

The EEO Complaint Process

Part 1614 of the Federal Sector Equal Employment Opportunity (EEO) complaint processing regulations makes it illegal to discriminate against employees or applicants for employment on the basis of race, color, national origin, religion, sex, disability or age. A person who files a complaint or who opposes an employment practice made illegal under any of the statutes enforced by the EEO is protected from retaliation.

The Equal Employment Opportunity Commission (EEOC) does not enforce the protections that prohibit discrimination based on sexual orientation, marital or family status, parental status, protected genetic information and political beliefs. These bases may only be appealed through the U.S. Department of Agriculture administrative process. They are not appealable to the EEOC or any other non-USDA agency or department. Employees or applicants who believe that the Agricultural Marketing Service (AMS) has discriminated against them have the right to file an EEO complaint.

Pre-Complaint Processing **Step 1**

An AMS employee or applicant who believes that discrimination has occurred must contact the AMS Civil Rights Program and speak with an EEO Counselor within 45 days of the alleged discriminatory action.

During the pre-complaint process, an AMS EEO Counselor will work with the individual and advise the individual in writing of their rights and responsibilities. An individual may choose to participate in counseling or Alternative Dispute Resolution (ADR), if ADR is offered.

Ordinarily, counseling must be completed within 30 days and ADR within 90 days. As appropriate, the Counselor will conduct a limited inquiry into the allegations and attempt resolution. The individual has the right to anonymity throughout the pre-complaint process, unless ADR is elected.

At the end of counseling or if ADR is unsuccessful, the individual will be issued a Notice of Right to File and informed how to file a formal complaint with USDA, Office of Civil Rights (OCR). The individual has 15 calendar days from the date of receiving the notice to file a formal EEO complaint in writing with:

USDA, Office of Civil Rights
Chief, Employment Complaints Division
Mail Stop Code 9440
1400 Independence Avenue, SW
Washington, DC 20250

An individual, acting as a class agent, may also file a class complaint. An EEOC administrative judge must certify the class in order for it to be accepted for processing.

Formal Complaint Processing
Step 2

USDA must conduct an investigation within 180 days of receiving a formal complaint unless the complaint is dismissed. When USDA finishes its investigation, the complainant may request a hearing before an Equal Employment Opportunity Commission (EEOC) administrative judge or request an immediate final agency decision.

In cases where a hearing is requested, the administrative judge issues a decision within 180 days and sends the decision to both parties. Where discrimination is found, the administrative judge orders appropriate relief. If USDA does not issue a final order within 40 days of receiving the administrative judge's decision, the decision becomes the final action. The USDA may inform the complainant that it will not fully implement the decision of the administrative judge, but the USDA must file an appeal.

A dissatisfied complainant may appeal to EEOC any agency's final action within 30 days of receiving notification of final action. USDA may appeal a decision by an EEOC administrative judge within 40 days of receiving the decision.

A complainant has the right to file a civil action in Federal District Court on claims raised in the EEO administrative process:

- a. Within ninety (90) days of receiving a final action on an individual or class complaint if no appeal has been filed;
- b. After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final action has not been taken;
- c. Within 90 days of receiving the EEOC's final decision on appeal; or
- d. After 180 days from the date of the filing of an appeal with the Commission if there has been no final decision by the Commission.

In reference to class complaints, a class agent may appeal the USDA's final decision on the merits of the class complaint within 30 days of receipt, or a class member may appeal the final decision on his/her claim for individual relief within 30 days from receiving the final decision.

Note: The timeframes in this guide are stated in calendar days.

The EEO Complaint Process

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The Grievance Procedure

Who can use the EEO Process?

Employees
Applicants

When can you use the Process?

If you believe you have been discriminated against based on race, color, age, religion, national origin, disability, or sex.

Complaints arising from parental status, marital or familial status, sexual orientation, protected genetic information or political beliefs are only processed within the Department. They are not appealable to EEOC.

How would the Process begin?

Contact EEO within 45 days of alleged act of discrimination. The EEO Counselor has 30 days from original contact to facilitate resolution.

If there is no resolution after this time, the counselor will issue to the employee a "Notice of Right to File" a formal complaint.

The employee has 15 days from receipt of the "Notice of Right to File" to file the formal complaint with USDA, Office of Civil Rights.

*Exception: If the employee agrees in writing to participate in an Alternative Dispute Resolution Program, the counseling period may be extended up to 90 calendar days from initial contact.

Who can use the Grievance Procedures?

