

HUMAN RESOURCES MANUAL

Instruction: 304-1: Appointment of Experts and Consultants

Issuance Date: 04/25/2008

Material Transmitted:

Department of Health and Human Services (HHS) Instruction 304-1, Appointment of Experts and Consultants, dated April 25, 2008.

Material Superseded:

HHS Instruction 304-1, Appointment of Experts and Consultants, dated May, 3, 1996, and amended January 27, 1998.

Background:

This Instruction has been superseded to bring it into compliance with the current regulations pertaining to the Appointment of Experts and Consultants. The regulations governing the different types of experts and consultants are significantly different as to warrant separate policies. The language of the current policy needs to be streamlined to concentrate on the regulations, provisions, and procedural requirements pertaining to experts and consultants appointed under 5 USC 3109.

The updates to this policy include: 1) identification of the experts and consultants included and excluded from coverage; 2) clarification of the purpose, use, and requirements for hiring experts and consultants; 3) statement of the conditions for hiring full-time and part-time, versus intermittent, appointments; 4) clarification regarding the differing provisions of compensation, pay basis, leave, travel and other benefits for each type appointment; and 5) provision of compliance and reporting requirements. In addition, Exhibit A, Expert and Consultant Request Form, has been completely redesigned to address data required by OPM.

This issuance is effective immediately. Implementation under this issuance must be carried out in accordance with applicable laws, regulations, bargaining agreements, and Departmental policy.

Antonia T. Harris
Deputy Assistant Secretary for Human Resources

INSTRUCTION 304-1

SUBJECT: APPOINTMENT OF EXPERTS AND CONSULTANTS

304-1-00	Purpose
304-1-10	References
304-1-20	Coverage and Exclusions
304-1-30	Definitions
304-1-40	Responsibilities
304-1-50	Usage of Experts and Consultants
304-1-60	Tenure
304-1-70	Compensation
304-1-80	Leave, Overtime/Holiday Pay, Travel and Other Benefits
304-1-90	Documentation, Reporting, and Accountability

Exhibit A: Experts and Consultants Request Form

304-1-00 PURPOSE

The purpose of this instruction is to provide Department-wide implementing guidance for appointing experts and consultants under 5 USC 3109 and 5 CFR Part 304.

304-1-10 REFERENCES

- A. 5 CFR Part 304 (Experts and Consultants)
- B. 5 CFR § 550.503 (Pay Administration)
- C. 5 CFR § 831.201 (Retirement)
- D. 5 CFR § 870.302 (Federal Employees Group Life Insurance Program)
- E. 5 CFR § 890.102 (Federal Employees Health Benefits Program)
- F. 5 USC § 3109 (Employment of experts and consultants; temporary or intermittent)
- G. 5 USC § 5533 (Dual Pay for More than One Position; Limitations; Exceptions)
- H. § 503 of Public Law 102-394 (Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 1993) 106 Stat.1825

304-1-20 COVERAGE AND EXCLUSIONS

A. Coverage

Appointments under 5 USC 3109 may be made to hire experts and consultants to provide professional or technical expertise that does not exist or is not readily available within HHS or to perform services that are not of a continuing nature and/or could not be performed by HHS employees in competitive or other permanent full-time positions.

B. Exclusions

This Policy does not apply to the following:

1. Procurement of services by contractors under the procurement laws;
2. Special Consultants appointed under 42 USC § 209(f);
3. Special Experts appointed under 42 USC § 282 & § 285;
4. Positions requiring Presidential appointment;
5. Positions in the Senior Executive Service;
6. Positions involving managerial or supervisory work, making final decision on substantive policies, or functioning in the chain of command (e.g., approving financial transactions or personnel actions); and
7. Substitutes for permanent, full-time jobs, to fill in for regular employees during staff shortages, or to bypass normal employment procedures and/or General Schedule pay rates.

