# Recent Developments in Representing Federal Employees: EEOC's Management Directive 110

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# What is Management Directive 110?

- Management Directive 110 ("MD-110") is a guidance issued by EEOC to provide detailed procedures for the processing of complaints of discrimination filed by federal employees and applicants for federal employment under 29 CFR Part 1614 .
- Federal agencies are responsible for developing and implementing their own equal employment programs, including alternative dispute resolution programs and complaint processing procedures, consistent with the Commission's regulations and this Directive.

# Changes to MD-110

Current revisions can be categorized into three categories:

- Implementation of Revised Regulations
- Conflict of Interest
- General Updates & Clarifications

# Implementation of Revised Regulations

- Federal EEO programs must comply with part 1614 and Management Directives and Bulletins
- Allow for pilot programs
- Clarify alleged retaliatory proposed actions should not be dismissed
- Agency must provide 180-day notice to CP re investigation
- AJ decision on merits of class complaints is final decision
- Digital case file submissions to EEOC

# Dealing with Non-Compliance

A three-step process to address issues of non-compliance with EEOC rules, regulations, orders, Management Directives, Bulletins, or any other instructions issued by the Commission is set forth:

- Notice to the agency of non-compliance
- Written notice to agency head
- Public notification of non-compliance

# Pilot Projects

- EEOC may grant agencies variances to conduct pilot projects for processing complaints in other than prescribed ways
- Pilot can be run for 24 months with 12-month extension
- Pilot Process:
  - Annual request for pilot authority period (during 2nd quarter of the fiscal year)
  - Office of Federal Operations review and recommendation period
  - Commission review and vote period (3rd quarter)
  - Agencies notified of Commission determination
  - Pilot must begin the first quarter of the next fiscal year

# Proposed Actions and Retaliation

Dismissal of alleged discrimination by proposed personnel actions or preliminary steps before taking personnel actions unless Complainant alleges that proposed action or preliminary step was taken in retaliation, then complaint should not be dismissed automatically.

Key is whether the alleged retaliatory proposal or preliminary step would dissuade a reasonable employee in CP's circumstances from engaging in protected EEO activity.

# 180-Day Notice of Rights

Where the investigation is not complete in 180 days, the agency shall issue written notice to complainant informing the complainant investigation is not yet complete, the estimated date of completion and complainant's right to file a civil action or request a hearing.

# AJ decision on merits of class complaints

- An Administrative Judge's decision on the merits of a class complaint is now a final decision which the agency can fully implement or not fully implement and appeal in its final action.
- New provision for expedited processing of appeals of decisions to accept or dismiss class complaints.

# Digital Case File Submissions

- Agencies must digitally submit appeals, complaint files and other filings in an acceptable digital format unless they have good cause.
- Complainants are encouraged to submit digital appellate records.

# Conflicts of Interest

Potential conflicts of interest in processing federal sector EEO complaints are addressed. Specifically:

- EEO and HR conflicts
- Complaint processing of matters involving EEO officials or high-level agency officials
- Conflicts between agency's defensive and EEO functions

# General Updates and Clarifications

- A federal sector EEO history piece (Preamble)
- Case law updates throughout document (specific reference to the Macy decision and processing claims of sex-stereotyping)
- Inclusion of GINA
- Consolidation of most EEO ADR (Chapter 3)
- A consolidated stand-alone remedies chapter (Chapter 11)
- Four new Appendices – Conflict Agreement (App. A), Incomplete Investigation Notice (App. K), Complaint File Format (App. L), and Documentation for Compliance Reference (App. Q)

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**Panel Presentation**

# RECENT DEVELOPMENTS IN REPRESENTING FEDERAL EMPLOYEES:

# EEOC'S MANAGEMENT DIRECTIVE 110

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## Introduction

In August 2015, the EEOC revised its Management Directive 110. The federal-sector EEO complaint process is governed by the federal regulations at 29 C.F.R. Part 1614. The MD-110 provides guidance on the regulations. The MD-110 provides specifics on the processes and procedures for federal sector EEO complaints. Practitioners must be familiar with the MD-110 and how the recent changes have affected the federal-sector complaint process.

This paper covers some of the major changes to the MD-110. Not all of the changes are covered in this paper. The EEOC provided a complete reference guide to the changes to the MD-110, which is found at https://www.eeoc.gov/federal/directives/md-110_reference_guide.cfm. The last major change to the MD 110 was in 1999. There were some minor revisions in 2003.

Also, please note that for Chapter 8, nearly every provision in Sections X and XI (formerly IX and X) were rewritten. These focus on recharacterizing decisions in class complaints as final decisions instead of recommended decisions.

For Chapter 11, the entire chapter was expanded from covering only attorneys' fees to include six other aspects of remedies. Two of these sections (III – Back Pay and VII – Compensatory Damages) are considerably larger than the others and not easily summarized. It is best for the Practitioner to review these new sections in full.

During the revision process, the Commission was open to considering sweeping changes to the

federal-sector hearings process. However, the resulting MD 110 leaves the existing hearings process largely intact. The changes are mostly a codification of case law developments from the past ten years. The best changes for employees are those dealing with sanctions and conflicts of interest.

## CHAPTER 1: AGENCY AUTHORITY AND RESPONSIBILITY

**Addresses potential conflicts of interest in processing federal sector EEO complaints.**

1. **Specifically addresses two important potential conflicts of interest: (1) when the alleged responsible management official is the head of the agency; and (2) when the alleged responsible management official is the EEO Director or supervisor in the EEO Office. (Section IV.B).**

   Old Language

   Chapter 1.III called for agencies to avoid conflicts of interest and the appearance of conflicts of interests.

   New Language & Significance

   (1) - Describes circumstances when accusations against the agency head or immediate staff of the agency head may create real or perceived conflicts of interest. Proposes a potential avenue to remedy the conflict and urges agencies to contact OFO with questions.

   (2) - Describes circumstances when accusations against the EEO Director or another supervisor in the EEO office may create real or perceived conflicts of interest. Requires the EEO Director to recuse himself/herself and retain a third party to conduct the counseling, investigation, and final agency decision.

   These sections were added in response to recent cases in which agency heads and EEO Directors were implicated in complaints, but did not recuse themselves to resolve the apparent conflict. A 2009 GAO report also criticized the General Counsel of some agencies for intruding into the EEO process and called for the EEOC and agencies to develop procedures to prevent such intrusions.

   **Practitioner Notes**: If you have a case in which the Agency head or EEO Director is implicated, you should immediately notify the EEO Director in writing, asking for recusal. The best practice when an EEO Director is implicated is for the Agency to ask another federal agency to take over the processing of the complaint. *See e.g., Lelah T. v. HUD*, EEOC Appeal No. 0720150034 at n. 2 (2015). In that case, the Complainant worked in the EEO Office at HUD ("ODEEO"). The EEO Director was one of the alleged discriminating officials. In addition, most of the witnesses were all employees or supervisors within the EEO Office. The Agency eventually had another federal agency (DOT) do all of the processing of that case. Most agencies already have work-sharing agreements in place for such instances. The protocol should ensure that the alleged discriminating officials are not copied on the correspondence from the EEO investigator, the EEO counselor, or by EEOC.

   This kind of conflict arises more frequently with small agencies, and practitioners should be

on the lookout for potential conflicts in such cases.

**2. Supplies guidance to agencies on how to develop an impartial record where a conflict of interest or the appearance of a conflict exists. (Section IV.C).**

Old Language - None

New Language & Significance

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

(1) - Calls for agencies to consider formal contracts or informal arrangements with a third party to resolve conflicts. Proposes formal interagency agreements to handle certain stages of the EEO process and informal agreements where a third party provides EEO services as needed.

(2) - Agencies should assess which stages a third party would be most effective in (i.e., counseling, EEO ADR, investigation, accept/dismiss letters, and/or final agency action). 29 C.F.R. § 1614.110(a) and (b) require the agency to take final action through a FAD, but may still assign writing and reviewing the final action to a third party.

