



Management Directive 110 and ADR

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What is Management Directive 110?

Management Directive 110 (“MD-110”) is a guidance issued by EEOC to provide detailed procedures under 29 CFR Part 1614 (“1614 regs”) for the processing of complaints of discrimination filed by federal employees and applicants for federal employment.

Background

- 2004 – EEOC creates a workgroup to analyze improvements to the EEO complaint process
- 2009 – Notice of proposed rulemaking (NPRM) to change federal sector EEO complaint processing
- 2012 – Final rule is published in the Federal Register, revising 1614 regulations
- 2014 – Proposed MD-110 revisions are sent out for comments from agencies and public
- 2015 – EEOC approves MD-110 revisions

Revised MD-110

Current revisions can be categorized into three categories:

- Implementation of Revised Regulations
- Conflict of Interest
- General Updates & Clarifications

PLUS

- Changes affecting ADR

Dealing with Non-Compliance

Chapter 1, Section IX establishes a three-step process to address issues of non-compliance with EEOC rules, regulations, orders, Management Directives, Bulletins, or any other instructions issued by the Commission:

- Notice to the agency of non-compliance
- Written notice to agency head
- Public notification of non-compliance

Establishing Pilot Projects

- Chapter 1, Section X permits EEOC to grant agencies variances to conduct pilot projects for processing complaints in other than prescribed ways
- Pilot can be run for 24 months with 12-month extension
- Pilot Process:
 - Annual request for pilot authority period (during 2nd quarter of the fiscal year)
 - Office of Federal Operations review and recommendation period
 - Commission review and vote period (3rd quarter)
 - Agencies notified of Commission determination
 - Pilot must begin the first quarter of the next fiscal year

Proposed Actions and Retaliation

Chapter 5, Section IV(A)(10) provides for dismissal of alleged discrimination by proposed personnel actions or preliminary steps before taking personnel actions.

However, if Complainant alleges that proposed action or preliminary step was taken in **retaliation**, then complaint should **not** be dismissed automatically.

Notice of Incomplete Investigation

Chapter 5, Section V(C) provides that 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.

Other Regulatory Revisions

- Chapter 9, Section IX(A)(2) gives the agencies 120 days to provide ordered relief.
- Chapter 9, Section IX(F) provides that in appeals alleging breach of settlement agreements EEOC can order compliance or that the complaint be reinstated from the point processing ceased.

Breach of Settlement Agreement

- Under footnote to Chapter 10, Section II(A)(3), complainant shall notify the agency in writing of the alleged noncompliance within 30 days of when complainant knew or should know of the alleged noncompliance.
- Under Chapter 10, Section II(A)(3), if the agency doesn't make determination within 35 days, then complainant can appeal to EEOC. If the agency makes determination, then complainant can appeal to EEOC within 30 days of determination.
- Under Chapter 9, Section IX(F), where a complaint is reinstated for further processing, parties will be returned to the *status quo ante* at the time they entered into the settlement agreement, and complainant will have to return any benefits received pursuant to the agreement.

Conflicts of Interest

Chapter 1, Section IV deals with potential conflicts of interest in processing federal sector EEO complaints. It specifically addresses:

- EEO and HR conflicts
- Complaint processing of matters involving EEO officials or high-level agency officials
- Conflicts between agency's defensive and EEO functions

Avoiding Conflicts of Interest

Chapter 1, Section IV(C) discusses how to avoid conflicts of interest in the EEO process:

- Agencies can make informal or formal arrangements with third parties (e.g., see Appendix A)
- Agencies should assess the stages of the EEO complaint process at which the assistance of a third party would be most effective, including **EEO ADR**.

General Updates and Clarifications

- A federal sector EEO history piece (Preamble)
- Case law updates throughout document (specific reference to the Macy decision and processing claims of sex-stereotyping)
- Inclusion of GINA
- A stand-alone remedies chapter (Chapter 11)
- Four new Appendices – Conflict Agreement (App. A), Incomplete Investigation Notice (App. K), Complaint File Format (App. L), and Documentation for Compliance Reference (App. Q)

ADR in Chapter 2 of MD-110

- Section I(E) discusses EEO ADR and counseling
- Section II requires counselor training on agency's informal and formal ADR processes (in both, initial 32-hours and annual continuing training)
- Section V provides further explanation of the purpose of the "limited inquiry" during the EEO counseling process
- Section VII clarifies use of the ADR program during the counseling process

ADR in Chapter 3 of MD-110

- Section I defines “parties”
- Section II(A)(1) defines “voluntariness”
- Section II(A)(3) deals with “confidentiality”
- Section III(A) provides minimum written ADR procedures
- Section III(A)(9) clarifies that in ADR the Responsible Management Official cannot be the agency’s Settlement Official
- Section III(C) discusses matters inappropriate for EEO ADR

ADR in Chapter 3 of MD-110 (cont'd)

- Sections III(E) and VI discuss various ADR techniques and combinations of techniques. Agencies have flexibility but **must** offer at least one ADR technique that allows for a meaningful participation of the parties (e.g., mediation, facilitation, settlement conference)
- Section V(A) discusses sources of neutrals and cautions when one person performs multiple roles, such as counselor, investigator, and ADR neutral.

Independent ADR Office

- Sections III(K) defines an “Independent ADR Office” as an office that functions independently of the traditional EEO Office. In addition to EEO disputes, an Independent ADR Office may attempt to informally resolve a variety of workplace concerns, such as, grievances, or general employee disagreements.
- The Commission encourages the implementation of an Independent ADR Office as a best practice.

Independent ADR Office (cont'd)

- While employees may go directly to the Independent ADR Office without first meeting with the EEO Counselor, an independent ADR office is not an office for the purpose of initiating the EEO process
- Where an agency permits ADR office employees to perform any collateral EEO duty (no matter how small or infrequent), the ADR office is no longer independent and any contact by an aggrieved party with the ADR office staff will initiate the traditional EEO process, including EEO counseling and Form 462 reporting.

ADR Elsewhere in MD-110

- Chapter 1, Section V **requires**, and provides rationale for, designation of the individual with settlement authority to participate in ADR.
- Chapter 11 “Remedies” sets forth guidance on remedies to include back pay, front pay, attorney’s fees and costs, awards of compensatory damages, and other forms of equitable relief.
- Chapter 12 “Settlement Authority”

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