304-1-30 DEFINITIONS

- A. Consultant. A person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. When an agency requires public advisory participation, a consultant also may be a person who is affected by a particular program and can provide useful views from personal experience.
- B. Consultant position. One that requires providing advice, views, opinions, alternatives, or recommendations on a temporary and/or intermittent basis on issues, problems, or questions presented by a Federal official.
- C. Expert. A person who is specially qualified by education and experience to perform difficult and challenging tasks in a particular field beyond the usual range of achievement of competent persons in that field. An expert is regarded by other persons in the field as an authority or practitioner of unusual competence and skill in a professional, scientific, technical or other activity.
- D. Expert position. One that requires the services of a specialist with skills superior to those of others in the same profession, occupation, or activity to perform work on a temporary and/or intermittent basis assigned by a Federal official.
- E. Intermittent employment. Employment without a regularly scheduled tour of duty.
- F. Service year. The calendar year that begins on the date of the individual's initial appointment in the agency.
- G. Temporary employment. Employment not to exceed 1 year. An expert or consultant serving under a temporary appointment may have a full-time, part-time, seasonal, or intermittent work schedule.
- H. Employment without compensation. Unpaid service that is provided at the agency's request and is to perform duties that are unclassified. It is not volunteer service.

304-1-40 RESPONSIBILITIES

- A. Office of Human Resources (OHR) is responsible for:

1. Updating and maintaining this policy;
2. Advising operating Human Resources organizations on the proper use of experts and consultants;
3. Coordinating HHS annual report to the Office of Personnel Management (OPM) on the employment of experts and consultants;
4. Reviewing OPDIV requests for exceptions to expert and consultant reappointment time and funding limits; and forwarding appropriate requests to OPM for official authorization for reappointment of an expert or consultant as an exception to limits.

B. Operating Divisions (OPDIVs) are responsible for:

1. Ensuring the compliance of the requirements of this policy within their respective organizations;
2. Consulting with the operating Human Resources organizations in determining the appropriate expert and consultant pay rates and cost of living adjustments, as outlined in this policy;
3. Providing written justifications regarding the necessity of needed expert or consultant services;
4. Submitting all necessary documentation regarding all requests to appoint or extend an expert or consultant to the operating Human Resources organization;
5. Submitting requests for reappointments as an exception to OPM time and funding limits through operating Human Resources organizations to the Deputy Assistant Secretary for Human Resources; and
6. Monitoring the hours worked of all full-time, part-time, and intermittent experts and consultants to ensure time worked does not exceed the agreed upon terms of the appointments.

C. Operating Human Resources organizations are responsible for:

1. Advising OPDIV managers and supervisors on the proper use of experts and consultants and the appropriate pay and cost of living allowances;
2. Reviewing OPDIV expert and consultant documentation for compliance with regulations, and processing appointments, as appropriate; and
3. Reviewing for OHR and OPM approval, OPDIV requests for exceptions to expert and consultant reappointment.

304-1-50 USAGE OF EXPERTS AND CONSULTANTS

- A. OPDIVs may appoint experts and consultants to positions that primarily require performance of advisory services, rather than performance of operating functions, without regard to competitive civil service requirements. Subject to the conditions

specified in this issuance, expert and consultant appointments may be used for individuals pending their Schedule C appointment or noncareer appointment in the Senior Executive Service. In addition, this authority may be used to appoint an individual whose permanent excepted appointment is pending. However, these expert and consultant appointments must be to appropriate expert/consultant assignments and not to the more permanent positions that are pending.

- B. A person already employed by the Federal government may be employed as an expert or consultant and receive pay for such employment only when: 1) the other Federal appointment is for an intermittent expert or consultant appointment, or 2) a determination is made that needed services may not otherwise be secured. When such dual employment occurs, care must be taken to insure that:
1. There is no conflict of duties or hours of employment between or among the appointments;
 2. If paid on a per hour basis, the individual does not receive pay for the same hours of the same day from more than one organization;
 3. If paid on a per day basis, he/she does not receive pay for the same day from more than one organization; and
 4. The individual does not receive travel expenses to or from the same location for the same day from two organizations.
- C. A full-time Federal employee may be appointed to serve also as an intermittent expert or consultant, without compensation for the services performed as an intermittent expert or consultant, in compliance with the dual pay and dual employment restrictions (5 U.S.C. 5533). Such employment *with compensation* may be approved as an exception to these restrictions only if a determination is made that the additional employment is in the public interest and the personal services cannot be readily obtained otherwise. This determination may be recommended by the OPDIV Head for approval by the Director of the operating Human Resources organization.
- D. Expert and consultant appointments are exempt from competitive examination, position classification, and the General Schedule pay rates. Such appointments may be made on a temporary basis (up to 1 year) or on a strictly intermittent basis without time limit or for any period determined by the OPDIV without regard to the civil service and classification laws, subject to the following requirements:
1. Positions must be expert or consultant positions;
 2. Persons employed as experts/consultants must be qualified to perform the duties of the positions to which they have been appointed; and
 3. Needed services must be of such a nature that OPDIVs can meet the need only through temporary or intermittent employment.