3. **Delegation of Settlement Authority (Section V)**

Old Language

The agency must designate an individual to attend settlement discussions convened by an EEOC Administrative Judge or to participate in alternative dispute resolution (ADR) attempts. Agencies should include an official with settlement authority at all ADR meetings. The probability of achieving resolution of a dispute improves significantly if the designated agency official has the authority to agree immediately to a resolution reached between the parties. If an official with settlement authority is not present at the settlement or ADR negotiations, such official must be immediately accessible to the agency representative during settlement discussions or ADR.

New Language

Adds that "the agency's official with settlement authority should not be the responsible management official or agency official directly involved in the case. This is not a general prohibition on those officials from being present at appropriate settlement discussions and participating, only that they are not the officials with the settlement authority.)"

**Practitioner's Note**: This is a major change. EEOC will no longer allow the RMO to serve as the designated settlement authority. This has pros and cons. RMOs may be motivated to resolve cases because they do not want to be found to have discriminated or retaliated. On the other hand, a settlement official who is not alleged to have discriminated can theoretically be more neutral and rational in the decision-making process. It also has the benefit of moving the matter up the food chain, which can result in more flexibility and resources being put toward settlement.

It would have been better if EEOC had insisted that settlement authorities be physically present during ADR and settlement conferences. Many agencies resist designating anyone with settlement authority to attend settlement discussions, and will try to send only the Agency's attorneys. Perhaps the Agency attorneys have been delegated actual authority to resolve the case, but this is rare and you should push to see whether the agency attorney would be the individual to sign the settlement agreement. If not, you should insist on having a settlement official to physically attend settlement conferences. Most Administrative Judges will insist upon this even though the guidance says that the settlement authority can be "immediately" available by phone.

*Belk v. Securities and Exchange Commission*, EEOC Appeal No. 01944626 (March 15, 1995).

Complainant filed three separate EEO complaints and alleged both the EEO Director and Executive Director discriminated against her. Complainant accused both Directors of deliberately trying to deny her a fair EEO process. In order to remedy the apparent conflict, the Chairman of the SEC requested the Acting Chief Judge from the Office of Administrative Law Judges appoint an Administrative Law Judge as Pro Tem EEO Director. The Acting Chief Judge did so, and all three EEO complaints were reviewed and decided by the Pro Tem EEO Director.

*Ellis v. CIA*, EEOC Appeal No. 01940566 (August 15, 1995).

Complainant filed an EEO retaliation complaint against the EEO Director for making comments during the EEO process designed to discourage her from pursuing a complaint. The Administrative Judge concluded that the EEO Director's behavior was inappropriate, but no actual violation occurred. On appeal, the EEOC agreed with the AJ's view of the EEO Director's behavior, but also reversed the AJ's finding and held the EEO Director's comments restrained the aggrieved person from filing a complaint in violation of 29 C.F.R. § 1614.105(g).

**4. Provides instruction to agencies on how to ensure a clear separation between the agency's EEO complaint program and the agency's defensive function. In particular, there must be sufficient legal resources provided to the EEO program and where necessary, a firewall established between the EEO function and the agency's defensive function. (Section IV.D).**

Old Language

Chapter 1.VI prohibited EEO officials from serving as representatives for complainants or agencies in connection with discrimination complaints.

New Language & Significance

Calls for clear and distinct between the investigative and defensive functions of the agency regarding discrimination complaints. There must be a clear separation between the two functions that ensures defensive actions will not influence the agency's investigative/remedial processes. The EEO Director must be given sufficient internal resources to accomplish such separation, including:

"[T]he agency representative in EEO complaints may not conduct legal sufficiency reviews of EEO matters." These reviews include legal analysis made during the processing of EEO complaints. If requested by the EEO office, such reviews may be conducted by individuals separate and apart from the defensive function.

Rotating agency representatives within an office is insufficient to ensure impartiality.

**Practitioner's Note**: Be on the lookout for "EEO Managers," who are responsible for conducting the Faragher/Ellereth independent management investigations" in harassment matters. EEO Managers may have absolutely nothing to do with the processing of EEO complaints, although employees may not realize this. For example, the Department of Labor has "EEO Managers," who conduct internal investigations and deal with reasonable accommodations on behalf of management. This is part of the Agency's defensive function. Their EEO complaints office does not have "EEO" in the title of the office, and is referred to as the "Civil Rights Center." This is obviously confusing to employees and appears to violate the MD 110. In a recent case, an EEOC AJ referred this issue to OFO for its review and opinion.

5. **Provides agency reporting requirements for federal complaint process activities, such as, EEOC Form 462, Title III of the No FEAR Act, and Annual Report to Congress. (Section VIII).**

Old Language - None

New Language & Significance

Form 462 - agencies must submit "an annual report of the status of all pre-complaints and formal complaints processed under its EEO complaints program. See 29 C.F.R. § 1614.602(a).

Title III of the No FEAR Act - agencies must "post cumulative quarterly fiscal year EEO complaint statistics . . . on the home page of the agency's public website." 29 C.F.R. § 1614.703. Formatting and content requirements are found in § 1614.704.

Annual Report to Congress - Title II of the No FEAR Act requires agencies to send Congress, EEOC, and the Attorney General an annual report. Report requirements are at 5

C.F.R. § 724.301-302.

**Practitioners Note:** Think about how you might use this information in your case, or dig deeper into this information in your discovery efforts. This information can be very helpful for pattern and practice cases, class actions, reasonable accommodation cases, etc.

## CHAPTER 2: PRE-COMPLAINT PROCESSING

1. **Defines "EEO ADR" as "a term used to describe a variety of approaches to resolving conflict that differ from traditional adjudicatory or adversarial methods." (Section I.E).**

   Old Language - None

   New Language & Significance

   Defines EEO ADR as the quoted language above. This added definition helps clarify when the requirements for EEO ADR in Section I.E must be met.

2. **Explains that EEO Counselor training requirements now include training in the various theories of discrimination and an overview of the agency's informal and formal ADR processes. (Section II.B).**

   Old Language

   Lists six different requirements for the thirty-two hour EEO Counselor training course.

   New Language & Significance

   Amends requirement (3) to include an overview of the Genetic Information Nondiscrimination Act of 2008 (GINA) and clarifies which provisions of the Rehabilitation Act must be provided.

   Adds requirement (4) to include an explanation of the theories of discrimination; instructions concerning class actions; and issues regarding fragmentation.

   Adds requirement (8) to include an overview of the agency's informal and formal ADR processes.

   **Practitioner's Note:** EEO counselors are not attorneys and have limited understanding of how claims develop and are litigated after the EEO counseling process is completed. One of the most frequent errors is when EEO counselors insist that incidents of hostile work environment more than 45 days old are untimely. More training can only be helpful, but we

are skeptical that it will do much to improve the EEO counseling process.

3. **Clarifies the EEO Counselor's roles and responsibilities, and adds that the EEO Counselor should explain to the aggrieved person the reasonable accommodations available throughout the EEO process. (Section III.1).**

   Old Language

   > "Where an aggrieved person seeks EEO counseling, the Counselor must ensure that the complainant understands his/her rights and responsibilities in the EEO process, including the option to elect ADR."

   It then lists seven different roles and responsibilities of EEO Counselors

   New Language & Significance

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

   It then labels each of the seven different roles and responsibilities of EEO Counselors as corresponding to one of the added roles.

   **Practitioner's Note:** Yikes. We are very concerned about the suggestion that EEO Counselors are supposed to be "educators." While some EEO counselors are able to undertake this task in a neutral manner, it is all too frequent that the EEO counselors try to convince the employee to abandon the complaint. If you are involved with the case at the informal EEO stage, we highly recommend being involved in each conversation with the EEO counselor so that you can monitor what your client is being told. If you come to the case after the EEO counseling period, take the time to ensure that the issues in the counseling report were framed correctly and write a letter to correct the record if necessary.

4. **EEO Counselors need to be familiar with: (1) Title VII's prohibition against sex discrimination, which includes discrimination on the basis of pregnancy, sexual orientation, and gender identity (including transgender status); (2) the Lilly Ledbetter Fair Pay Act of 2009; and (3) the Genetic Information Nondiscrimination Act of 2008. (Section IV.C).**

   Old Language

   Lists five different sets of statutes and regulations that EEO Counselors must be familiar

with.

