

## AO MANUAL

### Volume 4: Human Resources

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## § 310 General

- (a) The AO Director established the Fair Employment Practices System (FEPS) to comply with the [AO Personnel Act of 1990, Pub. L. No. 101-474 \(1990\)](#). Section 3(a)(9) of the Act requires the AO:
- (1) to establish a personnel system prohibiting discrimination on the basis of “race, color, religion, age, sex, national origin, political affiliation, marital status, or handicapping condition”; and
  - (2) to “promulgate regulations providing procedures for resolving complaints of discrimination by employees and applicants for employment.”
- (b) This chapter codifies the AO’s fair employment and equal employment opportunity policies and provides for the prompt, fair, and impartial resolution of allegations of discrimination, harassment, or retaliation.

<b>§ 310.10 Definitions</b>	
Alternative dispute resolution (ADR)	A term used to describe a variety of approaches to resolving conflict that differ from traditional adjudicatory methods.
Applicant	Any individual who applies for a position with the AO.
Benefits and privileges of employment	Include, but are not limited to, employer-sponsored: <ol style="list-style-type: none"> <li>(1) training,</li> <li>(2) services (e.g., employee assistance programs, credit unions, cafeterias, lounges, gymnasiums, auditoriums, transportation), and</li> <li>(3) employer-sponsored or employer-sanctioned parties or other social functions (e.g., parties to celebrate retirements, office outings).</li> </ol>
Complainant	An AO employee or applicant who invokes the Fair Employment Practices Complaint Process (FEP-CP) described in <a href="#">§ 350</a> . <b>(Note:</b> Former employees are considered employees to the extent they assert claims relating to their position as an AO employee.)
Contractor	An individual or entity that is authorized to provide support and services to or for the AO under a contract issued by the AO’s Finance and Procurement Office. <b>(Note:</b> Generally, the FEP-CP is not available to contractors. <b>See:</b> <a href="#">§ 350.20.10</a> .)
Deciding official	Supervisor, manager, or executive who has the authority to determine whether an accommodation will be provided and, if so, what the appropriate accommodation will be.

<b>§ 310.10 Definitions</b>	
Disability	Those impairments that meet the ADA/Rehabilitation Act definition of “disability,” as amended by the ADA Amendments Act of 2008 (ADAAA). <b>See:</b> <a href="#">42 U.S.C. § 12102</a> . The expanded definition is to be interpreted broadly and does not require extensive analysis.
Employee	Any full-time, part-time, or temporary employee of the AO. ( <b>Note:</b> Former employees are considered employees to the extent they assert claims relating to their position as an AO employee.)
Equal Employment Opportunity (EEO)	Federal laws prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability, or genetic information.
Essential functions	Job duties that are fundamental to the position, as opposed to marginal or occasional duties that the employee may perform.
Extenuating circumstances	Factors that could not reasonably have been anticipated or avoided before a request for a reasonable accommodation or limited situations in which unforeseen or unavoidable events prevent prompt processing and delivery of an accommodation.
Fair Employment Practices (FEP)	A term used to describe the AO’s fair employment and equal opportunity policies and practices.
Fair Employment Practices Complaint Process (FEP-CP)	The AO’s procedures for resolving complaints of discrimination by employees and applicants for employment.
Fair Employment Practices Decision (FEP-D)	A document issued by the FEP Officer that addresses the merits of each issue raised in the FEP-CP, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination, harassment, or retaliation is found, appropriate remedies and relief.
FEP Case manager	A person designated by the FEP Officer to oversee FEP-CP case processing.
FEP Counselor	Any AO employee appointed by the FEP Officer (or designee) who, serving as a neutral, provides the complainant with his or her rights and obligations during each phase of the FEP-CP, gathers limited information and documents, and attempts resolution of a complaint between the parties.
FEP Officer	Chief of the Office of Fair Employment Practices (OFEP), tasked with managing FEP complaints filed by employees and applicants under the AO’s FEP and equal employment opportunity (EEO) policies.
Final Agency Action	A decision within the FEP-CP that may be enforced if not appealed. Such decisions include FAO, FEP-D, appellate judicial officer (AJO) decision, or FAD.
Final Agency Decision (FAD)	A decision issued by the AO Director addressing an appeal of an FEP-D.

<b>§ 310.10 Definitions</b>	
Final Agency Order (FAO)	An order issued by the FEP Officer that partially or fully implements a decision by the Hearing Officer.
Healthcare provider	A person who has completed a course of study and is licensed to practice in a field of healthcare, which includes the diagnosis and assessment of the disability or disabilities in question.
Hearing officer	A contractor appointed by OFEP to preside over FEP-CP evidentiary hearings and authorized to issue written findings of fact, conclusions of law, and recommendations to the FEP Officer for a Final Agency Action.
Individual with a disability	<p>A person that:</p> <ol style="list-style-type: none"> <li>(1) has a physical or mental impairment that substantially limits one or more of that person's major life activities;</li> <li>(2) has a record of such an impairment; or</li> <li>(3) is regarded as having such an impairment.</li> </ol> <p><b>See:</b> "Disability" definition above.</p>
Interactive process	An information-gathering approach used by an employer with the employee to evaluate a request for a reasonable accommodation.
Interim accommodation	A temporary or short-term measure put in place until a long-term accommodation is granted and available.
Investigator	Any AO employee or contractor appointed by the FEP Officer who, serving as a neutral, collects and discovers factual information concerning the claim(s) in the complaint under investigation.
Major life activities	Activities that include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. Major life activities also include the operation of a major bodily function, including but not limited to: functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.
Mediation	A type of ADR commonly used in FEP-CP where parties meet with a neutral person who assists the parties in reaching a resolution.
Mental impairment	Any mental or psychological disorder such as intellectual disability, organic brain syndrome, emotional or mental illness (e.g., major depression, bipolar disorder, anxiety disorders), schizophrenia and specific learning disabilities.

<b>§ 310.10 Definitions</b>	
Office of Fair Employment Practices (OFEP)	The AO office that: <ol style="list-style-type: none"> <li>(1) prevents, identifies, and remedies prohibited discrimination, unfair practices, and related wrongful conduct within the AO through its Fair Employment Practices Complaint Process and other functions; and</li> <li>(2) promotes, encourages, and expands diversity, inclusiveness, equal employment opportunity, and fairness in the AO and the judiciary through the Diversity Recruiting and Outreach Program and other functions.</li> </ol>
Physical impairment	Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the body systems, such as: neurological, musculoskeletal, special sense organs, cardiovascular, reproductive, digestive, immune systems, respiratory, genitourinary, hemic, circulatory, and lymphatic, skin, normal cell growth, and endocrine system.
Post-Act complainant	A complainant who began employment with the AO on or after Oct. 30, 1990.
Pre-Act complainant	A complainant who was employed at the AO in a competitive service position before Oct. 30, 1990, without a break in service.
Prohibited conduct	Conduct that violates the Fair Employment Practices principles provided in this chapter. <b>See:</b> <a href="#">§ 320</a>
Qualified individual with a disability	An individual with a disability is qualified if the individual: <ol style="list-style-type: none"> <li>(1) satisfies the requisite skill, experience, education, and other job-related requirements of the position; and</li> <li>(2) can perform the position's essential functions, with or without a reasonable accommodation.</li> </ol>
Reasonable accommodation	Any modification or adjustment to the application or hiring process, the job, an employment practice, or the work environment that allows a qualified individual with a disability to perform the job's essential functions. Likewise, a reasonable accommodation based on religion is any adjustment to the work environment that will allow an employee to practice their religious beliefs. ( <b>Note:</b> <a href="#">The Rehabilitation Act of 1973</a> and <a href="#">Title VII of the Civil Rights Act of 1964</a> apply to the AO to the extent that they provide key terms and definitions of prohibited conduct and the reasonable accommodation processes.)
Reasonable Accommodation Coordinator (RAC)	A representative from the Office of AO Human Resources who acts as an impartial advisor and serves as a subject matter expert for employees and supervisors to use in addressing requests for reasonable accommodation. <b>See:</b> <a href="#">§ 360.20.10</a> .

