I. ORGANIZATION OF THE *GUIDE*

There are many ways that this book could be organized. No single format would satisfy everyone's needs. This is true, in part, because the book is intended for a wide variety of people who already have, and require, different levels of understanding about the EEO process and the substantive law involved. The book is intended for use by laypersons, who have little or no understanding of the area; by human relations specialists; equal employment opportunity personnel; and less experienced representatives, who have some background and understanding of the procedures and substantive law; and by longtime EEO personnel, seasoned practitioners and administrative judges, who fully understand both the procedures and the law. In other words, this book is intended for use by the full array of individuals who must administer, implement, defend, prosecute, and adjudicate equal employment opportunity programs and cases in the federal sector.

The book is organized first to acquaint the reader with the statutory authority of the Equal Employment Opportunity Commission and the federal sector EEO administrative process, including the precomplaint or counseling stage, and to give a complete overview of the formal complaint stage. Until October 1, 1992, the Equal Employment Opportunity Commission operated the federal sector EEO process under 29 CFR Part 1613. As of October 1, 1992, the Commission's regulations at 29 CFR Part 1614 became effective, and Part 1613 was abolished. Part 1614 revised the federal sector EEO administrative process. The *Guide* has been organized to be consistent with Part 1614. At the same time, because the Commission still looks to Part 1613 to interpret Part 1614, case law and guidance issued under Part 1613 are included in the book to the extent they remain relevant. On July 12, 1999, the Commission amended Part 1614 to be effective November 9, 1999. The changes, which were significant, generated much in the way of comment from agencies, complainants' representatives, and affected organizations. The changes brought about by the amendments are reviewed in Chapter 1 and discussed in detail throughout the *Guide*, where appropriate. On May 21, 2002, the Commission issued a notice of final rulemaking amending 29 CFR 1614.203. 67 Fed. Reg. 35732. The rulemaking adopts the Commission's guidance under the Americans with Disabilities Act at 29 CFR Part 1630 as being applicable in federal sector cases effective June 20, 2002, thereby replacing its previous guidance issued under the Rehabilitation Act of 1973. Pursuant to the ADA Amendments Act of 2008, the Commission issued its Notice of Final Rulemaking adopting changes to Part 1630 to make it consistent with the ADAAA. The amendments to Part 1630 become effective May 24, 2011.

In December 2009, the EEOC issued a notice of proposed rulemaking that would make several discrete, though largely insignificant changes, to Part 1614 and the federal sector process. The most significant changes were to the class complaint processing regulations. The changes, published at 77 Fed. Reg. 43498-43506 (July 25, 2012) became effective on September 24, 2012, brought the class complaint process in line with the individual complaint process and adopted a final agency action procedure requiring agencies to appeal findings of administrative judges in class complaints in the same manner as they must appeal individual complaint decisions. Other changes were mostly cosmetic and are noted in the appropriate chapters on the EEO complaint process.

Although the regulations of the EEOC set forth the administrative process in general detail, the Commission supplements the regulations through management directives issued to federal agencies. These management directives contain further explanation, guidance, and clarification of the Commission's position on a wide range of substantive and procedural issues in much the same way that the Federal Personnel Manual formerly supplemented the regulations of the Office of Personnel Management. Of particular significance is Management Directive ("MD") 110, Federal Sector Complaints Processing Manual, which was revised in November 1999 to implement the Commission's amendments to Part 1614. MD–110 is now available online at http://www.eeoc.gov/federal/md110/md.html, and has also been included in relevant sections of the *Guide*. The importance of MD–110 should not be overlooked; the "Commission's guidance is binding in nature, Federal agencies are required to comply with it." MD–110 at p. 2. One of the few other changes of any significance in the Commission's 2012 rulemaking was the addition of 29 CFR 1614.102(e) making clear that compliance with Part 1614 and EEOC Management Directives and Bulletins is mandatory on the part of agencies.

As of July 1, 2002, the Commission published a *Handbook for Administrative Judges. The Judges' Handbook* contains standardized procedural guidance for the processing of cases at the hearing stage and also contains considerable guidance on discovery and summary judgment. The *Judges' Handbook* is discussed in Chapter 6.

In October 2003, the Commission issued Management Directive 715 with guidance to federal agencies for establishing and maintaining affirmative employment programs under Title VII and the Rehabilitation Act. The Management Directive requires federal agencies to do an annual self-analysis of complaint activity and processing and to scrutinize the resulting data for employment barriers to protected groups. MD–715 is discussed in Chapter 1 under the subheading "Management Directive 715."

The Commission also publishes, from time to time, "Enforcement Guidance" and "Field Instructions" on various topics of interest in the field of discrimination law that set forth the Commission's position and case law, as well as the case law of the federal courts. The Commission has issued and periodically updates an EEOC *Compliance Manual* that contains additional guidance on substantive and procedural matters before the Commission. Although the *Compliance Manual* is drafted primarily with the private sector in mind, many sections are specifically applicable to the federal government and the Office of Federal Operations, the EEOC's federal sector appellate branch, routinely relies on the *Compliance Manual* in its decisions.

Finally, the Commission publishes the Digest of Equal Employment Opportunity Law on a quarterly basis, though in 2012 it was published only twice and publication has been sporadic since then. The Digest reviews significant federal sector decisions issued by the Office of Federal Operations and also contains an article on a current topic of interest setting forth important decisions and Commission guidance on the subject. All of these publications are available on the Commission's website at www.eeoc.gov.

The first seven chapters of the *Guide* explain the EEO process as administered by the federal agencies covered by Title VII of the 1964 Civil Rights Act, the Rehabilitation Act, the Age Discrimination in Employment Act, the Equal Pay Act and the Genetic Information Nondiscrimination Act. The *Guide* begins with a chapter that presents an overview of EEOC jurisdiction and the administrative process. The next three chapters cover the complaint process from precomplaint counseling through the investigative stage. Under the former Part 1613, agencies were required to make attempts at settling the complaint at the conclusion of the investigative stage. Although that requirement was dropped from Part 1614, as the complaint moves from the investigative to the hearing stage, aside from precomplaint counseling this still is the most likely time for the parties to engage in settlement discussions. As a result, the topic of settlement is covered in Chapter 5. Hearings are covered in Chapter 6, and the discussion of the administrative process concludes with a Chapter 7 on final agency decisions. Appeals to the EEOC are covered in Chapter 8. Chapter 9 deals with issues related to employees and their representatives in the administrative process, including the use of official time.

Chapters 10 through 12 discuss the theories of intentional, adverse impact, and harassment discrimination, and the burdens of proof applicable to each theory. The purpose behind this organization is to give the reader a firm grasp of the entire EEO process and a basis for evaluating potential cases.

Chapters 13 through 17 deal with the actual prohibited bases of discrimination, i.e., race, color, sex, national origin, religion, disability status, age, and reprisal. The purpose of these chapters is to give the reader an understanding of how the analytical modes apply to the various bases of discrimination and to bring attention to variations of those modes under specific prohibited bases. The next chapter, Chapter 18, focuses on how these bases of prohibited discrimination are applied to the wide variety of personnel actions and terms and conditions of employment encountered in the federal workplace.

A chapter on processing class action complaints, Chapter 19, has been included to follow the chapter on personnel actions. The chapter deals mainly with practice and procedure in class actions, as distinguished from individual complaints. Since the vast majority of agency and Commission cases deal with complaints of discrimination filed by individuals, the chapter has been segregated from the other chapters on the administrative processing of complaints to avoid confusion.

Chapter 20 deals with options for pursuing EEO complaints through negotiated grievance procedures and the Merit Systems Protection Board. In some instances, as addressed in that chapter, the employee will have the option of choosing one of those forums over the EEO process.

Next, the book contains chapters on forms of relief available through the EEO process, Chapter 21, and the recovery of attorney fees, Chapter 22. Since relief is, after all, the object of bringing any complaint and, at least from a complainant's point of view, the desired culmination of all the effort that goes into a complaint, it seemed appropriate to reserve a discussion of relief until the end of the book. This is not to say that the chapter on relief is only for complainants. Agencies also should be familiar with their potential liabilities in a case, since such a determination may have considerable influence on settlement deliberations. Also, a thorough familiarity with remedies will help avoid disputes in cases where an agency enters a finding of discrimination and grants relief. In previous editions, the issues of relief and attorney were included in the same chapter. But with the passage of time, not to mention new legislation, each area has become complex enough to deserve separate treatment.

The *Guide* includes a subject matter index, a detailed table of contents, and a table of cases. It is anticipated that the book will not keep one so enthralled as to be read from cover to cover. Rather, it is anticipated that the book will be used by persons to gain a general understanding of specific areas of law, or to assist in answering particular questions about an individual case.

The book also is not designed to give the reader an exhaustive account of every case decided by the Commission on a particular subject. For the most part, string cites have been avoided. The author's intent is to give the reader a reasonably succinct statement of the law in a particular area, discuss the significant cases, provide commentary, and then move on to other subjects.

One reason for avoiding string cites is that, in the past, the Commission, unlike the courts, issued written decisions in each case that came before it. Courts, on the other hand, do not always issue written decisions and even when they do, many are "unpublished" because the court does not believe the case is of precedential value or clarifies existing law in any way. Many of the Commission's past decisions lack any precedential or clarifying value. They are merely the final administrative resolution for the parties of cases that involve the application of well–established law to a particular set of facts. An attempt to include all of these cases in any book would add quantity, but not quality. In late 1997, the Commission adopted the practice of issuing "short form" decisions in many of its cases. Those decisions, without any discussion, provide a final administrative resolution to cases.

String cites also have been avoided because they tend to give the reader the impression that the author has made an extensive effort to include in the text all citations that are, or may be, relevant to a particular determination in a specific case. This, in turn, tends to discourage further research. For the practitioner, there is no substitute for an actual review of Commission decisions selected because of their relevance to a particular case. The book is intended to make the overall task of research easier, not to replace it. Review of additional Commission decisions which apply established law to various factual scenarios may well give the reader a better understanding of how to evaluate his or her own case.

Comments, be they on the organization, substance, style, or errors of commission or omission, are appreciated. Once the author has overcome the personal trauma of the particular criticism, comments will be assessed and possibly even used in subsequent revisions of the book. Of course, the author retains the right to label the commentator a fool and persist in his own backward and stubborn ways. Finally, the publisher retains the right to label the author a fool and insist on appropriate revisions.

This book is designed to be a resource for learning about the sometimes peculiar world of discrimination law in the federal sector. The author has sought to include some practical tips regarding the handling of those cases; those tips should not be construed as legal advice. In the end, there is no substitute for the preparation that goes into individual cases. It is hoped, however, that this *Guide* will make that preparation somewhat easier.

The Commission's decisions are published and available in printed form, and, more recently, on computer on–line services, greatly expanding the resources of both employees and agency representatives in pursuing discrimination complaints. The Commission has made some of its federal sector case law available on its website.

A. RESEARCH FOR THE BOOK

The principal resources used in the preparation of this book are the decisions of the Equal Employment Opportunity Commission, the decisions of its Office of Federal Operations, federal court decisions, federal statutes, the Commission's regulations set forth at 29 CFR Part 1600, *et seq*., the Commission's Complaint Processing Manual, MD–110 (August 2015), the Commission's Enforcement Guidance, and the EEOC *Compliance Manual*.

When the *Guide* was first published, the Commission's cases were available only on microfiche. The pieces of microfiche were numbered consecutively according to the order in which they were issued. Each piece also contained an issuance date, such as February–March 1987. Citations in the book to cases originally on microfiche are by case name, EEOC docket number, the number of the microfiche, the location on the microfiche of the first page of the decision, and the date of issuance by the Commission. For example, a citation of *Smith v. Agency*, 00000001, 1111/A1 (1985), is translated as follows: the first number following the case name is the docket number given to the case by the EEOC; the number on the left–hand side of the slash indicates the microfiche number (this is located in the top right–hand corner of the microfiche) and the number to the right of the slash indicates the location of the first page of the decision on the microfiche (horizontal rows are given letter designations from A to G starting at the top, vertical rows are given numbers from one to 14 from left to right); and the year indicates when the case was decided by the Commission. Case decisions issued after the use of microfiche was discontinued are cited by EEOC docket number only. It is worth noting that many of the Commission's older decisions are not available online through any source. Contrary to popular belief, in an Internet dominated world, the fact that the cases cannot be found online does not mean they lack value. It simply means they are hard to find. The Commission's Office of Federal Operations is the best source for older cases, though this requires the use of a rather backward instrument called a telephone.

The docket numbers used by the EEOC also tell a great deal about the nature and history of the case. The first two digits in the docket number indicate how the case came to the Commission. The docket numbers "01" indicate that the case was decided by the Office of Federal Operations on an appeal by a complainant from a final agency decision or final agency action; the docket numbers "02" indicate that the case is an appeal from a final grievance decision; the docket numbers "03" indicate that the decision involves a petition for review of a decision for the Merit Systems Protection Board; the docket numbers "04" indicate that the case involves a petition for enforcement of a Commission decision or settlement agreement; the docket numbers "05" indicate that the case involves a request to reopen a previous Commission decision; and the docket numbers "07" indicate that the case was decided by OFO on appeal from an agency which has declined to fully implement the decision of an administrative judge. Cases decided under the amended regulations at Part 1614 that became effective in November 1999, contained the letter "A" in the docket number until October 2006. The next two digits in the docket number indicate the year in which the appeal was first filed with the Commission. The final four digits are the actual case number.

As of October 2006, OFO adopted a new case docket numbering system. Cases still carry the two digit opening codes as described above. This is followed by the year in which the appeal was filed, e.g., "2006." Finally, the last digits are a notation of the order in which a particular case was filed with OFO in each calendar year. Appeals docketed under the former system are given a new docketing number at the time a decision is issued.

Of the appeals decided by the Commission, some are issued under the signature of the Executive Secretariat and some are issued under the signature of the Director of the Office of Federal Operations. When an appellate decision is signed by the Executive Secretariat, this indicates that the decision has actually been reviewed by the Commissioners. A decision issued under the signature of the Director of OFO has been issued directly from that office based on its authority delegated by the Commissioners. As a result, those decisions issued directly by the Commission are considered to be binding precedent. Ironically, even though OFO has direct review authority over the decisions of administrative judges, its decisions are not considered binding in the traditional sense. Instead, administrative judges are strongly encouraged to follow those decisions.

B. OTHER REFERENCE SOURCES

The EEOC relies heavily upon federal court cases in reaching its administrative decisions. Because the decisions of the EEOC are not subject to direct appellate review, court decisions seldom are binding upon the Commission in the traditional sense. In many instances, the Commission has adopted the decisions of the U.S. Supreme Court and lower federal courts. Certainly, the Commission will always consider any relevant court decisions brought to its attention in its own deliberations.

The Commission's regulations are published in full in the Code of Federal Regulations at Title 29, Part 1600, *et seq*. The Federal Register is often a useful source of additional information, since the comments of the Commission in adopting and amending regulations may give insight as to their scope and intent. This is particularly true of the changes brought about by Part 1614. In the proposed versions of the regulations, as well as the final version, the Commission provided detailed comment on the deficiencies of Part 1613 and how the new regulations are intended to address those deficiencies. The legislative history of Title VII, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act and the Equal Pay Act, the Civil Rights Act of 1991, and all their amendments also should not be overlooked when dealing with issues on which there is little other guidance.

CHAPTER 1
OVERVIEW

I. AUTHORITY AND JURISDICTION

A. STATUTORY AUTHORITY

The Equal Employment Opportunity Commission derives its authority and jurisdiction over federal sector discrimination complaints from three primary pieces of legislation: Title VII of the 1964 Civil Rights Act, as amended, the Rehabilitation Act of 1973, as amended, and the Age Discrimination in Employment Act (ADEA), as amended. On November 21, 1991, President Bush signed Public Law 102–166, the Civil Rights Act of 1991, which made several amendments to the 1964 Civil Rights Act, as well as some modifications to the Rehabilitation Act. On October 29, 1992, the Rehabilitation Act was amended through Public Law 102–569. Through this amendment, some of the requirements of the more stringent Americans with Disabilities Act (ADA) of 1990, Public Law 101–336 (July 26, 1990), were made applicable to the federal government. Most recently, Congress passed the Americans with Disabilities Amendments Act of 2008, S. 3406 (September 25, 2008), which enacted significant revisions to the ADA. The amendments are summarized below and discussed in detail in Chapter 14.

As explained more fully in the following chapters, there are other pieces of legislation which either give the Commission additional authority or indirectly impact upon its own authority. However, Title VII, the Rehabilitation Act, and the ADEA account for the vast majority of the EEOC caseload. The Commission also has significant responsibility and authority with respect to employment discrimination in the private sector. However, its role in the private sector should not be confused with its role in the federal sector. In the private sector, the Commission investigates complaints of employment discrimination within its jurisdiction and, when it deems appropriate, can initiate civil actions against employers it believes have engaged in prohibited discrimination. In the federal sector, the Commission's role is one of oversight with respect to agency processing of EEO complaints, adjudicating complaints when a hearing is requested, and deciding appeals from final agency actions or decisions on discrimination complaints. As a result of the different roles the Commission has in the private and federal sector, the processes in each sector are quite different.

The Commission also has jurisdiction over federal sector complaints of sex-based wage discrimination under the Equal Pay Act. To some extent, this jurisdiction is concurrent with its Title VII jurisdiction over complaints based on sex discrimination. The provisions of the Equal Pay Act are summarized below under the subheading "Equal Pay Act" and the subject is treated in more detail in Chapter 13 under the topic of "Sex Discrimination."

In the federal sector, the EEOC also is responsible for coordinating the government's policy prohibiting discrimination against employees based on protected genetic information. The EEOC's jurisdiction in this area originally came from Executive Order 13145. That jurisdiction was expanded through the Genetic Information Nondiscrimination Act of 2008 discussed briefly below and more extensively in Chapter 15.

Although the various pieces of legislation referenced above give the EEOC its substantive jurisdiction over employment discrimination in federal employment on the basis of race, color, sex, national origin, religion, disability status age and genetic information, it was another piece of legislation—the Civil Service Reform Act of 1978—that centralized jurisdiction in the Commission over federal sector employment discrimination. The Civil Service Reform Act is discussed more fully below under the section "Effect of the Civil Service Reform Act."

1. Title VII of the 1964 Civil Rights Act

As originally passed, Title VII of the 1964 Civil Rights Act, codified at 42 USC 2000e, *et seq*., did not apply to employees or applicants for employment in the federal government. It was not until March 24, 1972, the effective date of Public Law 92–261, that discrimination in the federal workplace was prohibited by statute. Since that time, discrimination complaints in the federal government have spawned voluminous and often confusing case law, but the prohibition had a rather inauspicious beginning. Under the 1972 amendments, 717(a) of the Title VII, codified at 42 USC 2000e-16(a), simply states:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from discrimination based on race, color, religion, sex, or national origin.

Originally, enforcement authority was given to the former Civil Service Commission. 42 USC 2000e-16(b) (1978).

Unlike the Rehabilitation Act and the Age Discrimination in Employment Act, Title VII applies to everyone. Everyone has a race, color, sex and national origin. Presumably, everyone also has a religion, or the absence of one. (Theological discussions are distinctly beyond the province of this book.) It is worth noting that Title VII does not prohibit all discrimination or all unfair treatment. Title VII applies strictly to the five bases enumerated in the statute.

The federal government was specifically excluded from the definition of an employer in 701(b) of the 1964 Act. But 701 did provide that employment in the federal government was to be free from discrimination. Through Executive Order 11246, as amended by Executive Order 11478, the President gave the Civil Service Commission the authority to issue regulations to establish a formal mechanism for the filing of discrimination complaints by federal employees. Some discrimination case law was developed by the CSC prior to its abolition in 1978. That case law is beyond the scope of this book, except to the extent that it has been subsequently adopted by the EEOC.

As amended in 1972, the General Accounting Office specifically was excluded from Title VII. 42 USC 2000e-16(a) (1978). Although employees from the Library of Congress were included, authority for enforcement of the statute was vested in the Librarian of Congress and not the Civil Service Commission. *See* 42 USC 2000e-16(b) (1978).

On January 23, 1995, through the Congressional Accountability Act of 1995, Public Law 104–1, § 2000e-16(a) was amended to delete the reference to the legislative branch and to add the Government Printing Office and the General Accounting Office to the list of federal agencies subject to Title VII. As a result, 42 USC 2000e-16 currently states:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branches of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from discrimination based on race, color, religion, sex, or national origin.

