigation within 30 calendar days from the date written authorization is issued.
- (f) The investigative fact-finding may include:
- (1) informal interviews with individuals,
 - (2) sworn declarations,
 - (3) document collection, or
 - (4) transcribed questioning (under oath, affirmation, or certification).
- (g) Upon completion of the investigation, the investigator must:
- (1) submit written notice of the completion of the investigation to the FEP Officer (or designee);
 - (2) compile and submit to the FEP Officer (or designee):
 - (A) a report of investigation (ROI);
 - (B) a copy of all witness statements;
 - (C) a copy of all documentary evidence; and

- (D) where applicable, a statement identifying any lack of cooperation or noncompliance on the part of an AO employee, including a complainant.
- (h) The ROI must include:
 - (1) a brief summary statement from the investigator explaining the investigative process;
 - (2) the date of initiation and completion of the investigation;
 - (3) dates of witness interviews; and
 - (4) the origin of all documentary evidence.
- (i) The ROI **must not** include personal opinions, conclusions, or findings of the investigator.
- (j) After the ROI is reviewed and approved by the FEP Officer (or designee), a copy must be provided to:
 - (1) the complainant, and
 - (2) the AO's General Counsel.

§ 330.40 Hearing and Recommendation

- (a) If a complainant wishes to proceed further in the process, he or she must request a hearing in writing within seven calendar days after receiving the ROI.
- (b) The FEP Officer must review the ROI to determine whether a hearing is warranted as a means of developing a full administrative record. If material facts are not in dispute, the FEP Officer may issue a decision on the merits for the complainant or for the AO, dismissing the complaint. Summary judgment for the AO resulting in dismissal is subject to [§ 330.20\(g\)\(3\)](#).
- (c) If material facts are in dispute, the FEP Officer may initiate, coordinate, and schedule a hearing as soon as practicable, but no later than 30 calendar days after the date of the request.
- (d) The hearing officer must:
 - (1) be an attorney with specialized, subject-matter expertise;

- (2) be a neutral party selected by the FEP Officer (or designee) who can oversee a fair, expeditious, efficient, and impartial hearing; and
 - (3) maintain at all times the neutrality necessary to avoid impropriety or the appearance of impropriety.
- (e) A copy of the ROI must be provided to the hearing officer at the time of selection.
- (f) Notice of selection of a hearing officer must be provided in writing to:
 - (1) the complainant, and
 - (2) the AO's General Counsel.
- (g) The proceedings must be recorded using audiotape or transcription.
- (h) The hearing officer will be authorized to perform the following functions, as appropriate, by the FEP Officer (or designee):
 - (1) convene a hearing and regulate the course of that proceeding;
 - (2) hold a telephonic prehearing conference to prepare for, simplify, and expedite the hearing;
 - (3) rule on evidentiary motion(s), including allowing or disallowing testimony or other evidence;
 - (4) make findings of fact and conclusions of law;
 - (5) recommend sanctions against any party for failing to adhere to reasonable standards of conduct in an administrative hearing;
 - (6) make a determination on the merits of each claim in the complaint, and, where appropriate, order lawful and proper relief;
 - (7) draw adverse inference(s) where a party demonstrates a clear lack of cooperation in the prehearing or hearing process;
 - (8) issue a written recommended decision; or
 - (9) take other action(s) as appropriate for an adjudicatory proceeding.

- (i) The hearing officer's recommended decision must be issued in writing to the FEP Officer no later than 30 calendar days after the hearing is concluded.
- (j) The recommended decision must include:
 - (1) all appropriate findings of fact and conclusions of law;
 - (2) a determination on the merits of each claim in the complaint; and
 - (3) where appropriate, a statement of the relief ordered, consistent with applicable federal law and policy.
- (k) The FEP Officer must provide a copy of the recommended decision to:
 - (1) the Director of the AO;
 - (2) the complainant;
 - (3) the complainant's representative, if any; and
 - (4) the AO's General Counsel.