<b>§ 310.10 Definitions</b>	
Record of impairment	A history of having, or being misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
Regarded as disabled	An actual or perceived physical or mental impairment, whether that impairment substantially limits, or is perceived to substantially limit, a major life activity.
Rehabilitation Act of 1973	The <a href="#">Rehabilitation Act of 1973</a> , as amended, section 501, requires government agencies in the Executive Branch to provide reasonable accommodation for individuals with disabilities unless it would cause undue hardship.
Religious Belief	<p><a href="#">Title VII of the Civil Rights Act of 1964</a> protects employees from discrimination based on their “religion.” The definition of religion under the Civil Rights Act includes:</p> <ul style="list-style-type: none"> <li>• traditional religious groups, such as Christianity, Judaism, Islam, Hinduism, and Buddhism;</li> <li>• lesser-known religions, including those that may have no other followers besides the employee; and</li> <li>• non-theistic and moral beliefs that concern ultimate ideas about life, purpose, and death.</li> </ul> <p><b>(Note:</b> Religious belief, as defined under the Civil Rights Act, does not include political, philosophical, social, economic, or medical beliefs and opinions.)</p>
Request for reasonable accommodation	An oral or written statement that an applicant or employee needs an adjustment or change at work or in the application process for a reason related to his or her own medical condition.
Substantially limits	The extent to which an impairment limits an individual’s ability to perform a major life activity as compared to most people in the general population, whether or not an individual chooses to forgo mitigating measures. An impairment need not prevent or significantly or severely restrict the individual from performing a major life activity to be considered substantially limiting.
Undue hardship	With respect to reasonable accommodations, a hardship that may cause significant difficulty or expense. This determination, which the AO makes on a case-by-case basis, considers factors such as the nature and cost of the accommodation needed and the impact of the accommodation on the AO’s operations.

## § 320 Protections and Prohibitions

The AO provides equal opportunity in employment for all persons and prohibits:

- (a) discrimination or harassment based on:
  - (1) race;
  - (2) color;
  - (3) religion;
  - (4) age (40 or older);
  - (5) sex (including pregnancy, gender identity, and sexual orientation);
  - (6) national origin;
  - (7) political affiliation;
  - (8) marital status; or
  - (9) disability; and
- (b) retaliation due to:
  - (1) participation in the Fair Employment Practices Complaint Process (FEP-CP) as a:
    - (A) complainant,
    - (B) witness,
    - (C) representative, or
    - (D) counselor;
  - (2) participation in an employer investigation of alleged sexual or discriminatory harassment;
  - (3) raising concerns about or opposing conduct prohibited in this chapter; or
  - (4) requesting an accommodation of a disability or religious practice.

## **§ 330 Application of Laws**

This policy incorporates the protective measures established by these laws:

- Alternative Dispute Resolution Act of 1996 (ADRA) ([5 U.S.C. chapter 5, subchapter IV](#));

- Merit principles from [5 U.S.C. §§ 7201, 7202](#), and [7204](#);
- Pregnant Workers Fairness Act (codified at [42 U.S.C. chapter 21G](#)) (requires reasonable accommodations to a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship. This law builds upon existing protections against pregnancy discrimination under Title VII of the Civil Rights Act and access to reasonable accommodations under the Americans with Disabilities Act));
- The Age Discrimination in Employment Act of 1967, Section 4 (codified at [29 U.S.C. § 623 \(Prohibition of age discrimination\)](#));
- The Equal Pay Act of 1963 (codified at [29 U.S.C. § 206\(d\) \(Prohibition of sex discrimination\)](#));
- The Fair Labor Standards Act of 1938, Section 206(d) (codified at [29 U.S.C. § 206 \(Minimum wage\)](#));
- Title VII of the Civil Rights Act of 1964, Sections 703-704 (codified at [42 U.S.C. §§ 2000e-2 \(Unlawful employment practices\)](#) and [2000e-3 \(Other unlawful employment practices\)](#)); and
- The Rehabilitation Act of 1973, Section 501 (codified at [29 U.S.C. § 791 \(Employment of individuals with disabilities\)](#)).

## **§ 340 Duties of the Fair Employment Practices Officer**

The FEP Officer (or designee) must:

- (a) ensure the fair, impartial processing and resolution of FEP complaints;
- (b) inform employees regarding their rights and responsibilities under FEP policy and procedures;
- (c) appoint FEP counselors, alternative dispute resolution (ADR) professionals, investigators, and hearing officers;
- (d) provide annual counselor certification training to appointed FEP counselors;
- (e) facilitate and assist interested parties in the resolution of FEP complaints;
- (f) determine the employee status of contractors;



- (g) issue a Fair Employment Practice Decision (FEP-D) on the merits of FEP complaints where an FEP-D is requested;
- (h) issue a Final Agency Order (FAO) in response to a hearing officer's recommended decision; and
- (i) require all relevant AO employees to cooperate in the informal counseling, investigation, hearing, and resolution of FEP complaints. **Note:** Non-supervisory employees are not required to participate in the informal counseling stage.

## **§ 350 Fair Employment Practices Complaint Process**

### **§ 350.10 General**

#### **§ 350.10.10 Covered Employees and Applicants**

- (a) Except as provided below in paragraph (b), the FEP-CP is available to all:
  - (1) current employees;
  - (2) former employees, to the extent they assert a claim related to their position as an AO employee; and
  - (3) applicants for employment.
- (b) Under the AO Personnel Act of 1990, the following employees are not eligible to raise claims under the FEP-CP:
  - (1) the AO Director;
  - (2) the AO Deputy Director; and
  - (3) any AO Executive Service (AOES) employee, including the six senior executive positions paid under [28 U.S.C. § 603](#) (see: AO Manual, Vol. 4, § 1415 (Definitions)).

#### **§ 350.10.20 Excluded Claims**

The FEP-CP process does not cover the following claims:

- (a) A claim already filed by the employee under the AO's grievance procedures (AO Manual, Vol. 4, § 1340 (Employee Grievances)). A grievance addresses any work-related matters of concern that is subject to the control of AO management, such as:

- disciplinary actions and the application of the Uniformed Services Employment and Reemployment Rights Act;
  - Employee Polygraph Protection Act of 1988; and
  - Occupational Safety and Health Act of 1970.
- (b) A claim already filed by the employee under the AO's Adverse Action Appeals procedures (**see:** AO Manual, Vol. 4, § 1370 (Appeal Rights)). An adverse action appeal addresses any adverse action such as:
- a reduction in pay band based on performance or conduct;
  - suspension greater than 14 days; and
  - removals (excluding removal for national security reasons or a workforce reduction).
- (c) A claim alleging reprisal or retaliation for anything other than retaliation as defined in [§ 320\(b\)](#).

#### **§ 350.10.30 Right to Representation**

- (a) A complainant may hire a representative at his or her own cost to represent the complainant's interest. An AO employee may represent the complainant only if the representation does not unduly interfere with the employee's official duties and does not present an actual or apparent conflict of interest, as determined by the FEP Officer.
- (b) The complainant must notify the FEP counselor or FEP case manager in writing if they retain or change a representative during the complaint process. The notice must indicate that they have obtained or changed a representative and provide the representative's name, email, mailing address, and telephone number.

#### **§ 350.10.35 Right to Anonymity**

- (a) During traditional counseling, the complainant has the right to anonymity. OFEP will refrain from divulging the complainant's identity, except with the complainant's authorization.
- (b) The right to anonymity ends upon the election of ADR, or upon the filing of a formal complaint.

#### **§ 350.10.40 Preparation Time**

A complainant and the complainant's representative, if an AO employee, may use a reasonable amount of official time during regular working hours, without charge to leave, to prepare the claim if it does not unduly interfere with the performance of the official duties. The complainant and representative, if applicable, are responsible for requesting official time with their supervisor or someone within their management chain who may consult with OFEP for guidance.

#### **§ 350.10.50 Computation and Extensions of Time**

- (a) In this chapter, all time periods are in calendar days, including Saturdays, Sundays, and legal holidays.
- (b) A time period begins on the day after the event that triggers the period and includes the last day of the period. If the last day falls on a Saturday, Sunday, or federal holiday, the period is extended to include the next business day.
- (c) The FEP Officer may extend any time limits based on a showing of good cause.

#### **§ 350.10.60 Records**

- (a) At the conclusion of informal and formal proceedings under the FEP-CP, copies of all papers, files, and reports produced by an FEP counselor, investigator, or hearing officer (including the hearing record), must be filed with the FEP case manager.
- (b) No papers, files, or reports relating to a dispute may be filed in any employee's official personnel folder unless necessary to implement the terms of a settlement agreement, FEP-D, or decision and order of a hearing officer or appellate judicial officer (AJO).
- (c) After a voluntary resolution is reached as a result of mediation, all notes, papers, files, and reports from that mediation must be destroyed, except for the signed resolution document.