(See also AMS Directive 346.1, Administrative Grievance System.)

Employees
A group of employees

When can you use the Procedure?

If you have suffered from unfair treatment, performance appraisals, non-selection for training, suspensions, changes in assignment, failure to follow rules and regulations. See also AMS Directive 346.1.

How would the Procedure begin?

The informal grievance must be presented to the official in the organization at the level with decision power within 15 days of the act or occurrence.

Must orally or in writing clearly identify concerns as a grievance.

It must state the corrective actions the grievant is seeking.

A determination and a response will be sent back to the grievant within 15 days. If resolution can not be achieved, the Deciding official will notify the grievant and advise him/her that a formal grievance may be filed within 10 calendar days.

Complainant's Rights and Responsibilities

The USDA EEO Pre-Complaint System covers individual and class complaints of discrimination based on race, color, religion, sex, national origin, age, physical or mental disability, sexual orientation, marital status, genetic information, political beliefs, and parental status. Age is a factor only if complainants are at least 40 years of age. A person with a disability(ies) is one who has a physical or mental impairment, which substantially limits one or more major life activities, has a record of impairment, or is regarded as having such impairment. Because the Equal Employment Opportunity Commission (EEOC) does not have jurisdiction in political belief, marital or parental status, sexual orientation, or genetic information complaints, these cases will be handled completely within the USDA administrative process. Complainants may have a representative of their choice at any stage in processing the complaint, provided the choice of a representative does not involve a conflict of interest or conflict of position. No reprisal action may be taken against a complainant or a complainant's representative. Individuals who contact an EEO Counselor may request to remain anonymous during the pre-complaint stage.

COMPLAINANTS HAVE THE FOLLOWING RIGHTS AND RESPONSIBILITIES:

- The right to elect between a negotiated grievance procedure (if applicable) and the EEO complaint procedure.
- Where an Agency is covered by 5 U.S.C. 7121(d) and where the negotiated procedure and the statute covers the alleged discrimination, the aggrieved individual would be required to elect either: (1) the statutory procedure for discrimination (the internal agency EEO process) or (2) the negotiated grievance procedure, but not both. Use of the pre-complaint process does not constitute an election.
- The right to choose between Alternative Dispute Resolution (ADR), if offered, and traditional EEO counseling.
- Where an aggrieved individual agrees to participate in the ADR procedure, the processing time shall automatically be extended to a total of ninety (90) days. A written notice terminating the processing period will be issued upon completion of the ADR or within 90 calendar days of the first contact with the EEO Counselor, whichever is earlier.
- The right to elect traditional counseling with a counseling period of thirty (30) days. When counseling is selected and if the complaint is not resolved, the right to written notice terminating counseling within thirty (30) calendar days of the date of initial contact with the EEO Counselor. The pre-complaint counseling period may be extended to a total of ninety (90) days with the approval of the aggrieved individual. If the complaint is not resolved, the right to file a formal individual or class complaint within 15 calendar days of receiving the written notice. The right to receive the name and address of the appropriate official with whom to file a formal complaint.
- The right to anonymity in the pre-complaint phase of complaint processing unless it is waived, ADR is elected or a formal complaint is filed.

- The right to representation throughout the complaint process including the pre-complaint stage. The complainant must immediately inform the EEO Counselor, the Deputy Director for Employment, Office of Civil Rights, USDA, or EEOC, as appropriate, if representation is obtained.
- To reject an agency's offer of resolution. But the rejection of an offer of resolution made pursuant to section 29 CFR 1614.109 (c) may limit the amount of attorney's fees or costs that may be recovered.
- The right to raise claims at the formal complaint stage that are like or related to claims raised at the pre-complaint stage. Amendments may be made after a complaint has been filed but they must address the same or similar claims raised at the pre-complaint stage.
- The right to election requirements in the event that the matter at issue can be appealed to the Merit Systems Protection Board, i.e., the matter is a mixed case complaint.
- The complainant has 20 calendar days from the date of the alleged discriminatory act to file a mixed case appeal with the Merit Systems Protection Board (MSPB); 15 calendar days from the date of a counselor/mediator's notice of final interview; or 30 calendar days after the initial EEO Counselor/Mediator contact to file a formal mixed case complaint. The complainant may not file both an MSPB appeal and an EEO complaint on the same matter. The process selected first is deemed the elected process.
- The right to file a notice of intent to sue when age is alleged as the basis for discrimination and the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to section 29 CFR 1614.201(a).
- The right to go directly to U.S. District Court on claims of sex based or wage discrimination under the Equal Pay Act. Such claims are also cognizable under Title VII.
- The right to file a formal complaint within 15 days of receipt of the "Notice of Right to File a Formal Complaint" in the event that he/she wishes to file a formal complaint at the conclusion of the pre-complaint process.
- The right to request a hearing before an EEOC Administrative Law Judge (except in a mixed case) after completion of the investigation or 180 calendar days from the filing of a formal complaint, whichever comes first. The request should be made directly to the appropriate EEOC office, and the responding agency must be notified of the hearing request. Consult the EEO Counselor for information on where a request for a hearing and notice to the agency should be sent.
- The right to an immediate final decision after an investigation by the agency in accordance with section 1614.108 (f).

