

# Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, as Amended in 2020 Student Guide

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## Welcome

**Welcome** to the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002, as amended in 2020 Training course.

**Our Mission:** On behalf of the Department of Defense (DOD) and other U.S. Government Departments and Agencies, the Defense Counterintelligence and Security agency (DCSA) supports national security and the warfighter through our security oversight and education missions.

DCSA oversees the protection of U.S. and foreign classified information and the industry under the National Industrial Security Program (NISP) and serves as the functional manager for the DOD security professional development program.

We provide security education, training, and professional development services as the functional manager for the DOD security professional development program and for other U.S. Government personnel and contractors.

## It's Required

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, as amended in 2020, also known as the No FEAR Act (Public Law 107-174), requires that all Federal employees receive training regarding their rights and remedies under Federal antidiscrimination and whistleblower protection laws.

## Objectives

Once you have completed this course, you should:

- Understand the purpose of the No FEAR Act
- Know the rights and remedies employees have under Federal antidiscrimination and whistleblower protection laws
- Understand how employees can exercise their rights under these laws

## Purpose

The No FEAR Act was enacted by Congress to ensure that Federal agencies:

**Notify** all Federal employees of their rights and remedies under Federal antidiscrimination and whistleblower protection laws

**Comply** with these laws by requiring agencies to report antidiscrimination complaint data to Congress each year, and publicly post that data

Are **accountable** for violations of these laws by requiring agencies to pay back the Department of the Treasury Judgment Fund for awards, judgments, and settlements in lawsuits involving discrimination and whistleblower retaliation

## Purpose (Cont.)

The Elijah E. Cummings's Federal Employment Antidiscrimination Act 2020 amended the 2002 No FEAR Act to include the following requirements:

- **Report Disciplinary Action** - When there is a finding of discrimination or retaliation, Federal Agencies must submit a disciplinary action report to the EEOC. The EEOC may refer the matter to which the report relates to the Office of Special Counsel if the Commission determines that the Federal agency did not take appropriate action with respect to the finding that is the subject of the report.
- **Annotate** findings of discrimination or retaliation in management official's personnel file. Notation of adverse action and reason for action to be notated in personnel record.
- **Establish a tracking system** that includes EEO process stages, resolution and disciplinary action taken.
- Establish a **model EEO program** where there is fair and impartial processing of complaints; that is not under control of the Human Resources Office or Office of General Counsel; devoid of internal conflicts of interest; ensures the efficient and fair resolution of complaints; and the Agency's EEO Officer reports directly to the head of the agency.

Additionally, the amendment states there will be **no limitation on advice or counsel regarding resolution**, and settlement agreements and do not prohibit disclosure to Congress, the Inspector General, the Office of Special Counsel or other internal investigative mechanism related to violation of law or rules, and mismanagement.

## **Prohibited Personnel Practices**

**The Civil Service Reform Act of 1978** is a Federal law created to promote overall fairness in Federal personnel actions.

This law states that a Federal employee who is authorized to take, direct others to take, recommend, or approve any personnel action, may not take certain types of personnel actions, referred to as **Prohibited Personnel Practices**.

## 12 Types of Prohibited Personnel Practices

There are 12 types of Prohibited Personnel Practices listed in the CSRA:

1. Discriminating against an employee or applicant based on race, color, religion, sex, age, national origin, mental or physical disability, marital status or political affiliation.
2. Asking for or considering on siding employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics
3. Coercing the political activity of any person
4. Deceiving or willfully obstructing anyone from competing for employment
5. Influencing anyone to withdraw from competing for a job to help or hurt the employment prospects of another person
6. Giving an unauthorized preference or advantage to anyone that helps or hurts the employment prospects of another employee or applicant
7. Hiring, promoting or advocating the hiring or promoting of relatives (nepotism)
8. Engaging in reprisal or retaliation against an individual for whistleblowing
9. Taking, failing to take or threatening to take, or not take a personnel action against an employee or applicant for:
  - a) Filing an appeal, complaint or grievance
  - b) Testifying for or assisting another in an appeal, complaint or grievance
  - c) Cooperating with or providing information to the Special Counsel or to an Inspector General; or
  - d) Refusing to obey an order that would require the individual to violate the law
10. Discriminating based on personal conduct which is not adverse to the on-the-job performance of an employee, applicant or others
11. Taking or failing to take, recommend, or approve a personnel action that would violate a veteran's preference requirement
12. Taking or failing to take a personnel action that violates any law, rule, or regulation implementing or directly concerning merit system principles.
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## **EEOC**

Equal Employment Opportunity Commission (EEOC) is a federal agency responsible for enforcing all Federal laws prohibiting employment discrimination on the basis of race, color, national origin, sex, age, religion, genetics or disability, and reprisal or retaliation for opposing discrimination or participating in a discrimination complaint or lawsuit.