#### **§ 350.10.70 Conflicts of Interest and Disqualification**

- (a) Generally, no person may serve as a counselor, investigator, mediator, or hearing officer to resolve an FEP-CP if such person:
  - (1) has a personal bias or prejudice concerning a party;
  - (2) has personal knowledge of the facts giving rise to the dispute;

- (3) is in the chain of command of the complainant or any participant in the dispute; or
- (4) serves within the same department as any party in the dispute.
- (b) A party may seek the disqualification of a counselor, investigator, mediator, or hearing officer, by petitioning the FEP Officer in writing.
- (c) Upon a showing of good cause for disqualification, the FEP Officer (or designee) must appoint a new counselor, investigator, mediator, or hearing officer to resolve the FEP-CP.

### **§ 350.20 Initiating the FEP-CP – Informal Counseling**

- (a) An individual wishing to pursue a claim under FEP-CP must first request informal counseling verbally or in writing.
- (b) The counseling request must be made to an OFEP staff member:
  - (1) within 60 days after the date of the allegedly discriminatory matter; or
  - (2) for a personnel action, within 60 days after the action's effective date.
- (c) The FEP Officer will extend the 60-day time limit when the individual shows:
  - (1) that he or she did not know — and reasonably should not have known — that the discriminatory matter or personnel action occurred;
  - (2) that, despite due diligence, he or she was prevented from contacting an OFEP staff member within the time limits by circumstances beyond his or her control; or
  - (3) other reasons considered sufficient by the FEP Officer.
- (d) Upon receipt of a timely request for counseling, the FEP Officer (or designee) must:
  - (1) provide the complainant with a copy of the FEP-CP Informal Complaint Form;
  - (2) instruct the complainant to complete and submit the FEP-CP Informal Complaint Form to the appropriate OFEP staff member; and

- (3) designate an FEP counselor within 15 days after the Informal Complaint Form is submitted.
- (e) The FEP counselor must do the following:
- (1) Upon assignment, schedule an initial interview with the complainant. During the initial interview, the FEP counselor must:
    - (A) inform the complainant of his or her rights and responsibilities in the FEP-CP, including the option to elect traditional counseling or ADR; and
    - (B) gather information about the allegations raised in the informal complaint.
  - (2) Attempt informal resolution when ADR is not offered or accepted.
  - (3) Prepare a Counselor's Report, consistent with [§ 350.20.30\(d\)](#).
- (f) Election of Traditional Counseling or ADR

Within seven days of the initial interview with the FEP counselor, the complainant must elect to either participate in traditional counseling or ADR.

#### **§ 350.20.10 Contractors**

- (a) Contractors are not AO employees and, as such, are not covered by the FEP-CP, except in very limited circumstances as described in paragraph (b). Contractors may, however, meet with an FEP counselor to discuss rights and responsibilities in the FEP-CP.
- (b) The FEP Officer (or designee) has the authority to determine if a contractor can be considered an "employee" of the AO for the purposes of the FEP-CP. This determination is based on a common law of agency test.
- (c) When a contractor files an informal complaint, the FEP counselor must, within 30 days of the filing,
  - (1) conduct a limited inquiry to determine whether an employment relationship exists, and
  - (2) report the findings of the limited inquiry to the FEP Officer (or designee).

- (d) If the FEP Officer (or designee) determines that an employment relationship does not exist between the AO and the contractor, the informal complaint will be dismissed for lack of jurisdiction.
- (e) If the FEP Officer (or designee) determines that an employment relationship exists between the AO and the contractor, the contractor may elect to participate in either traditional counseling or ADR. **See:** [§ 350.20.20](#).

### § 350.20.20 Traditional Counseling or ADR

- (a) Traditional Counseling
  - (1) If the complainant elects traditional counseling, the FEP counselor will:
    - (A) conduct a limited inquiry to clarify the complainant's claim(s) and assist the FEP Officer in evaluating legal claims provided in [§ 350.30\(c\)](#) at the conclusion of the counseling process; and
    - (B) assist the parties in exploring resolution at the lowest possible level.
  - (2) The traditional counseling period may last no more than 60 days from the date that the FEP Officer (or designee) receives a completed Informal Complaint Form unless the complainant agrees in writing to extend the counseling for an additional 30 days.
- (b) Alternative Dispute Resolution (ADR)
  - (1) ADR (i.e., mediation) is a process in which a neutral third party assists two opposing parties to reach a voluntary, negotiated resolution of a claim of discrimination. **See:** [§ 350.75](#).
  - (2) A complainant may elect ADR by submitting the ADR Election Form to the FEP counselor.
  - (3) If the complainant elects ADR and the AO does not agree to participate or fails to respond to the opportunity to participate in ADR within 10 business days, traditional counseling will begin for up to 60 days from the filing of the informal complaint, unless the complainant agrees in writing to extend the counseling for an additional 30 days.

- (4) If the parties agree to participate in ADR, the informal counseling period will be tolled for the duration of ADR, up to 90 days from the filing of the informal complaint.

### **§ 350.20.30 Conclusion of the Counseling Period**

- (a) If the parties reach an agreement during traditional counseling or ADR, the FEP case manager will incorporate the agreed upon terms into a settlement agreement.
  - (1) The Office of AO Human Resources (AOHR) and the Office of the General Counsel (OGC) must review and approve the settlement agreement before the parties and the FEP Officer may sign it.
  - (2) All terms of the settlement agreement must be consistent with [§ 350.80 \(Remedies\)](#).
  - (3) If the AO fails to comply with the settlement agreement, the individual may file a claim for breach. **See:** [§ 355.30](#).
- (b) If the parties are unable to reach a resolution during traditional counseling or ADR, the FEP counselor will conduct a final interview with the complainant before the counseling period concludes to discuss the counseling efforts, attempts at resolution, and the right to file a formal complaint.
- (c) Within five days after the conclusion of the counseling period, the FEP Officer (or designee) must issue a Notice of Completion of Counseling that informs the complainant of any right he or she may have under the FEP-CP to pursue his or her FEP claims further.
- (d) Within 15 days after the conclusion of the counseling period, the FEP counselor must prepare and file a "Counselor's Report." The report must include:
  - (1) a precise description of the claim(s) and the basis(es) identified by the complainant;
  - (2) a summary of facts gathered during informal counseling;
  - (3) a listing of the complainant's requested relief;
  - (4) any relevant documents gathered during the inquiry; and
  - (5) any attempts to informally resolve the complaint.

- (e) The Counselor's Report will be included in the Report of Investigation (ROI). **See:** [§ 350.40\(f\)](#).

### **§ 350.30 Formal Complaint Process – Complaint**

- (a) A complaint must be filed with the FEP case manager using OFEP's Formal Complaint Form within 15 days after receipt of the Notice of Completion of Counseling.
  - (1) If a formal complaint is not submitted by the specified written deadline, the absence of a filing will be considered a withdrawal, and the FEP Officer (or designee) will close the case.
  - (2) There is no right to appeal the FEP Officer's (or designee's) closure of the case.
- (b) Upon receipt of the complainant's formal complaint and the Counselor's Report, the FEP Officer (or designee) must evaluate the claims raised to determine whether to dismiss any of the claims due to one or more of the following:
  - (1) Failure to state a claim covered under the FEP-CP.
  - (2) Failure to timely comply with the time limits for initiating counselor contact or filing a formal complaint.
  - (3) Stating a claim that had already been decided.
  - (4) No relief can be granted because the effects of the alleged violation have been eradicated, and there is no reasonable expectation that the alleged violation will recur.
  - (5) Alleging dissatisfaction with the processing of a previously filed complaint.
- (c) The FEP Officer (or designee) must issue a Notice of Acceptance, Partial Acceptance, or Dismissal within 45 days after receipt of the complainant's Formal Complaint.
  - (1) When a Notice of Partial Acceptance is issued, there is no immediate right to appeal. The dismissal determination is reviewable by a hearing officer or the FEP Officer if a hearing or Fair Employment Practices Decision (FEP-D) is requested in the formal complaint process.
  - (2) When a case is dismissed, in full, the Notice of Dismissal is considered a Fair Employment Practices Decision (FEP-D). The



complainant has the right to appeal an FEP-D according to the procedures in [§ 355.10\(a\)](#) and [§ 355.20\(b\)](#).

