

§ 1614.202

that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

[57 FR 12646, Apr. 10, 1992, as amended at 64 FR 37658, July 12, 1999; 74 FR 3430, Jan. 21, 2009; 85 FR 35561, June 11, 2020]

§ 1614.202 Equal Pay Act.

(a) In its enforcement of the Equal Pay Act, the Commission has the authority to investigate an agency's employment practices on its own initiative at any time in order to determine compliance with the provisions of the Act. The Commission will provide notice to the agency that it will be initiating an investigation.

(b) Complaints alleging violations of the Equal Pay Act shall be processed under this part.

§ 1614.203 Rehabilitation Act.

(a) *Definitions.* The following definitions apply for purposes of this section:

(1) The term *ADA* means title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. 12101 through 12117), title V of the Americans with Disabilities Act, as amended (42 U.S.C. 12201 through 12213), as it applies to employment, and the regulations of the Equal Employment Opportunity Commission implementing titles I and V of the ADA at part 1630 of this chapter.

(2) The term *disability* means disability as defined under §1630.2(g) through (1) of this chapter.

(3) The term *hiring authority that takes disability into account* means a hiring authority that permits an agency to consider disability status during the hiring process, including the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u); the Veterans' Recruitment Appointment authority, as set forth at 5 CFR part 307; and the 30% or More Disabled Veteran authority, as set forth at 5 CFR 316.302(b)(4), 316.402(b)(4).

(4) The term *personal assistance service provider* means an employee or independent contractor whose primary job functions include provision of personal assistance services.

(5) The term *personal assistance services* means assistance with performing

29 CFR Ch. XIV (7–1–23 Edition)

activities of daily living that an individual would typically perform if he or she did not have a disability, and that is not otherwise required as a reasonable accommodation, including, for example, assistance with removing and putting on clothing, eating, and using the restroom.

(6) The term *Plan* means an affirmative action plan for the hiring, placement, and advancement of individuals with disabilities, as required under 29 U.S.C. 791(b).

(7) The term *Schedule A hiring authority for persons with certain disabilities* means the hiring authority for individuals with intellectual disabilities, severe physical disabilities, or psychiatric disabilities, as set forth at 5 CFR 213.3102(u).

(8) The term *Section 501* means section 501 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 791).

(9) The term *targeted disability* means a disability that is designated as a "targeted disability or health condition" on the Office of Personnel Management's Standard Form 256 or that falls under one of the first 12 categories of disability listed in Part A of question 5 of the Equal Employment Opportunity Commission's Demographic Information on Applicants form.

(10) The term *undue hardship* has the meaning set forth in part 1630 of this chapter.

(b) *Nondiscrimination.* Federal agencies shall not discriminate on the basis of disability in regard to the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. The standards used to determine whether Section 501 has been violated in a complaint alleging employment discrimination under this part shall be the standards applied under the ADA.

(c) *Model employer.* The Federal Government shall be a model employer of individuals with disabilities. Agencies shall give full consideration to the hiring, advancement, and retention of qualified individuals with disabilities in the federal workforce. Agencies shall also take affirmative action to promote the recruitment, hiring, and advancement of qualified individuals with disabilities, with the goal of

eliminating under-representation of individuals with disabilities in the federal workforce.

(d) *Affirmative action plan.* Pursuant to 29 U.S.C. 791, each agency shall adopt and implement a Plan that provides sufficient assurances, procedures, and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities at all levels of federal employment. An agency fails to satisfy this requirement unless it has adopted and implemented a Plan that meets the following criteria:

(1) *Disability hiring and advancement program—(i) Recruitment.* The Plan shall require the agency to take specific steps to ensure that a broad range of individuals with disabilities, including individuals with targeted disabilities, will be aware of and be encouraged to apply for job vacancies when eligible. Such steps shall include, at a minimum—

(A) Use of programs and resources that identify job applicants with disabilities, including individuals with targeted disabilities, who are eligible to be appointed under a hiring authority that takes disability into account, consistent with applicable OPM regulations, examples of which could include programs that provide the qualifications necessary for particular positions within the agency to individuals with disabilities, databases of individuals with disabilities who previously applied to the agency but were not hired for the positions they applied for, and training and internship programs that lead directly to employment for individuals with disabilities; and

(B) Establishment and maintenance of contacts (which may include formal agreements) with organizations that specialize in providing assistance to individuals with disabilities, including individuals with targeted disabilities, in securing and maintaining employment, such as American Job Centers, State Vocational Rehabilitation Agencies, the Veterans' Vocational Rehabilitation and Employment Program, Centers for Independent Living, and Employment Network service providers.

