



Chapter 2

Management Directive 110

EQUAL EMPLOYMENT OPPORTUNITY PRE- COMPLAINT PROCESSING

I. INTRODUCTION

A. Counseling Generally^[1]

The EEO process begins when a person who believes s/he has been aggrieved meets with an EEO Counselor.^[2] For further information on coverage under the statutes, see **Section 2.III.A.1 in "Threshold Issues" of the Commission's Compliance Manual. (<http://www.eeoc.gov/policy/docs/threshold.html>)**

In this Management Directive, the term

"EEO Counselor" refers to any agency or contracted employee who, serving as a neutral, provides an aggrieved individual with his/her rights and obligations under equal employment opportunity laws, gathers limited data and may attempt an informal resolution where ADR is not offered or accepted, pursuant to 29 C.F.R. § 1614.

The EEO Counselor provides vital information regarding the EEO process and other processes that may be available to the aggrieved individual, gathers basic information regarding the matter(s) from the aggrieved individual, and attempts to informally resolve the matter(s) if the matter does not go to the alternative dispute resolution program. The EEO Counselor plays a vital role in ensuring prompt and efficient processing of the formal complaint. This section of the Management Directive provides Commission guidance and procedures that EEO Counselors should follow when presented with individual and class claims of discrimination.

All **time periods** set out in this Management Directive are stated in calendar days unless otherwise indicated. The first day counted is the day after the event from which the time period begins to run and the last day of the period shall be included unless it falls on a Saturday or Sunday or federal holiday, in which case the period shall be extended to include the next business day. All time periods are subject to waiver, estoppel, and equitable tolling. See the **Commission's Compliance Manual** (<http://www.eeoc.gov/policy/docs/threshold.html#2-IV-D>), "Threshold Issues" 915-003, Section 2-IV Timeliness for further information.

B. Full-Time EEO Counselors

Agencies should use full-time EEO Counselors whenever possible. If an agency must rely on EEO Counselors for whom EEO counseling is a collateral-duty, agencies should consider the following best practices: (1) include a timeliness component in the performance plan of the collateral-duty EEO Counselors; (2) implement an agency policy to remove collateral duties from EEO Counselors for tardiness or inferior work product; and (3) provide incentives for good performance by using on-the-spot awards, letters to supervisors, and awards presentations.^[3] The Commission also expects agencies to use the step-by-step guide at Appendix B to develop or refine its own counseling procedures.

C. EEO Counselor Training Requirements

Continuing education and training for employees working in federal sector EEO is vitally important to promoting the goals and objectives of equal employment opportunity. This Chapter establishes mandatory training requirements for EEO Counselors. See Section II below for mandatory training requirements.

D. EEO Counseling and Investigations

An EEO Counselor, whether agency or contracted, may not serve as an investigator in a dispute in which s/he provided counseling to the aggrieved person. The EEO Counselor's role is to provide an environment for open dialogue leading to an informal resolution prior to the filing of a complaint. The role is compromised if the EEO Counselor also serves as an investigator of the complaint, as the role of the investigator is that of a neutral fact finder who collects and discovers factual information concerning the claim(s) in the complaint under investigation and prepares an investigative summary.

The Commission also discourages agencies from allowing an EEO Counselor to act as an investigator in a different dispute. Combining the roles of EEO Counselor and investigator (even with regard to different disputes) can create a perception of bias and potentially confuse individuals with regard to the purpose of the counseling process. Therefore, the Commission recommends against using EEO Counselors as investigators, except as a last resort.

E. EEO Counseling and EEO ADR

Both EEO alternative dispute resolution (ADR) and EEO counseling are essential to the prompt resolution of claims of discrimination. The opportunity for informal resolution is important. EEO ADR is a term used to describe a variety of approaches to resolving conflict that differ from traditional adjudicatory methods or adversarial methods. EEO ADR provides a means of improving the efficiency of the federal EEO complaint process by attempting early and informal resolution of EEO disputes without the filing of a complaint.

When an aggrieved person seeks pre-complaint counseling, the EEO Counselor must fully inform the individual of:

1. how the agency EEO ADR program works;
2. the opportunity to participate in the program where the agency agrees to offer EEO ADR in a particular case; and
3. the right to file a formal complaint if EEO ADR does not achieve a resolution.

See Chapter 3 of this Management Directive for more detailed EEO ADR information.

II. MANDATORY EEO COUNSELOR TRAINING REQUIREMENTS

A. Minimum Requirements

To ensure quality counseling throughout the federal sector, the Commission requires that new EEO Counselors, including contract and collateral-duty EEO Counselors, receive a minimum of thirty-two (32) hours of EEO Counselor training prior to assuming counseling duties. In addition to the training for new EEO Counselors, all EEO Counselors are required to receive at least eight (8) hours of continuing EEO Counselor training each fiscal year.