(d) Amendments

- (1) If a new incident(s) of discrimination, harassment, or retaliation occurs after the counseling period concludes, the complainant may request to amend the original complaint to add claims that are like or related to the previously filed complaint. The amendment must be submitted in writing to the FEP case manager and identify the new incidents at issue. The FEP Officer (or designee) must review the request to amend and determine whether to:
  - (A) accept the new claims as part of the original complaint;
  - (B) dismiss the new claims in whole or in part under § 350.30(c); or
  - (C) direct the complainant to initiate a new complaint that may be consolidated with the original complaint if the new claims are similar or related to a previously filed complaint.
- (2) Within 10 days of receipt of the amendment, the FEP Officer (or designee) must acknowledge receipt of the complaint amendment in writing, and inform the complainant of the following:
  - (A) The date on which the complaint or amendment was filed.
  - (B) If the complaint is dismissed in whole or in part under § 350.30(c), notification of the dismissal with an explanation of the one or more bases for dismissal.
  - (C) If the complaint is not dismissed in its entirety under § 350.30(c), notification that the AO will conduct an investigation within 180 days of Notice of Acceptance/Partial Acceptance of the original or amended complaint filing unless the parties agree in writing to extend the time.

### **§ 350.40 Formal Complaint Process – Investigation**

- (a) Upon acceptance of the formal complaint, the FEP Officer or FEP case manager must appoint an investigator to conduct an independent investigation of the facts surrounding the complaint. The investigation must include:

- (1) a thorough review of the Formal Complaint, Informal Complaint, the Counselor's Report, and any additional circumstances under which the alleged prohibited conduct occurred;
  - (2) the treatment of members of the complainant's protected class compared to treatment of other similarly situated employees, if applicable; and
  - (3) any applicable policies or practices.
- (b) The investigation is intended to develop an impartial and appropriate factual record upon which to make findings on the claims raised by the formal complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether prohibited conduct occurred.
- (c) The investigation must be conducted by an impartial individual.
- (d) In discharging his or her duties, the investigator may:
- (1) request documentary evidence from the complainant or relevant AO managers and employees;
  - (2) administer oaths; and
- (Note:** Witness statements must be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.)
- (3) interview witnesses, including the complainant and relevant AO managers and employees.
- (Note:** AO employees are required to cooperate with the investigator when it comes to producing witnesses, documentation, or other required information, giving testimony, or making affidavits.)
- (e) The investigator must complete the investigation within 180 days after the Notice of Acceptance/Partial Acceptance unless the parties agree to extend the time in writing.
- (f) At the end of the investigation period, the investigator must submit the findings and all documentation, statements, affidavits, and declarations surrounding the investigation (collectively, the ROI) in writing to the FEP Officer (or designee), who must provide copies to the complainant and the OGC.

- (g) Within 15 days of receiving the ROI, the complainant may submit a written rebuttal to any testimony or evidence in the ROI to the FEP case manager, who must provide a copy to OGC.

### **§ 350.50 Formal Complaint Process – Post-investigation Election**

- (a) Within 30 days after receiving the ROI, the complainant must request one of the following options:
  - (1) Hearing before a hearing officer; or
  - (2) A Fair Employment Practice Decision (FEP-D).
- (b) If the complainant fails to elect a hearing or FEP-D within 30 days of receiving the ROI, the complaint will be dismissed for failure to comply with the time limit for electing a hearing or an FEP-D. There is no right to appeal the FEP Officer's (or designee's) closure of the case.
- (c) The FEP Officer may reinstate a complaint dismissed under this section upon a written showing of good cause for missing the election deadline, as determined by the FEP Officer.

### **§ 350.60 Formal Complaint Process – Hearing and Recommendation**

- (a) 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.
- (b) Hearing Officer's Appointment
  - (1) Within 30 days after receipt of the complainant's request for a hearing, the FEP Officer must select a hearing officer and prepare an Assignment of Hearing Officer Letter.
  - (2) The hearing officer must be:
    - (A) an attorney with specialized subject-matter expertise; and
    - (B) a neutral party.

(c) Hearing Officer's Responsibilities

Once selected, the hearing officer is responsible for the complaint's adjudication until issuing a Report and Recommendation. The hearing officer's responsibilities include the following:

- (1) Issuing a recommended decision on the complaint, with or without a hearing;
- (2) Regulating the conduct of hearings;
- (3) Limiting the number of witnesses to exclude irrelevant or repetitive evidence;
- (4) Ordering discovery or the production of documents;
- (5) Determining who may be present during the hearing;
- (6) Limiting the hearing to the issues in dispute; and
- (7) Imposing sanctions on a party if he or she fails to comply without good cause with orders or requests. In appropriate circumstances, sanctions may include:
  - (A) drawing an adverse inference that the requested information in discovery, or the testimony of the requested witness at hearing, would have reflected unfavorably on the party refusing to provide the requested information;
  - (B) consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
  - (C) exclude other evidence offered by the party failing to produce the requested information or witness;
  - (D) issue a decision fully or partially in favor of the opposing party;
  - (E) dismiss the complaint for failure to cooperate or respond; or
  - (F) take such other actions as it deems appropriate.

(d) Dismissal or Summary Judgment

- (1) Motion to Dismiss

- (A) Motions to dismiss are appropriate when the complaint does not contain sufficient factual matter, accepted as true, to state a plausible claim of relief. ([Ashcroft v. Iqbal, 556 U.S. 662, 678 \(2009\)](#))
  - (B) The AO may file a motion to dismiss on the basis that the formal complaint:
    - (i) is frivolous, or unduly repetitive of a previous complaint;
    - (ii) fails to state a claim upon which relief may be granted; or
    - (iii) asserts claims that were not raised during informal counseling or amended to the formal complaint before the close of the investigation period.
  - (C) The complainant may file an opposition to the motion, and the AO may file a reply.
  - (D) The hearing officer may, at his or her discretion, provide a notice requiring the parties to appear and present for oral argument or testimony on a motion to dismiss.
  - (E) After considering the motion, opposition, and any reply, the hearing officer may:
    - (i) deny the motion,
    - (ii) order that discovery be permitted, or
    - (iii) issue a decision without a hearing.
- (2) Motion for Summary Judgment
- (A) Summary judgment is proper when material facts are not in genuine dispute. 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.”)
  - (B) Summary Judgment can be initiated by either party or the hearing officer.

- (i) On the Motion of a Party
  - (a) A party files a motion for summary judgment.
  - (b) The opposing party may file an opposition to the motion, and the moving party may file a reply.
  - (c) The hearing officer may, at his or her discretion, provide a notice requiring the parties to appear and present for oral argument or testimony on a motion for summary judgment.
  - (d) After considering the motion, opposition, and any reply, the hearing officer may:
    - (1) deny the motion,
    - (2) order that discovery be permitted on the facts involved,
    - (3) limit the hearing to the issues remaining in dispute (if any), or
    - (4) issue a decision without a hearing.
- (ii) On the Hearing Officer's Initiation

If the hearing officer believes that some or all of the material facts are not in genuine dispute, the hearing officer may, after giving notice to the parties and providing them an opportunity to respond, issue an order limiting the scope of the hearing or issue a summary judgment decision without conducting a hearing.

(e) Hearing Procedures

If the hearing officer does not recommend dismissal before the hearing, he or she must hold a formal hearing on the complaint's merits. The hearing officer determines the manner of conducting the hearing. However, the following specific provisions apply to FEP-CP hearings:

- (1) The hearing must be closed to anyone who does not have an interest in the proceeding. The hearing officer determines whether someone has such an interest on a case-by-case basis.

- (2) Both the complainant and the AO have the following rights at the hearing:
    - (A) to have representation;
    - (B) to present evidence; and
    - (C) to question or cross-examine any witness.
  - (3) The hearing must be limited to issues raised in the formal complaint.
  - (4) The hearing officer must conduct a fair and impartial hearing and take all necessary action to avoid undue delay in the disposition of all proceedings.
  - (5) A hearing transcript must be made and kept as the official record of the proceeding.
- (f) Witnesses
- (1) No later than 21 days before the hearing, the parties must submit a list of the witnesses they intend to call to testify at the hearing to the hearing officer and opposing party.
  - (2) No later than seven days after receipt of the opposing party's witness list, either party may submit a written objection to any of the witnesses to the hearing officer.
  - (3) No later than seven days before the hearing, after the parties have had an opportunity to object to any witnesses, the hearing officer must determine which witnesses may testify at the hearing.
- (g) Hearing Officer's Recommended Decision
- (1) The hearing officer must issue a Recommended Decision that includes:
    - (A) all findings of fact and conclusions of law;
    - (B) a determination on the merits of each claim in the complaint; and
    - (C) where appropriate, a statement of the relief recommended, consistent with applicable AO policy.