The EEOC provides oversight and coordination of all Federal equal employment opportunity regulations, practices and policies.

Title 29 Code of Federal Regulations (CFR) 1614 states that complaints of employment discrimination against Federal agencies are filed with each agency's servicing Office of Equal Employment Opportunity.

## **If You Believe You Have Been Discriminated Against**

Department of Defense EEO processes complaints of employment discrimination in accordance with 29 CFR Part 1614, EEOC and Management Directive 110.

If you believe you have been discriminated against as an employee or applicant for employment and wish to initiate the EEO complaint process, you must contact your servicing EEO office within 45 calendar days of the date you learned of the discrimination or in the case of a personnel action, within 45 calendar days of the effective date of the action.

Contact information for your servicing EEO office is provided at the end of this training.

## Protection Laws

The following Federal laws protect employees and applicants from employment discrimination: Title VII of the Civil Rights Act of 1964 and The Civil Rights Act of 1991.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, national origin, sex, or religion, and prohibits reprisal or retaliation for opposing discrimination or participating in Title VII discrimination complaints or lawsuits.

The Civil Rights Act of 1991 amended the Civil Rights Act of 1964 to provide additional money damages for Federal employees who successfully prove intentional discrimination, as well as recovery of attorney fees.

## Pregnancy

The Pregnancy Discrimination Act of 1978 amended the Civil Rights Act of 1964 to provide that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination.

It requires employers to treat women who are pregnant or affected by related conditions the same way as other applicants or employees with similar disabilities or limitations.

## Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employment discrimination on the basis of age against individuals who are forty years of age or older.

It also prohibits reprisal or retaliation for opposing age discrimination or for participating in an age discrimination complaint or lawsuit.

Attorney fees and costs are ***not recoverable*** in age discrimination EEO complaints, and compensatory damages are not an available form of relief under the ADEA.



## **Age Discrimination (Continued)**

Employees and applicants who believe they have been subjected to unlawful employment discrimination on the basis of age can choose to either:

- Contact EEO to initiate the complaint process, or
- Give notice of intent to sue to the EEOC within 180 calendar days of the alleged discrimination
  - o Once a timely notice of intent to sue has been submitted to the EEOC, a civil action in the appropriate U.S. District Court may be filed after 30 days from the date the EEOC received the notice.

Visit the EEOC website at <https://www.eeoc.gov> for the EEOC's fax number and mailing address.

## **Basis of Disability**

The Americans with Disabilities Act of 1991 (ADA), as amended, prohibits employment discrimination against qualified individuals with mental or physical disabilities in the private sector, and in state and local governments, on the basis of disability.

The Rehabilitation Act of 1973 prohibits employment discrimination in the Federal government against qualified individuals with mental or physical disabilities on the basis of disability. It also requires Federal agencies to provide reasonable accommodations for qualified employees and applicants with disabilities.

The Rehabilitation Act incorporates provisions of the ADA that define disability employment discrimination and that prohibit reprisal or retaliation for opposing employment practices that discriminate based on disability or for participating in disability discrimination complaints or lawsuits.

## **Genetic Information**

The Genetic Information Antidiscrimination Act of 2008 (GINA), effective November 21, 2009, prohibits employment discrimination on the basis of genetic information of employees or applicants for employment. It strictly limits employers from requesting genetic information from and disclosing genetic information of employees and applicants. It also prohibits harassment of individuals on the basis of genetic information and retaliation against individuals who have initiated discrimination complaints on the basis of genetics.

“Genetic information” includes information about diseases, conditions and disorders from genetic testing of individuals and their family members, as well as family medical history. The use of genetic information in employment decisions is prohibited because it bears no relation to an individual’s current ability to work.

## **Equal Pay**

The Equal Pay Act of 1963 (EPA), as amended, prohibits discrimination in wage differences between men and women performing substantially equal work and prohibits reprisal or retaliation for opposing sex-based wage discrimination or participating in EPA complaints or lawsuits.

“Substantially equal work” means that the jobs do not need to be identical, but they must be of equal skill, effort and responsibility, in the same establishment and under similar working conditions.

## **Equal Pay and the Complaint Process**

Employees and applicants who believe they have been subjected to sex-based wage discrimination under the EPA can choose to either:

- Contact EEO to initiate the complaint process, or
- File a civil action in the appropriate U.S. District Court.

A civil action must be filed within 2 years of the date of the discrimination, or within 3 years if the discrimination is willful. Attorney fees, costs and compensatory damages are not recoverable in EPA claims filed in the EEO complaint process

## **Protection of Employees by Antidiscrimination Laws**

Antidiscrimination laws protect employees from discrimination in the terms, conditions and benefits of their employment, such as:

- Hiring
- Promotion
- Reassignment
- Pay
- Awards
- Time and attendance
- Training
- Classification
- Performance evaluations

and adverse actions such as reprimands, suspensions and terminations. These laws also protect employees from unlawful harassment (sexual and non-sexual), hostile work environment and reprisal.