New Language & Significance

Clarifies (1) - Title VII - to clarify that it "includes discrimination on the basis of pregnancy, sexual orientation and gender identity including transgender status."

Adds requirement (5) to include the Lilly Ledbetter Fair Pay Act of 2009.

Adds requirement (6) to include the Genetic Information Nondiscrimination Act of 2008.

5. **Provides further explanation of the purpose of the "limited inquiry" during the EEO counseling process. (Section V).**

Old Language

The limited inquiry was previously described in Chapter II.VI.A as part of the procedures upon initiation of EEO Counseling.

New Language & Significance

Creates a new Section V further defining the limited inquiry. The additions:

- require EEO Counselors to familiarize themselves with fragmentation and Chapter 5.III (instructing agencies to avoid fragmentation);
- instruct the EEO Counselor on identifying claims and on how similar or separate claims raised in one complaint should be handled;
- provide guidance on determining the basis(es) of discrimination complaints; and
- describe the requirements for when basis(es) of a complaint are not covered by EEO laws.

**Practitioner's Note**: Whether this improves the process is yet to be seen. The Commission has provided lots of information like this in the past, and there has been limited improvement. However, perhaps this new "official" guidance can be used for motions for sanctions against agencies for failing to properly process complaints.

## CHAPTER 3: ADR FOR EEO MATTERS

1. **Clarifies that the Responsible Management Official cannot be the agency's Settlement Official. (Section III.A.2).**

Old Language - None

The relevant portions for this change were previously found at Chapter 3.VI. A - Written Procedures

New Language & Significance

The Written Procedures section is now under Chapter 3.III.A. This change adds subsection (2), stating:

> "The stages of the EEO process at which EEO ADR will be offered and the appropriate agency official(s) who makes the determination to offer EEO ADR on behalf of the agency (note the responsible management official for the alleged discrimination is not the proper agency official for this decision)"

**Practitioner's Note**: This is a major change. EEOC will no longer allow the RMO to serve as the designated settlement authority. This has pros and cons. RMOs may be motivated to resolve cases because they do not want to be found to have discriminated or retaliated. On the other hand, a settlement official who is not alleged to have discriminated can theoretically be more neutral and rational in the decision-making process. It also has the benefit of moving the matter up the food chain, which can result in more flexibility and resources being put toward settlement.

It would have been better if EEOC had insisted that settlement authorities be physically present during ADR and settlement conferences. Many agencies resist designating anyone with settlement authority to attend settlement discussions, and will try to send only the Agency's attorneys. Perhaps the Agency attorneys have been delegated actual authority to resolve the case, but this is rare and you should push to see whether the agency attorney would be the individual to sign the settlement agreement. If not, you should insist on having a settlement official to physically attend settlement conferences. Most Administrative Judges will insist upon this even though the guidance says that the settlement authority can be "immediately" available by phone.

2. **Provides that EEOC considers it a best practice to have an ADR office separate and apart from the EEO process—an independent ADR office—to resolve non-EEO issues and free up staff for processing EEO complaints; however there are certain requirements and limitations. (Section III.K).**

Old Language

The MD-110 previously emphasized the importance of neutrality of ADR proceedings at Chapter 3.VII.A.2 under ADR Core Principles.

New Language & Significance

The previous language regarding the neutrality of ADR proceedings has been retained and moved to Chapter 3.II.A.2.

Section III.K has been added and defines an Independent ADR Office as "an office that functions independently of the traditional EEO Office" and includes informal resolution of disagreements as part of its role. It further provides that:

> "Where an agency permits ADR office employees to perform any collateral EEO duty (no matter how small or infrequent), the ADR office is no longer independent and therefore any contact by an aggrieved party with the ADR office staff will initiate the traditional EEO process, including EEO counseling and Form 462 reporting. The agency's ADR staff member must provide to the aggrieved person the same information EEO Counselors are required to provide to the aggrieved persons, meet all training requirements of an EEO Counselor, and fully carry out the EEO Counselor's roles and responsibilities. This includes providing the EEO Counselor's report to the EEO Office for issuance in a timely manner. The ninety (90) day pre-complaint processing period will begin from the first contact with the ADR office staff member. Furthermore, an EEO Counselor may not act as a neutral in a case where s/he has previously provided EEO counseling."
>
> **Practitioner's Note:** The quality of ADR proceedings before agencies varies immensely. Every case is different. Some cases may be appropriately handled through the Agency's ADR office. However, it usually results in a delay of the investigation. The EEO process is long enough and waiting 90 days for ADR is usually not advisable. The parties can always discuss settlement during the traditional EEO counseling route.

## CHAPTER 5: AGENCY PROCESSING OF FORMAL COMPLAINTS

**1. Makes clear that a claim of harassment is actionable as long as at least one incident that is part of the claim occurred within the filing period.**

Old Language

Chapter 5.III.A.3, under Timeliness, stated that "in general, for a legal claim to be timely raised, at least one of the incidents the complainant cites as evidence in support of his/her claim must have occurred within the 45-day time period for contacting an EEO Counselor."

New Language & Significance

Chapter 5.III.A.3 retains the old language and, citing Bulluck v. Dep't of Veterans Affairs, clarifies that:

"[w]ith regard to the timeliness of a claim of harassment, because the incidents that make up a harassment claim collectively constitute one unlawful employment practice, the claim is actionable, as long as at least one incident that is part of the claim occurred within the filing period. Such a claim can include incidents that occurred outside the filing period that the complainant knew or should have known were actionable at the time of their occurrence."

**Practitioner's Note**: as noted above, this is one of the most frequent errors made by EEO counselors and by the EEO staff who characterize the claims in the formal EEO complaint. Agency attorneys frequently try to move for summary judgment on the older incidents in a HWE claim. Hopefully, this new language will help on this issue.

2. **Provides case updates related to harassment. See Bulluck v. Department of Veterans Affairs, EEOC Appeal No. 0120114276 (Mar. 14, 2012); Richardson v. U.S. Postal Service, EEOC Appeal No. 0120111122 (Feb. 1, 2012); and National Railroad Passenger Corp. v. Morgan**

Old Language - none

New Language & Significance

"With regard to the timeliness of a claim of harassment, because the incidents that make up a harassment claim collectively constitute one unlawful employment practice, the claim is actionable, as long as at least one incident that is part of the claim occurred within the filing period. Such a claim can include incidents that occurred outside the filing period that the complainant knew or should have known were actionable at the time of their occurrence. See Bulluck v. Dep't. of Veterans Affairs, EEOC Appeal No. 0120114276 (Mar. 14, 2012); Richardson v. U.S. Postal Service, EEOC Appeal No. 0120111122 (Feb. 1, 2012).

However, the Supreme Court has held that no recovery is available for discrete acts such as hiring, firing, and promotions that fall outside the filing period, even if they are arguably related to other discriminatory acts that occur within the filing period. National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). See also EEOC Compliance Manual 915.003, Section 2: "Threshold Issues,"(rev. July 21, 2005). However, as the Court recognized, an employee may use the prior discrete acts as background evidence in support of a timely harassment claim."

*Bulluck v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120114276 (Mar. 14, 2012).

Complainant alleged she was subject to discrimination and a hostile work environment on 9 separate occasions over the course of a year. When the complainant filed a formal complaint a month after the last occasion, the Agency determined the first 7 claims were untimely filed as distinct concrete acts. The Commission reversed the agency's finding and held that, although several claims alleged violations outside the 45 day period, they

survived as evidence of harassment because they were linked to the timely claims with a common theme of harassment and mistreatment.

*Richardson v. U.S. Postal Service*, EEOC Appeal No. 0120111122 (Feb. 1, 2012).