- (2) The hearing officer must issue a written Recommended Decision not later than 90 days after receipt of the official transcript.
- (3) If the hearing officer recommends summary dismissal or determination, the Recommended Decision must be issued within 120 days after receipt of the Assignment of Hearing Officer Letter, unless an extension is agreed upon by the parties.
- (4) The hearing officer must provide a copy of the Recommended Decision to:
  - (A) the complainant;
  - (B) the complainant's representative (if any);
  - (C) OGC; and
  - (D) the FEP Officer.

**§ 350.60.10 Final Agency Order (FAO)**

- (a) The FEP Officer may adopt, modify, or reject the Recommended Decision.
- (b) The FEP Officer's review of the Recommended Decision must include the following actions:
  - (1) Review of all legal determinations based on a "de novo" standard of review. (**Note:** The FEP Officer must determine whether the Recommended Decision properly applied legal principles.)
  - (2) Review of the findings of fact (including a finding of discriminatory intent), based on the administrative record as a whole, using a "clearly erroneous" standard. (**Note:** The FEP Officer must adopt findings of fact unless the FEP Officer is definitely and firmly convinced that a mistake has been made.)
- (c) No later than 60 days after receipt of the hearing officer's recommendation, the FEP Officer must issue a written Final Agency Order (FAO) to the parties.
- (d) If the FEP Officer issues an FAO that includes a finding of prohibited conduct in whole or in part, the FAO must specify the type of relief being awarded.



### **§ 350.70 Formal Complaint Process –Fair Employment Practices Decision (FEP-D)**

- (a) Once an investigation is complete and if the complainant has made a timely request for an FEP-D, the FEP Officer must issue an FEP-D within 90 days after receipt of the complainant's request.
- (b) The FEP-D must:
  - (1) outline all findings of fact and conclusions of law;
  - (2) consist of findings by the AO on the merits of each claim in the complaint;
  - (3) where appropriate, a statement of the relief recommended, consistent with applicable AO policy; and
  - (4) contain notice of the right to appeal the decision.
- (c) The FEP Officer must provide a copy of the FEP-D to:
  - (1) the complainant;
  - (2) the complainant's representative (if any); and
  - (3) OGC.
- (d) If the complainant does not file an appeal consistent with [§ 355.10\(a\)](#) or [§ 355.20\(b\)](#) within 30 days after the date of the FEP-D, the FEP-D becomes the Final Agency Decision (FAD).

### **§ 350.75 Alternative Dispute Resolution (ADR)**

- (a) Mediation is the primary ADR technique available in the FEP-CP.
- (b) A complainant may elect ADR at any stage of the FEP-CP by submitting the ADR Election Form to the FEP case manager or FEP counselor. If the FEP Officer agrees that ADR is proper and desirable, the FEP Officer may initiate the ADR process.
- (c) Duration
  - (1) Informal Counseling Stage
    - (A) If a complainant requests ADR during the informal counseling period, and the AO does not agree to participate or fails to respond to the opportunity to participate in ADR

within 10 business days, traditional counseling will begin for a period not to exceed 60 days from the filing of the informal complaint unless the complainant agrees in writing to extend the counseling for an additional 30 days.

- (B) If the parties agree to participate in ADR, the informal counseling period will be tolled for the duration of ADR, not to exceed 90 days from the filing of the informal complaint.

(2) Formal Complaint Stage

If parties mutually agree to ADR after a formal complaint is filed, the time period for processing the complaint will be tolled for the duration of ADR, not to exceed 90 days. If the dispute is not resolved, the processing of the complaint will resume.

(d) Procedure

- (1) The AO must ensure that a management official with settlement authority is available to participate in ADR.
- (2) Within seven days after receipt of the AO's agreement to participate in mediation, the FEP Officer (or designee) will:
  - (A) appoint a third-party neutral mediator, and
  - (B) issue a Mediation Confirmation Letter and Agreement to Mediate form.
    - (i) The participating parties must sign the form.
    - (ii) The signed form must be provided to the FEP case manager no later seven days before the scheduled mediation.
- (3) Either party may terminate the ADR process at any time. If termination occurs while the informal counseling period is tolled under [§ 350.20.20\(b\)\(4\)](#), traditional counseling will resume after the final ADR session and last for no more than an additional 30 days.
- (4) If the parties reach a tentative agreement during ADR, the proposed terms of the resolution must be documented on the Mediation Memorandum of Understanding form.
  - (A) This form will be used as the foundational document for formulating a written settlement agreement. Any terms agreed upon and listed on the form are not binding or

enforceable. The terms must be formally incorporated into a written settlement agreement, which must be reviewed by AOHR and OGC. The settlement agreement becomes binding and enforceable once executed by the parties and the FEP Officer.

- (B) If the AO fails to comply with the settlement agreement, the individual may file a claim for breach. **See:** [§ 355.30](#).
- (5) After a resolution is reached as a result of ADR, all notes, papers, files, and reports from that mediation must be destroyed, except for the signed settlement agreement.

### § 350.80 Remedies

- (a) In general, where there is a finding that a substantive right protected by FEPS was violated, the hearing officer (or the FEP Officer when a timely request for an FEP-D is made instead of a hearing) may order a necessary and appropriate remedy.
  - (1) A remedy may correct a past violation or ensure future compliance with the rights protected by FEPS, or both.
  - (2) A remedy should be tailored as closely as possible to the specific violation involved.
- (b) Specific remedies that may be provided to successful complainants under FEPS include, but are not limited to:
  - (1) placement in the subject position;
  - (2) placement in a comparable alternative position;
  - (3) reinstatement to a position from which previously removed;
  - (4) prospective promotion to a position;
  - (5) priority consideration for future promotion or position;
  - (6) back pay and attorney's fees, where the statutory criteria of the Back Pay Act (codified at [5 U.S.C. § 5596](#)) are satisfied;
  - (7) records modification and/or expungement;
  - (8) injunctive relief;
  - (9) accommodation of disabilities;

- (10) opportunity to participate in a denied benefit of employment (e.g., training, preferential work assignment, or compensatory time);
  - (11) granting of an award; or
  - (12) referral of supervisor(s) to the appropriate management officials for potential disciplinary action(s).
- (c) Remedies that are **not** legally available include:
- (1) payment of attorney's fees (unless authorized by the Back-Pay Act);
  - (2) compensatory damages (including pecuniary damages);
  - (3) punitive damages; or
  - (4) liquidated damages.

### § 350.90 [Reserved]

## § 355 Appeals and Non-Compliance Actions

### § 355.10 Pre-Act Complainant Appeal Rights

- (a) Appeal Rights to the Equal Employment Opportunity Commission
- (1) A pre-Act complainant who was entitled to file an appeal with the Equal Employment Opportunity Commission's Office of Federal Operations (EEOC-OFO) before the passage of the AO Personnel Act of 1990, may appeal to the EEOC-OFO:
    - (A) the AO's final agency order;
    - (B) the AO's fair employment practice decision;
    - (C) the AO's rejection or dismissal of the complaint or any portion of it; or
    - (D) the AO's alleged non-compliance with a settlement agreement, FAO, or FEP-D.
  - (2) For guidance on filing an EEOC-OFO appeal, **see:** [29 CFR 1614](#).
  - (3) A pre-Act complainant:
    - (A) may only seek appellate review from the EEOC-OFO; and

- (B) is not entitled to a hearing before an EEOC administrative judge.
- (b) Civil Actions
- (1) A pre-Act complainant who was entitled to file a civil action in an appropriate United States district court before the passage of the AO Personnel Act may file such an action:
    - (A) after exhausting the administrative remedies under the statutes cited in [§ 330](#);
    - (B) if 180 days from the date of filing the formal complaint, the AO has not issued an FAO or FEP-D;
    - (C) within 90 days after receipt of the EEOC-OFO's final decision on appeal; or
    - (D) after 180 days from the date of filing an appeal with the EEOC-OFO if there has been no final EEOC-OFO decision.
  - (2) If a claim is based on alleged age discrimination, a pre-Act complainant may proceed to file a civil action in the appropriate United States district court within 180 days after the alleged discriminatory action, after providing EEOC-OFO with 30 days' notice of an intent to file such action.