The new provisions took effect on January 23, 1996. 2 USC 1311(d). The Congressional Accountability Act ended the jurisdiction of the EEOC over competitive service employees of the legislative branch. The Act covers employees of the U.S. House of Representatives and the U.S. Senate, as well as several other government entities. Those employees now are provided the protections of Title VII, the ADA, ADEA and the Rehabilitation Act. Enforcement, however, is through the U.S. Office of Compliance and not the EEOC.

2. Rehabilitation Act of 1973

The Rehabilitation Act, Public Law 93–112, requires that each department and agency of the federal government, including the U.S. Postal Service and the Postal Rate Commission, develop an affirmative action plan "for the hiring, placement and advancement of individuals with disabilities…." The Act is codified at 29 USC 791. As discussed in Chapter 14, the Rehabilitation Act is unique in that it not only prohibits discrimination against qualified individuals with disabilities, it further requires reasonable accommodation of those individuals, where appropriate. It also requires that federal agencies take positive steps in the hiring, placement and advancement of individuals with disabilities.

As with Title VII, the Civil Service Commission originally had enforcement authority for the Rehabilitation Act. That authority was transferred to the EEOC under § 4 of the Reorganization Plan No. 1 and § 1–100 of Executive Order 12106 (Dec. 28, 1978).

In July 1990, Congress passed the Americans with Disabilities Act, Public Law 101–336, 104 Stat. 327, codified at 42 USC 12101, *et seq*. However, the United States and corporations wholly owned by the United States are excluded from the definition of "employer" under the Act. 42 USC 12111(5)(B). A section of the ADA that relates to current drug users does apply to the federal government.

In October 1992, Congress amended the Rehabilitation Act, 42 USC 791(g), making further provisions of the ADA applicable to the federal government:

> The standards used to determine whether this section has been

violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 and the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990, as such sections relate to employment.

The applicable sections of the ADA are codified at 42 USC 12111, *et seq.*, and 42 USC 12201–204 and 12210. The October 1992 amendment also substituted the terminology of "individuals with disabilities" for "handicapped employees," the terminology originally used in the Rehabilitation Act. The Rehabilitation Act and the relevant provisions of the ADA are discussed in detail in Chapters 14 and 15.

3. Americans With Disabilities Act Amendment Act of 2008

Disturbed by rulings of the U.S. Supreme Court that restricted the number of individuals covered by the ADA, in September 2008 Congress passed the ADA Amendments Act of 2008, S. 3406. The Act amended the nonaffirmative action employment provisions of the ADA that are applicable to the federal government under the Rehabilitation Act. The amendments specifically overruled four Supreme Court decisions holding that the ADA should be narrowly interpreted in determining whether an individual had a disability under the statute, *i.e.*, whether the individual had a physical or mental impairment that substantially limited a major life activity. The ADA Amendments Act of 2008 is discussed in detail in Chapters 14 and 15, below.

4. Age Discrimination in Employment Act

The Age Discrimination in Employment Act was passed in 1967 as Public Law 90–202. In April 1974, through Public Law 93–259, the ADEA was amended to prohibit age discrimination in the federal sector. Modeled largely after Title VII in its substantive provisions, the Act provides at 29 USC 633(a):

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the United States), in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, and in the Government Printing Office, the General Accounting Office and the Library of Congress shall be made free from any discrimination based on age.

Note that the ADEA does not prohibit all discrimination on the basis of age. For example, it does not prohibit an employer from deciding that a prospective employee is too young for a particular position. What the ADEA prohibits is discrimination against persons 40 years of age or older.

The Age Discrimination in Employment Act is covered in depth in Chapter 16, below. It is worth observing here that the Commission's jurisdiction over ADEA complaints is more discretionary in nature than its jurisdiction over Title VII and Rehabilitation Act complaints. Employees with complaints under the ADEA may exercise the option to pursue their complaints through the administrative process, or they may elect to proceed directly into U.S. district court after giving notice of intent to sue to the EEOC. Employees with Title VII or Rehabilitation Act complaints must exhaust the administrative process before obtaining the right to sue in U.S. district court.

As with Title VII and the Rehabilitation Act, administrative enforcement authority under the ADEA was initially vested in the Civil Service Commission and later transferred to the EEOC upon passage of the Civil Service Reform Act of 1978. *See* § 2 of Reorganization Plan No. 1, and § 1–101 of Executive Order 12106.

Also, as with Title VII, the ADEA was amended through the Congressional Accountability Act to delete the original reference to the legislative branch and to add the Government Printing Office and the General Accounting Office to the list of federal agencies subject to the ADEA. These ADEA provisions also took effect on January 23, 1996, and like their Title VII counterparts, required that the Administrative Conference and Judicial Conference report to Congress with recommendations on future ADEA coverage for judicial branch, Government Printing Office, General Accounting Office and Library of Congress employees. *See* "Statutory Authority," above.

Although the substantive proscription against age discrimination in the ADEA was patterned after the proscription against race, color, sex, national origin and religious discrimination in Title VII, the relief provisions of the ADEA more closely mirror the provisions of the Fair Labor Standards Act. As a result, federal sector remedies, including the award of attorney fees, are different from those under Title VII. See Chapter 16, subheading "Attorney Fees."

5. Equal Pay Act

The Equal Pay Act (EPA) is an amendment to the Fair Labor Standards Act intended to eliminate sex discrimination in the payment of wages. The relevant portion is codified at 29 USC 206(d) and provides:

> No employer having employees subject to the provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Federal agencies are included within the definition of employer under 29 USC 203(d)–(e). Enforcement authority for the Equal Pay Act was vested in the Administrator, Department of Labor, Wage and Hour Division. *See* 29 USC 204. Under Reorganization Plan No. 1 of 1978, Equal Pay Act enforcement authority was transferred to the EEOC. *See* Reorganization Plan No. 1, § 1.

Under previous regulations at 29 CFR Part 1613, the Commission established a separate administrative procedure for pursuing federal sector EPA complaints. Such complaints initially had to be filed with the appropriate district director of the EEOC and were not initiated by contacting an agency EEO counselor. Under Part 1614, complaints under the EPA are processed just as any other complaint of discrimination.

As with the ADEA, complainants alleging a violation of the EPA are not required to pursue an administrative complaint of discrimination. A complainant may file a civil action in U.S. district court within two years of the alleged violation, or three years if the violation is willful. *See* 29 CFR 1614.408.

All forms of sex-based wage discrimination under the EPA also are violations of Title VII and an employee can pursue both remedies simultaneously. The employee may not engage in double recovery for violations of both statutes, but is entitled to the highest recovery provided by either statute.

6. Civil Rights Act of 1991

With the enactment of the Civil Rights Act of 1991, Public Law 102–166, effective November 21, 1991, Congress significantly amended the Civil Rights Act of 1964. The Civil Rights Act of 1991 was in response to substantial criticism of the original Civil Rights Act and its subsequent interpretation by the U.S. Supreme Court.

From a substantive point of view, the legislation made two important changes. First, it authorized the payment of compensatory damages for such things as emotional pain, suffering, and future economic losses. Although the 1991 Civil Rights Act contains a provision for punitive damages, the federal government is exempt from that provision. It also reversed, in part, the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed.2d 733 (1989), that placed all aspects of the burden of proof in disparate or adverse impact cases on the plaintiff. In cases involving disparate impact employment discrimination, Congress reinstated the standard first set down by the court in *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971). Under the 1991 Civil Rights Act, if a plaintiff proves a *prima facie* case of disparate impact discrimination, the burden of production and persuasion shifts to the employer. See Chapter 11, subheadings "The Civil Rights Act of 1991" and "Agency's Burden—Business Necessity."

The 1991 Civil Rights Act also provides a "good faith" defense to claims of failure to make reasonable accommodation under the Rehabilitation Act. An employer may avoid an award of damages for violation of the reasonable accommodation clause if it can demonstrate that, in consultation with the disabled employee, it has made a good faith effort at reasonable accommodation.

With regard to persons employed by the federal government, the Civil Rights Act of 1991 made two significant changes with respect to coverage. The 1991 Act extended the protection of Title VII to employees of the House of Representatives and also to such entities as the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the U.S. Botanic Garden. It also extended the protections of the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, and specified sections of the Americans with Disabilities Act of 1990 to those employees. A section of the law designated as the Government Employee Rights Act of 1991 further extended Title VII protections to employees of the U.S. Senate. Although the protections of Title VII, the Rehabilitation Act and the ADEA were extended to these employees, in most instances, the jurisdiction of the EEOC was not expanded to cover these employees and enforcement was through other means. Many of the coverage changes of the 1991 Civil Rights Act were temporary in nature and were superseded by the Congressional Accountability Act of 1995.

A full treatment of the Civil Rights Act of 1991 is included in Chapter 13.

7. Congressional Accountability Act of 1995

The Congressional Accountability Act of 1995, Public Law 104–1, codified at 2 USC 1301, *et seq.*, was a sweeping attempt to bring legislative branch employees, as well as employees of several other government entities, within the ambit of the antidiscrimination statutes with a centralized enforcement mechanism. While legislative branch employees were given expanded rights under Title VII, the Rehabilitation Act, and the ADEA, enforcement is through the Office of Compliance and not the EEOC. *See* 2 USC 1301, *et seq.*

For a detailed discussion of the Act, see Chapter 13 under the subheading "Congressional Accountability Act—Legislative Employees."

8. No FEAR Act of 2002

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 became effective on October 1, 2003. The No FEAR Act has three basic components: 1) training for managers and employees on the antidiscrimination and antiretaliation laws; 2) making the entity found to have engaged in discrimination or retaliation financially responsible for the effects of the discrimination or retaliation; and 3) detailed reporting by each agency of complaint activity and, in particular, findings of discrimination and retaliation. The EEOC has no specific enforcement duties under the No FEAR Act. However, the EEOC is one of the entities to which federal agencies must report under the act.

On January 26, 2004, the EEOC published interim rules for implementation of the No FEAR Act. 69 FR 3483–3492. The comment period on the interim rules ended March 24, 2004. On July 27, 2006, the Commission published its notice of final rulemaking at 71 Fed. Reg. 43643—43652 with its final regulations, which are now, incorporated in the Commission's federal sector regulations at 29 CFR 1614.701, *et. seq.*

In support of the legislation, Congress made the following findings in Section 101 of the Act:

> (1) Federal agencies cannot be run effectively if they practice or tolerate discrimination,
>
> (2) the Committee on the Judiciary of the House of Representatives has heard testimony from individuals, including representatives of the National Association for the Advancement of Colored People and the American Federation of Government Employees that point to chronic problems of discrimination and retaliation against Federal employees,
>
> (3) in August 2000, a jury found that the Environmental Protection Agency had discriminated against a senior social scientist, and awarded that scientist $600,000,
>
> (4) in October 2000, an Occupational Safety and Health Administration investigation found that the Environmental Protection Agency had retaliated against a senior scientist for disagreeing with that agency on a matter of science and for helping Congress to carry out its oversight responsibilities,
>
> (5) there have been several recent class action suits based on discrimination brought against Federal agencies, including the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the Immigration and Naturalization Service, and the United States Marshals Service,
>
> (6) notifying Federal employees of their rights under discrimination and whistleblower laws should increase agency compliance with the law,
>
> (7) requiring annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency should enable Congress to improve its oversight over agencies' compliance with the law, and
>
> (8) penalizing Federal agencies by requiring them to pay for any discrimination or whistleblower judgments, awards, and settlements should improve agency accountability with respect to discrimination and whistleblower laws.

The act applies to all executive agencies as defined at 5 USC 105 and to the Postal Rate Commission and the U.S. Postal Service. Section 102(3).

One of the principal provisions of the act is to require that federal agencies found to have engaged in discrimination or retaliation reimburse a federal judgment fund out of their operating budgets. Section 201 of the act provides:

> (a) Applicability.—This section applies with respect to any payment made in accordance with section 2414, 2517, 2672, or 2677 of title 28, United States Code, and under section 1304 of title 31, United States Code (relating to judgments, awards, and compromise settlements) to any Federal employee, former Federal employee, or applicant for Federal employment, in connection with any proceeding brought by or on behalf of such employee, former employee, or applicant under—
>
> > (1) any provision of law cited in subsection (c), or
> >
> > (2) any other provision of law which prohibits any form of discrimination, as identified under rules issued under section 204.
>
> (b) Requirement.—An amount equal to the amount of each payment described in subsection (a) shall be reimbursed to the fund described in section 1304 of title 31, United States Code, out of any appropriation, fund, or other account (excluding any part of such appropriation, of such fund, or of such account available for the enforcement of any Federal law) available for operating expenses of the Federal agency to which the discriminatory conduct involved is attributable as determined under section 204.
>
> (c) Scope.—The provisions of law cited in this subsection are the following:
>
> > (1) Section 2302(b) of title 5 of the United States Code, as applied to discriminatory conduct described in paragraphs (1) and (8), or described in paragraph (9) of such section as applied to discriminatory conduct described in paragraphs (1) and (8), of such section.
> >
> > (2) The provisions of law specified in section 2302(d) of title 5 of the United States Code.
> >
> > (3) The Whistleblower Protection Act of 1986 and the amendments made by such Act.

The act, in Section 202, further requires that federal employees, former federal employees and applicants for federal employment be provided with written notification of the rights and protections available to federal employees. That written notification must include posting on the Internet. The section further requires that federal employees receive training on the rights available to them and the remedies for violation of those rights.

Section 203 of the act provides that each agency shall make annual reports on violations of the antidiscrimination and antiretaliation provisions and the costs of those violations. Section 203 provides:

> (a) Annual Report.—Subject to subsection (b), not later than 180 days after the end of each fiscal year, each Federal agency shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General an annual report which shall include, with respect to the fiscal year—
>
> > (1) the number of cases arising under each of the respective provisions of law covered by paragraphs (1) and (2) of section 201(a) in which discrimination on the part of such agency was alleged,
> >
> > (2) the status or disposition of cases described in paragraph (1),
> >
> > (3) the amount of money required to be reimbursed by such agency under section 201 in connection with each of such cases, separately identifying the aggregate amount of such reimbursements attributable to the payment of attorneys' fees, if any,
> >
> > (4) the number of employees disciplined for discrimination, retaliation, harassment, or any other infraction of any provision of law referred to in paragraph (1),
> >
> > (5) the final year-end data posted under section 301(c)(1)(B) for such fiscal year (without regard to section 301(c)(2)), and
> >
> > (6) a detailed description of—
> >
> > > (A) the policy implemented by such agency to discipline employees who are determined in any judicial or administrative proceeding to have discriminated against any individual in violation of any of the laws cited in section 201(c), and
> > >
> > > (B) with respect to each of such laws, the number of employees who are disciplined in accordance with such policy and the specific nature of the disciplinary action taken.
>
> (b) First Report.—The 1st report submitted under subsection (a) shall include for each item under subsection (a) data for each of the 5 immediately preceding fiscal years (or, if not available for all 5 fiscal years, for however many of those 5 fiscal years for which data are available).

Section 204 of the act gives the President or his designee responsibilities for issuing rules to carry out the provisions of the Act and rules to "require that a comprehensive study be conducted in the executive branch to determine the best practices relating to the appropriate disciplinary actions" against federal managers and supervisors who engage in discrimination or retaliation.

Significantly, with respect to the EEOC, Section 206 of the act requires:

> (a) Study.—Not later than 180 days after the date of the enactment of this Act, the General Accounting Office shall conduct a study relating to the effects of eliminating the requirement that Federal employees aggrieved by violations of any of the laws specified in paragraphs (7) and (8) of section 201(c) exhaust administrative remedies before filing complaints with the Equal Employment Opportunity Commission. Such study shall include a detailed summary of matters investigated, of information collected, and of conclusions formulated that lead to determinations of how the elimination of such requirement will—
>
> > (1) expedite handling of allegations of such violations within Federal agencies and will streamline the complaint-filing process,
> >
> > (2) affect the workload of the Commission,
> >
> > (3) affect established alternative dispute resolution procedures in such agencies, and

(4) affect any other matters determined by the General Accounting Office to be appropriate for consideration.

(b) Report.—Not later than 90 days after completion of the study required by subsection (a), the General Accounting Office shall submit to the Speaker of the House of Representatives, the President pro tempore of the Senate, the Equal Employment Opportunity Commission, and the Attorney General a report containing the information required to be included in such study.

The act, at Section 301, also requires that federal agencies, on an annual basis, post on their public websites a summary of statistical information relating to EEO complaints filed against them. Section 301 provides:

(a) In General.—Each Federal agency shall post on its public Web site, in the time, form, and manner prescribed under section 303 (in conformance with the requirements of this section), summary statistical data relating to equal employment opportunity complaints filed with such agency by employees or former employees of, or applicants for employment with, such agency.

(b) Content Requirements.—The data posted by a Federal agency under this section shall include, for the then current fiscal year, the following:

(1) The number of complaints filed with such agency in such fiscal year.

(2) The number of individuals filing those complaints (including as the agent of a class).

(3) The number of individuals who filed 2 or more of those complaints.

(4) The number of complaints (described in paragraph (1)) in which each of the various bases of alleged discrimination is alleged.

(5) The number of complaints (described in paragraph (1)) in which each of the various issues of alleged discrimination is alleged.

(6) The average length of time, for each step of the process, it is taking such agency to process complaints (taking into account all complaints pending for any length of time in such fiscal year, whether first filed in such fiscal year or earlier). Average times under this paragraph shall be posted—

(A) for all such complaints,

(B) for all such complaints in which a hearing before an administrative judge of the Equal Employment Opportunity Commission is not requested, and

(C) for all such complaints in which a hearing before an administrative judge of the Equal Employment Opportunity Commission is requested.

(7) The total number of final agency actions rendered in such fiscal year involving a finding of discrimination and, of that number—

(A) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(B) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(8) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination based on each of the respective bases of alleged discrimination, and

(B) of the number specified under subparagraph (A) for each of the respective bases of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(9) Of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination—

(A) the number and percentage involving a finding of discrimination in connection with each of the respective issues of alleged discrimination, and

(B) of the number specified under subparagraph (A) for each of the respective issues of alleged discrimination—

(i) the number and percentage that were rendered without a hearing before an administrative judge of the Equal Employment Opportunity Commission, and

(ii) the number and percentage that were rendered after a hearing before an administrative judge of the Equal Employment Opportunity Commission.

(10) (A) Of the total number of complaints pending in such fiscal year (as described in the parenthetical matter in paragraph (6)), the number that were first filed before the start of the then current fiscal year.

(B) With respect to those pending complaints that were first filed before the start of the then current fiscal year—

(i) the number of individuals who filed those complaints, and

(ii) the number of those complaints which are at the various steps of the complaint process.

(C) Of the total number of complaints pending in such fiscal year (as described in the parenthetical matter in paragraph (6)), the total number of complaints with respect to which the agency violated the requirements of section 1614.106(e)(2) of title 29 of the Code of Federal Regulations (as in effect on July 1, 2000, and amended from time to time) by failing to conduct within 180 days of the filing of such complaints an impartial and appropriate investigation of such complaints.

Subsection C requires agencies to compile and publish interim year-to-date data, final year-end data, and data for the five preceding fiscal years.

Finally, Section 302 of the act requires the EEOC to post the following statistical data on its website:

(a) In General.—The Equal Employment Opportunity Commission shall post on its public Web site, in the time, form, and manner prescribed under section 303 for purposes of this section, summary statistical data relating to—

(1) hearings requested before an administrative judge of the Commission on complaints described in section 301, and

(2) appeals filed with the Commission from final agency actions on complaints described in section 301.

(b) Specific Requirements.—The data posted under this section shall, with respect to the hearings and appeals described in subsection (a), include summary statistical data corresponding to that described in paragraphs (1) through (10) of section 301(b), and shall be subject to the same timing and other requirements as set forth in section 301(c).

(c) Coordination.—The data required under this section shall be in addition to the data the Commission is required to post under section 301 as an employing Federal agency.

9. Genetic Information Nondiscrimination Act of 2008

Initially adopted through Executive Order 13145, "[i]t is the policy of the Government of the United States to provide equal employment for all qualified persons and to prohibit [discrimination] against employees based on protected genetic information, or information about a request for or the receipt of genetic services." The Executive Order applied to the department and agencies of the federal government only and its policies were extended to all federal employees covered by Title VII.

Unlike its statutory jurisdiction, the EEOC did not have the authority under the Executive Order to directly adjudicate complaints of discrimination based on genetic information. The Executive Order did not create any enforceable rights for the employees covered. The EEOC's responsibility under the Executive Order was to coordinate the federal government's policy prohibiting genetic discrimination.