Complaint alleged her hours were reduced as part of ongoing discriminatory and retaliatory harassment. The Agency dismissed her claim on the basis that the reduction in hours occurred more than 45 days prior to her contacting an EEO Counselor. Citing *National Railroad Passenger Corp v. Morgan*, 122 S.Ct. 2061 (2002), the Commission reversed the Agency's finding and held that, because one act underlying the claim fell within the filing period, all acts constituting the claim were not time-barred.

**Provides additional guidance on how to avoid common errors in dismissing complaints of discrimination, including reference to EEOC, Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds, issued in September of 2014. (Section IV).**

3. **Requires agencies to clearly set forth their reasons for dismissing a complaint in all dismissal decisions and include evidence in the record that supports the grounds for dismissal. (Section IV).**

Old Language - None

New Language & Significance

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

4. **Explains that when an individual alleges retaliation in a complaint, he or she does not need to make a showing of an adverse employment action. (Section IV.A.3).**

Old Language - None

New Language & Significance

"When an individual alleges retaliation in a complaint, they do not need to make a showing of an adverse employment action. See Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006); EEOC Compliance Manual 915.003 Section 8-Retaliation II.D.3 (May 20, 1998) (any adverse treatment that is based upon a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity states a claim)."

**Practitioner's Note**: EEOC has a very broad view of retaliation, and the MD 110 provides reinforcement for that view.

*Hannah C., Complainant v. Dep't of Justice*, EEOC DOC 0720150004 (Mar. 10, 2016).
"The statutory retaliation clauses prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity."

*Zonia C., Complainant v. Dep't of Veterans Affairs*, EEOC DOC 0120161120 (Apr. 14, 2016).
"Under Commission policy, claimed retaliatory actions which can be challenged are not restricted to those which affect a term or condition of employment. Rather, a complainant is protected from any discrimination that is reasonably likely to deter protected activity."

*Clinton R., Complainant v. USPS*, EEOC DOC 0120160120 (Feb. 18, 2016)
"Persons aggrieved by reprisal need not suffer a loss of any term, condition, or privilege of employment[.]" The court went on to find that making Complainant perform a menial cleaning task was sufficient to state a claim of retaliation.

*Princess B., Complainant v. Dep't of Veterans Affairs*, EEOC DOC 0120143221 (Mar. 29, 2016).
Found that the complainant asserted a viable retaliation claim when she was denied letters of reference and a neutral SF-50.

*Complainant v. Dep't of Justice*, EEOC Appeal No. 0120142770 (January 29, 2015) (citing 29 C.F.R. § 1614.107(a)(5)).
On appeal, EEOC found that when retaliation is alleged, a proposed suspension is sufficient action to state a claim even though no suspension actually occurred.

*Complainant v. DHS*, EEOC DOC 0720130035 (Oct. 20, 2015).
EEOC upheld an AJ's finding that an adverse action occurred when Complainant's supervisor rejected Complainant's work reports; asked Complainant to provide more medical documentation for a disability; and informed the police that Complainant should be the suspect in a burglary.

**5. Clarifies that complaints alleging discrimination in proposals to take personnel actions or in other preliminary steps to taking personnel actions should be dismissed unless the complaint alleges that the proposal or preliminary step is retaliatory. (Section IV.A.10).**

Old Language - None

New Language & Significance

"However, if the complaint alleges that a proposal to take or a preliminary step in taking a personnel action is retaliatory, the complaint should not be dismissed because a proposed action could be considered adverse treatment in the context of

reprisal if it is reasonably likely to deter protected activity.[8] See Brown v. Dep't. of Defense, EEOC Appeal No. 0120103139 (Dec. 8, 2010) (complainant's claim that the agency discriminated against him when it placed him on a performance improvement plan stated a viable claim of retaliation)."

6. **Provides additional guidance and examples on the time limit for investigations. When amended, investigations shall be complete in not more than 360 days, unless there is a written extension of not more than 90 days. (Section V.B).**

   Old Language - None

   New Language & Significance

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

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

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

7. **Requires that if an agency fails to complete an investigation in a timely manner, the agency shall issue a written notice to the complainant informing him or her of the delay the revised estimated completion date, and complainant's right to file a civil action or request a hearing. (Section V.C). MD-110 Appendix K** (described below) **provides a sample "Notice of Incomplete Investigation."**

   Old Language - None

   New Language & Significance

   Creates a new Section V.C stating:

   "If the investigation is not completed within the 180-day time limit, the agency must

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

**Practitioner's Note**: you should seek sanctions, including a default judgment, if the investigation is not timely completed.

## CHAPTER 6: DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

1. **Clarifies that the three basic types of evidence are direct (evidence that proves a fact without resorting to inference or presumption), circumstantial (evidence based on inference), and statistical (evidence based on a survey of the general environment). (Section VI.B).**

Old Language

The old section on Types of Evidence at Chapter 6.VII.B listed and described comparative, direct, and statistical evidence. Circumstantial evidence was included in description of the other categories, but was not listed as an independent type of evidence.

New Language & Significance

The new section, now at Chapter 6.VI.B, lists direct, circumstantial, and statistical evidence with new descriptions of each. Comparative evidence is now described within circumstantial evidence. Each description is summarized below.

**Direct Evidence** - "evidence that proves a fact without resort to interference or presumption." Direct evidence is relevant in cases regarding disparate treatment through intentional treatment by an employer and the effect of policies. Direct evidence of bias and that of discrimination are different. The former is circumstantial evidence (i.e. "I would never hire a woman for that job") that is not directed towards a specific person.

**Circumstantial Evidence** - "evidence based on inference." Comparative evidence is a type of circumstantial evidence that shows how similarly situated persons outside a protected class were treated and must be sought in disparate treatment cases. Similarly situated persons are those "that it is reasonable to expect that they would receive the same treatment as the complainant in the context of a particular employment decision." Both the complainant and responding officials should provide comparators. Other types of circumstantial evidence

are general statements of bias, environment, and overlapping statistical evidence.

**Statistical Evidence** - survey of the general environment that may be conducted as appropriate. It is probative for claims regarding comparative treatment of groups.

**2. Explains that the complaint file must be assembled as an electronic document, unless the agency has demonstrated good cause as to why it cannot produce a digital copy of the file. In that case, a paper file may be submitted. (Section VIII.A).**

Old Language

The old section on the Contents of the Complaint File at Chapter 6.IX.A provided a list of documents pertinent to the complaint that must be provided.

New Language & Significance

The new section, now located at Chapter 6.VIII.A, removes the list of documents pertinent to the complaint. Instead, it now generally refers to documents pertinent to the complaint and Appendix L as demonstrating the required format. It further states that:

> "[t]he complaint file will be assembled as an electronic document, unless the agency has demonstrated good cause as to why the agency cannot produce a digital copy of the file, in which case a paper file may be submitted. While cost alone does not constitute good cause why an agency cannot submit files in a digital format, OFO will consider facts such as undue cost, undue burden, national security concerns, and other reasonable bases."

**3. Describes the digital complaint file requirements as outlined below. (Section VIII.D).**

**A. The file should be image over text or run through OCR text recognition such that it is searchable.**

Old Language - None

New Language & Significance

> "File should be image over text or run through OCR text recognition such that it is a searchable document.**"**

**B. The file should contain digital bookmarks identifying key documents, exhibits, and sections of the file with specific, rather than generic, titles.**

Old Language

New Language & Significance

"It should contain digital bookmarks identifying key documents, exhibits, and sections of the file as specified below Bookmarks should be labeled in a manner that clearly identifies the key documents, (for example, EEO Counselor's Report, rather than generic labels) within each identified section."

**C. The file should contain a typed summary of the investigation, including a discussion and analysis of the evidence that is signed and dated by the investigator. (Section VIII.D).**

Old Language - None

New Language & Significance

"It should contain a typed summary of the investigation signed and dated by the investigator and containing a discussion and analysis of the evidence. See Section IX of this Chapter.**"**

**4. Provides that the complainant and his or her representative should be given the option to receive the complaint file in a digital and/or paper medium. (Section VIII.F).**

Old Language - None

New Language & Significance

"The complainant and his/her representative should be given the option to receive these documents in a digital and/or paper medium."