- The right to go to the U.S. District Court 180 calendar days after filing a formal complaint, if no final action has been taken on the complaint, or 180 days after filing an appeal, if no decision has been issued on the appeal.
- The duty to mitigate damages, e.g., the interim earnings or amounts which could be earned by the individual with reasonable diligence, must be deducted from an award of back pay.
- The right to file two or more complaints, but the agency must consolidate the complaints and give appropriate notice in accordance with 29 CFR 1614.606. When a complaint has been consolidated with one or more prior complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days after the filing of the original complaint.
- A reasonable amount of official time in preparing and presenting the complaint of alleged discrimination. Such official time must be requested in advance from the appropriate supervisor.
- A duty to keep the agency and EEOC informed of a current mailing address and phone number(s) and serve copies of hearing requests and appeal papers on the agency.
- The duty to fully cooperate, in all phases of the pre-complaint and formal complaint processes, with the presentation of information (including the scheduling of meetings or conferences, responding to correspondence, providing requested material or data, etc.).

Responding Officials Have the Following Rights and Responsibilities:

The Pre-Complaint Process:

To be contacted by the EEO Counselor, be informed of the basis and issue(s) of the claim, and be given the opportunity to fully respond to all claims that involve the Responding Official (RO).

To suggest to the EEO Counselor persons to be interviewed and documents to be obtained relevant to the claim. The Counselor has the authority to decide what information is relevant and material to the claim.

To have a representative at any stage of the process. If legal representation is obtained by the RO, it must be at the RO's own expense. The role of the representative is limited to advising the RO on how to respond to questions. The representative may be any person within or outside of the Agricultural Marketing Service (AMS); however, the representative may not be a person either above or below the RO in the supervisory chain.

To participate and provide information during the Alternative Dispute Resolution (ADR) process.

To be informed of the outcome of each stage of the pre-complaint process.

The Formal Process:

To be notified that a complainant has filed a formal complaint.

To be contacted by an investigator and informed of the basis and issue(s) of the complaint and be given the opportunity to fully respond to all claims that involve the RO.

To suggest to the investigator persons to be interviewed and documents to be obtained relevant to the claims. The investigator has the authority to decide what information is relevant and material to the complaint.

To review and make any corrections or additions to his/her sworn statement before signing it.

To testify at any hearing on the complaint.

To be informed of the outcome of each stage of the formal process and to be provided with copies of the final decision and any Equal Employment Opportunity Commission or court decision on the complaint.

To be provided with a sanitized copy of the entire case file, if the final decision finds discrimination or any impropriety on the part of the RO. "Sanitized" means that the name and identifying information on persons not involved in the complaint are removed.

To be provided with a complete, un-sanitized copy of the entire case file, if any directed training or disciplinary action is proposed for the RO after a finding of discrimination.

To fully cooperate, in all phases of the pre-complaint and formal complaint processes, with the presentation of information (including the scheduling of meetings or conferences, responding to correspondence, providing requested material or data, etc.).

To work with management in attempts to reasonably resolve the matter at the lowest level possible.

To notify either the EEO Counselor or, in writing, the Chief, Employment Adjudication Division, Office of Civil Rights, U.S. Department of Agriculture, Mail Stop Code 9406, 1400 Independence Avenue, SW, Washington, D. C., 20250 of his/her representative, if one is obtained.

At any time after a complaint is initiated, to refrain from any actions that might create the appearance or perception of retaliation, reprisal, restraint, interference, coercion, or harassment against the complainant.

To refrain from discussing the pre-complaint or formal EEO complaint with anyone not directly involved with the processing of the complaint.

The Agricultural Marketing Service EEO Counseling Process