In 2008, through Pub. L. 110-233, Congress adopted the Genetic Information Nondiscrimination Act of 2008. The EEOC has given statutory authority for enforcement of Title II of the Act, which contains the provisions related to employment. The Act, which became effective on November 21, 2009, also directed the EEOC to promulgate final regulations on genetic discrimination. The Commission issued a Notice of Proposed Rulemaking under GINA on March 2, 2009, and issued final regulations on November 9, 2010. *See* 75 Fed. Reg. 68912-68939.

The Genetic Information Nondiscrimination Act is discussed more fully in Chapter 15.

B. EFFECT OF THE CIVIL SERVICE REFORM ACT

In 1978, as a result of Reorganization Plans Nos. 1 and 2, the functions of the former Civil Service Commission regarding Title VII, the Rehabilitation Act, and the ADEA were transferred to the Equal Employment Opportunity Commission, effective January 1, 1979. Reorganization Plans Nos. 1 and 2 of 1978 served as the bases for the Civil Service Reform Act of 1978, Public Law 95–454 (Oct. 23, 1978). Prior to this time, the EEOC had only enforcement authority in matters involving private sector employment.

The Civil Service Reform Act (CSRA) represented the first major overhaul of federal personnel law in nearly 100 years. In addition to transferring jurisdiction over discrimination complaints to the EEOC, the Act abolished the Civil Service Commission (CSC) and created the Office of Personnel Management to take over the administrative personnel functions of the CSC, and the Merit Systems Protection Board to take over many of the adjudicative functions of the CSC.

To some extent, the Civil Service Reform Act increased the number of avenues through which discrimination complaints could be pursued. The Act made it a so-called "prohibited personnel practice" for federal sector supervisors and managers to engage in prohibited discrimination. In particular, 5 USC 2302(b) provides:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> (1) discriminate for or against any employee or applicant for employment—
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964;
>
> (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967;
>
> (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938;
>
> (D) on the basis of a handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973; or
>
> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule or regulation….

Under 5 USC 1201, *et seq*., employees or applicants for employment who believe they are the victims of prohibited personnel practices may file a complaint with the Office of Special Counsel. The Special Counsel, originally a part of the Merit Systems Protection Board but now an independent agency, is authorized to investigate complaints and, where appropriate, seek both corrective action on behalf of the employee or applicant and disciplinary action against the offending officials. The Special Counsel has not pursued many corrective action complaints involving alleged discrimination due to a policy of deferring to the EEO process. While the Office of Special Counsel has not actively sought relief for the victims of discrimination, it has on a few occasions brought disciplinary actions against officials who have engaged in discrimination—a power which the EEOC does not have.

For employees who are subject to actions that are within the jurisdiction of the MSPB, see Chapter 20 below, prohibited personnel practices may be raised as an affirmative defense. For example, a competitive service employee who is removed on charges of misconduct may assert that, in truth, the action was based on discriminatory motives.

From a substantive standpoint, the Civil Service Reform Act brought about very few changes in discrimination law. But a working knowledge of the Reform Act and its many changes in federal civilian personnel law are important to understanding discrimination cases in the federal sector. A basic understanding of the procedural and substantive protections granted to employees by the CSRA is fundamental to determining whether an agency has complied in any given case. Failure to comply can be an indication of discrimination, particularly if the agency has complied in past cases. Conversely, the provisions of the Reform Act may explain why an otherwise apparent discriminatory act on the part of the agency is in fact justified. For example, it may explain why the agency engages in competitive selection for a vacancy rather than simply awarding the position to an employee who would appear to be the logical choice. Also, the Civil Service Reform Act has important election of remedy provisions which can determine the forum in which a complaint is brought and the issues that can be raised in that forum.

Every attempt has been made to explain various provisions of the CSRA at appropriate junctures in this book. But a final note of caution: the treatment here is by no means all inclusive. A working knowledge of Reform Act provisions in any given case is only gained by reference to the Act itself, Office of Personnel Management regulations and guidance, the regulations and case law of the Merit Systems Protection Board, the regulations and case law of the Federal Labor Relations Authority, the case law of the U.S. Court of Appeals for the Federal Circuit and agency regulations. Each of these sources should be consulted in any given case to ensure that nothing is overlooked.

C. ORGANIZATION OF THE COMMISSION

The Equal Employment Opportunity Commission consists of five members, appointed by the President with the advice and consent of the Senate. Each commissioner serves a term of five years. Not more than three members of the Commission can be of the same political party. The President is responsible for appointing both a chairman and vice chairman of the Commission from its members. *See generally* 42 USC 2000e-4.

A General Counsel to the Commission, appointed by the President with the advice and consent of the Senate, serves a term of four years. The Commission is also authorized to appoint hearing examiners, attorneys, and other employees to carry out its functions under law.

The federal sector represents only a portion of the Commission's work. Its primary responsibilities lie in the private sector where it investigates complaints of discrimination and can serve as a prosecutor bringing suit against private sector employers that the Commission believes have engaged in prohibited discrimination. In the federal sector, the employing agency is responsible for conducting investigations into complaints of discrimination. The Commission employs a cadre of administrative judges who hold hearings and issue decisions in federal sector cases and it also conducts an appellate review of those decisions as well as final agency decisions in cases where no hearing was requested.

It would not be unfair or inaccurate to describe the Commission's federal sector as being organizationally scattered. The Commission has district offices throughout the country. It also has field and area offices within each district. Each district also has a district director. The administrative judges work in the district, field and area offices. They report to a supervisory administrative judge who, in turn, reports to his or her respective district director. At the headquarters level, the district offices are organizationally within the Office of Field Programs.

The Commission's federal sector appellate functions are centralized at its headquarters in Washington, D.C., in what was formerly the Office of Review and Appeals. Effective February 21, 1991, the Office of Review and Appeals officially became the Office of Federal Operations (OFO). *See* 58 Fed. Reg. 6983 (Feb. 21, 1991). All references to the Office of Review and Appeals in the Commission's regulations also were amended to reflect the change in name. No substantive changes accompanied this change in name.

The net effect of the organizational structure of the EEOC is that the Office of Federal Operations establishes guidance and procedures for the administrative judges and, as part of its appellate process, reviews the work product of administrative judges. The judges themselves, however, work for and answer to the Office of Field Programs and not OFO. At times, this organizational structure has led to confusion as to the binding effect of the guidance and case decisions of OFO.

The EEO complaint process is summarized later in this chapter under the subheading "Processing Discrimination Complaints—Part 1614" and then treated in detail throughout the *Guide*. The EEOC does not, in the first instance, process discrimination complaints in the federal sector. Complaints are filed with the involved agency and that agency is responsible for investigating the complaint and, in cases where an EEOC hearing is not requested, issuing a final decision on the complaint. The primary role of the Commission during the agency processing of a complaint is to provide an administrative judge for a hearing if one is requested by the complainant. Prior to November 10, 1999, the administrative judge could only issue a recommended decision which was subject to acceptance, rejection, or modification by the agency. Under a Notice of Final Rulemaking, 64 Fed. Reg. 37644 (July 12, 1999), the Commission essentially gave its administrative judges the authority to make binding decisions that either the complainant or the agency can appeal to the EEOC. The revised regulations still permit agencies to issue a "final action" decision indicating if it will fully comply with the decision of the administrative judge. However, if the agency does not fully comply with the decision of the administrative judge, it is required to file a simultaneous appeal with the EEOC Office of Federal Operations. A full discussion of the 1999 changes is included later in this chapter.

Once the agency issues a final decision on a discrimination complaint, the Commission has appellate jurisdiction over that decision. Appeals are filed with and decided by the Office of Federal Operations. The Office of Federal Operations employs attorney-advisors who can be of assistance in responding to questions about the Commission's appellate process.

It is the exception rather than the rule that the five-member Commission actually gets involved in a discrimination complaint. Final decisions of the Office of Federal Operations are subject to reconsideration by the Commission, but the decision to grant reconsideration is entirely discretionary on the part of the Commission.

When specific questions arise, they should be addressed to the appropriate division of the EEOC. Communications with the Commission regarding specific complaints should include the case name, agency case number, and EEOC case number.

D. JURISDICTION

The EEOC's jurisdiction to decide complaints of discrimination in the federal sector is rather simple. Unlike agencies such as the Merit Systems Protection Board or the Federal Labor Relations Authority, the authority of the Commission is not circumscribed by a defined set of personnel actions nor restricted to issues of collective bargaining. The Commission's jurisdiction extends to all personnel actions as well as the terms, conditions and privileges of employment provided the complainant alleges some form of discrimination on the basis of race, color, sex, religion, national origin, disability status, age, or genetic information. The Commission also has jurisdiction over any complaint alleging reprisal because of participation in the EEO process or opposition to an employment practice prohibited by Title VII, the Rehabilitation Act, the ADEA, or GINA, as well as by Commission regulation.

1. Covered Actions

Title VII, the Rehabilitation Act, the ADEA, and GINA cover all personnel actions, as well as the terms, privileges, and conditions of employment. From a purely technical point of view, the amendment that brought the federal government within the ambit of Title VII, requires only that all "personnel actions shall be free

of discrimination" on the bases of race, color, sex, national origin, and religion. *See* 42 USC 2000-e(16). However, the Commission has interpreted that provision consistent with the private sector prohibition at 42 USC 2000-e(2)(a)(1), which states that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin…." That interpretation also has been extended to the other anti-discrimination statutes and, as a result, a discrimination complaint may be filed over anything from a removal action to a change in work hours. The only requirement is that the employee be "aggrieved" by the agency's action. In order to be aggrieved, the employee must sustain an "injury in fact." In legal terms, the issue of whether an employee is sufficiently aggrieved to bring a complaint is most often referred to as an issue of "standing."

Over the years, the EEOC, through both regulations and case law, has circumscribed its jurisdiction to some degree. For example, in enacting Part 1614, the Commission removed proposed adverse actions from the scope of the complaint processing regulations on the theory that proposed actions do not sufficiently aggrieve an employee until or unless they become effective. Through case law, the Commission has removed midyear performance appraisals from the ambit of the complaint process. Again, the basic theory is that midyear performance appraisals that do not result in a formal rating, with some exceptions, do not cause sufficient harm to render an employee aggrieved until the final year-end rating issues.

In cases involving alleged retaliation for protected activity, the Supreme Court has broadened Commission jurisdiction holding that an employee can be aggrieved by actions both inside and outside the workplace that would be reasonably likely to deter a reasonable person from filing or pursuing an EEO complaint.

See the section in Chapter 3 on "Standing: Failure to State a Claim," for a detailed discussion; see also Chapter 18, "Personnel Actions"; and Chapter 17, "Reprisal."

2. Employees Covered

The Commission's jurisdiction, unlike that of the Merit Systems Protection Board, is not limited to those executive branch employees who have completed a probationary period and obtained conversion to permanent appointments. The EEOC has jurisdiction over all complaints of discrimination based on race, color, religion, sex, national origin, age, disability status, and genetic information even when the complainant is an applicant for federal employment. The few positions which are exempt constitute an exception rather than the rule. Under Title VII, the Rehabilitation Act, and GINA, complainants are required to exhaust their administrative remedies before proceeding to U.S. district court. Under the ADEA and the EPA, complainants in the federal sector are not required to exhaust their administrative remedies by filing a complaint with the involved agency, but may avail themselves of the administrative process. Utilizing the administrative process does not toll the statute of limitations for civil actions under the ADEA and the EPA.

Both Title VII and the ADEA confer protection on competitive service employees of the judicial branch. Under legislation, discussed above, competitive service employees from the legislative branch have been removed from the jurisdiction of the EEOC. Under the Rehabilitation Act, the Commission does not have jurisdiction over complaints by competitive service employees in the legislative and judicial branches of government. The issue of coverage of competitive service employees in the legislative and judicial branches is discussed earlier under the subheading "Title VII of the 1964 Civil Rights Act." See also discussion later in this chapter on "Legislative and Judicial Branches"; Chapter 3, "Legislative and Judicial Employees"; Chapter 13, "Congressional Accountability Act—Legislative Employees."

Uniformed military personnel are not within the Commission's jurisdiction. *See DeGroat v. Secretary of Air Force*, 05900409, 2706/A2 (1990). However, there are circumstances where military employees, such as National Guard technicians who perform both military and civilian duties, can come within the Commission's jurisdiction. Such cases revolve around whether the alleged discrimination involves civilian or military duties. See the section later in this chapter discussing "Military Employees"; Chapter 3, "Military Departments."

The Commission's jurisdiction over complaints by federal employees does not extend to employees of state government whose positions are funded by federal grants. *See Kirchner v. Secretary of Agriculture*, 01892984, 2314/D5 (1989).

For further discussion of the employees covered by the antidiscrimination statutes, see Chapter 3, "Standing: Failure to State a Claim."

3. Agencies Covered

As noted above, the jurisdiction of the Commission extends to all employees within the executive agencies covered by the antidiscrimination statutes, with exclusions from coverage being the exception rather than the rule. The military agencies include the Department of the Army, the Department of the Navy, and the Department of the Air Force. *See* 5 USC 102. Executive agencies covered are defined at 5 USC 105 as "an Executive department, a Government corporation, and an independent establishment." Government corporations are defined by reference in section 103 of Title 5 as any corporation owned or controlled by the United States. Independent establishments include the General Accounting Office and any "establishment" in the executive branch which is not a department, military department, or government corporation. 5 USC 104. The U.S. Postal Service and the Postal Rate Commission are specifically covered by the acts.

Under Title VII, as originally amended to apply to federal employees, the General Accounting Office was exempt from coverage. 42 USC 2000e-16(a) (1978). The General Accounting Office and the Government Printing Office have since been added to the list of independent establishments coming within the ambit of Title VII. Under Title VII and the ADEA, as originally amended to include federal workers, the Commission also had jurisdiction over complaints of discrimination for competitive service employees in the government of the District of Columbia, the federal judicial and legislative branches and the Library of Congress. Note that with respect to these units of government, the Commission's jurisdiction was circumscribed to include only competitive service employees. The Commission, as noted above, does not have jurisdiction over complaints by competitive service employees in the legislative and judicial branches under the Rehabilitation Act. The Commission's jurisdiction over legislative branch employees was eliminated with the Congressional Accountability Act of 1995, discussed earlier under the heading "Congressional Accountability Act of 1995."

The Civil Rights Act of 1991 extended the protections of Title VII to employees of the House of Representatives, the U.S. Senate and the legislative agencies. The legislation provided that the House and Senate shall establish procedures for processing discrimination complaints. The legislation did not make clear what role, if any, the Commission would have in such complaint procedures. The procedures for enforcing the antidiscrimination statutes for legislative branch employees were established under the Congressional Accountability Act of 1995. *See* 2 USC 1301, *et seq.*

4. Unions

Labor unions fall within the coverage of Title VII. *See* 42 USC 2000e(d)–(e). There is a question as to whether unions fall within the coverage of the Rehabilitation Act since there is no comparable provision in that legislation. However, labor unions are covered under the Americans with Disabilities Act. There also remains a question as to whether federal sector labor unions are covered under the ADEA. Although the ADEA does apply to labor organizations, 29 USC 623(b), only certain portions of the ADEA apply to the federal government. *See* 29 USC 633a(f). It is not clear that the provision relating to labor unions applies to the federal government.

In *Jennings v. American Postal Workers Union*, 672 F.2d 712, 28 FEP 514 (8th Cir. 1982), the court found that a federal employee who alleged that a labor union discriminated against him on a basis prohibited by Title VII could file a complaint of discrimination directly with the EEOC. The court found that section 703(c) of Title VII was controlling. Section 703(c) prohibits labor organizations from discriminating against members on the bases of race, color, sex, religion and national origin, and also prohibits labor organizations from excluding persons from membership on those bases. A complaint cannot be filed with the agency where the employee works, since the agency has no control over any actions the union may take with respect to its members.

In *Reardon v. USPS*, 01860152, 1351/F12 (1986), the Commission decided that an employee could not file a complaint with his agency alleging that his union had engaged in disability discrimination. The Commission did not decide whether such an employee can file a complaint directly with the EEOC under Title VII, since that issue was not presented. The Commission did note that the Rehabilitation Act contains no provision similar to § 703(c) of Title VII. *However,* 5 USC 7114(a)(1), states:

> A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Section 7116(b)(4) of Title 5 specifically makes it an unfair labor practice:

> to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;…

Allegations of unfair labor practices fall within the province of the Federal Labor Relations Authority. *See* 5 USC 7118.

However, at least one court has held that federal sector labor organizations are covered entities under the ADA. In *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir. 1999), the court found that a former Postal Service worker could bring suit against the union under the ADA, though it ultimately dismissed the suit for other reasons. Agreeing with the EEOC, which filed an *amicus curiae* brief in the case and relying on *Jennings*, the court in *Jones*, 192 F.3d at 420, found:

The principal issue in this appeal is whether a labor union that represents federal employees may constitute a labor organization as that term is defined in the Americans With Disabilities Act (ADA), 42 USC §§ 12101–12213, and therefore be subject to suit in federal district court for violations of 42 USC § 12112(a). Because the ADA provides that the term "labor organization" shall have the same meaning given that term in Title VII of the Civil Rights Act of 1964, 42 USC §§ 2000e to 2000e-17, a sister statute, resolution of the principal issue requires us to resolve the antecedent question of whether a labor union that represents federal employees may constitute a labor organization as that term is defined in Title VII. For the reasons that follow, we hold a labor union that represents federal employees may constitute a labor organization as that term is defined in Title VII and by proxy the ADA.

The *Jones* court, *id.* at 423–28, elaborated on this holding:

> As previously stated, Congress defined the term "covered entity" in the ADA as "an employer, employment agency, *labor organization*, or joint labor-management committee," 42 USC § 12111(2) (emphasis added), and expressly incorporated Title VII's definition of "labor organization," *see id.* § 12111(7). For its part, Title VII defines "labor organization" as:
>
> > *a labor organization engaged in an industry affecting commerce,* and any agent of such an organization, *and includes any organization of any kind,* any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and *which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment*, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.
>
> *Id*. § 2000e(d) (emphasis added). Title VII goes on to state in a separate subsection of its definitional section that a labor organization "shall be deemed to be engaged in an industry affecting commerce," if it maintains a hiring office or has fifteen or more members and falls within one of the following five categories:
>
> > (1) is the certified representative of employees under the provisions of the National Labor Relations Act…, or the Railway Labor Act…;
> >
> > (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an *employer* or *employers* engaged in an industry affecting commerce; or
> >
> > (3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of *employers* within the meaning of paragraph (1) or (2); or
> >
> > (4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or
> >
> > (5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.
>
> *Id*. § 2000e(e).
>
> The ADA also expressly adopts Title VII's definitions of "commerce" and "industry affecting commerce." *See id.* § 12111(7). Title VII defines the term "commerce" as "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof." *Id.* § 2000e(g). Title VII defines an "Industry affecting commerce" as "any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes…any governmental industry, business, or activity." *Id.* § 2000e(h). The ADA also defines "employee" and "employer" in language that closely approximates the definitions of those terms in Title VII. *Compare* 42 USC § 12111(4)–(5) (ADA), *with* 42 USC § 2000e(b), (f) (Title VII). Notably, both the ADA and Title VII's definition of employer expressly exclude the United States or a corporation wholly owned by the government of the United States. *See id.* §§ 2000e(b) & 12111(5).
>
> …
>
> …After considering these points of reference, we conclude that Title VII's definition of labor organization is ambiguous as to whether a labor organization that represents federal employees may be subject to liability under Title VII. First, the initial clause of Title VII's definition of the term "labor organization"—[t]he term 'labor organization' means a labor organization engaged in an industry affecting commerce," 42 USC § 2000e(d)—begs the question of what is the nature of a labor organization for purposes of Title VII. Second, the balance of the definition, which uses the term "employer," defined in § 2000e(b) as excluding the United States or an agency thereof, merely provides a nonexclusive list of organizations, agencies, employee representation committees, groups, associations, or plans that may constitute a labor organization under Title VII. *See West v. Gibson*, 119 S. Ct. 1906, 1910 (1999) [other cites omitted]…
>
> The third circumstance creating ambiguity is that Title VII has a separate section specifically allowing federal employees to sue the United States for unlawful employment discrimination, but does not contain a parallel section addressing labor organizations that represent federal employees. The fourth circumstance creating ambiguity is that although § 2000e(e) declares when a labor organization shall be "deemed" to be engaged in an industry affecting commerce, it does not purport to define the term "labor organization" itself. Fifth and finally, the legislative history of Title VII and the ADA is silent regarding whether a labor organization engaged in an industry affecting commerce and that represents federal employees is subject to their respective proscriptions.
>
> Because we conclude Title VII's definition of labor organization is ambiguous as to whether a labor organization that represents federal employees may be subject to liability under Title VII, we turn to consider the deference this court should afford the interpretation proffered by the EEOC, the agency charged with primary responsibility for enforcement of Title VII. *See Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 441 (4th Cir. 1998). The level of deference that this court should afford the EEOC's proffered interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* (internal quotation marks omitted)….
>
> …[U]nder the circumstances of this case, we believe full *Chevron* deference is appropriate. After reading the EEOC's brief and listening to its presentation at oral argument, we are convinced the EEOC thoroughly considered the statutory interpretation issues at hand. Furthermore, as we will explain in greater detail momentarily, we find its reasoning valid. Additionally, the EEOC's position is consistent with its express agreement in its Compliance Manual with the Eighth Circuit's holding in *Jennings*. *See* EEOC Compliance Manual, Vol. II, § 605, App. 605–N (issued January 29, 1998). Finally, there is no evidence that the EEOC's proffered interpretation is inconsistent with an earlier or later pronouncement.
>
> Having determined that the EEOC's interpretation is entitled to full *Chevron* deference, we must next determine whether the EEOC's proffered interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If it is, then we must sustain the EEOC's interpretation. *See Molinary*, 125 F.3d at 235. We have no trouble in concluding that it is. Section 2000e(d) can reasonably be interpreted to mean that, at a minimum, if a labor organization representing federal employees exists for the purpose, in whole or in part, of dealing with the United States or an agency thereof concerning grievances, labor disputes, and the like of the federal employees it represents and is engaged in an "industry affecting commerce" as that term is defined in § 2000e(h), then that labor organization is subject to the proscriptions of Title VII and by proxy the ADA. This interpretation fully comports with Congress' primary purpose in enacting those statutes of eradicating certain employment discrimination. Such an interpretation avoids the anomalous result, surely not intended by Congress, of nonfederal employees being allowed to sue their employer and labor organizations for violations of Title VII and the ADA, but federal employees only being allowed to sue their employer.
>
> There is no dispute in this case that the Defendants represent federal employees and exist for the purpose in whole or in part of dealing with the Postal Service concerning grievances, labor disputes, and the like. Furthermore, the Defendants' significant representational activities on behalf of Postal Service employees fully support the conclusion that the Defendants are engaged in activities in commerce. *See* 42 USC § 2000e(h). Accordingly, the Defendants constitute labor organizations for purposes of Title VII liability and by proxy the ADA.