## CHAPTER 7: HEARINGS

1. **Clarifies that the agency shall arrange and pay for a verbatim transcript (provided in electronic format for the Administrative Judge and the complainant, unless otherwise requested) of the hearing proceedings pursuant to 29 C.F.R. § 1614.109(h), regardless of whether the Administrative Judge issues a decision. Contracts with court reporting firms must require delivery of the transcript to the Administrative Judge within a customary time frame determined by the court reporting firm in the jurisdiction, not to exceed twenty-one (21) days unless the Administrative Judge requires delivery of the transcript by a certain date after the hearing closes. (Section II.D).**

Old Language

"The agency shall arrange and pay for a verbatim transcript (printed or typewritten)

of the hearing proceedings pursuant to § 1614.109(h)."

"Contracts with court reporting firms must require delivery of the transcript to the Administrative Judge within ten (10) calendar days or less after the close of the hearing."

"As a matter of information, the General Services Administration maintains a list of court reporters available to agencies in the Federal Supply Schedule."

New Language & Significance

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

"Contracts with court reporting firms must require delivery of the transcript to the Administrative Judge within a customary time frame determined by the court reporting firm within the jurisdiction, not to exceed twenty-one (21) days unless the Administrative Judge requires delivery of the transcript by a certain date after the close of the hearing."

"As a matter of information, the General Services Administration maintains a list of court reporters available to agencies in the GSA eLibrary."

**Practitioner's Note**: At times, Agencies would resist providing transcript copies to the complainant. It should be clear now that such practice is unacceptable. A recent OFO decision upheld a sanction of default judgment on one claim when an Agency ordered daily draft transcripts during a hearing, and did not provide copies to Complainant or the AJ. *Complainant v. Pension Benefit Guar. Corp.*, EEOC Appeal No. 0720130001 (October 9, 2014).

**2. Reinforces EEOC's authority to issue sanctions against agencies and complainants when it deems necessary. See Waller v Dep't of Transportation, EEOC Appeal No 0720030069 (May 25, 2007). (Section III.A).**

Old Language - None

New Language & Significance

"The Commission has the authority to issue sanctions in the administrative hearing process because it was granted, through statute, the power to issue such rules and regulations that it deems necessary to enforce the prohibition on employment discrimination. See Waller v. Dep't. of Transportation, EEOC Appeal No.

0720030069 (May 25, 2007), request for reconsideration denied, EEOC Request No. 0520070689 (Feb. 26, 2009). In this respect, the Commission has determined "that delegating to its Administrative Judges the authority to issue sanctions against agencies, and complainants, is necessary and is an appropriate remedy which effectuates the policies of the Commission." Id."

3. **Further clarifies when an Administrative Judge may impose sanctions for failure to comply with his or her orders or within the specified time set forth in the order without good cause shown. See Rountree v. Department of the Treasury, EEOC Appeal No. 07A00015 (July 17, 2001). (Section III.A).**

Old Language

"Such order or request shall include a notice to show cause to the agency and, in appropriate circumstances, may provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record. The Administrative Judge also shall provide the agency with a reasonable period of time within which to take the action that the Administrative Judge has deemed necessary. The order or request further must identify the sanction(s) that the Administrative Judge may impose if the agency fails to comply with it."

New Language & Significance

"Such order or request shall make clear that sanctions may be imposed and the type of sanction that could be imposed for failure to comply with the order unless the agency can show good cause for that failure. See Rountree v. Dep't. of the Treasury, Appeal No. 07A00015 (July 17, 2001). In appropriate circumstances, the order or request may provide the agency with an opportunity to take such action as the Administrative Judge deems necessary to correct the deficiencies in the record within a specified reasonable period of time."

4. **Clarifies that agency requests for the medical records of complainants should occur only to establish or challenge disability status or the right to reasonable accommodation in Rehabilitation Act cases, or when a complainant is asserting a claim for compensatory damages and has sought medical treatment for one or more stress-related conditions. When a complainant is pro se, agencies must request the Administrative Judge's prior permission before making requests for medical information. (Section IV.B.4).**

Old Language - None

New Language & Significance

Adds an entirely new subsection (4) - Requests for Private Information Should be Limited.

The new language restricts requests for medical records of complainants to when seeking to establish or challenge disability status, the right to reasonable accommodation, or a claim for compensatory damages where a complainant has sought medical treatment for one or more stress-related condition. The request must be narrowly tailored to the condition(s) and time at issue. Per Chapter 11.VII, and citing Lawrence v. U.S. Postal Service, EEOC Appeal No. 01952288 (Apr. 18, 1996), complainants are not required to prove compensatory damages through medical records or expert evidence.

It further requires that, when a complainant is pro se, agencies must request the AJ's permission before making requests for medical information. The AJ must advise the parties of this provision at the initial status conference and explain that a complainant should contact the AJ tor request a protective order from overly broad or intrusive requests for medical records.

Agencies requests for wage information should only occur where the complainant requests back pay and has been compensated for subsequent employment. Agencies must request prior permission from the AJ before requesting tax records, except for W-2 and Schedule C documents.

## CHAPTER 8: COMPLAINTS OF CLASS DISCRIMINATION

1. **Provides that an Administrative Judge's decision on the merits of a class complaint is a final decision (not a recommended decision), which the agency can fully implement or appeal in its final action. (Section X & XI).**

Old Language

Chapter 8.IX - Administrative Judge's Recommended Decision:

> "The Administrative Judge shall transmit to the agency a report of findings and recommendations on the complaint, including a recommended decision, systemic relief for the class, and any individual relief, where appropriate, with regard to the personnel action or policy that gave rise to the complaint. The report of findings and recommendations shall be sent to the agency together with the entire record, including the transcript. The Administrative Judge shall also notify the class agent, in a separate communication, of the date on which the report of findings and recommendations was forwarded to the agency. § 1614.204(i)(1)"

Chapter 8.X - Agency Decision - § 1614.204(j) and (k):
Subsection B - Required Features of the Agency Final Decision:

"1. The agency's final decision on a class complaint must be in writing; must be transmitted to the agent by certified mail, return receipt requested, and must include a copy of the report of findings and recommendations of the Administrative Judge. See § 1614.204(j)(2).
2. Where the Administrative Judge addresses the merits of the complaint, the agency final decision also must address the merits. It must include a finding on the issue of discrimination, address the merits of the class agent's personal claim, and include the corrective action, if any, awarded to the class agent.3
3. A decision finding discrimination should include the dates of the agent's initial contact with the EEO Counselor and the date the agency eliminated the policy or practice on which there has been a finding of discrimination.
4. The final agency decision shall inform the agent of the right to appeal or to file a civil action and of the applicable time limits."

Subsection C - Binding Nature of Agency Decision:

"The final agency decision finding of discrimination will be binding on all members of the class and on the agency. A finding of no discrimination is not binding on a class member's individual complaint."

Subsection D - Notification of Agency Final Decision:

"The agency shall notify class members and the class representative of the decision and relief awarded, if any, through the same media employed to give notice of the existence of the class complaint . . . . The notice shall include the period for which the relief will be available and stating it in terms of precise calendar days, e.g., between 6/30/90 and 9/1/97."

New Language & Significance
Chapter 8.X (formerly Chapter 8.IX) - Administrative Judge's Decision on the Merits of the Class Complaint"

"The Administrative Judge shall transmit his/her decision on the complaint to the parties. If there is a finding of discrimination, the decision shall include systemic relief for the class, and any individual relief, where appropriate, with regard to the personnel action or policy that gave rise to the complaint. The decision shall be sent to the agency together with the entire record, including the transcript."

Chapter 8.XI (formerly Chapter 8.X) - Agency Final Actions - 29 C.F.R.
§§ 1614.204(j) and (k)"

Subsection B - Agency Final Action Requirements:

"The agency's final order on a class complaint must be in writing; notify the class

agent whether the agency will fully implement the decision of the Administrative Judge; and contain a notice of the right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action, and the applicable time limits. If the final order does not fully implement the decision of the Administrative Judge, the agency shall simultaneously file an appeal in accordance with 29 C.F.R. § 1614.403 and append a copy of the appeal to the final order. See 29 C.F.R. § 1614.204(j)(1)."