The Commission has developed training courses to satisfy these minimum requirements, and it offers them to agencies through the Commission's Revolving Fund Program on a fee-for-service basis.^[4] Agencies may also develop their own courses to satisfy this requirement as long as the training meets the minimum standards set forth by the Commission.

B. Minimum Standards for Thirty-Two-Hour Training Course

New EEO Counselors must receive at a minimum, training in the following areas before an agency assigns them to provide EEO counseling to aggrieved persons:

1. an overview of the entire EEO process set forth under 29 C.F.R. Part 1614, emphasizing important time frames in the EEO process, providing an overview of counseling class complaints, and analyzing fragmentation issues (see Chapter 5, Section III of this Management Directive for a discussion of fragmentation);
2. a review of the roles and responsibilities of an EEO Counselor, as described in this Chapter and in the appendices to this Management Directive;
3. an overview of the statutes that the Commission enforces, including **Title VII of the Civil Rights Act of 1964, as amended** (<https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>) (prohibiting discrimination on the basis of race, color, religion, sex, or national origin); the **Equal Pay Act of 1963** (<https://www.eeoc.gov/statutes/equal-pay-act-1963>);

1963) (prohibiting agencies from paying different wages to men and women performing equal work in the same work place); the **Age Discrimination in Employment Act of 1967, as amended** (<https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967>) (prohibiting discrimination against persons age 40 or older); **Sections 501 and 505 of the Rehabilitation Act of 1973, as amended** (<https://www.eeoc.gov/statutes/sections-501-and-505-rehabilitation-act-1973>) (prohibiting discrimination against people with disabilities); and **Title II of the Genetic Information Nondiscrimination Act of 2008** (<https://www.eeoc.gov/statutes/genetic-information-nondiscrimination-act-2008>) (prohibiting discrimination based on genetic information);

4. an explanation of the theories of discrimination, including the disparate treatment, adverse impact, and reasonable accommodation theories, and providing more detailed instructions concerning class actions and issues attendant to fragmentation;
5. a review of the practical development of issues through role-playing or other practices designed to have attendees practice providing EEO counseling, including the initial intake session with an aggrieved person, identifying claims, writing reports, and attempting resolution;
6. a review of other procedures available to aggrieved persons: the right to go directly to court under the Age Discrimination in Employment Act after notice to the Commission; mixed case processing issues, including the right of election; class complaints processing issues; and the negotiated grievance procedure, including the right of election;
7. an overview of the remedies available for each law, such as compensatory damages, attorney's fees, and costs available to prevailing parties: and
8. an overview of the agency's informal and formal EEO ADR processes.

C. Standards for Continuing Training Requirements

Once new EEO Counselors complete the minimum requirements, they must receive a minimum of eight hours of continuing EEO counseling training during every fiscal year thereafter. The purpose of this continuing training requirement is to keep EEO Counselors informed of developments in EEO practice, law, and guidance, as well as to enhance and develop their counseling skills. Accordingly, agencies should

conduct a needs assessment to determine specific areas for training. The Commission anticipates that this training will include segments on legal and policy updates, regulatory and statutory changes, counseling skills development, and EEO ADR program updates.

III. THE ROLES AND RESPONSIBILITIES OF AN EEO COUNSELOR

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. The EEO Counselor must perform several tasks in all cases, regardless of whether the aggrieved individual ultimately participates in EEO ADR, including:

1. Advise the aggrieved individual about the EEO complaint process under 29 C.F.R. Part 1614. The EEO Counselor should explain the reasonable accommodations available throughout the EEO process. The EEO Counselor should explain the agency EEO ADR program, stating that the program is available to the aggrieved individual or advising whether the program will be made available. The EEO Counselor should further explain that if the EEO ADR program is available, the aggrieved individual will have to decide whether to seek pre-complaint resolution through the EEO ADR process or through the traditional EEO counseling process. In this regard, the EEO Counselor should inform the aggrieved individual about the differences between the two processes. (Educator)
2. Determine the claim(s) and basis(es) raised by the aggrieved individual. (Information gatherer)
3. Conduct a limited inquiry during the initial interview with the aggrieved individual for the purpose of determining jurisdictional questions. This includes determining whether there may be issues relating to the timeliness of the individual's EEO Counselor contact and obtaining information relating to this issue. It also includes obtaining enough information concerning the

claim(s) and basis(es) so as to enable the agency to properly identify the legal claim raised if the individual files a complaint at the conclusion of the EEO counseling process. (Information gatherer)

Use of the term "initial interview" in this context is not intended to suggest that during the first meeting with the aggrieved person an EEO Counselor must obtain all of the information s/he needs to determine the claim(s) or basis(es). Nor does it mean that if the aggrieved individual decides to participate in EEO ADR, the EEO Counselor is prevented from contacting them to obtain such additional information as s/he needs for this specific purpose.