The court in *Jones*, 192 F.3d at 428–29, rejected the union's argument that the Rehabilitation Act provided the exclusive remedy for federal employees for disability discrimination. Because the union and not the agency was the defendant, the court found no sovereign immunity question presented. Having found that the APWU was covered by subject matter jurisdiction, the Fourth Circuit in *Jones*, *id.* at 429, held:

> Although Jones wins the battle over subject matter jurisdiction, he ultimately loses the war. The district court should have granted the Defendants' motion for summary judgment. The law is well settled that the ADA is not violated when an employer discharges an individual based upon the employee's misconduct, even if the misconduct is related to a disability. [cites omitted] Assuming Butts made the alleged discriminatory comments at issue to Postal Service officials and she represented the Defendants in doing so, there is absolutely no evidence to suggest that the Postal Service discharged Jones for any reason other

than the fact that he threatened the life of his supervisor. Because the ADA does not require an employer to ignore such egregious misconduct by one of its employees, even if the misconduct was caused by the employee's disability, we remand this case to the district court for entry of judgment in favor of the Defendants.

In *Bray v. Secretary of Treasury*, 01941865, 4090/E7 (1994), the Commission refused to uphold the dismissal of a complaint on the basis of lack of jurisdiction because the disputed actions were taken by union officials. The Commission held that agency employees cannot, acting under the guise of a union, insulate an agency from liability for discriminatory actions.

See also Chapter 3, section on "Standing: Failure to State a Claim—Agency Jurisdiction."

5. Remedial Powers

The Commission's remedial powers are broad. Under 42 USC 2000e-16(b), the EEOC has the authority to grant such "appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section…." Subsection (b) of 29 USC 633a gives the Commission similar powers to grant remedial relief under the ADEA, as does the Rehabilitation Act at 29 USC 794a, which incorporated, by reference, Title VII remedies in cases involving disability discrimination.

The discrimination statutes, as originally passed, were all considered to be remedial or "make whole" statutes. The Commission's remedial powers, while broad, did not encompass such items as punitive damages awards or consequential damages suffered as a result of prohibited discrimination. The focus was on placing the employee who has been determined to have suffered discrimination in the same position he or she would have been in had the discrimination not occurred. The Civil Rights Act of 1991 authorized both punitive and compensatory damages for such items as pain, suffering, humiliation and other nonpecuniary damages. 42 USC 1981a(b). The federal government is exempt from the punitive damages provision, but is subject to the provision for compensatory damages in cases involving intentional discrimination under Title VII and the Rehabilitation Act. *See Jackson v. Postmaster General*, 01923399, 3499/B12 (1992).

Although the 1991 Civil Rights Act did not include any provision addressing the retroactivity of its new remedies, the Commission initially issued a policy guidance statement declaring that the remedies were not retroactive and would only apply to intentional discriminatory acts that occur on or after November 21, 1991—the date the legislation became effective. The issue of retroactivity of the new remedies also was considered by several federal courts, with decisions split almost equally on whether or not the provision was retroactive. On April 13, 1993, the EEOC reversed its position and rescinded its earlier policy statement. The issue of the retroactivity of the 1991 Act was decided by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed.2d 229 (1994). The Court held that the substantive provisions of the Act were not retroactive and the compensatory damages provision did not apply to discriminatory acts occurring before the effective date of the legislation.

The focus of the original statutes was purely remedial and the new legislation exempted the federal government from punitive damages. The Commission does not have authority to order punitive measures against discriminating officials. In recent years, though, it has taken a much more aggressive posture toward alleged discriminating officials and held that it may review an agency's determination to discipline offending officials as part of its overall mandate to order corrective action. The Commission also has a Memorandum of Understanding with the Office of Special Counsel and refers findings of discrimination to OSC for decisions on whether that office will bring disciplinary action against the appropriate management officials.

While the Commission cannot order punishment of an offending government official, it can, and does, order broad remedial measures. The Commission routinely requires agencies to post Notices of Violation to publicize findings of discrimination. It also routinely orders agencies to provide specific training to managers and supervisors as a measure to correct past discrimination and prevent discrimination in the future.

Section 701(k) of Title VII provides that the prevailing party also may recover reasonable attorney fees and costs. A similar provision appears in the Rehabilitation Act. Although the respective acts make no specific mention of attorney fees in the administrative process, in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed.2d 723 (1980), the Supreme Court held that § 701(k) does allow for recovery of fees for representation in the administrative process. *See Patton v. Andrus*, 459 F. Supp. 1189 (D.D.C. 1978). The Commission's authority to award fees in cases involving age discrimination is circumscribed because the Age Discrimination in Employment Act, as applied to federal employees, contains no provision for recovery of fees.

E. CIVIL ACTIONS

Title VII originally provided that complainants may file a civil action in U.S. district court within 30 days of a final decision of an agency or the EEOC, or within 180 days of filing a complaint with an agency or appeal with the EEOC, if no final action has been taken. 42 USC 2000e-16(c). As with complaints in the private sector, federal employees are entitled to a trial *de novo*. *See* 42 USC 2000e-16(d); 42 USC 2000e-5(f) through (k). The procedure also applies to the Rehabilitation Act. 29 USC 794a. Under the 1991 Civil Rights Act, the time for filing a civil action after a final agency decision or final decision of the Commission has been extended to 90 days. 42 USC 2000e-16(c). Although the language of the 1991 Civil Rights Act seems clear, some U.S. district courts have held that the 30-day filing limit still applies in cases on appeal before the Merit Systems Protection Board where discrimination is raised as an affirmative defense. *See, e.g., James v. United States*, 888 F. Supp. 944 (S.D. Ind. 1995) (applying 30-day statute of limitations). The cases are based upon 5 USC 7703, which still contains the 30-day statute of limitations and was not amended by the 1991 Civil Rights Act.

Unlike Title VII and the Rehabilitation Act, an employee who believes he or she is aggrieved under the ADEA has the option of pursuing an administrative complaint with the agency and the EEOC, or filing an action in U.S. district court without exhaustion of the administrative remedies. 29 USC 633a(c). The employee must give the EEOC written notice at least 30 days in advance of filing suit, but not later than 180 days after the alleged discriminatory action.

The new civil rights legislation specifically provides for the right to a jury trial in U.S. district court in Title VII and Rehabilitation Act cases where the complainant seeks compensatory or punitive damages. *See* 42 USC 1981a(c). The federal government, however, is exempt from an award of punitive damages. Jury trials are not available for federal employees under the ADEA or the EPA because the 1991 Civil Rights Act did not amend those statutes.

II. AGENCY EEO PROGRAMS

The EEO process is administered by each federal agency individually, subject to review and oversight by the Equal Employment Opportunity Commission. The programs are premised on a two-fold statement of policy, as described at 29 CFR 1614.101:

> (a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age or handicap and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.
>
> (b) No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act (title VII) (42 USC 2000e et seq.), the Age Discrimination in Employment Act (ADEA) (29 USC 621 et seq.), the Equal Pay Act (29 USC 206(d)) or the Rehabilitation Act (29 USC 791 et seq.) or for participating in any stage of administrative or judicial proceedings under those statutes.

This simple statement of policy, however, spawns a complex and often confusing set of procedures for the processing of discrimination complaints. In addition to their responsibilities for processing complaints of discrimination, each agency also is responsible for promulgating programs designed to eradicate discrimination and to promote equal opportunity employment.

The regulations governing the federal sector process are set forth in 29 CFR Part 1614 and supplemental guidance is provided by EEOC Management Directive 110 (MD-110).

A. ORGANIZATION OF PART 1614

In originally promulgating 29 CFR Part 1614 in 1992, the EEOC consolidated and streamlined its former regulations for processing EEO complaints. The Commission's previous regulations, at 29 CFR Part 1613 contained several diverse sections that dealt with the administrative processing of complaints. It also contained separate sections for discrimination complaints based on Title VII, discrimination complaints based on the ADEA, and discrimination complaints based on the Rehabilitation Act. The regulations often were duplicative, confusing, and required extensive cross-referencing to understand them. This method of organization was abandoned in Part 1614. As the Commission explained in its notice of final rulemaking published in the Federal Register on April 10, 1992:

> Part 1614 is organized differently than Part 1613. Part 1613 contains separate subparts for each type of complaint, e.g., Title VII complaints, mixed case complaints, age complaints, class complaints, handicap complaints, and old mixed case complaints. Part 1614 attempts to avoid repetition and extensive cross-referencing by consolidating the complaint processing procedures as much as possible. The new part is organized into six subparts. Subpart A concerns the agencies' programs for promoting equal employment opportunity and the procedures for agency processing of individual complaints of discrimination.
>
> Subpart B provides additional provisions that are applicable to the processing of particular types of complaints (*i.e.*, ADEA, Equal Pay Act, Rehabilitation Act, class). Subpart C explains the relationship between the EEO process and the negotiated grievance process and between the EEO process and appeals to the Merit Systems Protection Board. Subpart D describes appeals to EEOC and the right to file civil actions under each statute administered by EEOC. Subpart E sets forth EEOC's policy on remedies and relief when discrimination has occurred. Subpart

F contains miscellaneous provisions of general applicability to agency EEO programs. The overwhelming majority of comments addressing this issue supported the revised organization.

Part 1614 presents a much clearer explanation of the EEO process. Still, it should be noted that not all of the confusion surrounding the administrative processing of EEO cases has been engendered by the Commission's regulations. The CSRA creates a muddled overlap of jurisdiction between the EEOC and the MSPB. Both the Commission and the Board have had their difficulties in applying the statutory scheme in this area. Often, complainants and agencies have been caught in the middle. These are issues that can only be addressed by Congress.

Part 1614 was most recently amended effective September 24, 2012. 77 Fed. Reg. 43498–43506 (July 25, 2012).

B. AGENCY PROGRAMS

The processing of discrimination complaints is only one aspect of an agency's responsibilities under the antidiscrimination statutes. Pursuant to 29 CFR 1614.102, each agency is required to establish an EEO program to eliminate discrimination and promote equal opportunity. Effective October 1, 2003, the EEOC issued Management Directive 715 (MD-715), which further refines and defines the responsibilities of agencies to promote equal employment opportunities. The directive also contains guidance to agencies for compliance with the No FEAR Act, discussed above under the heading "No FEAR Act of 2002."

The EEOC is not simply an adjudicator of federal sector complaints of discrimination. Its statutory mandate under both Title VII and the Rehabilitation Act includes implementing so-called "affirmative programs of equal employment opportunity." Through Part 1614 and MD-715, the Commission has sought to fulfill that mandate by requiring federal agencies to develop, implement, assess, and report on plans to promote equal employment opportunity.

The affirmative employment programs are sometimes referred to as "affirmative action" programs. Affirmative action in these programs should not be confused with court-ordered affirmative action. The object of the Commission's affirmative employment program policies is to increase employment opportunities for all individuals, regardless of race, color, sex, national origin, religion, or disability in all agencies of the federal government. Court-ordered affirmative action is a remedy for discrimination where an employer has demonstrated a long-standing resistance to the antidiscrimination laws.

1. Affirmative Employment Under Part 1614

The basic obligations of agencies to promote equal employment opportunity are set forth in 29 CFR Part 1614. Section 102 defines the nature of the program each agency is required to establish:

> (a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:
>
> (1) Provide sufficient resources to its equal employment opportunity program to ensure efficient and successful operation;
>
> (2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;
>
> (3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;
>
> (4) Communicate the agency's equal employment opportunity policy and program and its employment needs to all sources of job candidates without regard to race, color, religion, sex, national origin, age, disability, or genetic information, and solicit their recruitment assistance on a continuing basis;
>
> (5) Review, evaluate and control managerial and supervisory performance in such a manner as to insure a continuing affirmative application and vigorous enforcement of the policy of equal opportunity, and provide orientation, training and advice to managers and supervisors to assure their understanding and implementation of the equal employment opportunity policy and program;
>
> (6) Take appropriate disciplinary action against employees who engage in discriminatory practices;
>
> (7) Make reasonable accommodation to the religious needs of applicants and employees when those accommodations can be made without undue hardship on the business of the agency;
>
> (8) Make reasonable accommodation to the known physical or mental limitations of qualified applicants and employees with handicaps unless the accommodation would impose an undue hardship on the operation of the agency's program;
>
> (9) Provide recognition to employees, supervisors, managers and units demonstrating superior accomplishment in equal employment opportunity;
>
> (10) Establish a system for periodically evaluating the effectiveness of the agency's overall equal employment opportunity effort;
>
> (11) Provide the maximum feasible opportunity to employees to enhance their skills through on-the-job training, work-study programs and other training measures so that they may perform at their highest potential and advance in accordance with their abilities;
>
> (12) Inform its employees and recognized labor organizations of the affirmative equal employment opportunity policy and program and enlist their cooperation; and
>
> (13) Participate at the community level with other employers, with schools and universities and with other public and private groups in cooperative action to improve employment opportunities and community conditions that affect employability.

To a large degree, this section mirrors the former regulation at 29 CFR 1613.203, except that, significantly, it provides for basing the performance appraisals of managers and supervisors, at least in part, on the discharge of equal employment opportunity policy; calls for discipline where appropriate; and stresses the need for recognition of employees who demonstrate superior accomplishment of the agency's goals as expressed in its policies and programs.

Subsection (b) of 29 CFR 1614.102 details implementation of agency EEO programs:

> (b) In order to implement its program, each agency shall:
>
> (1) Develop the plans, procedures and regulations necessary to carry out its program;
>
> (2) Establish or make available an alternative dispute resolution program. Such program must be available for both the pre-complaint process and the formal complaint process.
>
> (3) Appraise its personnel operations at regular intervals to assure their conformity with its program, this part 1614 and the instructions contained in the Commission's management directives;
>
> (4) Designate a Director of Equal Employment Opportunity (EEO Director), EEO Officer(s), and such Special Emphasis Program Managers (e.g., People With Disabilities Program, Federal Women's Program and Hispanic Employment Program), clerical and administrative support as may be necessary to carry out the functions described in this part in all organizational units of the agency and at all agency installations. The EEO Director shall be under the immediate supervision of the agency head;
>
> (5) Make written materials available to all employees and applicants informing them of the variety of equal employment opportunity programs and administrative and judicial remedial procedures available to them and prominently post such written materials in all personnel and EEO offices and throughout the workplace;
>
> (6) Ensure that full cooperation is provided by all agency employees to EEO Counselors and agency EEO personnel in the processing and resolution of pre-complaint matters and complaints within an agency and that full cooperation is provided to the Commission in the course of appeals, including granting the Commission routine access to personnel records of the agency when required in connection with an investigation; and
>
> (7) Publicize to all employees and post at all times the names, business telephone numbers and business addresses of the EEO Counselors (unless the counseling function is centralized, in which case only the telephone number and address need be publicized and posted), a notice of the time limits and necessity of contacting a Counselor before filing a complaint and the telephone numbers and addresses of the EEO Director, EEO Officer(s) and Special Emphasis Program Managers.

Subsection (c) specifically sets forth the duties of the EEO director, who answers directly to the agency head:

> (c) Under each agency program, the EEO Director shall be responsible for:
>
> (1) Advising the head of the agency with respect to the preparation of national and regional equal employment opportunity plans, procedures, regulations, reports and other matters pertaining to the policy in § 1614.101 and the agency program;
>
> (2) Evaluating from time to time the sufficiency of the total agency program for equal employment opportunity and reporting to the head of the agency with recommendations as to any improvement or correction needed, including remedial or disciplinary action with respect to managerial, supervisory or other employees who have failed in their responsibilities;

(3) When authorized by the head of the agency, making changes in programs and procedures designed to eliminate discriminatory practices and to improve the agency's program for equal employment opportunity;

(4) Providing for counseling of aggrieved individuals and for the receipt and processing of individual and class complaints of discrimination; and

(5) Assuring that individual complaints are fairly and thoroughly investigated and that final decisions are issued in a timely manner in accordance with this part.

Subsection (e) and (f), which were part of the 2012 amendments require that agencies comply with EEOC management directives and bulletins, sets up a program for EEOC review of agency EEO programs, and allows the EEOC to grant variances from the Part 1614 procedures:

(e) Agency programs shall comply with this part and the Management Directives and Bulletins that the Commission issues. The Commission will review agency programs from time to time to ascertain whether they are in compliance. If an agency program is found not to be in compliance, efforts shall be undertaken to obtain compliance. If those efforts are not successful, the Chair may issue a notice to the head of any federal agency whose programs are not in compliance and publicly identify each non-compliant agency.

(f) Unless prohibited by law or executive order, the Commission, in its discretion and for good cause shown, may grant agencies prospective variances from the complaint processing procedures prescribed in this Part. Variances will permit agencies to conduct pilot projects of proposed changes to the complaint processing requirements of this Part that may later be made permanent through regulatory change. Agencies requesting variances must identify the specific section(s) of this Part from which they wish to deviate and exactly what they propose to do instead, explain the expected benefit and expected effect on the process of the proposed pilot project, indicate the proposed duration of the pilot project, and discuss the method by which they intend to evaluate the success of the pilot project. Variances will not be granted for individual cases and will usually not be granted for more than 24 months. The Director of the Office of Federal Operations for good cause shown may grant requests for extensions of variances for up to an additional 12 months. Pilot projects must require that participants knowingly and voluntarily opt-in to the pilot project. Requests for variances should be addressed to the Director, Office of Federal Operations.

Although it is the focus of this book, the processing of discrimination complaints is only a small portion of an agency's obligations under Part 1614.

In addition to the regulatory requirement that the EEO director report directly to the agency head, MD-110 requires that the EEO director have independent authority to carry out the agency's EEO programs. MD-110 at 1–3 also specifically prohibits EEO personnel from serving as agency representatives for agencies or complainants.

2. Management Directive 715

On October 1, 2003, the EEOC issued Management Directive 715 governing equal employment opportunity programs in the federal sector. MD-715 supersedes Management Directives 712 (March 29, 1983), and 713 and 714 (October 6, 1987), and all interpretive memoranda. MD-715 addresses affirmative employment responsibilities of federal agencies under Title VII and the Rehabilitation Act. There are no affirmative employment requirements in the provisions of the ADEA that apply to the federal sector.