(ii) *Application process.* The Plan shall ensure that the agency has designated

sufficient staff to handle any disability-related issues that arise during the application and selection processes, and shall require the agency to provide such individuals with sufficient training, support, and other resources to carry out their responsibilities under this section. Such responsibilities shall include, at a minimum—

(A) Ensuring that disability-related questions from members of the public regarding the agency's application and selection processes are answered promptly and correctly, including questions about reasonable accommodations needed by job applicants during the application and selection processes and questions about how individuals may apply for appointment under hiring authorities that take disability into account;

(B) Processing requests for reasonable accommodations needed by job applicants during the application and placement processes, and ensuring that the agency provides such accommodations when required to do so under the standards set forth in part 1630 of this chapter;

(C) Accepting applications for appointment under hiring authorities that take disability into account, consistent with applicable OPM regulations;

(D) If an individual has applied for appointment to a particular position under a hiring authority that takes disability into account, determining whether the individual is eligible for appointment under such authority, and, if so, forwarding the individual's application to the relevant hiring officials with an explanation of how and when the individual may be appointed, consistent with all applicable laws;

(E) Overseeing any other agency programs designed to increase hiring of individuals with disabilities.

(iii) *Advancement program.* The Plan shall require the agency to take specific steps to ensure that current employees with disabilities have sufficient opportunities for advancement. Such steps may include, for example—

(A) Efforts to ensure that employees with disabilities are informed of and have opportunities to enroll in relevant training, including management training when eligible;

(B) Development or maintenance of a mentoring program for employees with disabilities; and

(C) Administration of exit interviews that include questions on how the agency could improve the recruitment, hiring, inclusion, and advancement of individuals with disabilities.

(2) *Disability anti-harassment policy.* The Plan shall require the agency to state specifically in its anti-harassment policy that harassment based on disability is prohibited, and to include in its training materials examples of the types of conduct that would constitute disability-based harassment.

(3) *Reasonable accommodation—(i) Procedures.* The Plan shall require the agency to adopt, post on its public Web site, and make available to all job applicants and employees in written and accessible formats, reasonable accommodation procedures that are easy to understand and that, at a minimum—

(A) Explain relevant terms such as “reasonable accommodation,” “disability,” “interactive process,” “qualified,” and “undue hardship,” consistent with applicable statutory and regulatory definitions, using examples where appropriate;

(B) Explain that reassignment to a vacant position for which an employee is qualified, and not just permission to compete for such position, is a reasonable accommodation, and that the agency must consider providing reassignment to a vacant position as a reasonable accommodation when it determines that no other reasonable accommodation will permit an employee with a disability to perform the essential functions of his or her current position;

(C) Notify supervisors and other relevant agency employees how and where they are to conduct searches for available vacancies when considering reassignment as a reasonable accommodation;

(D) Explain that an individual may request a reasonable accommodation orally or in writing at any time, need not fill out any specific form in order for the interactive process to begin, and need not have a particular accommodation in mind before making a request, and that the request may be made to a supervisor or manager in the individual’s chain of command, the of-

fice designated by the agency to oversee the reasonable accommodation process, any agency employee connected with the application process, or any other individual designated by the agency to accept such requests;

(E) Include any forms the agency uses in connection with a reasonable accommodation request as attachments, and indicate that such forms are available in alternative formats that are accessible to people with disabilities;

(F) Describe the agency’s process for determining whether to provide a reasonable accommodation, including the interactive process, and provide contact information for the individual or program office from whom requesters will receive a final decision;