Subsection C - Binding Nature of Agency Final Action Implementing Administrative Judge's Decision:

"The final agency action implementing the Administrative Judge's decision finding discrimination will be binding on all members of the class and on the agency. A final agency action implementing the Administrative Judge's decision finding no discrimination is not binding on a class member's individual complaint."

Subsection D - Notification of Agency Final Action:

"The agency shall notify class members and the class representative of its final action through the same media employed to give notice of the existence of the class complaint."

2. **Clarifies that retaliation claims can be the subject of class actions when the plaintiffs establish a general practice of retaliation against employees who oppose discriminatory practices or exercise rights protected under Title VII. (Section XIII).**

Old Language - None

New Language & Significance

Retaliation claims can be the subject of class actions under the circumstances above. See Holsey v. Armour & Co., 743 F.2d 199, 216-217 (4th Cir. 1984), cert denied, 470 U.S. 1028 (1985). Reprisal is the appropriate basis for a class when specific reprisal actions were taken against a group for challenging policies or when reprisal was routinely visited on class members. See Levitoff v. Dep't of Agriculture, EEO Appeal No. 01913685 (Mar. 17, 1992), request to reopen denied, EEOC Request No. 05920601 (Sept. 10, 1992); as cited in Powell, et. al. v. Dep't of the Navy, EEOC Appeal No. 01974349 (Aug. 2, 2000).

## CHAPTER 9: APPEALS TO THE COMMISSION

1. **Provides that EEOC's Office of Federal Operations will provide expedited consideration (within 90 days of receipt of appeal) of class complaints that are dismissed for failure to meet the prerequisites of a class complaint. (Section III.D.1,**

**footnote 6).**

Old Language

"The Office of Federal Operations, Appellate Review Programs, will provide expedited consideration of class complaints that are dismissed for failure to meet the prerequisites of a class complaint."

New Language & Significance

"The Office of Federal Operations, Appellate Review Programs, will provide expedited consideration (within 90 days of receipt of appeal) of class complaints that are dismissed for failure to meet the prerequisites of a class complaint. See 29 C.F.R. § 1614.405(b)."

**Practitioner's Note:** In our experience, OFO has not met this 90-day deadline even since the changes have been implemented.

2. **Includes that the complainant, agent, grievant, or individual class member must file an appeal by mail or, as an alternative, through the Commission's electronic document submission portal. (Section IV.A.1).**

Old Language

Provides for the appellant to appeal via mail, hand-delivery, or fax using EEOC Form 573 at Appendix K

New Language & Significance

Provides for the appellant to appeal via mail or the Commission's electronic document submission portal using Form 573, now located at Appendix P.

3. **Requires agencies to file appeals and submit complete complaint case files to EEOC in a digital format either by using EEOC's electronic document submission portal or by some other approved method, unless they can show good cause for doing otherwise. (Section IV.A.2).**

Old Language

Requires agencies to appeal via the same procedures as the complainant, agent, grievant, or individual class claimant using the form at Appendix O.

New Language & Significance

Requires agencies to file appeals with the Commission in digital format (either the document submission portal or some other approved method), unless it has shown good cause why it is unable to do so, using the form at Appendix O.

**4. Clarifies that EEOC appellate decisions are final for purposes of filing a civil action, unless either party files a timely request for reconsideration. (Section V.D).**

Old Language

Chapter 9.V.E - Appeals Decisions Are Final - provided that:

"An appellate decision issued under § 1614.405(a) is final pursuant to § 1614.407 unless the Commission reconsiders the case."

New Language & Significance

Chapter 9.V.D (formerly 9.V.E.) - Appeals Decisions Are Final - now provides that:

"An appellate decision issued under 29 C.F.R. § 1614.405(a) is final pursuant to 29 C.F.R. § 1614.407 unless a timely request for reconsideration is filed by a party to the case."

**5. Explains that the Commission reserves the right to reopen any decision on its own motion. (Section VII.A).**

Old Language - None

New Language & Significance

"The Commission reserves the right to reopen any decision on its own motion. See Parnell v. Dep't. of Veterans' Affairs, EEOC Request No. 0520100031 (Dec. 7, 2009)."

**6. Extends the period within which agencies must provide ordered relief from 60 to 120 days. (Section IX.A.2).**

Old Language

Chapter 9.IX.A.1 provided that:

"The relief shall be provided in full not later than sixty (60) days after receipt of the decision unless otherwise ordered in the decision."

New Language & Significance

Chapter 9.IX.A.2 (formerly A.1) now provides that:

"The ordered relief shall be provided in full not later than one hundred twenty (120) days after receipt of the final decision unless otherwise ordered in the decision. A decision is considered final when it is issued. The 120-day period includes the 30-day period in which the complainant can file a request for reconsideration, as well as the 90-day period in which the complainant can file a civil action."

# CHAPTER 11: REMEDIES

1. **Sets forth consolidated guidance on remedies to include back pay, front pay, attorney's fees and costs, awards of compensatory damages (including a brief description of compensatory damages), and other forms of equitable relief.**

Old Language

Chapter 11 only described the availability of and conditions for attorney's fees and costs.

New Language & Significance

The new Chapter 11 retains the old language on attorney's fees and costs at Chapter 11.VI. Sections I - V and VII have been added and are summarized below.

Section I - Introduction:

Retains all of the introductory language at the former Section I, but removes certain language specifically describing attorney's fees and costs which has been moved to Chapter II.VI.

Section II - Non-Discriminatory Placement:

Calls for non-discriminatory placement of an individual who was discriminated against. Where the discrimination was non-selection or failure to promote, this includes an offer of placement into the position sought, or a substantially equivalent position. See Carson v. Dep't of Justice, EEOC Appeal No. 0120100078 (Feb. 16, 2012). The offer should be made retroactive to the date of selection in question along with all step / pay increases and monetary benefits associated with the position. See Steward v. Dep't of Homeland Security, EEOC Request No. 0520070124 (Nov. 14, 2011). A substantially equivalent position is within the same commuting area. Bakken v. Dep't of Transportation, EEOC Appeal No. 0120093529 (Aug. 8, 2011).

When the relief includes an offer for a position or promotion, the offer must be made in writing and give the complainant 15 days to accept or reject the offer. Failure to respond in the time limit is construed as a declination. Back pay ceases to accrue when the individual is placed into the position or the offer is rejected.

Where a discriminatory termination is found, the agency should offer reinstatement retroactive to the date of termination, along with all applicable benefits and step / pay increases. See Oni v. Dep't of the Treasury, EEOC Appeal No. 0720100015 (Oct. 11, 2011).

In "mixed motive" cases, the agency need not offer complainant the position sought if it can demonstrate it would have taken the same action, even absent the discrimination, by clear and convincing evidence. If this demonstration is made, complainant is not entitled to personal relief, but may still be entitled to declaratory relief, injunctive relief, and/or attorneys' fees and costs. See Montante v. Dep't of Transportation, EEOC Appeal No. 0120110240 (Nov. 9, 2011), request for consideration denied, EEOC Request No. 0520120259 (June 8, 2012).

When an offer for employment is accepted as a remedy, the individual shall be deemed to have performed service during the period the individual would have served for all purposes except service requirements for completion of a required probationary or trial period.

Section III - Back Pay:

Back pay must be computed in the manner prescribed by 5. C.F.R. § 550.805 if the Commission finds discrimination and the agency provides the individual with non-discriminatory placement. Several personnel actions can generate back pay (i.e. removals, suspensions, denials of promotions, and failure to hire).