MD-715 applies to "all executive agencies and military departments (except uniformed members) as defined in Sections 102 and 105 of Title 5 USC (including those with employees and applicants for employment who are paid from nonappropriated funds), the United States Postal Service, the Postal Rate Commission, the Tennessee Valley Authority, the Smithsonian Institution, and those units of the judicial branch of the federal government having positions in the competitive service." MD-715 is divided into three subparts. Subpart A "provides policy guidance and standards for establishing and maintaining effective affirmative programs of equal employment opportunity" under Title VII. Subpart B provides policy guidance for "effective affirmative action programs" under the Section 501 of the Rehabilitation Act. Finally, Subpart C sets forth general reporting requirements of agencies on their efforts to achieve equal employment opportunity. When issued in 2003, the EEOC announced plans to issue further guidance and instructions on implementing the policies of MD-715, but as of 2015 no further guidance has been issued.

The introduction to MD-715 sets forth the purpose of the directive:

> The United States government employs over two million men and women across the country and around the world. The ability of our government to meet the complex needs of our nation and the American people rests squarely on these dedicated and hard-working individuals. Perhaps now more than ever before—with increasing public expectations of governmental institutions—federal agencies must position themselves to attract, develop and retain a top-quality workforce that can deliver results and ensure our nation's continued growth and prosperity.
>
> Equal opportunity in the federal workplace is key to accomplishing this goal. In order to develop a competitive, highly qualified workforce, federal agencies must fully utilize all workers' talents, without regard to race, color, religion, national origin, sex or disability. While the promise of workplace equality is a legal right afforded all of our nation's workers, equal opportunity is more than a matter of social justice. It is a national economic imperative. Federal agencies must make full use of our nation's human capital by promoting workplace practices that free up opportunities for the best and brightest talent available. All workers must compete on a fair and level playing field and have the opportunity to achieve their fullest potential.
>
> Policies and practices that impede fair and open competition in the federal workplace cost the American economy millions of dollars each year. The most obvious costs are out-of-pocket costs borne by both agencies and federal workers in connection with workplace disputes. Perhaps less obvious—but just as expensive—are costs associated with decreased morale and productivity and the ineffective and inefficient use of human capital resources. These costs can—and should—be avoided. Agencies must make a firm commitment to the principles of equal opportunity and make those principles a fundamental part of agency culture.
>
> Title VII of the Civil Rights Act of 1964 (Title VII) and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act) mandate that all federal personnel decisions be made free of discrimination on the basis of race, color, religion, sex, national origin, reprisal or disability and also require that agencies establish a program of equal employment opportunity for all federal employees and job applicants. 42 U.S.C. § 2000e-16 and 29 U.S.C. § 791. The Equal Employment Opportunity Commission (EEOC) has adjudicatory responsibilities in the federal EEO complaints process and oversight responsibility for federal programs required by Section 717 of Title VII and Section 501 of the Rehabilitation Act generally.
>
> This Directive, which reflects recent and significant changes in the law, including recent Supreme Court decisions, supersedes earlier EEOC Management Directives and related interpretative memoranda on this subject and provides new guidance on the elements of legally compliant Title VII and Rehabilitation Act programs. This Directive requires agencies to take appropriate steps to ensure that all employment decisions are free from discrimination. It also sets forth the standards by which EEOC will review the sufficiency of agency Title VII and Rehabilitation Act programs, which include periodic agency self-assessments and the removal of barriers to free and open workplace competition.
>
> Additional information concerning federal sector equal employment opportunity law and programs can be found at EEOC's website at http://www.eeoc.gov/. The EEOC will also supplement this Directive on an as-needed basis through the issuance of additional guidance and technical assistance. Questions concerning this Directive should be directed to EEOC's Office of Federal Operations.

There are six essential elements of the Title VII and Rehabilitation Act model programs under MD-715. These are: 1) a demonstrated commitment from agency leadership; 2) integration of EEO into the agency's strategic mission; 3) management and program accountability; 4) proactive prevention of unlawful discrimination; 5) efficiency; and 6) responsiveness and legal compliance. Each of these elements is broadly defined in the introduction to MD-715:

> *Demonstrated Commitment From Agency Leadership*
>
> This Directive requires agency heads and other senior management officials to demonstrate a firm commitment to equality of opportunity for all employees and applicants for employment. Even the best workplace policies and procedures will fail if they are not trusted, respected and vigorously enforced. Agencies must translate equal opportunity into every day practice and make those principles a fundamental part of agency culture. This commitment to equal opportunity must be embraced by agency leadership and communicated through the ranks from the top down. It is the responsibility of each agency head to take such measures as may be necessary to incorporate the principles of equal employment opportunity into the agency's organizational structure.
>
> To this end, agency heads must issue a written policy statement expressing their commitment to equal employment opportunity (EEO) and a workplace free of discriminatory harassment. This statement should be issued at the beginning of their tenure and thereafter on an annual basis and disseminated to all employees. In addition, agency heads and other senior management officials may, at their discretion, issue similar statements when important issues relating to equal employment opportunity arise within their agency or when important developments in the law occur.
>
> *Integration of EEO Into The Agency's Strategic Mission*
>
> Equality of opportunity is essential to attracting, developing and retaining

the most qualified workforce to support the agency's achievement of its strategic mission. To this end, and in addition to the regulatory requirements found at 29 C.F.R. § 1614.102(b)(4), as interpreted in Management Directive 110 at 1–1, agencies must:

Maintain a reporting structure that provides the agency's EEO Director with regular access to the agency head and other senior management officials for reporting on the effectiveness, efficiency and legal compliance of the agency's Title VII and Rehabilitation Act programs. To emphasize the importance of the position, the agency head should be involved in the selection and performance review of the EEO Director.

Ensure EEO professionals are involved with, and consulted on, the management and deployment of human resources. The EEO Director should be a regular participant in senior staff meetings and regularly consulted on human resources issues.

Allocate sufficient resources to create and/or maintain Title VII and Rehabilitation Act programs that: 1) identify and eliminate barriers that impair the ability of individuals to compete in the workplace because of race, national origin, sex or disability; 2) establish and maintain training and education programs designed to provide maximum opportunity for all employees to advance; and 3) ensure that unlawful discrimination in the workplace is promptly corrected and addressed.

Attract, develop and retain EEO staff with the strategic competencies necessary to accomplish the agency's EEO mission, and interface with agency officials, managers and employees.

Recruit, hire, develop and retain supervisors and managers who have effective managerial, communications and interpersonal skills. Provide managers and supervisors with appropriate training and other resources to understand and successfully discharge their duties and responsibilities.

Involve managers and employees in the implementation of the agency's Title VII and Rehabilitation Act programs.

Use various media to distribute EEO information concerning federal EEO laws, regulations and requirements, rights, duties and responsibilities and to promote best workplace practices.

Management and Program Accountability

A model Title VII and Rehabilitation Act program will hold managers, supervisors, EEO officials and personnel officers accountable for the effective implementation and management of the agency's program. In ensuring such accountability, the agency must:

Conduct regular internal audits, on at least an annual basis, to assess the effectiveness and efficiency of the Title VII and Rehabilitation Act programs and to ascertain whether the agency has made a good faith effort to identify and remove barriers to equality of opportunity in the workplace.

Establish procedures to prevent all forms of discrimination, including harassment, retaliation and failure to provide reasonable accommodation to qualified individuals with disabilities.

Evaluate managers and supervisors on efforts to ensure equality of opportunity for all employees.

Maintain clearly defined, well-communicated, consistently applied and fairly implemented personnel policies, selection and promotion procedures, evaluation procedures, rules of conduct and training systems.

Implement effective reasonable accommodation procedures that comply with applicable executive orders, EEOC guidance, the Architectural and Transportation Barriers Compliance Board's Uniform Federal Accessibility Standards and Electronic and Information Technology Accessibility Standards. Ensure that EEOC has reviewed those procedures when initially developed and if procedures are later significantly modified.

Be mindful of the agency's disability program obligations, including the provision of reasonable accommodations, when negotiating collective bargaining agreements with recognized labor organization(s) representing agency employees.

Ensure effective coordination between the agency's EEO programs and related human resource programs, including the Federal Equal Opportunity Recruitment Program (FEORP), the Selective Placement Programs and the Disabled Veterans Affirmative Action Program (DVAAP).

Review each finding of discrimination to determine the appropriateness of taking disciplinary action against agency officials involved in the matter. Track these decisions and report trends, issues and problems to agency leadership for appropriate action.

Ensure compliance with settlement agreements and orders issued by the agency, EEOC, and EEO-related cases from the Merit Systems Protection Board, labor arbitrators, and the Federal Labor Relations Authority.

Proactive Prevention of Unlawful Discrimination

Agencies have an ongoing obligation to prevent discrimination on the bases of race, color, national origin, religion, sex, age, reprisal and disability, and eliminate barriers that impede free and open competition in the workplace. As part of this on-going obligation, agencies must conduct a self-assessment on at least an annual basis to monitor progress, identify areas where barriers may operate to exclude certain groups and develop strategic plans to eliminate identified barriers. A more detailed explanation of this process follows at Part A (Title VII) and Part B (Rehabilitation Act) of this Directive.

Efficiency

Agencies must have an efficient and fair dispute resolution process and effective systems for evaluating the impact and effectiveness of their EEO programs.

Maintain an efficient, fair and impartial complaint resolution process. Agencies should benchmark against EEOC regulations at 29 C.F.R. Part 1614 and other federal agencies of similar size highly ranked in EEOC's Annual Report on the federal sector complaints process.

Ensure that the investigation and adjudication function of the agency's complaint resolution process are kept separate from the legal defense arm of the agency or other agency offices with conflicting or competing interests.

Establish and encourage the widespread use of a fair alternative dispute resolution (ADR) program that facilitates the early, effective and efficient informal resolution of disputes. Appoint a senior official as the dispute resolution specialist of the agency charged with implementing a program to provide significant opportunities for ADR for the full range of employment-related disputes. Whenever ADR is offered in a particular workplace matter, ensure that managers at all appropriate levels will participate in the ADR process.

Use a complaint tracking and monitoring system that permits the agency to identify the location, status, and length of time elapsed at each stage of the agency's complaint resolution process, the issues and the bases of the complaints, the aggrieved individuals/complainants, the involved management officials and other information necessary to analyze complaint activity and identify trends.

Identify, monitor and report significant trends reflected in complaint processing activity. Analysis of data relating to the nature and disposition of EEO complaints can provide useful insight into the extent to which an agency is meeting its obligations under Title VII and the Rehabilitation Act.

Ensure timely and complete compliance with EEOC orders and the provisions of settlement/resolution agreements.

Maintain a system that collects and maintains accurate information on the race, national origin, sex and disability status of agency employees. *See* 29 C.F.R. § 1614.601 for further guidance.

Maintain a system that tracks applicant flow data, which identifies applicants by race, national origin, sex and disability status and the disposition of all applications. EEOC will issue more detailed guidance on collecting and maintaining applicant flow data.

Maintain a tracking system of recruitment activities to permit analyses of these efforts in any examination of potential barriers to equality of opportunity.

Identify and disseminate best workplace practices.

Responsiveness and Legal Compliance

Federal agencies must:

Ensure that they are in full compliance with the law, including EEOC regulations, orders and other written instructions. *See* 42 U.S.C. § 2000e-16(b).

Report agency program efforts and accomplishments to EEOC and respond to EEOC directives and orders in accordance with EEOC instructions and time frames.

Ensure that management fully and timely complies with final EEOC orders for corrective action and relief in EEO matters.

MD-715, Section II, Subpart A deals with the obligation of federal agencies to develop "an affirmative program of equal employment opportunity" under Title VII. This means that:

Section 717 of Title VII requires federal agencies to take proactive steps to ensure equal employment opportunity for all their employees and applicants for employment. This means that agencies must work to proactively prevent potential discrimination before it occurs and establish systems to monitor compliance with Title VII. Agencies must regularly evaluate their employment practices to identify barriers to equality of opportunity for all individuals. Where such barriers are identified, agencies must take measures to eliminate them. With these steps, agencies will ensure that all persons are provided opportunities to participate in the full range of employment opportunities and achieve to their fullest potential.

The first requirement of Subpart A is that agencies must conduct an annual self-evaluation. This self-evaluation, described in Subpart A, Section II, requires agencies to

> monitor progress and identify areas where barriers may operate to exclude certain groups. A first step in conducting this self-assessment involves looking at the racial, national origin and gender profile of relevant occupational categories in an agency's workforce. Guidance on how to group occupational categories will be provided separately. This "snapshot" can serve as a diagnostic tool to help agencies determine possible areas where barriers may exist and may require closer attention.

According to MD-715, this self-assessment provides a "statistical snapshot" that is a starting point for the identification of workplace barriers. *Id.* That snapshot must then be evaluated in light of the "totality of the circumstances." *Id.* The self-assessment must, at a minimum, include the following data for each agency as of the end of each fiscal year:

> Total workforce distribution by race, national origin and sex for both the permanent and temporary workforce;
>
> Permanent and temporary workforce participation rates for each grade level by race, national origin and sex;
>
> Permanent and temporary workforce participation rates for each of the agency's major occupational categories (divided by grade level) by race, national origin and sex;
>
> Participation rates in supervisory and management positions by race, national origin and sex;
>
> The race, national origin and sex of applicants for both permanent and temporary employment;
>
> The rates of selections for promotions, training opportunities and performance incentives by race, national origin and sex; and
>
> The rates of both voluntary and involuntary separations from employment by race, national origin and sex.

Id. Regarding the "rates of selections for promotions" portion of Part A, II, the Commission held in *Casie S. v. Secretary of Housing and Urban Development*, 0120100672 (2018), that nothing in that language requires the "agency to keep promotion applications categorized by national origin or Best Qualified Lists categorized by national origin."

The purpose of gathering this information is to help the agency identify meaningful disparities in its workforce and to focus further self-assessment. As the Commission explains:

> In conducting its self-assessment, agencies shall compare their internal participation rates with corresponding participation rates in the relevant civilian labor force (CLF). Geographic areas of recruitment and hiring are integral factors in determining "relevant" civilian labor force participation rates. EEOC will provide appropriate civilian labor force data for use by agencies. With respect to positions typically filled through the internal promotion process or through transfers from other federal agencies, a self-assessment will involve looking at the racial, national origin and gender profile of the occupational categories and/or grade levels from which such promotions or transfers are typically made. EEOC will, from time to time, provide additional guidance on conducting the analysis.

Id. The directive requires agencies to collect and maintain race, national origin and gender data on employees in both the permanent and temporary workforce, as well as on applicants for employment. Collection of the data from both employees and applicants should be by voluntary self-identification. *See* 29 CFR 1614.601.

Section III of Subpart A addresses barriers to equal employment opportunity under Title VII. If an agency's self-assessment identifies racial, national origin or gender-based disparities, it must then identify the barriers creating those disparities:

> Workplace barriers can take various forms and sometimes involve a policy or practice that is neutral on its face. Identifying and evaluating potential barriers requires an agency to examine all relevant policies, practices, procedures and conditions in the workplace. The process further requires each agency to eliminate or modify, where appropriate, any policy, practice or procedure that creates a barrier to equality of opportunity.
>
> For example, if a self-assessment revealed that Hispanics are virtually absent from the workforce in a facility, it would be logical for the agency to initially focus attention on its hiring and recruitment activities. The agency could rule out potential recruitment concerns if it determined that Hispanics were well represented among its applicants for employment. It would then be appropriate for the agency to examine all other aspects of the hiring process to identify the factor(s) responsible for the statistical disparity.

Id. The Commission suggests several questions that an agency might consider in identifying workplace barriers:

> Are recruitment efforts resulting in a cross-section of qualified applicants? Is there a significant disparity between the proportion of a racial, national origin or gender group in the agency's applicant pools and the proportion of that group in the relevant labor markets from which applicants are drawn?
>
> In a workforce where employees of a particular group are virtually absent, to what extent are employment opportunities unnecessarily restricted to internal applicants?
>
> Have supervisors, managers and executives been adequately trained on the agency's obligations under Title VII?
>
> Are there decision makers whose employment decisions have excluded individuals on the basis of race, national origin or sex?
>
> Are there any selection criteria that tend to screen out a particular racial, national origin or gender group?

Id. Subpart A, section III. Section IV of Subpart A discusses the evaluation and elimination of workplace barriers based on race, national origin or gender. The Commission provides the following example of how self-analysis might lead to identification of a workplace barrier that creates a racial disparity:

> For example, statistical disparities are identified in an agency's auditor occupational group and further examination of the situation reveals the following: In the past, the auditor occupational group was racially diverse, including at the higher grade levels. However, after the agency instituted a requirement that auditors must be certified public accountants (CPAs) in order to be promoted to the GS-14 level or higher, few internal candidates held CPAs and therefore did not qualify for promotional opportunities to the higher level grades. As a result, the agency recruited candidates for these positions from a local business school with a student population that primarily came from the same racial group. Over time, auditors at the grade 14 level and above did not reflect the racial diversity of auditors at the lower grade levels. Assuming the requirement for a CPA is justified by business necessity, the agency has several options to consider in designing a response to this situation. Most obviously, the agency should increase its applicant pool for positions at the grade 14 and above by recruiting at other business schools with more diverse student populations. As an additional option, the agency might take steps to encourage its own auditors at the lower grade levels to pursue a CPA.

In order to assess the appropriateness of any policy, practice or condition that is identified as creating a statistical disparity, the Commission requires that agencies consider:

> Whether the agency head can do more to demonstrate to the workforce, his or her commitment to equal employment opportunity;
>
> Whether there are budgetary or other restrictions governing a decision to limit recruitment to internal applicants;
>
> Whether certain qualification standards are truly necessary to the successful performance in a position; and
>
> Whether selection criteria used to assess qualifications that have been found to exclude or adversely impact a particular racial, national origin or gender group truly measure the knowledge, skills and abilities that they purport to measure, and whether alternative criteria are available that do not disadvantage any particular group.

Id., subpart A, section IV. Where an identified barrier serves no legitimate purpose, it must be eliminated immediately. Even if a policy that poses a barrier can be justified by business necessity, agencies must evaluate whether there is an alternative, less exclusionary practice that would serve the same purpose. If the self-analysis identifies barriers that are not within an agency's control, this should be brought to the attention of the EEOC.

MD-715 also suggests several measures that an agency can undertake to enhance and maximize opportunities for all employees:

> Identifying career enhancing opportunities such as details, developmental assignments, mentoring programs, etc. Structuring details or developmental assignments to expose a broad range of employees to a variety of positions within the agency.
>
> Assessing internal availability of candidates by identifying job-related skills, education, knowledge and abilities that may be obtained at lower levels in the same or similar occupational series.
>
> Conducting a skills-building inventory of agency employees, including but not limited to, current and potential gaps in skills and the distribution of skills. Developing an action plan to address these gaps.
>
> When appropriate, developing broad criteria for evaluating the knowledge, skills and abilities of applicants for particular positions that takes into account a range of experience and skills.

Subpart A, section IV. Subpart B of the MD-715 addresses the proactive prevention of discrimination under Section 501 of the Rehabilitation Act. In the Rehabilitation Act, Congress required the federal government to become a model employer of individuals with disabilities. The Rehabilitation Act requires each agency to establish and maintain "an affirmative action program plan for the hiring, placement, and advancement to individuals with disabilities." As the Commission explains:

> The mandate to serve as a model employer requires several things. First, agencies may not discriminate against qualified individuals with disabilities. But non-discrimination alone is not enough. The Rehabilitation Act also requires agencies to take proactive steps to ensure equal employment opportunity for individuals with disabilities. This means agencies must attempt to prevent discrimination before it occurs and must establish systems to monitor their own compliance with the Act. Agencies must regularly evaluate their employment practices to identify barriers to equality of opportunity for individuals with disabilities. Where such barriers are identified, agencies must eliminate them. With these steps, agencies will ensure that individuals with disabilities are provided opportunities to fully participate in employment opportunities and achieve to their fullest potential.

By incorporating provisions of the Americans with Disabilities Act into the Rehabilitation Act, Congress defined the term discrimination to include:

> Making unlawful medical examinations or inquiries;
>
> Not providing reasonable accommodations to an otherwise qualified individual with a disability unless the agency can demonstrate that the accommodation would impose an undue hardship on its operations;
>
> Denying job opportunities to an otherwise qualified applicant or employee because of the need for a reasonable accommodation;
>
> Using qualification standards, employment tests or other selection criteria that screen out, or tend to screen out, individuals with disabilities unless shown to be job-related for the position in question and consistent with business necessity;
>
> Failing to select and administer employment tests in the most effective manner to ensure that when the test is administered, the test results accurately reflect the skills, aptitudes or other factors the test purports to measure, rather than reflecting the impaired sensory, manual or speaking skills of the employee or applicant;
>
> Using standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control;
>
> Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
>
> Participating in a contractual or other arrangement or relationship that has the effect of subjecting a qualified applicant or employee with a disability to prohibited discrimination; and
>
> Excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

Id. Section I. Like Title VII, the Rehabilitation Act also includes protections against reprisal for participation in the EEO process or opposing any discriminatory practice under the Act.