(G) Provide guidance to supervisors on how to recognize requests for reasonable accommodation;

(H) Require that decision makers communicate, early in the interactive process and periodically throughout the process, with individuals who have requested a reasonable accommodation;

(I) Explain when the agency may require an individual who requests a reasonable accommodation to provide medical information that is sufficient to explain the nature of the individual’s disability, his or her need for reasonable accommodation, and how the requested accommodation, if any, will assist the individual to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of the workplace;

(J) Explain the agency’s right to request relevant supplemental medical information if the information submitted by the requester is insufficient for the purposes specified in paragraph (d)(3)(i)(I) of this section;

(K) Explain the agency’s right to have medical information reviewed by a medical expert of the agency’s choosing at the agency’s expense;

(L) Explain the agency’s obligation to keep medical information confidential, in accordance with applicable laws and regulations, and the limited circumstances under which such information may be disclosed;

(M) Designate the maximum amount of time the agency has, absent extenuating circumstances, to either provide a requested accommodation or deny the request, and explain that the time limit begins to run when the accommodation is first requested;

(N) Explain that the agency will not be expected to adhere to its usual timelines if an individual's health professional fails to provide needed documentation in a timely manner;

(O) Explain that, where a particular reasonable accommodation can be provided in less than the maximum amount of time permitted under paragraph (d)(3)(i)(M) of this section, failure to provide the accommodation in a prompt manner may result in a violation of the Rehabilitation Act;

(P) Provide for expedited processing of requests for reasonable accommodations that are needed sooner than the maximum allowable time frame permitted under paragraph (d)(3)(i)(M) of this section;

(Q) Explain that, when all the facts and circumstances known to the agency make it reasonably likely that an individual will be entitled to a reasonable accommodation, but the accommodation cannot be provided immediately, the agency shall provide an interim accommodation that allows the individual to perform some or all of the essential functions of his or her job, if it is possible to do so without imposing undue hardship on the agency;

(R) Inform applicants and employees how they may track the processing of requests for reasonable accommodation;

(S) Explain that, where there is a delay in either processing a request for or providing a reasonable accommodation, the agency must notify the individual of the reason for the delay, including any extenuating circumstances that justify the delay;

(T) Explain that individuals who have been denied reasonable accommodations have the right to file complaints pursuant to 29 CFR 1614.106;

(U) Encourage the use of voluntary informal dispute resolution processes that individuals may use to obtain prompt reconsideration of denied requests for reasonable accommodation;

(V) Provide that the agency shall give the requester a notice consistent with the requirements of paragraph (d)(3)(iii) of this section at the time a request for reasonable accommodation is denied; and

(W) Provide information on how to access additional information regarding reasonable accommodation, including, at a minimum, Commission guidance and technical assistance documents.

(ii) *Cost of accommodations.* The Plan shall require the agency to take specific steps to ensure that requests for reasonable accommodation are not denied for reasons of cost, and that individuals with disabilities are not excluded from employment due to the anticipated cost of a reasonable accommodation, if the resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, would enable it to provide an effective reasonable accommodation without undue hardship. Such steps shall be reasonably designed to, at a minimum—

(A) Ensure that anyone who is authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware that, pursuant to the regulations implementing the undue hardship defense at 29 CFR part 1630, all resources available to the agency as a whole, excluding those designated by statute for a specific purpose that does not include reasonable accommodation, are considered when determining whether a denial of reasonable accommodation based on cost is lawful; and

(B) Ensure that anyone authorized to grant or deny requests for reasonable accommodation or to make hiring decisions is aware of, and knows how to arrange for the use of, agency resources available to provide the accommodation, including any centralized fund the agency may have for that purpose.

