

# 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