304-1-60 TENURE

- A. All expert and consultant appointments, including conversions from other civil service appointments to positions under 5 USC 3109, are in the excepted service. If an employee is serving on a competitive service appointment, subsequent conversion to an excepted service appointment into an expert or consultant position will change that employee's status and may affect any rights previously provided as a competitive service employee.
- B. OPDIVs may reappoint an expert or consultant to perform demonstrably different duties without regard to the length of that individual's previous expert or consultant service with the organization.
- C. Reappointments to perform *substantially the same duties* are subject to the following limits:
1. An OPDIV may employ an expert or consultant who works on a full-time basis for a maximum of 2 years, i.e., on an initial appointment not to exceed 1 year and a reappointment not to exceed 1 additional year.
 2. An OPDIV may reappoint an expert or consultant who works on a part-time or intermittent schedule in accordance with one of the following options. The OPDIV must determine which option it will use in advance of any reappointment and must base its determination on objective criteria (e.g., nature of duties, pay level, whether or not work is regularly scheduled.)
 - a. Option 1 -- Annual service. Option 1 must be applied to reappointments of experts and consultants appointed without compensation. An OPDIV may reappoint an expert or consultant, with no limit on the number of reappointments, as long as the individual is paid for no more than 6 months (130 days or 1,040 hours) of work, or works for no more than that amount of time without compensation, in a service year. An expert or consultant who exceeds this limit in his/her first service year may be reappointed for 1 additional year. An expert or consultant who exceeds the limit during any subsequent service year may not be reappointed thereafter.
 - b. Option 2--Cumulative earnings. Each expert or consultant will have a lifetime limit of twice the maximum annual rate for GS-15, Step 10 (excluding locality pay or any other additional pay.) OPDIVs may reappoint an expert or consultant until his/her total earnings from expert or consultant employment within HHS reach the lifetime maximum, as determined by using the applicable maximum salary rate. At that point, the employment must be terminated.

304-1-70 COMPENSATION

- A. Base salary will be set at the lowest rate necessary to recruit the candidate consistent with pay offered to other similarly qualified candidates or consistent with the criteria listed below. The appointee's compensation is the base salary for pay, leave and benefits. Experts and consultants are not authorized locality pay. Base salary excludes any other types of compensation. The following criteria must be used when determining base salary:

1. The level and difficulty of the work to be performed;
 2. The qualifications of the expert or consultant;
 3. The pay rates of comparable individuals performing similar work in the Federal or non-Federal sectors; and
 4. The availability of qualified candidates.
- B. OPDIVS with appropriated funds under the FY 1993 Labor/HHS Appropriations Act, Public Law 102-394 (excludes FDA and IHS) may set salaries at rates for individuals not to exceed the rate of basic pay for level IV of the Executive Schedule, with the approval of the operating Human Resources organization.
- C. OPDIVS without appropriated funds under the FY 1993 Labor/HHS Appropriations Act, Public Law 102-394, i.e., FDA and IHS. may set basic salaries up to GS-15, Step 10 per annum, with the approval of the operating Human Resources organization.
- D. Experts and consultants are not entitled to periodic step increases given to other Federal employees. An OPDIV may, however, adjust the pay of an expert or consultant, provided it does not exceed the GS-15, Step 10 maximum rate of basic pay, or level IV of the Executive Schedule, with the approval of the operating Human Resources organization.
- E. An expert or consultant may be employed without compensation, provided the individual agrees in advance in writing to waive any claim for compensation for those services. This is not volunteer service.
- F. Experts and consultants may be paid on an hourly basis or on a daily basis. The basic difference between these two pay bases is that an expert or consultant paid on an hourly basis is paid at his/her hourly rate for each hour worked, whereas an expert or consultant paid on a daily basis is paid at his/her full daily rate for each day worked, regardless of the number of hours involved. At the time of appointment, experts and consultants will be assigned a daily or an hourly pay basis. Pay basis is documented on the SF 50 as a daily rate followed by "PD" or as an hourly rate followed by "PH." Pay must be on an hourly basis for any expert or consultant approved to perform duties away from the work site.
- G. Regardless of the pay basis of an expert or consultant, his/her biweekly pay is still limited by law to an amount which does not exceed the biweekly rate of pay for GS 15, Step 10. For example, an expert or consultant being paid the maximum daily rate cannot be paid for work in excess of 10 days per pay period, since such pay would exceed the statutory maximum. Similarly, an expert or consultant being paid the maximum hourly rate cannot be paid for work in excess of 80 hours per pay period.
- H. Retired members of the uniformed and civilian services who are employed as experts and consultants are subject to the same compensation pay restrictions as other retired employees who are reemployed. In rare situations, OPM may grant an exception.