4. Seek a resolution of the dispute at the lowest possible level, unless the agency offers EEO ADR and the aggrieved individual agrees to participate in the EEO ADR program. If the dispute is resolved in counseling, the EEO Counselor must document the resolution. (Facilitator, translator, messenger, and suggestion maker)
5. Advise the aggrieved individual of his/her right to file a formal discrimination complaint if attempts to resolve the dispute through EEO counseling or EEO ADR are unsuccessful. (Educator)
6. Prepare a report sufficient to document that the EEO Counselor undertook the required counseling actions and to resolve any jurisdictional questions that arise. (Report Writer)
7. Advise the aggrieved person that their identity will not be revealed unless the aggrieved person authorizes them to reveal it or they file a formal complaint with the agency. (Educator)

The Commission has developed a guide for EEO counseling that agencies may use in developing or refining their own procedures. (See Appendix B of this Management Directive).

IV. INITIAL INTERVIEW SESSION

A. Provide Required Written Notice

At the initial session or as soon as possible thereafter, the EEO Counselor must provide all aggrieved individuals written notice of their rights and responsibilities.

29 C.F.R. § 1614.105(b). The Commission has set forth this information in the "EEO Counselor Checklist," in Appendix C of this Management Directive.

B. Provide Information on Other Procedures as Required

Depending upon the facts and circumstances of the case, an aggrieved person may have options other than the Part 1614 procedure available in pursuit of a discrimination claim. The individual, in some cases, may have to elect the process s/he wishes to pursue. Election options apply in age discrimination complaints, mixed case complaints, Equal Pay Act complaints, and claims where certain negotiated grievance procedures apply. In addition, procedures may be available through the Office of Special Counsel. As such, EEO Counselors must be familiar with these procedures and be able to identify such cases when the aggrieved person first seeks counseling. See Appendices D and E of this Management Directive.^[5]

C. Explain Statutes and Regulations

EEO Counselors must have a good working knowledge of the complaint processing regulations in Part 1614 and a sufficient familiarity with federal anti-discrimination statutes, regulations and Commission guidance that will enable them to identify bases and claims correctly. These statutes are:

1. Title VII of the Civil Rights Act of 1964, as amended
(<https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>)

Title VII prohibits discrimination based on race, color, religion, sex, and national origin. It also prohibits reprisal or retaliation for participating in the discrimination complaint process or for opposing any employment practice that the individual reasonably and in good faith believes violates Title VII.

Title VII's prohibition against sex discrimination includes discrimination on the basis of pregnancy, sexual orientation and gender identity including transgender status.

A claim of discrimination based on sexual orientation is inherently a claim of sex discrimination. **Baldwin v. Dep't. of Transportation**
(https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120133080.txt), EEOC Appeal No. 0120133080 (July 15, 2015). A claim of

discrimination based on gender identity or transgender status is also a claim of sex discrimination. **Macy v. Dep't. of Justice** (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt), EEOC Appeal No. 0120120821 (Apr. 20, 2012). EEO Offices should therefore process such complaints under 29 C.F.R. Part 1614 as claims of sex discrimination, unless complainant specifically requests to use a different process. For additional information, see **Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment** ([https://op.bna.com/gr.nsf/id/llbe-9x5qcw/\\$File/OPM%20EEOC%20MSPB%20OSC%20Guide.pdf](https://op.bna.com/gr.nsf/id/llbe-9x5qcw/$File/OPM%20EEOC%20MSPB%20OSC%20Guide.pdf)).

2. **Age Discrimination in Employment Act of 1967, as amended (ADEA)** (<https://www.eeoc.gov/statutes/age-discrimination-employment-act-1967>).

The ADEA prohibits discrimination in employment on the basis of age (40 years or older). It also prohibits retaliation against individuals exercising their rights under the statute. Unlike Title VII and the Rehabilitation Act, the ADEA allows persons claiming age discrimination to go directly to court, after giving the Commission 30 days' notice of the intent to file such an action, without utilizing an agency's administrative complaint procedures. If, however, an individual chooses to file an administrative complaint, s/he must exhaust administrative remedies before proceeding to court. As with Title VII complaints, a complainant exhausts administrative remedies 180 days after filing a formal complaint, if the agency has not taken a final action, or 180 days after filing an appeal with the Commission if the Commission has not issued a decision.

3. **Rehabilitation Act of 1973, as amended** (<https://www.eeoc.gov/statutes/sections-501-and-505-rehabilitation-act-1973>).