§ 330.50 Final Determination and Remedy

- (a) The Director of the AO may adopt, modify, or reject the recommendation of the hearing officer.
- (b) The Director's review of the recommended decision must:
 - (1) render all conclusions of law on a *de novo* basis; and
 - (2) review findings of fact, based on the administrative record as a whole, using a "clearly erroneous" standard.
- (c) The Director's final decision must be issued in writing no later than 30 calendar days after receiving the hearing officer's recommendation.
- (d) The Director's decision is final. No further appeal or review is available.
- (e) The Director's final decision must include, as appropriate, an Order of Relief, as set forth below.

- (f) When the Director issues a final decision that includes a finding of discrimination in whole or in part, a statement of relief consistent with applicable federal law and policy must be included, as set forth below.

§ 330.50.10 Order of Relief

- (a) An order of relief seeks to award “full relief” that will:
 - (1) put the complainant in the situation he or she would have occupied but for the discrimination;
 - (2) compensate the complainant for attorney’s fees in certain cases;
 - (3) provide equitable relief for lost earnings and benefits; and
 - (4) deter, prevent, and protect from all potential instances of future discrimination.
- (b) Such relief should be granted on a case-by-case basis, pursuant to legal and equitable principles, and where appropriate may include one or more of the following:
 - (1) notification to all employees that the AO is committed to equal employment opportunity and will not tolerate discrimination;
 - (2) a commitment that the AO will stop the identified discriminatory action(s);
 - (3) back pay and associated benefits for lost earnings and benefits of employment (**see: [5 U.S.C. § 5596](#)** (Back Pay Act));
 - (4) cancellation of the unwarranted personnel action and restoration of the employee, as necessary (e.g., reinstatement following termination or restoration of grade following demotion);
 - (5) promotion;
 - (6) priority consideration for a future position;
 - (7) injunctive relief, including but not limited to:
 - (A) a temporary stay,
 - (B) a cease and desist order, or

- (C) an order to implement the terms of a reasonable accommodation;
 - (8) modification of AO records or expunction of adverse or improper material or information;
 - (9) opportunity to participate in a denied benefit of employment (e.g. training, preferential work assignment, or compensatory time);
 - (10) granting of an award;
 - (11) referral of supervisor(s) to the appropriate management officials for potential disciplinary action(s) for engaging in discriminatory practices; and/or
 - (12) other relief, as appropriate.
- (c) The following remedies are **not** available under the FEP-CP:
 - (1) compensatory damages, or
 - (2) punitive damages.
 - (d) No provision in this subsection may be construed to deprive any AO employee of any remedy, legal or equitable, under applicable federal law or policy.

§ 330.60 Entitlements and Alternative Process for Pre-Act Complainants

- (a) FEP-CP procedures differ slightly for “pre-Act” employees.
- (b) FEP-CP does not abolish or diminish any rights or remedies of an AO employee.
- (c) Within seven calendar days after receipt of the ROI, a pre-Act complainant must elect in writing:
 - (1) to proceed under the FEP-CP as set forth in [§ 330.40 \(Hearing and Recommendation\)](#), **or**
 - (2) to receive an immediate final agency decision pursuant to [29 CFR part 1614 \(Federal Sector Equal Employment Opportunity\)](#).

§ 330.60.10 Pre-Act Employee Election of FEP-CP

- (a) A pre-Act complainant who elects to use the FEP-CP must waive in writing the right to use the 29 CFR part 1614 process, including, ultimately,
 - (1) the right to file an appeal with the EEOC, or
 - (2) the right to file a civil action in U.S. district court.
- (b) A pre-Act complainant who elects the FEP-CP will therefore be further entitled to a hearing and a recommended decision by a neutral hearing officer and a written final decision by the AO Director.
- (c) A pre-Act complainant who elects the FEP-CP will likewise be bound by all final determinations in the FEP-CP, including a final decision on the merits by the AO Director, as set forth in [§ 330.50 \(Final Determination and Remedy\)](#).