As with Subpart A, MD-715, as it relates to the Rehabilitation Act requires agencies to conduct a self-assessment of policies, practices and procedures that, directly or indirectly, relate to the employment of individuals with disabilities. For the purposes of Subpart B:

> [T]he term "employment" refers to the full range of employment decisions, including (but not limited to) hiring, advancement, retention, and other general terms, conditions and privileges of employment. The term "conditions" is intended to refer to the full range of environmental circumstances within an agency, including the physical layout and design of the structure in which the agency is located. In this regard, agencies should be mindful of their obligation to ensure that their physical structures and facilities comply with the requirements of the Architectural Barriers Act (42 U.S.C. § 4151 *et seq*.) and relevant titles of the ADA.

In addition, agencies are reminded of their responsibilities to bring physical structures and facilities into compliance with the Architectural Barriers Act.

As with the self-assessment under Subpart A, the self-assessment of the agency's fulfillment of its obligations under the Rehabilitation Act is intended to provide a "statistical snapshot" as a starting point for the identification and elimination of employment barriers. However:

> [A]gencies must be mindful that, while such numerical analyses can be useful as initial diagnostic and measuring tools, not all issues relating to their obligations under the Rehabilitation Act will lend themselves to such an analysis. Moreover, an agency can be liable for discrimination under the Rehabilitation Act if its practices exclude even one individual on the basis of that individual's disability. It is the responsibility of each agency to be sensitive to any employment circumstance or condition that may be relevant to its ability to meet its fundamental obligation to effect appropriate hiring, advancement and retention of individuals with disabilities, especially those with targeted disabilities.

Agencies are required to conduct the self-analysis on an annual basis with respect to the end of the fiscal year and, at a minimum, must include the following:

> Total workforce distribution of employees with disabilities for both the permanent and temporary workforce;
>
> Representation and distribution of employees with disabilities, by grade, in both the permanent and temporary workforce;
>
> Permanent and temporary workforce participation of employees with disabilities in major occupational groups by grades;
>
> The representation of individuals with disabilities among applicants for permanent and temporary employment;
>
> The representation of employees with disabilities among those who received promotions, training opportunities and performance incentives;
>
> The representation of employees with disabilities among those who were voluntarily and involuntarily separated;
>
> The effectiveness and efficiency with which the agency processes requests for reasonable accommodation under the Rehabilitation Act;
>
> The extent to which an agency is in compliance with Section 508 of the Rehabilitation Act's requirement to provide employees with disabilities access to information and data that is comparable to that provided to those without disabilities; and
>
> Information and trend data reflecting the nature, status and disposition of complaints in the administrative process (EEOC, MSPB and FLRA) and in court alleging violations of the Rehabilitation Act.

Id., subpart B, section III. Unlike protected categories covered by Title VII, there is no comparable census data on individuals with disabilities and, the Commission notes, this makes a reliable statistical analysis based on general workforce data difficult.

> However, a review of agency annual submissions to the EEOC reveals that some agencies favorably distinguish themselves (compared to the federal government in general) through the number of employees with disabilities in their workforce. Until such time as reliable data is developed and disseminated concerning the general availability of individuals with disabilities in the workforce, this Directive recommends agencies evaluate themselves against the workforce profile of the federal government in general and that of agencies ranked highly, in this respect, in the most recent EEOC annual report on the federal workforce. All agencies, regardless of their relative standing, are strongly encouraged to effect steady and measurable progress with respect to the employment and advancement of individuals with disabilities.
>
> In addition to the absence of reliable availability data for individuals with disabilities, any statistical analysis is complicated by the fact that disabilities are individual in nature, making gross statistical comparisons of limited value. Notwithstanding these limitations, an agency's analysis of the above information can help facilitate an assessment concerning the extent to which individuals with disabilities, especially those with targeted disabilities, are provided equal employment opportunities. Statistical information may be a useful starting point for a more thorough examination of the agency's physical facilities, electronic and information processes, personnel policies, selection and promotion procedures, evaluation procedures, rules of conduct and training systems to ensure full accessibility for individuals with disabilities.

Id. The collection and maintenance of data for the self-analysis also poses special problems because of the ADA prohibitions on the collection and distribution of medical information. Agencies are required to adopt procedures that ensure the information for the self-analysis is collected and managed consistent with ADA requirements regarding confidentiality. Information on individuals with disabilities may be collected in the following ways:

> Agencies may use information obtained from Standard Form 256, the "Self-Identification of Handicap" form (SF 256) issued by the Office of Personnel Management, or other information that individuals choose to disclose about the existence of disabilities. *See* 29 C.F.R. § 1614.601(f).
>
> Agencies tracking applications from individuals with disabilities, or considering the use of excepted appointing authorities or other special programs, may invite applicants to indicate if they have the types of disabilities that are covered by the program at issue.
>
> Whenever an agency invites an applicant or employee to provide information about his/her disability, the agency must clearly notify such individual that: (a) response to the invitation is voluntary and refusal to provide the information will not subject the individual to any adverse treatment; (b) the information will be kept confidential and used only for affirmative action purposes; and (c) individuals may self-identify at any time during their employment and failure to complete SF 256 or to respond to pre-offer invitations will not excuse the agency from Rehabilitation Act requirements.

Id. To ensure confidentiality, medical and disability-related information must be collected and maintained on separate forms, kept in separate files and treated as confidential medical records.

The information collected may be put to limited, authorized uses:

> For affirmative action purposes alone, medical and disability-related

information may be disclosed to managers and others involved in a selection process, as well as to those responsible for affirmative action, where the information indicates that an applicant may be included under excepted appointing authorities or eligible to receive other affirmative action benefits. Moreover, disability-related information may be used to manage, evaluate, and report on EEO and affirmative action programs; data from SF 256 may, for example, be provided to those who will generate the statistics necessary for the workforce analyses required by this Directive.

All persons to whom information is disclosed for Rehabilitation Act program purposes must be informed about the restrictions placed on use of the information and instructed not to disclose it further than necessary to satisfy those purposes.

Id. Subpart B also requires that agencies take steps to identify any potential workplace barriers. In identifying those barriers, the Commission suggests that agencies consider the following:

Are the agency's recruitment efforts resulting in sufficient numbers of applicants with disabilities, especially targeted disabilities?

Are there opportunities to re-survey the agency's workforce at least every other year to maintain accurate and updated statistics on employees with disabilities?

Is the physical structure and layout of the agency facility in compliance with applicable accessibility standards?

Even if the agency is in compliance with accessibility standards, are there other physical barriers that remain?

Is there evidence in the workplace of actions or practices reflecting myths, fears and stereotyping regarding individuals with disabilities?

In a workforce where employees with disabilities are virtually absent, to what extent are employment opportunities restricted to internal applicants? Could hiring be expanded to include external candidates?

Has the agency adequately trained its supervisors, managers and executives on the requirements of the Rehabilitation Act, including the duty to provide reasonable accommodations to otherwise qualified individuals with disabilities?

Does the agency have an adequately funded and effective procedure for providing reasonable accommodations to employees with disabilities?

Are there particular decision makers or groups of decision makers whose employment decisions consistently exclude qualified individuals on the basis of disability?

Do selection criteria tend to exclude individuals with disabilities, in general, or to exclude a person with particular types of disabilities? If so, are these standards necessary to the successful performance of a particular job? Does the selection criteria at issue truly measure the knowledge, skills and abilities it purports to measure and are there alternative criteria that would serve the same purpose?

Id., subpart B, section IV. When an employment barrier is identified which is not job-related and consistent with business necessity, it must be eliminated immediately. Even if the policy or practice is job-related and consistent with business necessity, the agency must consider whether less exclusive policies or practices would serve the same purpose, including whether reasonable accommodation can be made. If the barrier is beyond the control of the agency, it must notify the EEOC immediately. Agencies are cautioned that any barriers associated with myths, fears or stereotypes must also be eliminated immediately.

Agencies also are required to have written procedures for reasonable accommodation requests. These procedures were also previously required by Executive Order 13164. These procedures:

Should address the scope of the agency's obligation to provide reasonable accommodation and the types of accommodations that must be considered. In addition, the procedures should address at least the following:

the personnel whom employees, selectees or applicants should initially contact to request a reasonable accommodation;

the personnel forms, if any, that an individual may be asked to complete in connection with a request for an accommodation;

the circumstances in which supervisors or others should initiate inquiries about the need for accommodation;

the personnel and/or offices that must approve an accommodation request;

the amount of time decision makers have to answer requests for accommodation;

an explanation of when decision makers may request documentation of the existence of a disability or the need for an accommodation;

the resources, including technical assistance, available to decision makers to gain information about possible accommodations for particular disabilities;

the ways in which accommodations can be funded or effected;

the documentation, if any, that must be maintained concerning the consideration and disposition of requests for accommodation; and

the process, if any, that individuals may follow to appeal denials of requests for accommodation or specific accommodations.

MD-715, subpart B, section V. The procedures also should ensure that requests for accommodation are processed expeditiously by knowledgeable personnel.

Unlike the procedures that apply to Title VII, Subpart B also requires, with respect to the Rehabilitation Act, that an agency establish goals. Section VI of Subpart B provides:

The steps described above—conducting work force analyses, reviewing agency policies, practices and facilities, and fulfilling obligations to people with disabilities under the Rehabilitation Act—should enable an agency to make substantial progress in promoting the employment of qualified individuals with disabilities. However, such efforts may well be insufficient to provide the adequate employment opportunities that are required by the Rehabilitation Act for individuals with disabilities. Indeed, Congress anticipated that the federal government, as a model employer of individuals with disabilities, would take additional steps to include individuals with disabilities at all levels of the federal workforce.

This Directive requires agencies with 1,000 employees or more to maintain a special recruitment program for individuals with targeted disabilities and to establish specific goals for the employment and advancement of such individuals. For these purposes, targeted disabilities may be considered as a group. Agency goals should be set and accomplished in such a manner as will effect measurable progress from the preceding fiscal year.

To accomplish established goals, agencies should, as appropriate: 1) engage in outreach and targeted recruitment; 2) take advantage of excepted appointing authorities; 3) create training and development plans for individuals with disabilities; and 4) take disability into account in selection decisions where an individual with a disability is otherwise qualified with or without a reasonable accommodation. To achieve maximum impact through their Rehabilitation Act program, agencies are required, under this Directive, to give special attention to those with targeted disabilities in each of the activities discussed herein.

Subpart C of MD-715 discusses EEOC oversight and technical assistance. For the most part, the oversight consists of setting forth the specific requirements for annual reports to the EEOC of the data collected by agencies under Subparts A and B. Agency reports must be submitted annually to the EEOC and, at a minimum, must include:

The name and location of the agency or reporting component;

The number of permanent and temporary employees employed;

The name of the head of the agency or reporting component;

The name, title, grade and qualifications of the principal EEO official(s) responsible for overseeing the program and preparing the report;

Copies of relevant EEO policy statements issued or reinforced during the previous fiscal year;

A narrative description of the agency's mission, mission-related functions, and a copy of the agency's organizational chart;

A description of how the agency's Title VII and Rehabilitation Act programs measure up against the essential elements of a model program described in this Directive;

A description of activities undertaken during the preceding year in connection with the self-assessment and barrier identification and elimination under Parts A and B of this Directive;

A description of action items and plans to be implemented or accomplished by the agency during the upcoming year in connection with carrying out its responsibilities under this Directive;

A description of action items and plans to provide maximum opportunity for employees to advance to their highest level of potential under Parts A and B of this Directive;

Data required in connection with Form 462 reporting; and

Other information, in such format as EEOC may prescribe, required in the instructions supplementing this Directive.

Id., subpart C, section I. Agency reports must be submitted on an annual basis and "also include a plan that sets forth steps that [the agency] will take in the future to correct deficiencies or further improve efforts undertaken pursuant" to MD-715. Upon submission:

Reports filed by agencies pursuant [to] this Directive will be evaluated for clarity and content by EEOC. EEOC will approve or disapprove specific plans as appropriate. In addition, EEOC will periodically conduct evaluations and program reviews to more closely assess whether the program elements of this Directive are being met and will be available on an ongoing basis as issues arise for agencies to consult with in facilitating program improvements.

> There are many consequences associated with an agency's failure to fully implement effective EEO programs, including the out-of pocket costs that will be borne by the agency in connection with workplace disputes, especially after the passage of the No Fear Act, and the very real costs associated with decreased morale and productivity resulting from the ineffective and inefficient use of human capital resources. Moreover, where annual reports or information otherwise obtained by EEOC suggest that an agency is giving insufficient attention to its obligations under this Directive, EEOC will inform the President and appropriate Congressional committees.

Id.

In September 2008, the Commission supplemented MD-715 with regard to the agencies obligations under the Rehabilitation Act with Questions and Answers: Promoting Employment of Individuals with Disabilities in the Federal Workforce, which is available on the EEOC's website at www.eeoc.gov.

III. PROCESSING EEO COMPLAINTS—PART 1614 AND MD-110

On its face, the statutory process is not complex. However, through regulations, a process has been designed which has proved the undoing of many a complainant, whether or not represented by legal counsel. The process also has proved the undoing of many an agency. A report released by OFO in September 2014 found that for Fiscal Year 2012, OFO reversed more than 44% of all agency procedural dismissals of EEO complaints. *See Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds* (September 15, 2014).

The process, originally embodied in 29 CFR Part 1613, was replaced by 29 CFR Part 1614 in 1992. Part 1614 was substantially revised in 1999. In addition, in November 1999, the Commission published a revised version of EEOC Management Directive 110 (MD-110) that supplements the new regulations with detailed guidance on their interpretation and application. Part 1614, as noted above, was last amended effective September 24, 2012. 77 Fed. Reg. 43498–43506 (July 25, 2012). MD-110 was revised on August 5, 2015. Both the current regulations and MD-110 are available on the Commission's website at www.eeoc.gov.

It is not clear that the new process is actually less complex. The confusion is compounded by the fact that both agencies and complainants make errors in the processing of discrimination complaints. For those reasons, it is particularly important that the potential complainant and his or her representative pay close attention to the procedural regulations of both the involved agency and the EEOC. There are few things more unpleasant than telling the potential complainant that he or she has a great case on the merits but will be unsuccessful in obtaining relief because of procedural mistakes. On the other side of the coin, agencies often expend large amounts of time, energy, and resources endeavoring to correct procedural errors in cases with little, or no, merit. If the following sections on EEOC structure and on agency and EEOC procedure seem overly tedious it is because of the large number of complaints that are dismissed or remanded on procedural grounds.

Consistent with its earlier case law, all the amendments are effective as of September 24, 2012 and apply to all cases at any stage of the administrative process. *See Nicoloudakis v. Postmaster General*, 05981139 (2001) (applying 1999 reconsideration standards to a request filed before the effective date of the amendments); *Davis v. Secretary of Veterans Affairs*, 01986601 (1999). *See also Powers v. Postmaster General*, 01994964 (1999); *McNeil v. Postmaster General*, 04990007 (1999).

There are three distinct segments to a discrimination complaint in the federal sector. In the first segment of the federal sector process, discrimination complaints are processed by the employing agency. This part of the process may not be avoided in complaints alleging discrimination under Title VII or the Rehabilitation Act. The administrative processing of a complaint is not required under the ADEA or the EPA, but age discrimination complaints and gender-based wage discrimination complaints may be processed administratively at the option of the complainant. The general rule is that the complainant must bring the complaint to the attention of the agency by contacting an EEO official within 45 days of the occurrence of the incident he or she believes to be discriminatory. Under Part 1613, a complainant was required to initiate precomplaint counseling within 30 days of the incident. There are some narrow circumstances under which the time period for initiating precomplaint counseling can be extended. See Chapter 2. None of these circumstances, however, relieve a complainant from exhausting the agency's administrative process.

In the second segment of the federal sector process, a complainant who has not received relief at the agency level, or who is dissatisfied with that relief, has the option of pursuing the matter further with the EEOC at the administrative level or going directly to U.S. district court. In the final segment of the federal sector process, the complainant has the option of pursuing the matter administratively with the EEOC and, if dissatisfied with the results, then bringing a complaint in U.S. district court. Each of the options and the attendant procedures are outlined below.

A. COMPLAINT COVERAGE

Section 1614.103 consolidates and clarifies several sections of the previous regulations at 29 CFR Part 1613 relating to the coverage of complaints under the EEO administrative process:

> (a) Individual and class complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin), the ADEA (discrimination on the basis of age when the aggrieved individual is at least 40 years of age), the Rehabilitation Act (discrimination on the basis of handicap) or the Equal Pay Act (sex-based wage discrimination) shall be processed in accordance with this part. Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part.
>
> (b) This part applies to:
>
> (1) Military departments as defined in 5 USC 102;
>
> (2) Executive agencies as defined in 5 USC 105;
>
> (3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority; and
>
> (4) All units of the judicial branches of the Federal Government having positions in the competitive service, except for complaints under the Rehabilitation Act.
>
> (5) The National Oceanic and Atmospheric Administration Commissioned Corps;
>
> (6) The Government Printing Office; and
>
> (7) The Smithsonian Institution.
>
> (c) Within the covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.
>
> (d) This part does not apply to:
>
> (1) Uniformed members of the military departments referred to in paragraph (b)(1) of this section;
>
> (2) Employees of the General Accounting Office;
>
> (3) Employees of the Library of Congress;
>
> (4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or
>
> (5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 USC 213(f).

In addition to consolidating several provisions of the previous regulations, Part 1614 changed the procedure for filing complaints of discrimination under the Equal Pay Act. Under the former Part 1613, these complaints were pursued outside of the agency administrative procedures. Since all violations of the Equal Pay Act also are violations of Title VII, an employee could pursue a complaint under the Equal Pay Act and Title VII simultaneously. Part 1614 eliminated that duplication. An employee now can process one complaint of discrimination through the agency process that alleges both a violation of the Equal Pay Act and Title VII. The employee, however, cannot recover under both statutes but is entitled to the higher amount recoverable under either statute.

1. Legislative and Judicial Branches

Coverage for legislative and judicial branch employees has been in a state of flux for the past several years, as discussed earlier under the heading "Title VII of the 1964 Civil Rights Act." Over the years, legislative and judicial employees who were competitive service employees were included in the EEO complaint process for the purposes of Title VII, the Rehabilitation Act, and the ADEA. Later, the Commission changed its position on the inclusion of competitive service employees in the legislative and judicial branches for Rehabilitation Act coverage. To make matters more complicated, Congress passed legislation creating a special process for legislative and judicial employees and then repealed the process and replaced it with a new one.

When initially made applicable to the federal government, Title VII and the ADEA clearly covered competitive service employees in the legislative and judicial branches of government. The Rehabilitation Act was silent on the matter. Although the EEOC originally interpreted this silence to include competitive service employees in the legislative and judicial branches, Part 1614 omitted legislative and judicial branch employees from coverage under the Rehabilitation Act. 29 CFR 1614.103(b)(4). This was a significant departure from Part 1613, as the Commission explained in its 1992 notice of final rulemaking:

> In a change from § 1613.701(b), § 1614.103 eliminates coverage of units in the legislative and judicial branches and restricts the coverage of part 1614, for purposes of the Rehabilitation Act, to military departments as defined in 5 USC 102, executive agencies as defined in 5 USC 105, the U.S. Postal Service, the Postal Rate Commission and the Tennessee Valley Authority. This definition of EEOC's charge processing jurisdiction is based

on the plain language of section 501 of the Rehabilitation Act, which limits coverage to departments, agencies and instrumentalities in the executive branch, and brings the regulation into conformity with a recent decision of a United States Court of Appeals. In *Judd v. Billington*, 863 F.2d 103 (D.C. Cir. 1988), the court held that section 791 of the Rehabilitation Act "applies only to employees in the executive branch. *See* 29 USC 791(b)." 863 F.2d at 105. A couple of commenters urged us not to abide by this decision. The Commission, however, already acknowledged and adopted the *Judd* decision in *Faucette v. Kennickell*, Request No. 05880886 (March 1, 1989). Because the Commission already decided this issue, we are not reversing that decision by regulation.

The former Civil Service Commission had authority to issue regulations covering competitive positions in legislative and judicial branch agencies, 5 USC 7153; however, that authority passed, not to EEOC, but to the Office of Personnel Management in 5 USC 7203. EEOC has requested that the Office of Personnel Management issue a regulation under section 7203 extending regulatory coverage of the Rehabilitation Act to competitive positions in the legislative and judicial branches. The Office of Personnel Management has responded by stating that it does not believe it has authority under the Rehabilitation Act to issue such a regulation. In addition, EEOC has asked the Interagency Committee on Handicapped Employees to recommend a legislative change to section 501 of the Rehabilitation Act to provide competitive employees of legislative and judicial branch agencies with a remedy under the Rehabilitation Act.