- I. When necessitated by unforeseen and unusual circumstances, OPDIVs may submit requests for exceptions to the above compensation provisions through their operating Human Resources organizations, to the Deputy Assistant Secretary for Human Resources. Upon concurrence, OHR will forward such requests to OPM for official authorization as an exception to the above limits.

304-1-80 LEAVE, OVERTIME/HOLIDAY PAY, TRAVEL AND OTHER BENEFITS

A. Full-time and Part-time Experts and Consultants:

1. Are entitled to earn annual and sick leave. The rates of leave accrual and the provisions for lump-sum payment are the same as for other employees;
2. Paid on a daily rate basis are not entitled to overtime pay;
3. Paid on an hourly basis do qualify for premium pay, provided they have a regularly scheduled tour of duty, and provided the total pay will not exceed the applicable biweekly or annual pay limitation;
4. Are entitled to pay at their regular hourly rates for holidays on which they perform work. In addition, they are paid at their regular rate for holidays when they perform no work when those holidays fall on their regular tour of duty;
5. Are entitled to the travel benefits payable to regular employees, including transportation expenses and per diem in lieu of subsistence while on official business away from their official duty stations;
6. Are not entitled to transportation expenses between their homes or places of regular business and their places of employment; and
7. Are not entitled to per diem in lieu of subsistence while employed away from their homes or places of regular business.

B. Intermittent Experts and Consultants:

1. Are entitled to pay at their regular rates for work performed on a holiday. They are not entitled to receive pay for holidays on which they performed no work;
2. Are not entitled to leave benefits, overtime pay, or pay for working beyond the 8 hour day;
3. May be paid for transportation expenses incurred in traveling between their homes or places of regular business and their places of employment; and
4. May be paid per diem in lieu of subsistence while at places of employment away from their homes or places of regular business.

- C. All full-time, part-time, and intermittent employees are entitled to coverage for injuries during their period of service under the Federal Employees Compensation Act.

- D. Experts and consultants whose service is intermittent or temporary for one year or less are not covered under the Federal Employees Retirement System and are ineligible for life insurance and health benefits. However, if an employee currently covered by retirement, life insurance, or health benefits is appointed as an intermittent or temporary (full-time or part-time) expert or consultant without a break in service or after a separation from service of three days or less, coverage is continued. To continue life insurance coverage for an intermittent employee, there must be an expectation that the employee will return to the previous position on a full-time basis.

304-1-90 DOCUMENTATION, REPORTING, AND ACCOUNTABILITY

A. Documentation

1. OPDIVs will submit the following to their operating Human Resources organizations for compliance and processing:
 - a. Resume or curriculum vitae of the requested individual;
 - b. Applicable financial disclosure form (i.e., OGE-450 or SF-278);
 - c. Information contained on the Experts and Consultants Request Form (Exhibit A); and
 - d. Completed Request for Personnel Action, Standard Form 52, authorizing the action.
2. Any requests requiring OPM approval will be forwarded to the Deputy Assistant Secretary for Human Resources for approval and transmittal.

B. Reporting

OHR/ASAM will prepare and submit annual reports to OPM regarding 1) the total number of days the OPDIV employed each paid expert and consultant; and 2) the total amount of funds, excluding payments for travel and related expenses, the OPDIV paid each expert and consultant.

C. Accountability

1. Each OPDIV must develop a system of oversight. The system must include:
 - a. Appropriate training and information procedures to ensure that officials and employees understand the unique requirements of expert and consultant appointments appointed under 5 USC 3109;
 - b. Procedures for monitoring the time and funding limitations of experts and consultants; and
 - c. Provisions for reviewing and monitoring expert and consultant appointments.
2. OHR/ASAM will conduct periodic accountability reviews to analyze OPDIV usage of expert and consultant appointments and reappointments, and conduct case reviews to ensure that all appointments made under 5 U.S.C. 3109 adhere to regulations.