(iii) *Notification of basis for denial.* The Plan shall require the agency to provide a job applicant or employee who is denied a reasonable accommodation with a written notice at the time of the denial, in an accessible format when requested, that—

(A) Explains the reasons for the denial and notifies the job applicant or employee of any available internal appeal or informal dispute resolution processes;

(B) Informs the job applicant or employee of the right to challenge the denial by filing a complaint of discrimination under this part;

(C) Provides instructions on how to file such a complaint; and

(D) Explains that, pursuant to 29 CFR 1614.105, the right to file a complaint will be lost unless the job applicant or employee initiates contact with an EEO Counselor within 45 days of the denial, regardless of whether the applicant or employee participates in an informal dispute resolution process.

(4) *Accessibility of facilities and technology—(i) Notice of rights.* The Plan shall require the agency to adopt, post on its public Web site, and make available to all employees in written and accessible formats, a notice that—

(A) Explains their rights under Section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794d, concerning the accessibility of agency technology, and the Architectural Barriers Act, 42 U.S.C. 4151 through 4157, concerning the accessibility of agency building and facilities;

(B) Provides contact information for an agency employee who is responsible for ensuring the physical accessibility of the agency's facilities under the Architectural Barriers Act of 1968, and an agency employee who is responsible for ensuring that the electronic and information technology purchased, maintained, or used by the agency is readily accessible to, and usable by, individuals with disabilities, as required by Section 508 of the Rehabilitation Act of 1973; and

(C) Provides instructions on how to file complaints alleging violations of the accessibility requirements of the Architectural Barriers Act of 1968 and Section 508 of the Rehabilitation Act of 1973.

(ii) *Assistance with filing complaints at other agencies.* If an agency's investigation of a complaint filed under Section 508 of the Rehabilitation Act of 1973 or the Architectural Barriers Act of 1968 shows that a different entity is responsible for the alleged violation, the Plan

shall require the agency to inform the individual who filed the complaint where he or she may file a complaint against the other entity, if possible.

(5) *Personal assistance services allowing employees to participate in the workplace—(i) Obligation to provide personal assistance services.* The Plan shall require the agency to provide an employee with, in addition to professional services required as a reasonable accommodation under the standards set forth in part 1630 of this chapter, personal assistance services during work hours and job-related travel if—

(A) The employee requires such services because of a targeted disability;

(B) Provision of such services would, together with any reasonable accommodations required under the standards set forth in part 1630 of this chapter, enable the employee to perform the essential functions of his or her position; and

(C) Provision of such services would not impose undue hardship on the agency.

(ii) *Service providers.* The Plan shall state that personal assistance services required under paragraph (d)(5)(i) of this section must be performed by a personal assistance service provider. The Plan may permit the agency to require personal assistance service providers to provide personal assistance services to more than one individual. The Plan may also permit the agency to require personal assistance service providers to perform tasks unrelated to personal assistance services, but only to the extent that doing so does not result in failure to provide personal assistance services required under paragraph (d)(5)(i) of this section in a timely manner.

(iii) *No adverse action.* The Plan shall prohibit the agency from taking adverse actions against job applicants or employees based on their need for, or perceived need for, personal assistance services.

(iv) *Selection of personal assistance service providers.* The Plan shall require the agency, when selecting someone who will provide personal assistance services to a single individual, to give primary consideration to the individual's preferences to the extent permitted by law.

(v) *Written procedures.* The Plan shall require the agency to adopt, post on its public Web site, and make available to all job applicants and employees in written and accessible formats, procedures for processing requests for personal assistance services. An agency may satisfy this requirement by stating, in the procedures required under paragraph (d)(3)(i) of this section, that the process for requesting personal assistance services, the process for determining whether such services are required, and the agency's right to deny such requests when provision of the services would pose an undue hardship, are the same as for reasonable accommodations.

(6) *Utilization analysis*—(i) *Current utilization.* The Plan shall require the agency to perform a workforce analysis annually to determine the percentage of its employees at each grade and salary level who have disabilities, and the percentage of its employees at each grade and salary level who have targeted disabilities.