The Rehabilitation Act prohibits discrimination on the basis of mental and physical disabilities, as well as retaliation for exercising rights under the Act. The Rehabilitation Act requires that agencies make reasonable accommodations to the known physical or mental limitations of an applicant or qualified employee with a disability unless the agency can demonstrate that the accommodations would impose an undue hardship on the operation of its program. (Congress amended the Rehabilitation Act of 1973 in October

1992 to provide that the standards used to determine whether non-affirmative action employment discrimination has occurred shall be the standards applied under **Title I of the Americans with Disabilities Act** (<https://www.eeoc.gov/statutes/titles-i-and-v-americans-disabilities-act-1990-ada>). See § 503(b) of the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat 4344 (Oct. 29, 1992); 29 U.S.C. § 791(g.) (Congress amended the Rehabilitation Act again when it issued the **Americans with Disabilities Act Amendments Act of 2008** (<https://www.eeoc.gov/statutes/ada-amendments-act-2008>)). This statute broadly interprets the definition of disability by adding "major bodily functions" as a major life activity and by directing that the determination of whether an impairment substantially limits a major life activity should be determined based on the impairment's effect in its active state (for impairments that are episodic or in remission) and should be determined without taking into account the ameliorative effects of mitigating measures, such as medication.

4. **Equal Pay Act of 1963 (EPA)** (<https://www.eeoc.gov/statutes/equal-pay-act-1963>)

The EPA prohibits sex-based wage discrimination. It prohibits federal agencies from paying employees of one sex lower wages than those of the opposite sex for performing substantially equal work. Substantially equal work means that the jobs require equal skills, effort, and responsibility, and that the jobs are performed under similar working conditions.^[6] The EPA also prohibits retaliation for exercising rights under the Act.

5. **Lilly Ledbetter Fair Pay Act of 2009** (<http://www.gpo.gov/fdsys/pkg/PLAW-111publ2/pdf/PLAW-111publ2.pdf>)

The **Lilly Ledbetter Fair Pay Act of 2009** (<http://www.gpo.gov/fdsys/pkg/PLAW-111publ2/pdf/PLAW-111publ2.pdf>) amended Title VII of the Civil Rights Act of 1964 to provide that an individual subjected to compensation discrimination under Title VII, the Age Discrimination in Employment Act of 1967, or the Americans with Disabilities Act of 1990 may file a complaint within forty-five (45) days of any of the following:

- a. When a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- b. When the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- c. When the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or in part on such compensation decision or other practice.

The Act also has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation pending on or after that date.

6. Genetic Information Nondiscrimination Act of 2008 (GINA)
(<https://www.eeoc.gov/statutes/genetic-information-nondiscrimination-act-2008>)

GINA prohibits discrimination by federal agencies based on an individual's genetic information, which includes the results of genetic tests to determine whether the individual is at increased risk of acquiring a condition in the future, as well as an individual's family medical history. Specifically, the law prohibits the use of genetic information in making employment decisions, restricts the acquisition of genetic information by federal agencies, imposes strict confidentiality requirements, and prohibits retaliation against individuals who oppose actions made unlawful by GINA. The remedies available under GINA are the same as those available under Title VII and the Rehabilitation Act.

7. Commission Regulations, Guidelines, and Policy Directives
(<https://www.eeoc.gov/federal-sector/management-directive/regulations-directives-guidance-and-resource-documents>)

The Commission has issued regulations that address the application of federal nondiscrimination law to the federal government. The regulations governing the processing of federal sector discrimination complaints are contained in Title 29 of the Code of Federal Regulations (C.F.R.), Part 1614. The regulations set out the EEO Counselor's obligations enumerated in Section II of this Chapter.

Other Commission regulations and guidelines address the substantive provisions of federal nondiscrimination law. For example, 29 C.F.R. Part 1630 sets forth Commission regulations applicable to the Rehabilitation Act. EEO Counselors should be familiar with Part 1630 in order to counsel individuals who present claims of disability discrimination.^[7] The Commission also has disseminated enforcement guidance on discrete issues and areas of nondiscrimination law, such as "**Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors**" (<http://www.eeoc.gov/policy/docs/harassment.html>), issued June 18, 1999, and "**Revised Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act**," issued **October 17, 2002** (<http://www.eeoc.gov/policy/docs/accommodation.html>). These documents and other Enforcement Guidance are available on the Commission's website at http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm (<https://www.eeoc.gov/enforcement-guidances-and-related-documents>) in the Enforcement Guidance and Related Documents section.

V. THE LIMITED INQUIRY

Once the EEO Counselor has determined the basis(es) and claim(s) adhering to the guidance set forth below, s/he should conduct a limited inquiry. Prior to any resolution attempts, a limited inquiry should be conducted in all counseling. The purpose of the limited inquiry is to obtain information to determine jurisdictional questions if a formal complaint is filed and is performed regardless of whether the aggrieved person subsequently chooses EEO ADR. The limited inquiry also is used to obtain information for settlement purposes if the person chooses EEO counseling over EEO ADR, or does not have the right to choose between EEO counseling and EEO ADR, for example where the agency has specified in its written EEO ADR procedures that the matter is inappropriate for EEO ADR. For further information, see Chapter 3 Section III.C of this Management Directive.

While the scope of the inquiry will vary based on the complexity of the claims, the inquiry is intended to be limited and is not intended to substitute for the in-depth fact-finding required in the investigative stage of formal complaint process. The EEO Counselor must at all times control the inquiry. If the aggrieved person or agency

personnel raise objections to the scope or nature of the inquiry, the EEO Counselor shall seek guidance and assistance from the EEO Director. If the EEO Counselor has problems with the inquiry, s/he should immediately notify the EEO Director.

Appendix B includes suggested methods for conducting the inquiry. This guidance may be used to supplement established procedures.

A. Determining the Claim(s)

1. Fragmentation

The EEO Counselor plays a crucial role in the complaint process. As discussed in more detail in Chapter 5, Section III of this Management Directive, EEO Counselors must assist the aggrieved individual in articulating the claim so as to avoid fragmenting the claim. EEO Counselors must review the materials set forth in Section III of Chapter 5 and become familiar with the concept of fragmentation.

2. Identifying the claim(s)

At the initial interview, the EEO Counselor must determine what action(s) the agency has taken or is taking that causes the aggrieved person to believe s/he is the victim of discrimination. Before the EEO Counselor begins the inquiry, s/he must be certain that the claim(s) are clearly defined and the aggrieved person agrees with how the agency defines the claim(s). The EEO Counselor must also determine, based on his/her understanding of the claims, whether special procedures apply. For further information about special procedures, see Chapter 4 of this Management Directive.

If a claim is like or related to a previously filed complaint, then the complaint should be amended to include that claim when the agency can complete the development of an impartial and appropriate factual record within 360 days of when the original complaint was filed. If the claim is not like or related to a previously filed complaint, or where an impartial and appropriate record cannot be developed within 360 days of when the original complaint was filed, the claim should be processed as a separate complaint. Commission regulations require agencies to consolidate complaints for processing unless it is impossible to do so. See 29 C.F.R. § 1614.606. In a process set forth in Chapter 5, Section III.B of this Management Directive, a complainant shall be

instructed to submit a letter to the agency's EEO Director or designee, describing the new incident(s) and stating that s/he wishes to amend his/her complaint to include the new incident(s). The EEO Director or designee shall review the request and determine the correct handling of the amendment in an expeditious manner.

B. Determining the Basis(es)

The aggrieved person must believe s/he has been discriminated against on the basis of race, color, sex (includes pregnancy, equal pay, gender identity, and sexual orientation) when discrimination based on, religion, national origin, age (40 and over), disability, genetic information, or in retaliation for having participated in activity protected by the various civil rights statutes. The EEO Counselor should determine if the aggrieved person believes that his/her problem is the result of discrimination on one or more of the bases.

C. When the Basis(es) Is Not Covered by the EEO Laws

If it is clear that the aggrieved person's problem does not involve a basis(es) set forth in the Commission's laws and regulations, the EEO Counselor should inform the aggrieved person and, if possible, provide him/her with the appropriate process for addressing the matter. If the aggrieved person insists that s/he wants to file a discrimination complaint, the EEO Counselor should conduct a final interview and issue the Notice of Right to File a Discrimination Complaint. Under no circumstance should the EEO Counselor attempt to dissuade a person from filing a complaint.

VI. RESOLUTION

In almost all instances, informal resolution with an EEO Counselor, freely arrived at by all parties involved in the dispute, is the best outcome of a counseling action. In seeking resolution, the EEO Counselor must listen to and understand the viewpoint of both parties so that s/he is able to assist the parties in achieving resolution. The EEO Counselor's role is to facilitate resolution, not develop, or advocate specific terms of an agreement. The EEO Counselor must be careful not to inject his/her views on settlement negotiations.^[8]

Appendix C includes suggested methods for seeking resolution. This guidance may be used to supplement established agency procedures.

A. Extension of Counseling for Resolution Efforts

When the aggrieved individual and an EEO Counselor engage in resolution efforts, they may decide that they need additional time to reach an agreement. If the aggrieved person consents, the EEO office may extend the counseling period an additional period up to but not exceeding 60 days. See 29 C.F.R. § 1614.105(e).

B. Resolution of the Dispute

If, during the course of the limited inquiry, the agency and the aggrieved person agree to an informal resolution of the dispute, the terms of the resolution must be reduced to writing, clearly identify the claims resolved, and be signed by both parties^[9] to help ensure they have the same understanding of the terms of the resolution. See 29 C.F.R. § 1614.603. The Commission recommends that the EEO Counselor, with the knowledge and guidance of the EEO Director, set forth the terms as agreed to by the parties (agency and the aggrieved individual) of the informal resolution in a settlement transmitted to the parties. The letter should state clearly the terms of the informal resolution and should notify the aggrieved person of the procedures available under 29 C.F.R. § 1614.504, in the event that the agency fails to comply with the terms of the resolution. Other laws may provide requirements in settlement agreements, as for example, the **Older Worker's Benefit Protection Act of 1990** ([https://www.law.cornell.edu/wex/older_workers_benefit_protection_act_\(ow_bpa\)](https://www.law.cornell.edu/wex/older_workers_benefit_protection_act_(ow_bpa))). Appendix F in this Management Directive is a recommended format for the resolution settlement.

The EEO Counselor shall transmit a signed and dated copy of the settlement to the EEO Director. The EEO Director shall retain the copy for four years or until s/he is certain that, the agreement has been fully implemented.

C. Failure to Resolve the Dispute

The aggrieved person may not be satisfied with the agency's proposed resolution of the dispute, or the agency officials may not agree to the aggrieved person's suggestions. If informal resolution is not possible, the EEO Counselor must hold a

final interview with the aggrieved person and issue the Notice of Right to File a Discrimination Complaint. No further counseling should occur.

VII. THE EEO ADR PROGRAM

A. The Choice of EEO Counseling or EEO ADR

At the initial counseling session the EEO Counselor will inquire whether the aggrieved is interested in trying to resolve the matter through the agency's EEO ADR program. If the aggrieved is interested, then within a reasonable time, the agency must decide whether to offer EEO ADR to the aggrieved person. When the agency offers EEO ADR in accordance with its EEO ADR policy/procedures, and the aggrieved agrees to participate, then the agency must provide an official with settlement authority for the EEO ADR process. See Chapter 3 of this Management Directive for more information about the EEO ADR process. If the agency offers EEO ADR, then the aggrieved person must be given a reasonable time to choose whether to pursue counseling or participate in EEO ADR. If the aggrieved person chooses to participate in EEO ADR, counseling activities must end. The EEO Counselor should resume the EEO process as specified in Section VII.B of this Chapter.

To participate in EEO ADR, the aggrieved person must sign the agency's Election Form, Agreement to Mediate, or other similar form. The EEO Counselor's Report should include the signed form.

B. Role of the EEO Counselor during EEO ADR Process

When an aggrieved person chooses to participate in the EEO ADR process, the EEO Counselor cannot attempt to resolve the matter. Once the aggrieved person selects EEO ADR, the EEO Counselor must complete the intake functions of counseling (that is, obtaining the information needed to determine the basis(es), claim(s), timeliness, and desired redress) and refer the dispute for EEO ADR processing. Once those tasks are completed, the EEO Counselor should have no further involvement in resolving the matter until s/he learns the outcome of the EEO ADR process. The role of the EEO Counselor will vary depending on whether the parties successfully resolve the dispute during EEO ADR.

1. Successful EEO ADR Outcome

The EEO Counselor shall advise the aggrieved person that if the dispute is resolved during the EEO ADR process, the terms of the agreement must be in writing, clearly identify the claims resolved, and be signed by both parties. See 29 C.F.R. § 1614.603.

2. Unsuccessful EEO ADR/Aggrieved Withdraws from ADR

The EEO Counselor shall advise the aggrieved person that if EEO ADR does not resolve the dispute, or if the matter is not resolved within ninety (90) days from the initial contact with the EEO Counselor, the aggrieved person will receive a final interview and Notice of Right to File a Formal Complaint explaining how to file a formal complaint.

In addition, the EEO Counselor must prepare the EEO Counselor's Report and conduct the final interview. The report should state whether the parties attempted EEO ADR, but cannot reveal any other information about the EEO ADR attempt.

C. Completing the EEO ADR Process

If the agency offers EEO ADR in a particular case and the aggrieved person agrees to participate, the pre-complaint processing period shall be up to ninety (90) days. See 29 C.F.R. § 1614.105(f). Should the parties successfully resolve the dispute during the EEO ADR process, they must sign a written settlement agreement. See 29 C.F.R. § 1614.603. In addition, the EEO ADR program should notify the EEO Counselor of the settlement, and provide a copy of the document.

If the dispute is not resolved within the 90-day period, the EEO ADR program will notify the EEO Counselor, who will issue the Notice of Right to File a Discrimination Complaint, required by 29 C.F.R. § 1614.105(d), as soon as possible, but not later than the 90th day after the individual initiates the EEO process or contacts the EEO office. See 29 C.F.R. § 1614.105(f).

VIII. FINAL INTERVIEW

During the final interview with the aggrieved person, the EEO Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. The EEO Counselor should provide the aggrieved with information to

move the matter forward and answer any questions the aggrieved may have. The EEO Counselor must not indicate whether s/he believes the discrimination complaint has merit. Since EEO counseling inquiries are conducted informally and do not involve sworn testimony or extensive documentation, the EEO Counselor (1) cannot make findings on the claim of discrimination, and (2) should not imply to the aggrieved person that his/her interpretation of the claims of the case constitutes an official finding of the agency on the claim of discrimination. See Appendix G for a sample Notice of Right to File a Discrimination Complaint.

In addition, the EEO Counselor must provide the aggrieved person with the following information:

A. Right to Pursue the Claim through the Formal Process

If the dispute has not been resolved to the satisfaction of the aggrieved person, the EEO Counselor must tell the aggrieved person that s/he has the right to pursue the claim further through the formal complaint procedure. It is the aggrieved person, and not the EEO Counselor, who must decide whether to file a formal complaint of discrimination.

B. Requirements of the Formal Complaint

The EEO Counselor must inform the aggrieved person that the complaint:

1. Must be in writing;
2. Must be specific with regard to the claim(s) that the aggrieved person raised in EEO counseling and that the person wishes to pursue;
3. Must be signed by the complainant or complainant's attorney; and
4. Must be filed within **fifteen (15) calendar days** from the date s/he receives the Notice of Right to File a Discrimination Complaint. Written complaints filed by facsimile, electronic communication, hand delivery during business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier must meet the regulatory time frames. The date of the postmark, facsimile, electronic communication, hand delivery, delivery to a third-party commercial carrier or in person filing at the agency's EEO office is considered the date filed and must be within the requisite 15 days.

C. Time Frames to Complete the Final Interview

The EEO Counselor must conduct the final interview and issue the Notice of Right to File a Discrimination Complaint within 30 days of the date the aggrieved person brought the dispute to the EEO Counselor's attention. If, however, the aggrieved person consented to a written extension of time, the extension cannot exceed 60 days for counseling. If the aggrieved agreed to participate in EEO ADR, the counseling period may not exceed 90 days. If the dispute is not resolved at the end of the extended time period, the EEO Counselor must advise the aggrieved party in writing of his/her right to file a complaint.

The 30-day EEO counseling period (or as extended by agreement of the aggrieved party) commences when the aggrieved person (1) first initiates contact with any agency official logically connected with the EEO process and (2) exhibits an intent to begin the EEO process. The unavailability of an EEO Counselor to meet with the aggrieved person for a period of time after such initial contact does not toll the 30-day counseling period. Absent agreement from the aggrieved person to extend the time period, the EEO Counselor must conduct the final interview and issue the Notice of Right to File a Discrimination Complaint at the end of the 30-day period.

D. Name(s) of Person(s) Authorized to Receive Complaints

The EEO Counselor shall provide the aggrieved person with the names of persons authorized to receive complaints of discrimination. The EEO Counselor shall inform the aggrieved person (or his/her representative) that the complaint must be delivered to one of the authorized persons.

E. Loss of Confidentiality during Formal Process

In accordance with 29 C.F.R. § 1614.105(b)(2)(g), the EEO Counselor should explain that unless the aggrieved authorizes or files a formal EEO complaint, the EEO Counselor will not reveal their identity. Once the complaint is filed, the complaint file, or part of it, may be shared only with those who are involved and need access to it. This includes the EEO Director, agency EEO officials, and possibly persons whom the aggrieved person has identified as being responsible for the actions that gave rise to the complaint. The complaint file is not a public document to be released

outside the EEO complaint process. The identity of the aggrieved person does not remain confidential in the formal complaint process.

F. Written Notice of Right to File a Discrimination Complaint

After the final interview and not more than 30 days after the aggrieved contacted the EEO office, the written Notice of Right to File a Discrimination Complaint must be issued. The Notice must specify that an aggrieved person has **15 calendar days** after receipt of the notice of Right to File a Discrimination Complaint to file a formal complaint (including a class complaint).

The notice must also advise the aggrieved person of the appropriate official with whom to file a complaint and of complainant's duty to inform the agency immediately when the complainant retains counsel or a representative.

The EEO Counselor must advise the aggrieved individual of his/her duty to inform the agency of a change of address if s/he should move during the pendency of the EEO process and the possible consequences for not doing so.

IX. THE EEO COUNSELOR'S REPORT

When advised that an aggrieved person has filed a formal complaint, the EEO Counselor will submit a written report pursuant to 29 C.F.R. § 1614.105(c). The report will contain relevant information about the aggrieved person, jurisdiction, claims, bases, requested remedy, and the EEO Counselor's checklist, as specified in the sample EEO Counselor's Report. See Appendix H of this Management Directive. If the aggrieved person attempted to resolve the dispute via counseling or EEO ADR, the report should state that the aggrieved person chose either traditional EEO counseling or the EEO ADR program and that the dispute was not resolved through either procedure. However, the report should **not** provide a summary of the resolution attempts, nor any opinion as to whether discrimination occurred.

A. Time Limits

The EEO Counselor must submit to the office designated to accept formal complaints and to the aggrieved individual a copy of the EEO Counselor's Report.

This must be done within **fifteen (15) days** after notification by the EEO Director or other appropriate official that a formal complaint has been filed. It is essential that the EEO Counselor maintain his/her record of counseling so that this regulatory time limit is met.

B. Contents of Report

The report must include:

1. A precise description of the claim(s) and the basis(es) identified by the aggrieved individual;
2. Pertinent documents gathered during the inquiry, if any;
3. Specific information bearing on timeliness of the counseling contact;
4. An explanation for why the counseling process was untimely, if applicable; and
5. An indication as to whether an attempt was made to resolve the complaint.

The EEO Counselor should also retain a copy of the EEO Counselor's Report for availability in the event that the original EEO Counselor's Report, submitted to the office designated to accept formal complaints, is lost or misplaced. All notes, drafts and other records of counseling efforts will be maintained by the agency after counseling is completed for a period up to four years after resolution of the case.

Appendix H is a recommended format for an EEO Counselor's report.

C. Confidentiality of Negotiations for Resolution

In order to facilitate resolution attempts, all parties involved in resolution must be free to explore all avenues of relief. Offers and statements by parties made in response to resolution attempts by the EEO Counselor cannot be used against either party during the administrative EEO process if resolution attempts fail. The EEO Counselor will not report any discussions that occur during negotiations for resolution. For confidentiality of EEO ADR activities see Chapter 3, Section II.a.3 of this Management Directive.

X. COUNSELING CLASS ACTION COMPLAINTS

Occasionally, an EEO Counselor may need to provide EEO counseling to an aggrieved person or group of individuals who seek to represent a class of persons. ^[10] A class is defined as a group of employees, former employees, or applicants who allege that they have been or are being adversely affected by an agency personnel policy or practice that discriminates against the group on the basis of their common race, color, religion, sex, national origin, age, genetic information, disability, or retaliation. See 29 C.F.R. §§ 1614.103(a) and 1614.204; see also Chapter 8 of this Management Directive for further guidance for class actions.

The aggrieved person(s) comes to the EEO Counselor as a class agent representing the group. A class inquiry must be brought to the attention of an EEO Counselor by a class agent **within forty-five (45) calendar days** of the date when the specific policy or practice adversely affected the class agent or, if a personnel action, within 45 days of the effective date of that action.

The EEO counseling requirements for class claims are the same as those for individual claims of discrimination, but the facts must be framed to meet the requirements of 29 C.F.R. § 1614.204.

It is strongly recommended that, if class allegations are raised or an individual approaches an EEO Counselor as a class agent for counseling, the EEO Counselor immediately contact the EEO Director, or designated person, for advice and guidance.

^[1] Please note: there is no pre-counseling phase of the 29 C.F.R. § 1614 process.

^[2] The Commission consistently has held that a person may satisfy the criterion of EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process. See **Hyman v. Dep't. of the Navy** (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/012010006_0.txt), EEOC Appeal No. 0120100060 (May 26, 2011); **Martell v. Dep't. of Commerce** (https://www.eeoc.gov/sites/default/files/migrated_files/decisions/01A15294_r.txt), EEOC Appeal No. 0120110980 (Dec. 21, 2000); **Lodge v. Social Security Administration**

https://www.eeoc.gov/sites/default/files/migrated_files/decisions/0120110847.txt), EEOC Appeal No. 0120110847 (May 12, 2011).

[3] For more information, please review the Commission's report "**Attaining a Model Agency Program: Efficiency** (<https://www.eeoc.gov/federal-sector/reports/attaining-model-agency-program-efficiency>)" (2004).

[4] For more information about EEOC training courses, visit the Commission's website at <http://www.eeoc.gov/federal/training/index.cfm> (<https://www.eeoc.gov/federal-sector/federal-training-outreach>).

[5] See Chapter 4, Section II, of this Management Directive, for additional guidance on the election process applicable to mixed case complaints.

[6] Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. EPA complaints are processed under Part 1614. In the alternative, an EPA complainant may go directly to a court of competent jurisdiction on the EPA claim.

[7] The Commission has issued guidelines covering all of the substantive bases of prohibited discrimination. EEO Counselors should be familiar with 29 C.F.R. Part 1604 (Guidelines on Sex Discrimination) and Appendix to Part 1604 (Questions and Answers on the Pregnancy Discrimination Act); Part 1605 (Guidelines on Religious Discrimination); Part 1606 (Guidelines on National Origin Discrimination); Part 1620 (The Equal Pay Act); Part 1625 (the Age Discrimination in Employment Act); and Part 1635 (Guidelines on the Genetic Information Nondiscrimination Act).

[8] As noted in Appendix C, at point "B," the EEO Counselor acts as a neutral and not as an advocate for the aggrieved person or the agency. When the aggrieved person seeks advice from the EEO Counselor, the Counselor should remind him/her of the right to representation.

[9] Please note that in the federal EEO process, the parties are the complainant and the agency. See **Bates v. Tennessee Valley Authority** (<https://casetext.com/case/bates-v-tennessee-valley-authority>), 851 F.2d 1366, 1368 (11th Cir. 1988). The supervisor/manager who has been accused of discrimination is not a party to the EEO complaint, although he may be subject to other legal liability. *Id.*

[10] This need may arise in the course of counseling an individual where the EEO Counselor identifies allegations of class discrimination.