### **§ 355.20 Post-Act Complainant Appeal Rights**

- (a) Appeal of a Final Agency Order
  - (1) Appeal Rights

Where either party believes there was a mistake of fact or law, a complainant or the AO may appeal to an Appellate Judicial Officer (AJO) any FAO consistent with the provisions below.
  - (2) Time

An appeal must be filed within 30 days from the date the FAO is issued. If an appellant does not timely file an appeal, the appeal must be dismissed as untimely.
  - (3) How to Appeal

The complainant or the AO must file an appeal with the FEP Officer or FEP case manager, using OFEP's Notice of Appeal Form, in person, email, or mail.

(4) Supporting Statement or Brief

- (A) Any statement or brief in support of the appeal must be submitted to the FEP Officer, with a copy to the opposing party, in person or by email or mail within 30 days after filing the notice of appeal.
- (B) Any statement or brief in opposition to an appeal must be submitted to the FEP Officer, with a copy to the opposing party, in person or by email or mail within 30 days after receipt of the statement or brief supporting the appeal.
- (C) If no statement or brief supporting the appeal is filed, any statement or brief in opposition to an appeal must be submitted within 60 days after the filing date of the notice of appeal.

(5) The Record

The FEP Officer must submit the notice of appeal, any response to the notice of appeal, and the complaint file (complaint, Report of Investigation, hearing transcript, final agency order) to the Chair of the Judicial Resources Committee (JRC) within 30 days after notification that a party has filed an appeal. The Chair of the JRC will identify an AJO who will decide the issues on appeal.

(6) Appellate Judicial Officer Review

- (A) The AJO must be a judge appointed under Article III of the United States Constitution.
- (B) The AJO must review the complaint file and all written statements and briefs from either party.
- (C) No new evidence may be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available before or during the investigation or hearing process.
- (D) Standard of Review

- (i) Only contentions of mistakes of fact or law may be considered on appeal.
  - (ii) The AJO must review findings of fact (including a finding of discriminatory intent) based on a “clearly erroneous” standard of review. The AJO must uphold findings of fact unless the AJO is definitely and firmly convinced that a mistake has been made.
  - (iii) The AJO must review legal determinations based on a “de novo” standard of review. The AJO must determine whether the decision properly applied legal principles.
- (E) Decision
  - (i) The AJO must issue a timely, written decision providing the reasons for the decision.
    - (a) If the decision contains a finding of discriminatory conduct, the AJO must include any appropriate remedy and, where appropriate, relief and attorney’s fees under the Back-Pay Act.
    - (b) The decision must be dated and transmitted immediately to all parties.
  - (ii) The decision issued by the AJO is final.
- (b) Appeal of a Fair Employment Practices Decision (FEP-D)
  - (1) Appeal Rights

Where either party believes there was a mistake of fact or law, a complainant or the AO may appeal to the Director any FEP-D consistent with the provisions below.
  - (2) Time
    - (A) An appeal must be filed within 30 days from the date the FEP-D is issued. If an appellant does not timely file an appeal, the appeal must be dismissed as untimely.
    - (B) If the complainant does not file an appeal within 30 days after the date of the FEP-D, the FEP-D becomes a Final Agency Decision.

(3) How to Appeal

The complainant or the AO must file an appeal with the Director, using OFEP's Notice of Appeal Form, in person, email, or mail.

(4) Supporting Statement or Brief

(A) Any statement or brief in support of the appeal must be submitted to the Director, with a copy to the opposing party, in person or by email or mail within 30 days after filing the notice of appeal.

(B) Any statement or brief in opposition to an appeal must be submitted to the Director, with a copy to the opposing party, in person or by email or mail within 30 days after receipt of the statement or brief supporting the appeal.

(C) If no statement or brief supporting the appeal is filed, any statement or brief in opposition to an appeal must be submitted within 60 days after the filing date of the notice of appeal.

(5) Director's Review and Decision

(A) The Director must review the complaint file and all written statements and briefs from either party.

(B) No new evidence may be considered on appeal unless there is an affirmative showing that the evidence was not reasonably available before or during the investigation or during the hearing process.

(C) Standard of Review

(i) Only contentions of mistakes of fact or law may be considered on appeal.

(ii) The Director must review findings of fact (including a finding of discriminatory intent) based on a "clearly erroneous" standard of review. The Director must uphold findings of fact unless the Director is definitely and firmly convinced that a mistake has been made.

(iii) The Director must review legal determinations based on a "de novo" standard of review. The Director must determine whether the decision properly applied legal principles.



- (D) Final Agency Decision
  - (i) The Director must issue a timely, written decision providing the reasons for the decision.
    - (a) If the decision contains a finding of discriminatory conduct, the Director must include any appropriate remedy and, where appropriate, relief and attorney's fees under the Back-Pay Act.
    - (b) The decision must be dated and transmitted immediately to the complainant or his or her representative, OFEP, and OGC.
  - (ii) The decision issued by the Director is final.

### **§ 355.30 Breach of a Settlement Agreement**

- (a) A complainant may file a claim of breach alleging non-compliance with settlement terms reached during the FEP-CP.
  - (b) The complainant must notify OFEP in writing of the AO's alleged non-compliance with the settlement agreement within 30 days after the date the complainant knew or should have become aware of the AO's non-compliance. The notice must:
    - (1) include a copy of the fully executed settlement agreement;
    - (2) identify the specific terms alleged to have been breached; and
    - (3) include any documents providing evidence of the breach.
  - (c) The FEP Officer must determine whether the agreement was breached and notify the complainant in writing.
  - (d) If the FEP Officer determines that the agreement was breached, the complainant may request:
    - (1) enforcement of the settlement agreement; or
    - (2) reinstatement of the underlying complaint at the point at which the processing of the complaint was stopped.
- (Note:** Where a complaint is reinstated for further processing, both the AO and the complainant would be required to return any benefits received under the agreement.)

## **§ 355.40 Non-Compliance with Final Agency Action**

- (a) A complainant may file a Notice of Non-compliance with the FEP Officer and OGC for enforcement of an FAO, FEP-D, AJO Decision, or FAD.
- (b) The complainant must notify OGC and the FEP Officer in writing of the AO's alleged non-compliance within 30 days after when the complainant knew or should have become aware of the AO's non-compliance. The notice must:
  - (1) identify the corrective action ordered by the hearing officer, OFEP, appellate judge, or Director that the AO has not complied with;
  - (2) include a copy of the FAO, FEP-D, AJO Decision, or FAD; and
  - (3) include any documents evincing the non-compliance.
- (c) Within 30 days, OGC must file a written response to the Notice of Non-compliance serving both the complainant and OFEP.
- (d) Upon receipt of the Notice of Non-Compliance and OGC's response, if filed, the FEP Officer will notify the Director of the notice and request enforcement of the order.

## **§ 360 Reasonable Accommodation**

### **§ 360.10 General**

#### **§ 360.10.10 Applicability**

- (a) Except as provided below in paragraph (b), the following individuals may engage in the reasonable accommodation program provided in this section:
  - (1) current employees; and
  - (2) applicants for employment with the AO.
- (b) Contractors who report to the AO may not request an accommodation through the AO Reasonable Accommodation Process.

#### **§ 360.10.20 Records**

- (a) All papers, files, and medical documents exchanged during the accommodation process will be maintained by the Reasonable

Accommodation Coordinator (RAC) in AOHR until the requester ceases to be employed by the AO.

- (b) No papers, correspondence, files, or medical documents relating to request for accommodation will be filed in any employee's official personnel folder (OPF).
- (c) Notes, papers, files, and medical documents will be disclosed only to those individuals necessary to assess the reasonable accommodation or with the consent of the requester.
- (d) When the requester ceases to serve as an employee of the AO, all notes, papers, files, and medical documents will be destroyed.