## **Office of Special Counsel**

The Office of Special Counsel (OSC) is an independent Federal agency that investigates complaints of prohibited personnel practices that do not fall under the authority of the EEOC, including discrimination on the basis of:

- Marital status
- Political affiliation or activities
- Conduct that does not adversely affect employee performance
- Whistleblower retaliation

## **Whistleblower Protection and the OSC**

The CSRA defines *whistleblowing* as the disclosure by an employee or applicant of information that he or she reasonably believes is evidence of:

- A violation of a law, rule or regulation
- Gross mismanagement
- Gross waste of funds
- An abuse of authority
- A substantial and specific danger to public health or safety

## **Whistleblower Protection and the OSC (Continued)**

If it violates a law or Executive Order to disclose certain information, for example, if it is in the interest of national defense or the conduct of foreign affairs, disclosure of the information by a whistleblower is only protected if disclosure is made to the Special Counsel, the Inspector General, or comparable agency official.

It is a violation of the CSRA for a Federal employee authorized to take, direct others to take, or recommend or approve any personnel action to retaliate against an employee for protected whistleblowing.

## **Merit Systems Protection Board (MSPB)**

The Merit Systems Protection Board (MSPB) is an independent Federal agency established to protect Federal merit systems against partisan political and other prohibited personnel practices and to protect Federal employees against abuses by management. The MSPB has the authority, in part, to review and issue rulings on:

- Appeals of adverse actions such as removals, suspensions of more than 14 days, furloughs, and demotions
- Appeals of administrative decisions affecting rights or benefits under the Civil Service Retirement System or the Federal Employees' Retirement System
- Complaints filed under the Whistleblower Protection Act, the Uniformed Services Employment and Reemployment Rights Act, and the Veterans Employment Opportunities Act; and
- Cases brought by the Special Counsel

## **Appealing to the Merit Systems Protection Board**

Federal employees and applicants who believe they have been subjected to an adverse personnel action on the basis of race, color, national origin, sex, age, genetics or disability, or in reprisal for protected EEO activity, and the adverse personnel action is appealable to the MSPB, may choose to file an EEO complaint OR file an appeal with the MSPB, but not both.

The MSPB appeal must be filed within 30 days of the effective date of the personnel action in question.

Information regarding procedures for filing MSPB appeals can be found on the MSPB web site at <https://www.mspb.gov>.

## **Bargaining Unit Employees**

Employees under a bargaining unit agreement may be able to grieve claims of employment discrimination through a union-negotiated grievance procedure instead of through the EEO complaint process, unless the agreement specifically states that employees cannot do so.

These employees may also choose to grieve claims of other prohibited personnel practices through a union-negotiated grievance procedure, or the OSC.

If a prohibited personnel practice that is appealable to the MSPB is at issue, these employees may choose to file a grievance through a union-negotiated grievance procedure, with the OSC or the MSPB.

## **Administrative Grievances**

Appropriated Funds (AF) employees may be able to file administrative grievances with their servicing Civilian Personnel Advisory Center (CPAC) to resolve employment issues.

Certain employment issues cannot be grieved through this procedure, including any matter covered by a negotiated grievance procedure or subject to a formal review and adjudication by the MSPB or the EEOC (See DOD Directive 1400.25M, Subchapter 771).

For more information with respect to employment issues that can be administratively grieved or to submit a grievance, contact your servicing CPAC.

## **Reprisal**

Reprisal is retaliation against an individual who has engaged in activities protected under Federal antidiscrimination and whistleblower protection laws.

Protected activity includes:

- Opposing discrimination
- Filing a discrimination complaint
- Participating in a discrimination complaint or lawsuit
- Reporting waste, fraud and abuse, or other whistleblower activity
- Under the CSRA, reprisal against an individual who has engaged in any of these activities is a prohibited personnel practice.

## Reprisal (Continued)

Retaliation does not have to involve an adverse personnel action to fall under the definition of reprisal.

The U.S. Supreme Court has ruled that an individual only has to prove that the **action taken** by management **would have deterred a reasonable employee from filing a charge of discrimination** (*Burlington Northern and Santa Fe Railroad Co. v. White*, 1061 LRP 37559 (U.S. 06/22/06)).

Federal agencies can discipline employees who engage in reprisal, up to and including removal, as provided in the DOD Table of Penalties.

## Public Disclosure of Complaint Data

The No FEAR Act, as amended, requires Federal agencies to report annual antidiscrimination complaint data to Congress, and to publicly post the data on agency websites, and to post findings of discrimination (including retaliation) on its public internet website.