In a section of the 1991 Civil Rights Act, entitled the Government Employees Rights Act of 1991, Congress mandated coverage of the antidiscrimination statutes for legislative employees, but enforcement was not vested in the EEOC. Currently, legislative employees are not within the jurisdiction of the EEOC. *See* 2 USC 1301 *et seq; see* also Chapter 13, "Congressional Accountability Act—Legislative Employees," Sections "Administrative and Judicial Procedures" and "Election of Remedies."

2. Overseas Employees

Section 103(c) of Part 1614 makes it clear that complaint coverage extends to federal employees overseas. In comments on the 1992 final rulemaking the Commission explained:

> The Commission has reviewed its proposed regulation in light of *Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991). The Commission believes, as did the Civil Service Commission, that the statutes prohibiting discrimination in federal employment, insofar as they are unaffected by treaty obligations, apply to federal employees overseas. The legislative history of the statutes clearly envisions coverage of overseas employees, and there is no possibility of conflict with foreign laws. This conclusion is bolstered by Congress' specific coverage of overseas employment in section 109 of the 1991 Civil Rights Act.

3. Department of Veterans Affairs

The Department of Veterans Affairs distinguished itself, in a manner of speaking, when ordered by Congress to establish an EEO complaint processing program "so as to encourage timely and fair resolutions of concerns and complaints." *See* Pub. L. 105–114, § 101(a) (Nov. 21, 1997), codified at 38 USC 516(a). The agency specifically was ordered by Congress to take a number of measures, including establishing a special complaint processing unit—the Office of Employment Discrimination Complaint Adjudication—and to hire full-time EEO counselors because of widespread abuses in its EEO complaint processing.

4. Military Employees

Section 103(d) of Part 1614 provides that uniformed members of the military departments are excluded from that coverage. *See also Johnson v. Hoffman*, 424 F. Supp. 490 (E.D. Mo. 1977), *aff'd sub nom. Johnson v. Alexander*, 572 F.2d 1219 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978). This also is consistent with previous Commission rulings on the subject.

5. General Accounting Office

The General Accounting Office Personnel Act, 31 USC § 731, established an independent personnel system for GAO. Under the Act, the GAO's Personnel Appeals Board adjudicates complaints of discrimination.

As of December 12, 2003, the Personnel Appeals Board revised its regulations. The Board's regulations, as well as its decisions, are available at www.pab.gao.gov.

B. AGENCY PROCESSING OF COMPLAINTS

Each agency is responsible for promulgating regulations for processing individual and class complaints of discrimination based on race, color, religion, sex, national origin, age, disability, genetic information and retaliation for protected EEO activity. Those regulations, however, must comply with the EEOC regulations set out at 29 CFR 1614.105 through 1614.110 and 1614.204. *See* 29 CFR 1614.104(a). Pursuant to 29 CFR 1614.104(b), the EEOC maintains oversight authority and:

> [S]hall periodically review agency resources and procedures to ensure that an agency makes reasonable efforts to resolve complaints informally, to process complaints in a timely manner, to develop adequate factual records, to issue decisions that are consistent with acceptable legal standards, to explain the reasons for its decisions, and to give complainants adequate and timely notice of their appeal rights.

Under Part 1613, agencies were required to promulgate regulations for processing Title VII complaints, 29 CFR 1613.211, age discrimination complaints, 29 CFR 1613.511–512, and complaints of disability discrimination, 29 CFR 1613.708–709. Part 1614 requires that all complaints of discrimination be processed the same, regardless of the basis of discrimination. Much of the duplication in the former regulations has been avoided by providing for unified complaint processing.

MD-110 is a lengthy explanatory document that provides substantial guidance on the interpretation and application of the Commission's regulations. In amending Part 1614 in 2012, EEOC ended a long-running debate on whether the Management Directive was binding on agencies. By adding 29 CFR 1614.102(d), the Commission made the guidance binding:

> Agency programs shall comply with this part and the Management Directives and Bulletins that the Commission issues. The Commission will review agency programs from time to time to ascertain whether they are in compliance. If an agency program is found not to be in compliance, efforts shall be undertaken to obtain compliance. If those efforts are not successful, the Chair may issue a notice to the head of any federal agency whose programs are not in compliance and publicly identify each non-compliant agency.

That amendment also paves the way for the EEOC to make further changes to the federal sector without formal rulemaking.

1. Agency EEO Directors

Each agency is required to appoint a Director of Equal Employment Opportunity, who is under the direct supervision of the agency head. *See* 29 CFR 1614.102(b)(4). The EEO director must have independent authority and, under MD-110 at 1–4 to 1–5, agencies are advised to take precautions to insulate their EEO programs from outside influences:

> To ensure that federal agencies achieve their goal of being a model workplace, all managers and employees must view/consider equal employment opportunity as an integral part of the agency's strategic mission. Commission regulations require that the EEO Director "be under the immediate supervision of the agency head." 29 C.F.R. § 1614.102(b)(4). The purpose of this requirement is to ensure that the EEO Director has the access and authority to ensure that the agency truly considers the elimination of workplace discrimination to be a fundamental aspect of the agency's mission.
>
> Where such sub-components are authorized, the EEO Director shall be under the immediate supervision of the head of the sub-component. The sub-component EEO Director may, in the alternative, report to either the EEO Director of the parent organization or to the head of the parent organization.
>
> In order to maintain and exercise the independent authority required of the position, the EEO Director cannot be placed under the supervision of the agency's Chief Human Capital Officer or other officials responsible for executing and advising on personnel actions or providing the agency with a legal defense to claims of discrimination, such as the Office of General Counsel.
>
> By placing the EEO Director under the immediate supervision of the head of the agency, the agency underscores the importance of equal employment opportunity to the mission of each federal agency and ensures that the EEO Director is able to act with the greatest degree of independence.
>
> This unfettered relationship allows the agency head to have a clear understanding of EEO factors when making organizational decisions. Placing the EEO Director under the authority of others within the agency may undermine the EEO Director's independence, especially where the person or entity to which the EEO Director reports is involved in, or would be affected by, the actions of the EEO Director in the performance of his/her implementation of the agency program set forth in 29 C.F.R. § 1614.102.

2. Avoiding Conflicts of Interest

As may be apparent from the immediately preceding section, the EEO function within an agency is intended to be neutral; it is neither on the side of the complainant nor the agency. The primary responsibility delegated from the agency head to the EEO director during the agency processing of the complaint is to see that a complete and impartial investigation is conducted.

Over the last several years, the admonition contained in the original version of MD-110 that agency heads should not permit intrusion into the EEO process by the agency defense function, has been the subject of much debate. Many agency defense counsel have argued that they must be involved in the investigative process to adequately protect the agency from unwarranted

financial liability in the event of a discrimination finding. Many counsel on the complainant's side have argued, just a vehemently, that there is no role for agency defense counsel in a neutral process unless and until there is a request for a hearing and the adversarial part of the process begins.

In its proposed revisions to MD-110, the EEOC set forth a series of 16 questions and answers to help define the proper roll of agency counsel. This section was eliminated from the final version. Instead, the Commission replaced the proposed section with a more amorphous section, at 1-5 to 1-6:

> Federal agencies have a unique role to play in ensuring equal employment opportunity. First, every agency head has a statutory obligation to eradicate unlawful employment discrimination that may occur within the agency. This anti-discrimination responsibility is what requires federal agencies to administer a fair and impartial investigative process designed to determine the validity of complaints, as well as to employ affirmative efforts to root out discrimination and ensure equal employment opportunity. The agency head designates the Director of the Office responsible for the agency's EEO programs to carry out this obligation.
>
> At the same time, the agency head has a fiduciary obligation to defend the agency against legal challenges brought against it (agency defensive function), including charges of discrimination. The agency head designates the General Counsel of the agency (or an agency representative) to carry out this obligation.
>
> In this Management Directive, the term
>
> "*Agency Representative*" refers to any or all agency employees, (for example Defense Counsel, agency counsel, or legal representative), whose job duties include defending the agency's personnel policies and/or actions. The term is not limited to attorneys employed in an agency's Office of General Counsel or Office of Legal Counsel. The term also includes attorneys in the Office of Human Capital and non-attorney employees whose job duties include defending the agency's personnel policies and/or actions, for example, labor relations specialists.
>
> Some may view the agency's investigative process as inherently biased because the agency accused of discrimination is the same agency that is charged with administering the EEO investigative process. Nevertheless, the statute requires that an agency comply with rules, regulations, orders and instructions which shall include the issuance of a "final action" on a complaint of discrimination, and Commission regulations establish a comprehensive system through which agencies must issue these final agency actions. Moreover, as the Commission's regulations make clear, and as this management directive reinforces, a federal agency head is obligated to protect both the integrity of the agency's EEO process and the legal interests of the agency.
>
> It is important to reiterate that prior to the issuance of the final agency action, the agency is responsible for the fair, impartial processing and resolution of complaints of employment discrimination. Because the agency carries this responsibility of impartially processing discrimination complaints, conflicts of interest can arise when agency representatives in offices, programs, or divisions within the agency with a legal defensive role play a part in the impartial processing. This does not mean that any involvement in the EEO process by the Office of General Counsel or Office of Human Capital automatically creates a potential conflict, but instead refers to impermissible involvement in the EEO process by those employees or units of employees designated to represent the agency in adversarial proceedings. *See Complainant v. Dep't. of Defense*, EEOC Appeal No. 0120084008 (June 6, 2014) (finding that an agency representative should not interfere with the development of the EEO investigative record by "us[ing] the power of its office to intimidate a complainant or her witnesses"); *see also Rucker v. Dep't. of the Treasury*, EEOC Appeal No. 0120082225 (Feb. 4, 2011) (stating an agency "should be careful to avoid even the appearance that it is interfering with the EEO process."

The issue of conflicts of interest is addressed more fully in Chapter 9.

3. Complaint Processing Variances

The next several sections set out in the detail the EEO process. However, the notice of final rulemaking also gave agencies the discretion to apply to EEOC for "variances" that would allow them to set up alternative programs for processing EEO complaints. The amendment at 29 CFR 1614.102(f), provides:

> Unless prohibited by law or executive order, the Commission, in its discretion and for good cause shown, may grant agencies prospective variances from the complaint processing procedures prescribed in this Part. Variances will permit agencies to conduct pilot projects of proposed changes to the complaint processing requirements of this part that may later be made permanent through regulatory change. Agencies requesting variances must identify the specific section(s) of this part from which they wish to deviate and exactly what they propose to do instead, explain the expected benefit and expected effect on the process of the proposed pilot project, indicate the proposed duration of the pilot project, and discuss the method by which they intend to evaluate the success of the pilot project. Variances will not be granted for individual cases and will usually not be granted for more than 12 months. Requests for variances should be addressed to the Director, Office of Federal Operations.

The Commission, in *Franchesca V. v. Secretary of Veterans Affairs*, 0120131173 (2016), clarified, to some degree, the requirements for a variance. The agency, in *Franchesca V.*, allowed complainants to elect how they received correspondence from the EEO office, e.g., mailed or emailed, and complainants were required to acknowledge that the date of any emailed correspondence would also serve as the date of receipt of the correspondence. The Commission, in *Franchesca V.*, held that the agency's change in procedures amounted to a variance and that the agency was obligated to first submit a request and receive approval from the Commission:

> The process the Agency describes here of allowing complainants to elect the manner in which they receive complaint-related correspondence can best be defined as a "variance" from the complaint prom sing procedures prescribed in the regulations. The Commission, in its discretion and for good cause shown, may grant agencies variances from the complaint processing procedures prescribed in the regulations, permitting them to conduct pilot projects concerning proposed changes to the complaint processing requirements that may later become permanent through regulatory change. *See* 29 C.F.R. § 1614.102.
>
> Agencies desiring to request variances from the complaint processing procedures prescribed in the regulations must: (1) address these requests to the Director of the Office of Federal Operations; (2) identify the specific section(s) of the regulations from which they wish to deviate and exactly what they propose to do instead; (3) explain the expected benefit and expected effect on the process as a result of the proposed variance; (4) indicate the proposed duration of the pilot variance; (5) and discuss the method by which they intend to evaluate the success of the pilot variance. *Id*.
>
> There is no evidence in the record to show that the Agency followed these steps to implement a pilot variance in the instant matter. As a result, we do not find that the previous decision clearly erred in finding that the Agency did not meet its threshold obligation of establishing when Complainant received the notice because it utilized an unapproved method of delivery, i.e., service by electronic mail.

4. EEO Counselors and the Precomplaint Stage

Contacting an EEO counselor is the first step in initiating what is referred to as the precomplaint or informal stage. "Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter." 29 CFR 1614.105(a). A complainant is required to contact an EEO counselor within 45 calendar days of "the matter alleged to be discriminatory or, in the case of personnel actions, within 45 days of the effective date of the action." 29 CFR 1614.105(a)(1). The agency is required to extend the 45-day period, under 29 CFR 1614.105(a)(2), if the complainant:

> [W]as not notified of the time limits and was not otherwise aware of them,…did not know and reasonably should not have known that the discriminatory matter of personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

The 45-day period for contacting a counselor is an expansion of the previous requirement of counselor contact within 30 days of the alleged discriminatory incident or action. *See* 29 CFR 1613.214 (1991). Unlike its predecessor section, 1614.105(a)(1) does not specify calendar days. However, 29 CFR 1614.604(a) provides that all references to "days" in the Commission's regulations mean "calendar days," unless otherwise stated. The term "calendar days" means exactly what it suggests; weekends and holidays are included. If the last day falls on a Saturday, Sunday, or federal holiday, the time period is extended until close of business on the next business day. *Id*. at (d).

As noted above, the precomplaint stage is often referred to as the informal stage of the EEO complaint process. One should not be deceived by the reference to this stage as informal counseling. There is nothing informal about it. Not only is an agency free to reject complaints on the basis of timeliness where the EEO counselor has not been contacted within 45 days of the incident, but the agency also may restrict the formal complaint to only those matters either actually raised or those like or related to matters raised in the informal counseling stage. *See* 29 CFR 1614.107(a)(2).

The functions of an EEO counselor were set out in detail at 29 CFR 1613.213(a):

> The agency shall require the Equal Employment Opportunity Counselor to make whatever inquiry he or she believes necessary into the matter; to seek a solution of the matter on an informal basis; to counsel the aggrieved person concerning the issues in the matter, to keep a record of the counseling activities so as to brief, periodically, the Equal Employment Opportunity Officer on those activities; and, when advised that a complaint of discrimination has been accepted from an

aggrieved person, to submit a written report to the Equal Employment Opportunity Officer, with a copy to the aggrieved person, summarizing the counselor's actions and advice both to the agency and the aggrieved person concerning the issues in the matter….

Under Part 1614, the duties of EEO counselors are now specified through Commission Management Directives. 29 CFR 1614.105(c). However, 29 CFR 1614.105(b) provides:

> (1) At the initial counseling session, Counselors must advise individuals in writing of their rights and responsibilities, including the right to request a hearing or an immediate final decision after an investigation by the agency in accordance with 1614.108(f), election rights pursuant to 1614.301 and 1614.302, the right to file a notice of intent to sue pursuant to 1614.201(a) and a lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part, the duty to mitigate damages, administrative and court time frames, and that only the claims raised in precomplaint counseling (or issues or claims like or related to issues or claims raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency. Counselors must advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency. The notice required by paragraphs (d) or (e) of this section shall include a notice of the right to file a class complaint. If the aggrieved person informs the Counselor that he or she wishes to file a class complaint, the Counselor shall explain the class complaint procedures and the responsibilities of a class agent.
>
> (2) Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

ADR is discussed below under the section "Alternative Dispute Resolutions."

EEO counselors are appointed by each agency. Most are employees of the agency, though in recent years many agencies have retained contractors to perform the counseling function. Until 1999, there were no formal requirements or training to be a counselor. As a result, there was a great deal of variation in the skill and knowledge of agency EEO counselors. Under the 1999 revisions to MD-110, new EEO counselors are required to have 32 hours of counselor training to qualify as a counselor and must have eight hours of counselor training each year. MD-110 at 2–3 to 2–4. Existing counselors need not undergo the 32 hours of training, but they are required to receive eight hours of annual training. In addition to the required training, the EEOC also encourages agencies to appoint full-time counselors, instead of using employees who perform counseling as a collateral duty.

Employees and their representatives are well advised to document their contacts with counselors in the event that the timeliness or scope of the complaint is later called into question. For example, it is a good idea to send the counselor a letter, or these days an email, after the initial contact confirming that contact and its date. In cases where the counselor does not seem to have a firm grasp of the issues presented by the complaint, it may be advisable for the employee or his representative to draft a chronology of events or statement of relevant facts for submission to the counselor. This will help ensure that the full scope of the complaint is preserved for the formal complaint stage.

Many agencies list EEO counselors on employee bulletin boards or websites. If no such listing is available or if the employee works in a branch of the agency which is too small to have its own counselor, the EEO staff director of the agency should be contacted for assignment of a counselor.

Agencies are admonished to assure that their employees cooperate with the EEO counselor. *See* 29 CFR 1614.102(b)(6). Part 1614 deletes a provision that guaranteed that EEO counselors would be "free from restraint, interference, coercion, discrimination or reprisal in connection with the performance of his duties…." *See* 29 CFR 1613.213(d) (1991). Instead, Part 1614 contains a ban on retaliation for participating in EEO activities. 29 CFR 1614.101(b).

Although a complainant is entitled to representation during the precomplaint stage of the complaint process, attorney fees generally may not be recovered for work done during this stage. Usually, the complainant only is entitled to recover attorney fees for a minimal amount of time prior to filing the formal complaint to permit the attorney to assess the case and make a determination on whether or not to undertake representation. Under the 1999 amendments to Part 1614, the Commission has carved a small exception to the general rule. In cases where an EEOC administrative judge has issued a finding of discrimination that is upheld on appeal to the Commission, attorney fees for work performed during the counseling process are recoverable. *See* 29 CFR 1614.501(e)(iv). Presumably, the provision is intended as a disincentive for agencies to appeal the rulings of administrative judges.

Counselors are required to attempt a resolution of the complaint between the parties. In reality, few complaints are resolved in precomplaint counseling. In many cases, settlement is not even discussed during this phase of the complaint.

5. Alternative Dispute Resolutions

In an effort to reduce the number of formal complaints and encourage early resolution of complaints, the Commission's regulations require that all agencies either set up an alternative dispute resolution program or have ready access to one. *See* 29 CFR 1614.102(b)(2). Chapter 3 of MD-110 provides guidance on ADR programs. Alternative dispute resolution (ADR) may be offered by the agency in lieu of precomplaint EEO counseling.

Consistent with its increased emphasis on ADR, the Commission has recently expanded its website to include web pages on federal sector ADR. The website includes information about ADR and Management Directive 715, and the EEOC's own ADR program—RESOLVE.

In the first instance, it is the agency that has discretion as to whether it will offer ADR in any given case. In other words, the agency is required to have an ADR program but it is not required to offer ADR in every case. An agency may not, however, preclude entire bases of discrimination from its ADR program. If ADR is offered, the agency is required to advise the complainant of the right to elect ADR or traditional counseling pursuant to 29 CFR 1614.105(b)(2):

> Counselors shall advise aggrieved persons that, where the agency agrees to offer ADR in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

In cases where an agency does offer ADR, the complainant's decision regarding whether to participate is entirely voluntary. EEO counselors must advise complainants of their right to elect participation in either ADR or traditional counseling. Complainants may always elect to undergo traditional EEO counseling instead of ADR if they so choose. A complainant who chooses ADR, however, waives his or her right to undergo traditional precomplaint counseling.