### **§ 360.10.30 Policy Exclusions**

- (a) The reasonable accommodation process does not excuse conduct that would result in disciplinary action.
- (b) An individual who poses a direct threat to the health and safety of himself, herself, or others, with or without accommodation, such that the individual poses a significant risk of substantial harm, is not qualified for an accommodation. Determining whether an individual poses a direct threat requires an individualized assessment.
- (c) A person who is "currently engaging" in the illegal use of drugs is not a "qualified individual with a disability." However, "qualified individuals" under the ADA include those persons:
  - (1) who have been successfully rehabilitated and who are no longer engaged in the illegal use of drugs;
  - (2) who are currently participating in a rehabilitation program and are no longer engaging in the illegal use of drugs; and
  - (3) who are regarded, erroneously, as illegally using drugs.

## **§ 360.20 Key Roles and Responsibilities**

### **§ 360.20.10 Reasonable Accommodation Coordinator (RAC)**

The RAC administers the reasonable accommodation program AO-wide by doing the following activities.

- (a) Facilitate the reasonable accommodation program by:

- (1) reviewing requests from employees and applicants for completeness;
  - (2) assessing requests to determine whether the requester meets the definition of a qualified individual with a disability;
  - (3) examining requests to determine whether the requester identifies an AO requirement, policy, or practice that conflicts with the requester's described religious belief, practice, or observance;
  - (4) providing advice and guidance to the requester, the requester's supervisor and manager, the deciding official, and any other appropriate official on the criteria for evaluating requests for reasonable accommodation;
  - (5) initiating the interactive process with the requester, the requester's supervisor and manager, the deciding official, and any other appropriate official;
  - (6) providing advice and guidance to the requester, the requester's supervisor, and manager, the deciding official, and any other appropriate official, on issuing timely decisions granting or denying accommodation requests; and
  - (7) assisting the AO with implementing granted accommodations.
- (b) Work with deciding officials, supervisors, and managers to ensure that any accommodation, if appropriate:
- (1) meets the individual's disability-related needs or religious needs without eliminating essential functions of the position,
  - (2) is feasible, and
  - (3) does not pose an undue hardship to the AO.
- (c) Work with applicants with disabilities and applicants who need a religious accommodation to either apply or be interviewed for a job.
- (d) Develop an online and in-person reasonable accommodation training course for supervisors, managers, and all other bi-weekly employees.
- (e) Maintain the confidential case file of all accommodation requests in compliance with AO policy; the Rehabilitation Act of 1973, as amended; and Title VII of the Civil Rights Act of 1964.

### **§ 360.20.20 Requester**

The requester is the employee, applicant, or third party on the employee's or applicant's behalf who requests the reasonable accommodation. The requester takes the following actions:

- (a) initiate the reasonable accommodation process;
- (b) cooperate in the interactive dialogue throughout the reasonable accommodation process (understanding that failure to cooperate may result in denial of the reasonable accommodation request);
- (c) provide promptly any requested medical information about the disability, functional limitation(s), and need for accommodation to the RAC; and
- (d) provide promptly any requested information on the AO requirement, policy, or practice that conflicts with the requester's sincerely held religious beliefs or on the nature of the requester's sincerely held belief.

### **§ 360.20.30 Supervisor or Manager**

The supervisor or manager consults with the RAC about specific requests to ensure that an accommodation enables the individual to perform the position's essential functions or meets the requester's religious needs and is a reasonable and effective accommodation. The supervisor or manager takes the following actions:

- (a) forward all reasonable accommodation requests received to the RAC as soon as practical, but no later than three business days after receipt, and direct the individual to contact the RAC;
- (b) clarify whether the individual seeking the assistance is requesting a reasonable accommodation when the initial communication is unclear; and
- (c) participate in the interactive process to ensure that any accommodation, whether based on disability or religion, is a reasonable and effective accommodation that enables the individual to perform the position's essential functions.

### **§ 360.20.40 Deciding Official**

The deciding official has the authority to grant or deny the requested accommodation and takes the following actions:

- (a) participate in the interactive process to ensure that any accommodation, whether based on disability or religion, is a reasonable and effective accommodation that enables the individual to perform the position's essential functions; and

- (b) render the final decision.

### **§ 360.20.50 Human Resources Specialist**

The designated human resources specialist from AOHR consults with the RAC about specific requests to help determine the essential functions of the position. The human resources specialist may perform the following actions:

- (a) provide a current copy of the requester's job description and the performance plan to the RAC;
- (b) forward all reasonable accommodation requests received to the RAC as soon as practical, but no later than three business days after receipt, and direct the requester to contact the RAC; and
- (c) clarify whether the individual seeking the assistance is requesting a reasonable accommodation when the initial communication is unclear.

## **§ 360.30 Submitting a Reasonable Accommodation Request**

### **§ 360.30.10 Initiating the Request**

- (a) An AO employee wishing to request a reasonable accommodation may do so orally or in writing to his or her supervisor or manager, another supervisor or manager in the employee's immediate chain of command, the appropriate deciding officer or associate director, or the RAC.
- (b) An applicant wishing to request a reasonable accommodation may do so orally or in writing to a human resources specialist or any other AO employee directly involved in the application or hiring process.
- (c) A third party (i.e., a family member, health professional, or other representative) may make a written or oral request for reasonable accommodation on behalf of an employee or applicant with the individual's consent. Unless an employee is incapacitated, the RAC will contact the employee or applicant and confirm the individual's interest in an accommodation before processing the accommodation.
- (d) In addition to the official channels provided above, a request for a reasonable accommodation may be sent directly to the RAC by email at [AO\\_Reasonable\\_Accommodations@ao.uscourts.gov](mailto:AO_Reasonable_Accommodations@ao.uscourts.gov).

### **§ 360.30.20 Determining the Official to Respond to an Accommodation Request**

- (a) The official who receives a request for a reasonable accommodation must first determine the appropriate deciding official (i.e., person with authority

to grant or deny requested accommodation), using the following guidelines.

<b>§ 360.30.20(a) Guidelines for Deciding Official</b>		
<b>Request from:</b>	<b>For:</b>	<b>Decided by:</b>
(1) Applicant	Accommodations that <b>do not</b> involve personnel actions, large expenditures, or other high-level determinations	Human resources specialist responsible for recruitment or selection, after consulting with: (A) the RAC and (B), in matters regarding accessible parking, the AO's Facilities and Security Office
(2) Applicant or Employee	Accommodations that involve personnel actions, large expenditures, or other high-level determinations	Appropriate associate director
(3) Employee	(A) Accommodations that involve accessible parking or workspace reconfiguration	Requester's immediate supervisor, after consulting with the RAC and the AO's Facilities and Security Office
	(B) Accommodations other than those listed above	Requester's immediate supervisor, after consulting with the RAC

- (b) The receiving official must forward the request to the appropriate deciding official and the RAC as soon as practical, but no later than three business days after receipt.
- (c) A deciding official must designate in writing an alternate(s) to receive and process requests for reasonable accommodation in their absence or unavailability and ensure that potential requesters are provided both the name and contact information for any alternate deciding official.

**§ 360.40 Responding to a Reasonable Accommodation Request**

- (a) Within seven days after receipt of an oral or written request for a reasonable accommodation, the RAC must send the requester a Reasonable Accommodation Request form to complete and return to the RAC.
  - (1) If the requester is unable to complete the Reasonable Accommodation Request form due to physical or mental limitations, or religious beliefs, the RAC will complete the form and request that the employee, applicant, or third party review the form and confirm that it accurately captures the type(s) of accommodation requested and the reason the individual is requesting the accommodation.

- (2) An employee who requires a reasonable accommodation on a recurring basis (e.g., a sign language interpreter) is only required to submit the Reasonable Accommodation Request form for the initial request and to provide appropriate advance notice each time the accommodation is needed again.
- (b) When the need for an accommodation is obvious and the requested accommodation can be approved and implemented, the appropriate deciding official may do so without delay or further processing. (**Note:** A disability is obvious or already known when it is clearly visible or where the individual has a record of impairment at the AO.) When this occurs, the deciding official must document the following information in writing in the case file (**see:** [§ 360.70](#)):
    - (1) date the request for accommodation was received;
    - (2) specific accommodation requested;
    - (3) specific accommodation approved; and
    - (4) date the accommodation was put in place.
  - (c) When the need for an accommodation is not obvious, the RAC will meet separately with the deciding official and the requester to explain the reasonable accommodation process, obtain additional information and, if necessary, offer alternative means of providing reasonable accommodation and discuss their effectiveness in removing the workplace barrier that is impeding the requester.

#### § 360.40.10 Supporting Information

The RAC may ask for additional information from the requester to support the accommodation request.