Numerous sub-sections are included covering the following topics and providing examples:

- Back Pay Issues
- Determining Gross Back Pay
- Overtime or Premium Pay as a Component of Back Pay
- Retirement Deductions and Back Pay
- Interim Earnings Deducted from Back Pay
- Worker's Compensation Benefits May be Partially Deductible from Back Pay
- Availability for Work - Prerequisite for Receipt of Back Pay
- Unemployment Compensation Not Deducted from Back Pay - the Collateral Source Rule
- Tax Consequences of a Lump Sum Payment of Back Pay
- Liquidated Damages (ADEA and EPA only)
- Restoration of Leave

Section IV - Front Pay

Front pay, in lieu of reinstatement, made be awarded "when: (1) no position is available;

(2) a subsequent working relationship between the parties would be antagonistic; or (3) the employer has a record of long-term resistance to anti-discrimination efforts. Brinkley v. U.S. Postal Service, EEOC Request No. 05980429 (Aug. 12, 1999)." Front pay is an equitable remedy for a reasonable future period for the victim "to reestablish his rightful place in the job market." See Deidra Brown-Fleming v. Dep't of Justice, EEOC Petition No. 0420080016 (Oct. 28, 2010).

Section V - Other Forms of Equitable Relief

Agencies must also (1) cancel unwarranted personnel actions and restore the employee to his/her status prior to discrimination; (2) expunge adverse materials relating to the discriminatory practice from records; and (3) provide full opportunity to participate in the benefit denied (i.e. training, preferential work assignments, or overtime).

In cases involving a discriminatory performance appraisal, relief includes raising the rating and entitlement to all benefits and awards that would have been received with the higher performance appraisal. McKenzie v. Dep't of Justice, EEOC Appeal No. 0120100034 (July 7, 2011); Hairston v. Dep't of Education, EEOC Appeal No. 0120071308 (Apr. 15, 2010); Cook v. Dep't of Labor, EEOC Appeal No. 0720080045 (Feb. 22, 2010).

Training for and disciplinary action against officials who engaged in discrimination is also appropriate, and training is not a form of discipline. See James v. Dep't of Agriculture, EEOC Appeal No. 0120073831 (Sept. 22, 2009), request for reconsideration denied, EEOC Request No. 0520100086 (Mar. 22, 2010); Morrow v. U.S. Postal Service, EEOC Appeal No. 0720070058 (Nov. 13, 2009).

Relief includes ordering the agency to cease discriminatory policies or practices.

After discrimination is found, the agency should ensure that the same type of action does not recur.

Section VII - Compensatory Damages

Compensatory damages compensate a party for losses or suffering due to discriminatory conduct and "may be had for any proximate consequences which can be established with requisite certainty" like past pecuniary loss, future pecuniary loss, and nonpecuniary loss. See Goetze v. Dep't of the Navy, EEOC Appeal No. 01991530 (Aug. 23, 2001).

Subsection A established the conditions where compensatory damages are appropriate. These include provisions under the Civil Rights Act of 1991 (42 U.S.C. § 1981a(b)(3)), ADEA, and Equal Pay Act. Agencies are "not liable for compensatory damages in cases of disability discrimination where the agency demonstrates that it made a good faith effort to accommodate the complainant's disability." The amount of compensatory

damages may be determined by the Commission it its decisions or by remanding to the agency to determine that amount.

Subsection B provides for the legal principles establishing, defining, and calculating entitlement to nonpecuniary, past pecuniary, and future pecuniary damages.

# APPENDICES

**1. Appendix K: Notice of Incomplete Investigation**

Old Language - None

New Language & Significance

Provides a sample Notice of Incomplete Investigation which agencies must provide to complainants if they fail to complete an investigation within the 180-day time frame under Chapter 5.V.C.

The notice informs the complainant of the right to request a hearing before an AJ or file a civil action along with the procedures entailed in both. It also provides that, in the alternative, a complainant may wait for the investigation to be completed and then request a hearing before an AJ or an immediate Final Agency Decision.

# Revised Management Directive 110 Reference Guide

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# REVISED MD-110 REFERENCE GUIDE
# SEPTEMBER 2015

## BACKGROUND

On August 5, 2015, the Equal Employment Opportunity Commission (EEOC) approved the first revision to its Management Directive 110 (MD-110) since 1999. The revised MD-110 provides federal agencies with updated Commission policies, procedures, and guidance relating to the federal sector complaint process as set forth in 29 C.F.R. Part 1614 and reflects new developments in case law, as the federal workplace and EEO practices have evolved. The revised directive also includes changes required after EEOC amended certain sections of the regulations governing the federal sector Equal Employment Opportunity (EEO) process in 2012. The revisions to MD-110 were based on recommendations from the Commissioners; testimony and submissions from a Commission meeting on federal sector reform; staff proposals; comments from agencies and agency components filed pursuant to Executive Order 12067; and public comments from individuals, members of the bar, civil rights groups, unions, other organizations, and federal agencies.

The final rule adopted in 2012 contains a number of key revisions to 29 C.F.R. Part 1614:

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

The rule requires that EEOC provide guidance regarding the changes the rule requires and continue to assess the federal sector EEO complaint process with a view to further improvements.

Because the last major revision of MD-110 was in 1999, in addition to implementing the new regulatory provisions, EEOC took the opportunity to update MD-110 based on new legal and practical developments. The agency identified five focus areas: (1) pilot projects process; (2) class complaint updates; (3) conflict of interest updates; (4) implementation of final rule; and (5) general updates and clarifications.

Following is a summary of the changes, updates, and revisions in the new MD-110, organized by chapter.

## PREAMBLE

- Provides the history of the federal sector equal employment opportunity (EEO) complaint process.

## CHAPTER 1: AGENCY AUTHORITY AND RESPONSIBILITY

- Defines key terms, such as, "federal agency," "EEO Director," Agency Representative," and "EEO ADR."
- Provides an overview of an EEO Director's major responsibilities in accordance with 29 C.F.R § 1614.102(2). (Section III).
- Addresses potential conflict of interest in processing federal sector EEO complaints.
- Specifically addresses two important potential conflicts of interest: (1) when the alleged responsible management official is the head of the agency; and (2) when the alleged responsible management official is the EEO Director or supervisor in the EEO Office. (Section IV.B).
- Supplies guidance to agencies on how to develop an impartial record where a conflict of interest or the appearance of a conflict exists. (Section IV.C).
- Provides instruction to agencies on how to ensure a clear separation between the agency's EEO complaint program and the agency's defensive function. In particular, there must be sufficient legal resources provided to the EEO program and where necessary, a firewall established between the EEO function and the agency's defensive function. (Section IV.D).
- Provides agency reporting requirements for federal complaint process activities, such as, EEOC Form 462, Title III of the No FEAR Act, and Annual Report to Congress. (Section VIII).
- Establishes how EEOC will address issues of non-compliance with rules, regulations, orders, Management Directives, Bulletins, or any other instructions issued by the Commission. (Section IX).
- Outlines the steps for requesting pilot projects on processing complaints in ways other than those prescribed in 29 C.F.R. § 1614. (Section X).

## CHAPTER 2: PRE- COMPLAINT PROCESSING

- Defines "EEO ADR" as a term used to describe a variety of approaches to resolving conflict that differ from traditional adjudicatory or adversarial methods. (Section I.E).
- Explains that EEO Counselor training requirements now include training in the various theories of discrimination and an overview of the agency's informal and formal ADR processes. (Section II.B).
- Clarifies the EEO Counselor's roles and responsibilities, and adds that the EEO Counselor should explain to the aggrieved person the reasonable accommodations available throughout the EEO process. (Section III.1).
- Advises the aggrieved person that his or her identity will not be revealed unless he or she authorizes the EEO Counselor to reveal it or he or she files a formal complaint. (Section III.7).
- Spells out that EEO Counselors need to be familiar with: (1) Title VII's prohibition against sex discrimination, which includes discrimination on the basis of pregnancy, sexual orientation, and gender identity (including transgender status); (2) the Lilly Ledbetter Fair Pay Act of 2009; and (3) the Genetic Information Nondiscrimination Act of 2008. (Section IV.C).
- Provides further explanation of the purpose of the "limited inquiry" during the EEO counseling process. (Section V).
- Clarifies use of the EEO ADR program during the counseling process. (Section VII).