(ii) *Source of data.* For purposes of the analysis required under paragraph (d)(6)(i) of this section, an employee may be classified as an individual with a disability or an individual with a targeted disability on the basis of—

(A) The individual's self-identification as an individual with a disability or an individual with a targeted disability on a form, including but not limited to the Office of Personnel Management's Standard Form 256, which states that the information collected will be kept confidential and used only for statistical purposes, and that completion of the form is voluntary;

(B) Records relating to the individual's appointment under a hiring authority that takes disability into account, if applicable; and

(C) Records relating to the individual's requests for reasonable accommodation, if any.

(iii) *Data accuracy.* The Plan shall require the agency to take steps to ensure that data collected pursuant to paragraph (d)(6)(i) of this section are accurate.

(7) *Goals*—(i) *Adoption.* The Plan shall commit the agency to the goal of ensuring that—

(A) No less than 12% of employees at the GS-11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with disabilities;

(B) No less than 12% of employees at the GS-10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with disabilities;

(C) No less than 2% of employees at the GS-11 level and above, together with employees who are not paid under the General Schedule but who have salaries equal to or greater than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with targeted disabilities; and

(D) No less than 2% of employees at the GS-10 level and below, together with employees who are not paid under the General Schedule but who have salaries less than employees at the GS-11, step 1 level in the Washington, DC locality, are individuals with targeted disabilities.

(ii) *Progression toward goals.* The Plan shall require the agency to take specific steps that are reasonably designed to gradually increase the number of persons with disabilities or targeted disabilities employed at the agency until it meets the goals established pursuant to paragraph (d)(7)(i) of this section. Examples of such steps include, but are not limited to—

(A) Increased use of hiring authorities that take disability into account to hire or promote individuals with disabilities or targeted disabilities, as applicable;

(B) To the extent permitted by applicable laws, consideration of disability or targeted disability status as a positive factor in hiring, promotion, or assignment decisions;

(C) Disability-related training and education campaigns for all employees in the agency;

(D) Additional outreach or recruitment efforts;

(E) Increased efforts to hire and retain individuals who require supported employment because of a disability,

who have retained the services of a job coach at their own expense or at the expense of a third party, and who may be given permission to use the job coach during work hours as a reasonable accommodation without imposing undue hardship on the agency; and

(F) Adoption of training, mentoring, or internship programs for individuals with disabilities.

(8) *Recordkeeping.* The Plan shall require the agency to keep records that it may use to determine whether it is complying with the nondiscrimination and affirmative action requirements imposed under Section 501, and to make such records available to the Commission upon the Commission's request, including, at a minimum, records of—

(i) The number of job applications received from individuals with disabilities, and the number of individuals with disabilities who were hired by the agency;

(ii) The number of job applications received from individuals with targeted disabilities, and the number of individuals with targeted disabilities who were hired by the agency;

(iii) All rescissions of conditional job offers, demotions, and terminations taken against applicants or employees as a result of medical examinations or inquiries;

(iv) All agency employees hired under the Schedule A hiring authority for persons with certain disabilities, and each such employee's date of hire, entering grade level, probationary status, and current grade level;

(v) The number of employees appointed under the Schedule A hiring authority for persons with certain disabilities who have been converted to career or career-conditional appointments in the competitive service, and the number of such employees who were terminated prior to being converted to a career or career-conditional appointment in the competitive service; and

(vi) Details about each request for reasonable accommodation including, at a minimum—

(A) The specific reasonable accommodation requested, if any;

(B) The job (occupational series, grade level, and agency component)

sought by the requesting applicant or held by the requesting employee;

(C) Whether the accommodation was needed to apply for a job, perform the essential functions of a job, or enjoy the benefits and privileges of employment;

(D) Whether the request was granted (which may include an accommodation different from the one requested) or denied;

(E) The identity of the deciding official;

(F) If denied, the basis for such denial; and

(G) The number of days taken to process the request.

(e) *Reporting—*(1) *Submission to the Commission.* On an annual basis, each federal agency shall submit to the Commission for approval, at such time and in such manner as the Commission deems appropriate—

(i) A copy of its current Plan;

(ii) The results of the two most recent workforce analyses performed pursuant to paragraph (d)(6) of this section showing the percentage of employees with disabilities and employees with targeted disabilities in each of the designated pay groups;

(iii) The number of individuals appointed to positions within the agency under the Schedule A hiring authority for persons with certain disabilities during the previous year, and the total number of employees whose employment at the agency began by appointment under the Schedule A hiring authority for persons with certain disabilities; and

(iv) A list of changes made to the Plan since the prior submission, if any, and an explanation of why those changes were made.