- (a) Disability-Related
  - (1) The requester is responsible for providing the RAC with the appropriate medical information where the disability or need for accommodation is not obvious or already known. **Note:** A disability is obvious or already known when it is clearly visible or where the individual has a record of impairment at the AO.
  - (2) If a disability or the need for an accommodation is not apparent or enough medical information has not been provided, the RAC may request medical information necessary to determine whether:



- (A) the employee has a covered disability (i.e., a physical or mental impairment that substantially limits a major life activity); and
    - (B) if the employee has a disability, what reasonable accommodation(s) are necessary.
  - (3) The RAC may only seek medical documentation sufficient to explain the nature of the disability, the requester's need for a reasonable accommodation, and how the requested accommodation will assist the requester with applying for a job, performing the essential functions of a job, or enjoying the benefits and privileges of the workplace.
  - (4) The RAC will provide the requester with a Medical Inquiry form, if the RAC requests medical information.
- (b) Religion-Related
- (1) The requester is responsible for providing the RAC with a narrative statement that:
    - (A) identifies the AO requirement, policy, or practice that conflicts with the requester's sincerely held religious observance, practice, or belief;
    - (B) describes the nature of the sincerely held religious beliefs or religious practice or observance that conflicts with the AO requirement, policy, or practice; and
    - (C) provides the accommodation or modification requested and any alternative accommodations that also would eliminate the conflict between the AO requirement, policy, or practice and the requester's sincerely held religious belief.
  - (2) The RAC may only seek religion-related information sufficient to explain the nature of the sincerely held religious belief, the requester's need for a reasonable accommodation, and how the requested accommodation will enable the requester to practice their religious belief(s).

**§ 360.40.20 Granting a Reasonable Accommodation Request**

- (a) The deciding official must provide an effective reasonable accommodation to qualified individuals with a disability unless providing an

accommodation would impose an undue hardship on the daily operations of the requester's office

- (b) The deciding official must provide a religious accommodation that would eliminate the conflict between the AO requirement, policy, or practice and the individuals sincerely held religious belief(s), unless providing an accommodation would impose an undue hardship on the daily operations of requester's office.
  - (1) The deciding official may, as part of the interactive process and at the RAC's advisement, offer alternative suggestions for reasonable accommodation.
  - (2) If more than one accommodation is effective and the accommodations are equally cost-effective, the requester's preferred accommodation should be given primary consideration. However, the deciding official has the discretion to choose among multiple effective accommodations.
- (c) The deciding official will notify the RAC of the decision to grant the accommodation, and the RAC will prepare and provide written notification of the decision to the requester.
- (d) The requester is not required to accept any accommodation, aid, service, opportunity, benefit offered, or alternative religious accommodation. However, if the requester rejects a reasonable accommodation, aid, service, opportunity, or benefit that is necessary to enable the requester to perform the essential functions of the position held or desired, the individual will not be considered qualified.

#### **§ 360.40.30 Denying a Reasonable Accommodation Request**

- (a) The deciding official will notify the RAC of the decision to deny the accommodation, and the RAC will prepare and provide written notification of the decision to the requester.
  - (1) The notice will provide the requester with detailed information on the specific reasons for the denial.
  - (2) If the deciding official has denied a specific requested accommodation, but offered an alternative accommodation that the requester rejected, the denial notice must explain both the reasons for the denial of the requested accommodation and why the deciding official believes alternative accommodation would be effective.

- (b) The denial notice must also inform the individual that he or she has the right to initiate an FEP-CP complaint based on the denial of the reasonable accommodation.

### **§ 360.50 Initiating an FEP-CP Complaint After Denial**

If an individual is dissatisfied with the resolution reached by the deciding official, the individual may initiate an FEP-CP complaint based on the denial of the reasonable accommodation. **See:** [§ 350](#).

### **§ 360.60 Timeframes to Process Requests and Provide Accommodations**

- (a) The reasonable accommodation process begins as soon as a change is requested or workplace barrier is identified, whether orally or in writing.
- (b) The time necessary to process a request will depend on the nature of the accommodation requested and whether there is a need to obtain supporting information.
  - (1) The standard processing time for a request for a reasonable accommodation that neither requires the submission of medical information nor has any extenuating circumstances is typically no more than 30 business days from the date the requester requests an accommodation. If a determination results in finding that a reasonable accommodation will be provided, the accommodation should be provided promptly and without undue delay, barring extenuating circumstances.
  - (2) If a request for reasonable accommodation requires expedited review and a decision in less than 30 business days, the requester must include in the request the circumstances requiring expedited processing and the date the requested accommodation must be decided or in place.
  - (3) If the RAC finds that medical documentation is necessary to determine whether the requester has a covered disability, the typical 30-day processing time will be tolled (i.e., the calculation of time in the processing period immediately stops) until appropriate medical documentation is provided.
  - (4) Extenuating circumstances due to events that could not have reasonably been anticipated or avoided may also require tolling (i.e., pausing, delaying) the time frames. (**Note:** Absence from the office is not an extenuating circumstance.) In those situations, the RAC must notify the requester of any extenuating circumstance or

delay and provide an approximate date when a decision should be expected.

- (5) If there is a delay in providing an approved accommodation, the deciding official, after consulting with the RAC, should determine if temporary measures may assist the requester.

### **§ 360.70 Information Tracking and Reporting Requirements**

- (a) The RAC must maintain a confidential case file of all accommodation requests in compliance with AO policy and either the Rehabilitation Act of 1973, as amended, or Title VII. These case files are necessary to evaluate the efficacy and consistency of the reasonable accommodation process.
- (b) Records must be maintained for three years after:
  - (1) the employee separates from the AO;
  - (2) the applicant applies for employment; or
  - (3) an FEP-CP complaint results in a final adjudication, whichever is later.
- (c) The confidential case file must include at least the following items:
  - (1) Relevant emails or communication between applicants, employees, and AO officials.
  - (2) Number of reasonable accommodations, by type, that have been requested for the application process and whether those requests have been granted or denied.
  - (3) Jobs (position, pay band level, and department) for which reasonable accommodations have been requested.
  - (4) Types of reasonable accommodations that have been requested for each of those jobs.
  - (5) Number of reasonable accommodations, by type, for each job that have been approved, and the number of accommodations, by type, that have been denied.
  - (6) Number of requests for reasonable accommodations, by type, that relate to the benefits or privileges of employment, and whether those requests have been granted or denied.

- (7) Reasons for denial of requests for reasonable accommodation.
- (8) Amount of time taken to process each request for reasonable accommodation.
- (9) Sources of technical assistance that have been consulted in trying to identify possible reasonable accommodations.

### **§ 360.80 Confidentiality Requirements**

- (a) Confidentiality applies to all aspects of the reasonable accommodation process.
  - (1) The existence of an accommodation request, details of the request, how the request was resolved, and any information about the requester's functional limitations or religious beliefs must remain confidential.
  - (2) AO employees who obtain or receive such information are strictly bound by these confidentiality requirements.
- (b) The RAC is responsible for maintaining all medical and religion-based information obtained by the AO in connection with a request for a reasonable accommodation. All medical and religion-based information obtained in connection with a request for reasonable accommodation must be kept confidential and in files separate from the individual's personnel file.
- (c) Information regarding these records, or any aspect of the process, may be disclosed only to the following entities:
  - (1) Supervisors and managers, who need to know, may be told about the determination of eligibility of an individual with a disability, the necessary restrictions on the work or duties of the employee, and about any recommended accommodations. Still, medical information should be disclosed only if strictly necessary.
  - (2) Office of the General Counsel, who may provide guidance to supervisors and managers on requests for reasonable accommodation, may be told about the determination of eligibility of an individual with a disability, the necessary restrictions on the work or duties of the employee and about any recommended accommodations, but medical information should be disclosed only if strictly necessary.

- (3) First aid and safety personnel may be given specific medical information when appropriate if the individual with a disability might require emergency treatment.
  - (4) Worker's compensation offices or insurance carriers, in certain circumstances, may be told about the determination of eligibility of an individual with a disability, the necessary restrictions on the work or duties of the employee, and any recommended accommodations. Still, medical information should be disclosed only if strictly necessary.
  - (5) A hearing officer or the FEP Officer if an employee initiates an FEP-CP complaint alleging a denial of his or her request for a reasonable accommodation.
- (d) When disclosing information, the individual disclosing it must inform the recipient of the confidentiality requirements.