## CHAPTER 3: ADR FOR EEO MATTERS

- Clarifies that the Responsible Management Official cannot be the agency's Settlement Official. (Section III.A.2).
- Adds that the agency's written EEO ADR procedures should cover not only those matters when EEO ADR is unavailable, but also the criteria the agency uses to determine when an issue is appropriate for ADR. (Section III A.5).
- Includes more details on the matters inappropriate for EEO ADR, and reiterates the Commission's position that the majority of matters are assumed to be eligible for EEO ADR, with very narrow exceptions. (Section III.C).
- Clarifies a requirement that EEO ADR programs must make available at least one ADR technique that allows for the meaningful participation of all involved parties, such as mediation, facilitation, or settlement conferences. (Section III.E).
- Provides that EEOC considers it a best practice to have an ADR office separate and apart from the EEO process—an independent ADR office—to resolve non-EEO issues and free up staff for processing EEO complaints; however there are certain requirements and limitations. (Section III.K).

## CHAPTER 4: PROCEDURES FOR RELATED PROCESSES

- Provides additional information and case updates for processing mixed-case complaints. (Section II).

## CHAPTER 5: AGENCY PROCESSING OF FORMAL COMPLAINTS

- Explains that because the Merit Systems Protection Board (MSPB) does not have jurisdiction to hear matters that cannot be appealed, complaints containing such matters should be processed by the agency under the 1614 process and not mixed with matters that are appealable to the MSPB. This will not be considered fragmentation. (Section III).
- Makes clear that a claim of harassment is actionable as long as at least one incident that is part of the claim occurred within the filing period.
- Provides case updates related to harassment. See Bulluck v. Department of Veterans Affairs, EEOC Appeal No. 0120114276 (Mar. 14, 2012); Richardson v. U.S. Postal Service, EEOC Appeal No. 0120111122 (Feb. 1, 2012); and National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). (Section III.A.3).

Provides additional guidance on how to avoid common errors in dismissing complaints of discrimination, including reference to EEOC, Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds, issued in September of 2014. (Section IV).

- Requires agencies to clearly set forth their reasons for dismissing a complaint in all dismissal decisions and include evidence in the record that supports the grounds for dismissal. (Section IV).
- Explains that when an individual alleges retaliation in a complaint, he or she does not need to make a showing of an adverse employment action. (Section IV.A.3).
- Clarifies that complaints alleging discrimination in proposals to take personnel actions or in other preliminary steps to taking personnel actions should be dismissed unless the complaint alleges that the proposal or preliminary step is retaliatory. (Section IV.A.10).
- Provides additional guidance and examples on the time limit for investigations. When amended, investigations shall be complete in not more than 360 days, unless there is a written extension of not more than 90 days. (Section V.B).
- Requires that if an agency fails to complete an investigation in a timely manner, the agency shall issue a written notice to the complainant informing him or her of the delay the revised estimated completion date, and complainant's right to file a civil action or request a hearing. (Section V.C). MD-110 Appendix K provides a sample "Notice of Incomplete Investigation."

## CHAPTER 6: DEVELOPMENT OF IMPARTIAL AND APPROPRIATE FACTUAL RECORDS

- Clarifies that the three basic types of evidence are direct (evidence that proves a fact without resorting to inference or presumption), circumstantial (evidence based on inference), and statistical (evidence based on a survey of the general environment). (Section VI.B).
- Explains that the complaint file must be assembled as an electronic document, unless the agency has demonstrated good cause as to why it cannot produce a digital copy of the file. In that case, a paper file may be submitted. (Section VIII.A).
- Describes the digital complaint file requirements as outlined below. (Section VIII.D).
    - The file should be image over text or run through OCR text recognition such that it is searchable.
    - The file should contain digital bookmarks identifying key documents, exhibits, and sections of the file with specific, rather than generic, titles.
    - The file should contain a typed summary of the investigation, including a discussion and analysis of the evidence that is signed and dated by the investigator. (Section VIII.D).
- Provides that the complainant and his or her representative should be given the option to receive the complaint file in a digital and/or paper medium. (Section VIII.F).

## CHAPTER 7: HEARINGS

- Clarifies that the agency shall arrange and pay for a verbatim transcript (provided in electronic format for the Administrative Judge and the complainant, unless otherwise requested) of the hearing proceedings pursuant to 29 C.F.R. § 1614.109(h), regardless of whether the Administrative Judge issues a decision. Contracts with court reporting firms must require delivery of the transcript to the Administrative Judge within a customary time frame determined by the court reporting firm in the jurisdiction, not to exceed twenty-one (21) days unless the Administrative Judge requires delivery of the transcript by a certain date after the hearing closes. (Section II.D).
- Reinforces EEOC's authority to issue sanctions against agencies and complainants when it deems necessary. See Waller v Department of Transportation, EEOC Appeal No 0720030069 (May 25, 2007). (Section III.A).
- Further clarifies when an Administrative Judge may impose sanctions for failure to comply with his or her orders or within the specified time set forth in the order without good cause shown. See Rountree v. Department of the Treasury, EEOC Appeal No. 07A00015 (July 17, 2001). (Section III.A).
- Clarifies that agency requests for the medical records of complainants should occur only to establish or challenge disability status or the right to reasonable accommodation in Rehabilitation Act cases, or when a complainant is asserting a claim for compensatory damages and has sought medical treatment for one or more stress-related conditions. When a complainant is pro se, agencies must request the Administrative Judge's prior permission before making requests for medical information. (Section IV.B.4).

## CHAPTER 8: COMPLAINTS OF CLASS DISCRIMINATION

- Provides that an Administrative Judge's decision on the merits of a class complaint is a final decision (not a recommended decision), which the agency can fully implement or appeal in its final action. (Section X & XI).
- Clarifies that retaliation claims can be the subject of class actions when the plaintiffs establish a general practice of retaliation against employees who oppose discriminatory practices or exercise rights protected under Title VII. (Section XIII).

## CHAPTER 9: APPEALS TO THE COMMISSION

- Provides that EEOC's Office of Federal Operations will provide expedited consideration (within 90 days of receipt of appeal) of class complaints that are dismissed for failure to meet the prerequisites of a class complaint. (Section III.D.1, footnote 6).
- Includes that the complainant, agent, grievant, or individual class member must file an appeal by mail or, as an alternative, through the Commission's electronic document submission portal. (Section IV.A.1).
- Requires agencies to file appeals and submit complete complaint case files to EEOC in a digital format either by using EEOC's electronic document submission portal or by some other approved method, unless they can show good cause for doing otherwise. (Section IV.A.2).
- Provides the minimum requirements for electronic files: They must have electronic bookmarks and sequentially numbered pages starting with the first page of the file. (Section IV.G).
- Authorizes the use of electronic signatures on digital documents. (Section IV.H).
- Clarifies that EEOC appellate decisions are final for purposes of filing a civil action, unless either party files a timely request for reconsideration. (Section V.D).
- Explains that the Commission reserves the right to reopen any decision on its own motion. (Section VII.A).
- Extends the period within which agencies must provide ordered relief from 60 to 120 days. (Section IX.A.2).

## CHAPTER 10: ADMINISTRATIVE APPEALS, CIVIL ACTIONS, AND APPOINTMENT OF COUNSEL

- No modifications.

## CHAPTER 11: REMEDIES

- Sets forth consolidated guidance on remedies to include back pay, front pay, attorney's fees and costs, awards of compensatory damages (including a brief description of compensatory damages), and other forms of equitable relief.

## CHAPTER 12: SETTLEMENT AUTHORITY

- No modifications.

## APPENDICES

- Creates four new appendices:
    - Appendix A:Interagency Agreement between a Third-Party Agency and the Agency
    - Appendix L: Complaint File Format
    - Appendix K: Notice of Incomplete Investigation
    - Appendix Q: Quick Reference Chart: Documentation Required to Close Compliance with the Most Common OFO Orders
- Revises and modifies the following forms:
    - Appendix D: Information on Other Procedures (revised and refers all standing and jurisdiction references directly to MSPB regulations).
    - Appendix M: Request for a Hearing Form(revised and modified)
    - Appendix P: Notice of Appeal/Petition, as revised, February 2009