The data includes the number of complaints filed under each antidiscrimination law and the status, the amount of money paid in settlements, and findings of discrimination and disciplinary actions taken against employees for violating these laws.

Not later than 90 days after the date on which all appeals and final actions have been exhausted the head of the Federal agency subject to the finding of discrimination shall provide notice:

- a) on the public internet website of the agency, in a clear and prominent location linked directly from the home page of that website;
- b) stating that a finding of discrimination (including retaliation) has been made; and
- c) which shall remain posted for not less than 1 year.

The Defense Counterintelligence and Security Agency posts annual No FEAR Act data on its Office of Equal Employment Opportunity website at: <https://www.dcsa.mil/Contact-Us/eeo/>.

## The Judgement Fund

When an administrative complaint is settled or an administrative judge has made a finding of discrimination or reprisal, the activity where the complaint arose has always been responsible for paying settlement money or monetary awards.

Prior to the No FEAR Act, awards and settlements in Federal discrimination and whistleblower retaliation lawsuits were paid by the Department of the Treasury out of its Judgement Fund.

## **The Judgement Fund: The Bottom Line**

The No FEAR Act now requires agencies to reimburse the Department of the Treasury Judgement Fund from their own budgets for settlements and monetary damages.

**Bottom line:** each activity within the Department of Defense is now responsible for paying money for settlements, findings and judgements in both the administrative complaints process and in Federal lawsuits.

## **Reimbursement of the Judgement Fund**

Agencies are prohibited from using Reduction in Force, RIFs, furloughs or reductions in employee compensation or benefits in order to reimburse the Judgement Fund. However, reimbursement may be made over a period of time.

Procedures for reimbursing the Judgement Fund, as well as the consequences for agency noncompliance, can be found on the Department of the Treasury Financial Management Service website: <https://www.fiscal.treasury.gov/judgment-fund/reimbursing-judgment-fund.html>

## **Reporting Disciplinary Action**

Not later than 120 days after the date on which a Federal agency takes final action, or a Federal agency receives a final decision issued by the Equal Employment Opportunity Commission, involving a finding of discrimination (including retaliation) Federal agency shall submit to the Commission a report stating:

1. whether disciplinary action has been proposed against a employee as a result of the violation; and
2. the reasons for any disciplinary action.

EEOC may refer disciplinary action reports to the Office of Special Counsel if appropriate action has not been taken by the federal agency.

## **Annotating Findings**

If a Federal agency takes an adverse action against a Federal employee for an act of discrimination (including retaliation) prohibited by a provision of law, the agency shall, after all appeals relating to that action have been exhausted, include a notation of the adverse action and the reason for the action in the personnel record of the employee.

## **Establish Tracking System**

Not later than one year after the date of enactment of the Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020, each Federal agency shall establish a system to track each complaint of discrimination adjudicated through the Equal Employment Opportunity process from the filing of a complaint with the Federal agency to resolution of the complaint, including whether a decision has been made regarding disciplinary action as the result of a finding of discrimination.

## **Establish Model EEO Program**

Each Federal agency shall -

1. be responsible for the fair and impartial processing and resolution of complaints of employment discrimination (including retaliation) prohibited by a provision of law, and
2. establish a model Equal Employment Opportunity Program that -
  - a. is not under the control, either structurally or practically, of the agency's Office of Human Capital or Office of the General Counsel (or the equivalent);
  - b. is devoid of internal conflicts of interest and ensures fairness and inclusiveness within the agency; and
  - c. ensures the efficient and fair resolution of complaints alleging discrimination (including retaliation).

Additionally, the head of each Federal agency's Equal Employment Opportunity Program shall report directly to the head of the agency.



## Advice or Counsel

The Elijah E. Cummings Federal Employee Antidiscrimination Act of 2020 states:

- Nothing in this amendment shall prevent a Federal agency or a subcomponent of a Federal agency, or the Department of Justice, from providing advice or counsel to employees of that agency (or subcomponent, as applicable) in the resolution of a complaint.
- A Settlement Agreement “Does Not” prohibit disclosure to Congress, IG, OSC, or other internal investigative mechanisms related to violation of law or rules, mismanagement, etc.

## Your Right to Initiate an EEO Complaint

If you believe you have been subjected to employment discrimination on the basis(es) of race, color, national origin, sex, age, religion, genetics or disability, or in reprisal for protected EEO activity, you have the right to initiate an EEO complaint.

You must contact the EEO office to initiate the process within:

**45 calendar days** of the alleged discrimination, or the date you learned of the discrimination, or if a personnel action is involved, within **45 calendar days** of the date the action became effective.

Send an email to [dcsa.quantico.hq.mbx.eeo@mail.mil](mailto:dcsa.quantico.hq.mbx.eeo@mail.mil)