§ 330.60.20 Pre-Act Employee Election of 1614 process

- (a) A pre-Act complainant electing the [29 CFR part 1614](#) process will receive an immediate final decision from the Director.
- (b) A pre-Act complainant who, prior to the passage of the [AO Personnel Act of 1990](#), was entitled to file an appeal with the EEOC under 29 CFR part 1614, **may appeal to the EEOC**:
 - (1) the AO's immediate final decision;
 - (2) the dismissal of a complaint under [§ 330.20\(g\) \(Formal Complaint\)](#);
 - (3) summary judgment entered for the AO under [§ 330.40 \(Hearing and Recommendation\)](#) because there is no genuine dispute of material facts; or
 - (4) an allegation that the AO is in noncompliance with a settlement agreement or final decision.
- (c) A pre-Act complainant who prior to the passage of the AO Personnel Act of 1990 was entitled to file a civil action with the appropriate U.S. district court, under 29 CFR part 1614, **may file such a civil action** after exhausting his or her administrative remedies as set forth in 29 CFR part 1614.

- (d) The 1614 process for pre-Act complainants who elect to use it:
 - (1) is set forth in 29 CFR part 1614 under the jurisdiction of:
 - the EEOC and/or
 - the appropriate U.S. district court; and
 - (2) is not administered by the AO.

§ 340 Alternative Dispute Resolution (ADR)

- (a) The FEP office may employ Alternative Dispute Resolution (ADR) to resolve workplace disputes according to the principles and processes established by the U.S. Department of Justice’s Office of Dispute Resolution. **See:** [Alternative Dispute Resolution Act of 1996 \(ADRA\)](#).

§ 340(b) Core Principles of AO ADR Process	
Binding and non-binding nature	ADR has both binding and non-binding aspects. Use of the process itself creates no binding consequences. Any settlement of the relevant dispute that results in an agreement between the parties should be made binding in accordance with applicable law.
Confidentiality	ADR processes should assure confidentiality consistent with applicable law and the general principles and policy of the ADRA.
Coordination	Coordination of ADR processes is essential among all AO offices with responsibilities affected by dispute resolution, including offices of human resources, general counsel, fair employment practices, and AO management.
Ethics	Neutrals should follow the professional guidelines and ethical principles applicable to the type of ADR they are practicing.
Neutrality	Neutrals should have no stake in the substantive outcome of a dispute before them at any time during the ADR process.
Preservation of rights	Participants in ADR should retain their right to proceed with the FEP-CP if a mutually acceptable resolution is not achieved.
Quality	The FEP office should establish training standards for those in the FEP-CP participating in ADR, and should conduct regular assessments of the efficiency and effectiveness of its ADR programs.
Representation	All parties to a dispute have the right to be accompanied by a representative of their choice, consistent with applicable law.

§ 340(b) Core Principles of AO ADR Process	
Self-determinism	ADR processes should provide participants an opportunity to make informed, voluntary decisions.
Timing	Use of ADR methodology should be encouraged at the earliest point possible and at the lowest level of AO management possible.
Voluntariness	Participation in ADR on the part of all parties is voluntary.

- (c) AO ADR techniques must be broad-based and flexible in nature. These techniques include, but are not limited to, the following:
- mediation,
 - interest-based problem solving,
 - summary adjudication, or
 - arbitration.
- (d) At any stage of the FEP-CP, if the parties and the FEP Officer agree that ADR is proper and desirable, the FEP Officer may initiate the ADR process.
- (e) During the pendency of the ADR process, the FEP-CP will be suspended for a set period of time by mutual consent of the parties and the FEP Officer.
- (f) If a settlement is reached, the settlement agreement must include an explanation of how the FEP-CP would be affected.
- (g) All terms of the settlement agreement must be consistent with available remedies for AO employees.
- (h) If settlement is not reached during the ADR, the FEP-CP will be resumed, picking up from the point at which proceedings were suspended.

§ 350 AO Processes Other than FEP-CP Election

- (a) There are other processes or forums at the AO that may be used to assist employees in resolving work-related matters, including:
- adverse action procedures,
 - grievance procedures, or
 - abolishment of position process.

- (b) In situations where remedies may be available from the FEP-CP and another forum, the individual must elect a remedy by choosing **one** forum or the other, but not both, to raise allegations of discrimination.
- (c) Election is made by filing a formal FEP-CP complaint **or** the filing of another initial filing (for example, a grievance or an adverse action appeal). If more than one process is invoked, the earlier filing will determine the elected forum.