The core principles of ADR are that the process be voluntary, neutral, confidential, and enforceable. MD-110 at 3–2 to 3–4 provides:

> Any program developed and implemented by an agency must be fair to the participants, both in perception and reality. Fairness should be manifested throughout the EEO ADR proceeding by providing, at a minimum: as much information about the EEO ADR proceeding to the parties as soon as possible; the right to be represented throughout the EEO ADR proceeding; and an opportunity to obtain legal or technical assistance during the proceeding to any party who is not represented. Fairness also requires the following elements:
>
> 1. Voluntariness
>
> Parties must knowingly and voluntarily enter into an EEO ADR proceeding. An EEO ADR resolution can never be viewed as fair if it is involuntary. Nor can a dispute be actually and permanently resolved if the resolution is involuntary. Unless the parties have reached a resolution willingly and voluntarily, the dissatisfaction of one party could lead to conflicts within the workplace or even to charges that the resolution was coerced or reached under duress.
>
> In addition, aggrieved parties should be assured that they are free to end the EEO ADR process at any time, and that they retain the right to proceed with the administrative EEO process if they prefer that process to EEO ADR and resolution has not been reached. Both parties should be reassured that no one can force a resolution on them, not agency management, EEO officials, or the third-party neutral. Finally, parties are more likely to approach a resolution voluntarily when they know of their right to representation at any time.
>
> Note: When the agency determines it to be appropriate to offer EEO ADR to an individual, there is no conflict with voluntariness when the agency requires the responsible management official to participate since s/he is not a party and is not the agency official with settlement authority. When the agency offers the individual EEO ADR and the individual agrees to participate, the parties have voluntarily entered into the EEO ADR process.
>
> 2. Neutrality
>
> To be effective, an EEO ADR proceeding must be impartial and independent of any control by either party, in both perception and reality. Using a neutral third party as a facilitator or mediator ensures this impartiality. In this Management Directive a "*neutral*" refers to a third party who has no stake in the outcome of the proceeding whose function is to assist the parties in resolving the matters at hand.
>
> A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve. For example, s/he might be an employee of another federal agency who knows none of the parties and whose type of work differs from that of the parties. Or s/he may be an employee within the same agency as long as s/he can remain neutral regarding the outcome of the proceeding. The agency must ensure the independence and objectivity of the neutral at all times.

3. Confidentiality

Confidentiality is essential to the success of all EEO ADR proceedings. Congress recognized this fact by enhancing the confidentiality provisions contained in the Administrative Dispute Resolution Act of 1996 (ADRA), specifically exempting qualifying dispute resolution communications from disclosure under the Freedom of Information Act. *See* 5 U.S.C. § 574. Parties who know that their EEO ADR statements and information are kept confidential will feel free to be frank and forthcoming during the proceeding, without fear that such information may later be used against them. To maintain that degree of confidentiality, there must be explicit limits placed on the dissemination of EEO ADR information. For implementation and reporting purposes, the details of a resolution can be disseminated to specific offices only with a need to have that information. Neither the ADRA nor the Commission's core principles require the parties to agree that a settlement must be confidential.

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

4. Enforceability

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

ADR must be completed within 90 days of the initial request for counseling. *See* 29 CFR 1614.105(f). If ADR is not successful or is not completed within 90 days, the complainant must be advised on his right to file a formal complaint of discrimination. *See Id.* If ADR is unsuccessful, the counselor's report must contain a summary of the initial counseling session, the issues and the basis(es) of the claim, and a notation that the complainant underwent ADR but it was unsuccessful. The contents of the settlement discussions are confidential and may not be disclosed.

6. Notice of Final Interview

At the conclusion of the precomplaint counseling or ADR process, the counselor is required to furnish the employee with a notice of final interview. The notice of final interview advises the complainant of the conclusion of precomplaint counseling and of his or her right to file a formal complaint of discrimination with the agency.

The current regulations provide that if the complainant undergoes traditional EEO counseling, the notice must be issued within 30 days of counselor contact, unless the complainant agrees to an extension. Pursuant to, 29 CFR 1614.105(d),

> Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. If the matter has not been resolved, the aggrieved person shall be informed in writing by the Counselor, not later than the thirtieth day after contacting the Counselor, of the right to file a discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is informed immediately if the complainant retains counsel or a representative.

Previously, 29 CFR 1613.213(a) provided:

> …The Equal Employment Opportunity Counselor shall, insofar as is practicable, conduct the final interview with the aggrieved person not later than 21 calendar days after the date on which the matter was called to the counselor's attention by the aggrieved person. If, within 21 days, the matter has not been resolved to the satisfaction of the aggrieved person, that person shall be immediately informed in writing, at the time of the final interview, of his or her right to file a complaint of discrimination at any time up to 15 calendar days after receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure that the agency is immediately informed if the complainant retains counsel, or any other representative….

The 21-day period set out in the former regulation was advisory "insofar as is practicable" for precomplaint counseling to be concluded. *Id.* Counseling was seldom concluded within the 21-day period and often dragged on for months. To resolve this problem, Part 1614 sets mandatory time limits on counseling. The complainant, however, may agree to extend the counseling period for up to 60 days, as set forth in 29 CFR 1614.105(e):

> Prior to the end of the 30-day period, the aggrieved person may agree in writing with the agency to postpone the final interview and extend the counseling period for an additional period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed extension, the notice described in paragraph (d) of this section shall be issued.

There is no requirement that a complainant agree to any extension of time, nor is it required that the complainant agree to extend the time period for counseling for a full 60 days. The complainant can agree to extend the counseling period for less than 60 days.

The 1999 regulations provide for a 90-day precomplaint period where the parties agree to participate in the agency's ADR program. If the matter is not resolved through ADR within 90 days, the agency must issue the notice of final interview pursuant to 29 CFR 1614.105(f):

> Where the aggrieved person chooses to participate in an alternative dispute resolution procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be 90 days. If the claim has not been resolved before the 90th day, the notice described in paragraph (d) of this section shall be issued.

Note that there is no provision for an extension of time if ADR is utilized. The notice must issue after 90 days.

An employee's 15-day time frame for filing a formal complaint does not begin until actual receipt of the notice of final interview. However, a complainant is not prevented from filing a formal complaint if the applicable time period has expired and the agency fails to issue a notice of final interview.

7. Formal Complaints

Within 15 days of receipt of the notice of final interview, the employee or his or her representative must submit a written formal complaint to the agency. *See* 29 CFR 1614.106(b). The notice of final interview should indicate where and to whom the complaint should be submitted. The complaint must be signed by the employee or his or her representative. If the representative signs the complaint, it is advisable to submit a designation of representative letter signed by the employee to assure the agency that the representative is acting with proper authority. Complaints not accompanied by such a letter will not be rejected, but processing may be delayed until an appropriate designation letter is submitted.

Some agencies use a form for submission of the complaint. These may be obtained from the agency and, in most cases, are provided with the notice of final interview. There is no requirement that such a form be used. The form is not designed for lengthy complaints and, if used, should be used only as a cover sheet to the actual complaint. The space for stating the basis of the complaint is extremely small. In most cases, the complainant will want to submit a written statement detailing the incident(s) complained of, the basis for the complaint, and any evidence which supports the complaint. If documentary evidence is available, this should be attached to the statement in the form of exhibits. (If a statement has been prepared for the EEO counselor, this may suffice.) This is no time to engage in guessing games with the agency. In short, the complaint should be as complete as possible in order to expedite its processing and focus the agency's attention on the issues presented by the complaint.

The complaint must be filed with the agency that has allegedly discriminated against the complainant. *See* 29 CFR 1614.106(a). If a formal complaint form is not used, the written complaint should contain, at a minimum: (1) the employee's name and position; (2) the name of the employing agency and location of the agency; (3) a brief description of the personnel action or incident which forms the basis of the complaint; (4) the basis or bases of discrimination, *e.g.*, race, color, sex, etc.; (5) the date the personnel action or incident occurred; (6) the date the employee contacted the EEO counselor; (7) the date the notice of final interview was received; and (8) the telephone number and address of the complainant and his or her representative. *See* 29 CFR 1614.106(c).

The agency must acknowledge receipt of the complaint and advise the complainant of the date on which the complaint was filed. 29 CFR 1614.106(e). The agency must further advise the complainant of his or her right to appeal any final decision or dismissal of the complaint. *See id.* Finally, the agency must advise the complainant that the investigative stage of the process must be completed within 180 days of the filing of the complaint, unless the parties mutually agree to extend that date. *See id.*

As part of the 1999 amendments to Part 1614, a complainant may now amend a formal complaint to include issues that are like or related to the initial complaint. 29 CFR 1614.106(d) provides:

> A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint. After requesting a hearing, a

complainant may file a motion with the administrative judge to amend a complaint to include issues or claims like or related to those raised in the complaint.

When a complaint is amended to include a like or related claim, no additional counseling is required. A claim is like or related to the initial complaint if it adds to or clarifies it, or could reasonably be expected to grow out of the initial complaint. *See Scher v. Postmaster General*, 05940702 (1995). If a new claim arises that is not like or related to the underlying matter, the new regulations provide that new claims can be consolidated by the agency for processing pursuant to 29 CFR 1614.606. There is little practical difference between amending a complaint to include additional claims and consolidating complaints. The main difference is that if the complaints are consolidated under 1614.606, the complainant will be required to go through the precomplaint process for each complaint.

After submission of the complaint, the agency will decide whether to accept or dismiss it. From a purely technical perspective, agencies do not accept complaints. The Commission's regulations set forth at 29 CFR 1614.107(a) the bases on which an agency "shall" dismiss a complaint, but those same regulations do not provide for acceptance of a complaint. In practice, however, agencies do "accept" complaints. Note that an agency also has the option of accepting some portions of the complaint and dismissing others. If the entire complaint is dismissed, the complainant may pursue appellate remedies with the EEOC, discussed in Chapter 8. Under the 1992 provisions of Part 1614, the complainant was required to appeal partial dismissals of a complaint directly to EEOC. Under the 1999 amendments to Part 1614, a partial dismissal may not be appealed until there has been a final action by the agency. 29 CFR 1614.107(b). The bases for dismissing complaints are discussed in Chapter 3 under the section "Bases for Dismissal of Complaints."

Under Part 1613, after the filing of the formal complaint, there were no time frames for actions on complaints filed with agencies. Section 1613.220(a) did admonish both the agency and the complainant to proceed without "undue delay." The regulation was wholly without effect since the EEOC has always been plagued with significant problems in processing its own caseload in a timely manner.

After the complaint has been pending 180 days with the agency, the complainant may, at his or her option, request a hearing before an administrative judge employed by the EEOC. *See* 29 CFR 1614.108(g). The complainant may request a hearing whether or not the agency has completed its investigation of the complaint. In the alternative, the complainant may file a complaint in U.S. district court after the complaint has been pending before the agency for more than 180 days. *See* 42 USC 2000e-16(c). At that point, the administrative process will be deemed exhausted.

8. Dismissal of Complaints

Prior to assigning the complaint to an investigator, the agency must determine whether any matters presented by the complaint are subject to dismissal. The agency has the option of accepting the complaint in its entirety, dismissing the complaint in its entirety, or accepting some matters raised by the complaint and dismissing others.

The bases for acceptance or dismissal of the matters raised by the complaint are not within the agency's discretion. Instead, the Commission has set forth nine bases for dismissal at 29 CFR 1614.107(a):

> (a) Prior to a request for a hearing in a case, the agency shall dismiss an entire complaint:
>
> (1) That fails to state a claim under 1614.103 or 1614.106(a) or states the same claim that is pending before or has been decided by the agency or Commission;
>
> (2) That fails to comply with the applicable time limits contained in 1614.105, 1614.106 and 1614.204(c), unless the agency extends the time limits in accordance with 1614.604(c), or that raises a matter that has not been brought to the attention of a Counselor and is not like or related to a matter that has been brought to the attention of a Counselor;
>
> (3) That is the basis of a pending civil action in a United States District Court in which the complainant is a party provided that at least 180 days have passed since the filing of the administrative complaint, or that was the basis of a civil action decided by a United States District Court in which the complainant was a party;
>
> (4) Where the complainant has raised the matter in a negotiated grievance procedure that permits allegations of discrimination or in an appeal to the Merit Systems Protection Board and 1614.301 or 1614.302 indicates that the complainant has elected to pursue the non-EEO process;
>
> (5) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory, unless the complaint alleges that the proposal or preliminary step is retaliatory;
>
> (6) Where the complainant cannot be located, provided that reasonable efforts have been made to locate the complainant and the complainant has not responded within 15 days to a notice of proposed dismissal sent to his or her last known address;
>
> (7) Where the agency has provided the complainant with a written request to provide relevant information or otherwise proceed with the complaint, and the complainant has failed to respond to the request within 15 days of its receipt or the complainant's response does not address the agency's request, provided that the request included a notice of the proposed dismissal. Instead of dismissing for failure to cooperate, the complaint may be adjudicated if sufficient information for that purpose is available;
>
> (8) That alleges dissatisfaction with the processing of a previously filed complaint; or
>
> (9) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination. A clear pattern of misuse of the EEO process requires:
>
> (i) Evidence of multiple complaint filings; and
>
> (ii) Allegations that are similar or identical, lack specificity or involve matters previously resolved; or
>
> (iii) Evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system.

The first seven bases for dismissal of complaints were contained in the 1992 version of Part 1614. The specific bases for dismissal are discussed, in full, in Chapter 3 under the section "Bases for Dismissal of Complaints." The 1999 amendments to Part 1614 added two new bases for dismissal that are found at 29 CFR 1614.107(a)(8) and (9).

Under 1614.107(a)(8), agencies may dismiss complaints that allege dissatisfaction with the processing of an EEO complaint. These complaints are commonly referred to as spin-off complaints. Under the current regulations, the agency EEO office must advise complainants to address their concerns to the proper individual. The Commission no longer recognizes "spin-off complaints" as an EEO complaint for purposes of processing under Part 1614. *See* MD-110, at 5–25 to 27.

The other dismissal provision relates to abuse of process. *See* 29 CFR 1614.107(a)(9). Such a dismissal is proper only in cases where there has been a clear misuse or abuse of the process. *See* MD-110, at 5–17 to 5–20. It is envisioned that the abuse of process provision will be rarely used. The provision essentially codifies case law that the Commission developed over the years to deal with abuse of process.

In December 2009, the Commission proposed to amend section 107(a)(5) to more accurately reflect the state of the law after *Burlington Northern & Sante Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006). The revised version, as adopted in 2012, includes an exception for complaints alleging retaliation. The change accounts for the Court's holding in that case that broadened the scope of injury under the antiretaliation clause. *Burlington Northern* is discussed in Chapter 17.

If a complaint is dismissed in its entirety, the dismissal constitutes a final agency decision. The complainant may appeal that decision directly to the EEOC Office of Federal Operations. The appeal procedures are discussed later in this chapter, subheading "*Appeals to the EEOC*," and in detail in Chapter 8.

9. Partial Dismissals

What to do about the partial dismissal of complaints long plagued the Commission.

In the 1999 amendments to Part 1614, the Commission has come up with a Solomon-like solution that does not force complainants to simultaneously pursue litigation and an appeal, yet ensures complainants of some outside review of agency decisions to partially dismiss a complaint prior to the hearing. At 29 CFR 1614.107(b), the Commission sets forth its solution:

> Where the agency believes that some but not all of the claims in a complaint should be dismissed for the reasons contained in paragraphs (a)(1) through (9) of this section, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated, and shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.

In other words, in cases where a hearing is requested, the administrative judge can reinstate the dismissed claims, oversee a supplemental investigation of the issues or allow the parties to conduct their own respective discovery and issue a decision on the dismissed claims. Obviously, an agency is not precluded from arguing on appeal that the claims were properly dismissed in the first instance.

The Commission also has sought to remedy this so-called fragmentation of complaints by giving further guidance on the definition of claims and how to

distinguish claims for relief from the evidence in support of those claims. *See* MD-110 at 5–5 to 5–10.

10. Investigations

Once the formal complaint has been accepted, the agency is obligated to conduct an investigation into the complaint. *See* 29 CFR 1614.108.

In its letter accepting the complaint, the agency will define the claims subject to investigation. If the employee believes the agency has construed the claims to be investigated in such a way that portions of the complaint are eliminated, this is the time to raise the objection. In many instances, this can be done by sending a letter to the agency EEO director stating that the claims have been defined improperly and how the claims should be redefined to include the full scope of the complaint. In the event the agency chooses not to redefine the claims, sending such a letter will insure that the dispute over definition of the claims is properly preserved for either the administrative judge or the EEOC on appeal.

The investigator is provided with the complaint, the EEO counselor's report and any other documentation included in the complaint file. Title 29 CFR 1613.216(a) previously defined the scope of the investigation:

> The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for the appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file.

Part 1614 gives agencies great latitude in conducting EEO investigations, subject to additional instructions through EEOC management directives. Title 29 CFR 1614.108 provides:

> (a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.
>
> (b) In accordance with instructions contained in Commission Management Directives, the agency shall develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint. An appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.
>
> (c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:
>
> (1) The complainant, the agency, and any employee of a federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.
>
> (2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.
>
> (3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:
>
> (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
>
> (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
>
> (iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
>
> (iv) Issue a decision fully or partially in favor of the opposing party; or
>
> (v) Take such other actions as it deems appropriate.

To date, this greater regulatory latitude has had little effect on the conduct of agency investigations. Generally, the first step in the investigative process has been to secure an affidavit from the complainant. As a rule in the past, the investigator met with the complainant and conducted an interview or series of interviews based on the complexity of the complaint. From the interview, the investigator prepared an affidavit for the complainant's signature. This still remains the preferred method of many agencies.

Agencies frequently use investigators who are located at installations geographically separate from the complainant and most witnesses. Sometimes these investigators are agency employees and other times they are private contractors. In these cases, it is not unusual for the investigator to submit written questions to the complainant and relevant witnesses and request that they prepare their own affidavits in response to the questions.

Another frequently employed method of investigation is the so-called factfinding conference. These conferences resemble informal hearings where the investigator presides and witness testimony is taken under oath with a verbatim transcript prepared. In many cases, the investigator will conduct all witness questioning. The investigator may entertain specific questions suggested by the complainant and the agency but, in most instances, will not permit traditional cross-examination of witnesses by the parties.

Although agencies continue to complain of the drain that EEO complaints place on their resources, most agencies have failed to take advantage of the latitude the Commission has given them in conducting investigations. The 1999 amendments to Part 1614 have attempted to address the agencies' failure to take full advantage of the discretion they are given in structuring investigations. The former Part 1613 required the agency to conduct a "thorough review of the circumstances under which the alleged discrimination occurred…." That requirement has been replaced under Part 1614 with a standard that requires only that the agency develop a "factual record…that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred." 29 CFR 1614.108(b). The new standard suggests there are cases in which only a cursory investigation will be required to reach a conclusion.

From the complainant's perspective, any investigative affidavits should be as complete as possible and great care should be taken to review the affidavit prior to signature. Some investigators feel it is their obligation to exclude information which they consider irrelevant to the complaint. This may be true, particularly of background information and incidents occurring outside of the complaint period which the employee believes are evidence of discriminatory motivation. Since the complainant's affidavit is of primary importance in the process and it is a signed statement attesting to its accuracy and completeness to the best of the complainant's knowledge, the employee or his representative should not be meek about objecting to the exclusion of such information. If the investigator refuses to include this information in the affidavit, the employee should prepare a supplemental affidavit which includes this information. The supplemental affidavit should be submitted to the investigator, accompanied by a cover letter which makes it clear that the employee attempted to include this information in the original affidavit. The cover letter also should request that the supplemental affidavit be made a part of the investigative file.

The investigator will usually interview and obtain an affidavit from the agency official(s) alleged to have engaged in discrimination. The Commission used to refer to such persons as alleged discriminating officials (ADOs). However, in October 1987, when the EEOC amended Part 1613, it dropped this term from its lexicon. "[T]he EEOC expressed the view that an individual who is named or is identified as the person responsible for the action which gave rise to a complaint is a witness whose participation in the complaint process should not be materially different from that of any other witness." MD-110, Chapter 5, Section A (1992). Many agencies now use the terms "responsible management official" or "responding management official" (RMO) to describe the officials alleged to have engaged in discrimination.

In most cases, the RMO will be readily apparent. In some cases, particularly those involving complex hiring or promotion schemes, the employee may not be aware of all agency officials who participated in the process. In this event, the employee's affidavit should make it clear that the list of RMOs provided is not necessarily all-inclusive. In addition, the employee should be prepared to provide the investigator with a list of all persons who are not RMOs but who may have knowledge relevant to the complaint, as well as a list of documents and records which may contain relevant information.

As previously noted, under Part 1614, the agency EEO investigations must be completed within 180 days of the filing of the complaint. The complainant and the agency may, by written agreement, extend this period for up to 90 additional days. *See* 29 CFR 1614.108(e). If a complaint has been amended, the agency must complete the investigation within 180 days of the amendment, or 360 days from the date of the initial complaint, whichever comes first. *See* 29 CFR 1614.108(f). It is not clear that the 90-day extension in subsection (e) applies to amended complaints. However, the Commission is unlikely to pose any objection if the agency and the complainant mutually agree to an extension of the investigation beyond 360 days in the case of an amended complaint. Pursuant to 29 CFR 1614.108(f), complainants are entitled to see the investigative file upon its completion and to be informed of the right to request a hearing: