Revisions to EEO Management Directive 110

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LULAC National Convention & Exposition,
New York, July 2012
In 2004, EEOC created a workgroup to develop consensus recommendations from the Commissioners for improvements to the EEO complaint process.

The Workgroup determined that it did not have internal consensus for large scale revision of the federal sector EEO complaint process at the time, but that there was agreement on several discrete changes to the existing regulations that would clarify or build on the improvements made by the last major revisions.

Notice of proposed rulemaking (NPRM) was circulated to all agencies for comment pursuant to Executive Order 12067 and subsequently published in the Federal Register on December 21, 2009.

The notice proposed changes to the Commission’s federal sector EEO complaint processing regulations at 29 CFR Part 1614 to implement the recommendations of the Federal Sector Workgroup.

It sought public comment on those proposals.

The final rule was published in the Federal Register on July 25, 2012.
EEO Management Directive 110

- EEO Management Directive 110 is 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 the 1614 regulations.

- The current draft revisions can be categorized into three categories:
  - 1) Implementation of Revised Regulations;
  - 2) Conflict of Interest; and
  - 3) General Updates & Clarifications.
Implementation of Revised Regulations
Six Significant Revisions

1. Requirement that agency EEO programs comply with part 1614 and EEOC Management Directives and Management Bulletins.

2. Addition to regulation to allow for pilot programs.

3. Revision to 29 CFR § 1614.107(a)(5) explaining proposed actions should not be dismissed if alleged as retaliatory.

4. Requirement that an agency provide written notice that the investigation is not complete.

5. Revision to the class complaint regulations making an administrative judge’s decision on the merits of a class complaint a final decision.

6. Requirement that agencies submit appeals and complaint files to EEOC in a digital format.
Compliance Revision

- Requirement that agency EEO programs comply with part 1614 and the Management Directives and Bulletins issued by EEOC. 29 C.F.R. § 1614.102(e). (Chapter 1, MD-110).

- Three Step Process:
  - Notice to the agency of non-compliance;
  - Written notice to agency head;
  - Public notification of non-compliance.
Pilot Projects

- New § 1614.102(f) permits EEOC to grant agencies variances from particular provisions of part 1614 to conduct pilot projects for processing complaints in ways other than those prescribed in part 1614. (Chapter 1, MD-110).

- Timeframe for pilot projects up to 24 months with possible additional 12 month extension.

- Pilot Process:
  - Annual request for pilot authority period (during 2\textsuperscript{nd} quarter of the fiscal year);
  - Office of Federal Operations review and recommendation period;
  - Commission review and vote period (3\textsuperscript{rd} quarter);
  - Agencies notified of Commission determination;
  - Pilot must begin the first quarter of the next fiscal year.
Clarifying that complaints alleging discrimination in proposals to take personnel actions or other preliminary steps to taking personnel actions should be dismissed unless the complaint alleges that the proposal or preliminary step is retaliatory. 29 C.F.R. § 1614.107(a)(5).

Supreme Court's holding in Burlington Northern & Santa Fe Railway Co. v. White, stated that Title VII's anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse."

*Burlington Northern* states that the anti-retaliation provisions of Title VII do not mirror the anti-discrimination provisions and that this difference must be given weight when interpreting the statute.

The key question is whether the alleged retaliatory proposal or preliminary step would dissuade a reasonable worker in the complainant's circumstances from engaging in protected EEO activity.

Covered in Chapter 5, Section IV.A of MD-110.
Notice for Untimely Investigation

• If the agency fails to complete the investigation in a timely manner, it shall issue written notice to complainant informing the complainant of its failure, the estimated date of completion and complainant’s right to file a civil action or request a hearing. See 29 C.F.R. § 1614.108(g). (Chapter 5, MD-110).

• Sample Notice provided in Appendix of the Directive.
Class Complaints

• Revision making an administrative judge’s decision on the merits of a class complaint a final decision, which the agency can fully implement or appeal in its final action. 29 C.F.R. § 1614.204. (Chapter 8, MD-110).

• New provision for expedited processing of appeals of decisions to accept or dismiss class complaints (certification decisions). 29 CFR § 1614.405(b). (Chapter 9, MD-110).
Digital Filing of Records and Files

- Revision requiring agencies to digital file appeals, complaint files and other filings. 29 C.F.R. § 1614.403(g). (Chapter 9, MD-110).

- Provision encouraging complainants to submit digital appellate records. 29 C.F.R. § 1614.403(g). (Chapter 9, MD-110).
Other Revisions

- A revision which provides that EEOC appellate decisions are final for purposes of filing a civil action, unless a timely request for reconsideration is filed by either party. 29 CFR § 1614.405(c). (Chapter 9, MD-110).

- A revision extending the time period within which agencies must provide ordered relief from 60 to 120 days. 29 CFR § 1614.502(c). (Chapter 9, MD-110).

- A revision which distinguishes appeals alleging breach of settlement agreements from those alleging breach of final decisions. EEOC can order compliance with both settlement agreements and final decisions, and, in the case of a settlement breach, order that the complaint be reinstated from the point processing ceased. 29 CFR § 1614.504(c). (Chapter 10, MD-110).
Conflict of Interest

• The revised draft directive contains a stand-alone section within Chapter 1, addressing potential conflicts of interest in processing federal sector EEO complaints.

• The section addresses three potential conflicts:
  • (1) EEO and HR conflicts;
  • (2) complaint processing of matters involving EEO officials or high-level agency officials; and
  • (3) conflicts between agency legal and EEO programs.
The draft revised directive contains several updates and organizational restructuring to ensure that it reflects current policies, procedures, laws and case precedents.

In particular, the draft revisions provide:
- A federal sector EEO history piece (Preamble).
- An attempt to consolidate most ADR discussion into Chapter 3.
- Updated case law throughout document (also, specific reference to the Macy decision and processing claims of sex-stereotyping).
- Inclusion of GINA throughout the document.
- A stand-alone remedies chapter (Chapter 11).
- Three new Appendices – Conflict Agreement, Investigation Notice and Compliance Documentation Guide.
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