Exhibit A EXPERT and CONSULTANT REQUEST FORM	
1. NAME OF PERSON: <i>(Last, first, middle initial)</i>	2. TOTAL PERIOD FOR WHICH APPOINTMENT IS REQUESTED: <i>(List dates from beginning month/day/year to ending month/day/year)</i>
3. MAILING ADDRESS	4. APPROXIMATE NUMBER OF DAYS IN CALENDAR YEAR PERSON IS EXPECTED TO PERFORM SERVICES DURING THIS PERIOD.
5. TYPE OF APPOINTMENT: <i>(Appointment versus Extension/Re-appointment), (Expert versus Consultant), (Full-time, Part-time, Intermittent), Hourly basis versus Daily basis)</i>	
6A. STATE THE BASE SALARY (EXCLUDING LOCALITY PAY): 6B. WILL COST OF LIVING ADJUSTMENTS BE AUTHORIZED?	
7. EXPLAIN IN FULL THE SERVICES TO BE PERFORMED: <div style="height: 80px;"></div>	
7A. EXPLAIN WHAT DUTIES WILL BE ASSIGNED THAT WILL INVOLVE THE PERSON IN THE TRANSACTION OF BUSINESS ON BEHALF OF THE GOVERNMENT WITH ANY PROFIT OR NON-PROFIT ORGANIZATION: <div style="height: 80px;"></div>	
7B. SPECIFY WHAT DUTIES WILL BE ASSIGNED THAT WILL INVOLVE THE PERSON IN THE RENDERING OF ADVICE TO THE GOVERNMENT WHICH WILL HAVE DIRECT AND PREDICTABLE EFFECT ON THE INTERESTS OF ANY PROFIT OR NON-PROFIT ORGANIZATION: <div style="height: 80px;"></div>	
8. JUSTIFICATION FOR OBTAINING OR EXTENDING THIS PERSON'S SERVICES: <i>(Please include special qualifications of the nominee which relate specifically to the services to be performed.)</i> <div style="height: 100px;"></div>	
9A. TOTAL NUMBER OF DAYS OPDIV ALREADY EMPLOYED THE ABOVE PERSON AS AN EXPERT OR CONSULTANT TO PERFORM SUBSTANTIALLY THE SAME DUTIES: 9B. TOTAL AMOUNT OF FUNDS, EXCLUDING PAYMENTS FOR TRAVEL AND RELATED EXPENSES, I.E., LODGINGS/MEALS, ETC., OPDIV PAID THE ABOVE PERSON AS AN EXPERT OR CONSULTANT TO PERFORM SUBSTANTIALLY THE SAME DUTIES:	
10. PROPOSED TOTAL AMOUNT OF FUNDS, EXCLUDING PAYMENTS FOR TRAVEL AND RELATED EXPENSES, I.E., LODGINGS/MEALS, ETC., OPDIV ESTIMATES PAYING THE ABOVE PERSON AS AN EXPERT OR CONSULTANT ON THIS APPOINTMENT: <div style="height: 80px;"></div>	

Exhibit A

**CERTIFICATION
EXPERT/CONSULTANT APPOINTMENT**

In approving the appointment of this consultant/expert, I have considered the requirements of law, Office of Personnel Management, and HHS policies and instructions. More specifically, I certify that:

1. the services of this individual are essential for effective program management;
2. the duties to be performed are those of *(check one)*

 a consultant, i.e., they are purely advisory in nature and will not include the performance of supervision of operating functions;

 an expert, i.e., they require a high level of expertise not available in the regular workforce;
3. the individual is qualified to *(check one)*

 provide advisory services as a consultant as that term is defined in 5 CFR 304.102 and HHS Instruction 304-1;

 serve as an expert as that term is defined in 5 CFR 304.102 and HHS Instruction 304-1;
4. the appointment is appropriately designated as *(check one)*

 intermittent (the individual will work occasionally and irregularly);

 Full-time or part-time (the individual will work on a regular basis for a temporary period);
5. the appropriate appointment authority is being used;
6. the pay level is appropriate for the duties to be performed and the qualifications of the appointee; and
7. the record of appointment has been clearly documented to show the services to be performed and the special qualifications of the appointee which relate specifically to those services.

Date

Signature (Supervisor/Program Manager)
Authorized to Obtain the Consultant's/Expert's Services

Date

Signature (Appointing Official)