(2) *Availability to the public.* Each agency shall make the information submitted to the Commission pursuant to paragraph (e)(1) of this section available to the public by, at a minimum, posting a copy of the submission on its public Web site and providing a means by which members of the public may request copies of the submission in accessible formats.

(f) *Commission approval and disapproval—*(1) *Basis for approval.* If the Commission determines that an agency has adopted and implemented a Plan

Equal Employment Opportunity Comm.

§ 1614.204

that meets the requirements set forth in paragraph (d) of this section, the Commission shall approve the Plan.

(2) *Basis for disapproval.* If the Commission determines that an agency has failed to adopt and implement a Plan that meets the requirements set forth in paragraph (d) of this section, the Commission shall disapprove the Plan as required by 29 U.S.C. 791(b). Failure to achieve a goal set forth in paragraph (d)(7)(i) of this section, by itself, is not grounds for disapproval unless the Plan fails to require the agency to take specific steps that are reasonably designed to achieve the goal.

[82 FR 677, Jan. 3, 2017]

§ 1614.204 Class complaints.

(a) *Definitions.* (1) A *class* is a group of employees, former employees or applicants for employment who, it is alleged, have been or are being adversely affected by an agency personnel management policy or practice that discriminates against the group on the basis of their race, color, religion, sex, national origin, age, disability, or genetic information.

(2) A *class complaint* is a written complaint of discrimination filed on behalf of a class by the agent of the class alleging that:

(i) The class is so numerous that a consolidated complaint of the members of the class is impractical;

(ii) There are questions of fact common to the class;

(iii) The claims of the agent of the class are typical of the claims of the class;

(iv) The agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.

(3) An *agent of the class* is a class member who acts for the class during the processing of the class complaint.

(b) *Pre-complaint processing.* An employee or applicant who wishes to file a class complaint must seek counseling and be counseled in accordance with § 1614.105. A complainant may move for class certification at any reasonable point in the process when it becomes apparent that there are class implications to the claim raised in an individual complaint. If a complainant moves for class certification after com-

pleting the counseling process contained in § 1614.105, no additional counseling is required. The administrative judge shall deny class certification when the complainant has unduly delayed in moving for certification.

(c) *Filing and presentation of a class complaint.* (1) A class complaint must be signed by the agent or representative and must identify the policy or practice adversely affecting the class as well as the specific action or matter affecting the class agent.

(2) The complaint must be filed with the agency that allegedly discriminated not later than 15 days after the agent's receipt of the notice of right to file a class complaint.

(3) The complaint shall be processed promptly; the parties shall cooperate and shall proceed at all times without undue delay.

(d) *Acceptance or dismissal.* (1) Within 30 days of an agency's receipt of a complaint, the agency shall: Designate an agency representative who shall not be any of the individuals referenced in § 1614.102(b)(3), and forward the complaint, along with a copy of the Counselor's report and any other information pertaining to timeliness or other relevant circumstances related to the complaint, to the Commission. The Commission shall assign the complaint to an administrative judge or complaints examiner with a proper security clearance when necessary. The administrative judge may require the complainant or agency to submit additional information relevant to the complaint.

(2) The administrative judge may dismiss the complaint, or any portion, for any of the reasons listed in § 1614.107 or because it does not meet the prerequisites of a class complaint under § 1614.204(a)(2).

(3) If the allegation is not included in the Counselor's report, the administrative judge shall afford the agent 15 days to state whether the matter was discussed with the Counselor and, if not, explain why it was not discussed. If the explanation is not satisfactory, the administrative judge shall dismiss the allegation. If the explanation is satisfactory, the administrative judge shall refer the allegation to the agency for further counseling of the agent.