

# Rules and Regulations

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## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 724

RIN 3206-AK55

### Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002—Reporting & Best Practices

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing final regulations to carry out the reporting and best practices requirements of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act). The No FEAR Act requires Federal agencies to report annually on certain topics related to Federal antidiscrimination and whistleblower protection laws. The No FEAR Act also requires a comprehensive study to determine the executive branch's best practices concerning disciplinary actions against employees for conduct that is inconsistent with these laws. This rule will implement the reporting and best practices provisions of the No FEAR Act.

**DATES:** *Effective Date:* The rule is effective February 26, 2007.

**FOR FURTHER INFORMATION CONTACT:** Gary D. Wahlert by telephone at (202) 606-2930; by FAX at (202) 606-2613; or by e-mail at [NoFEAR@opm.gov](mailto:NoFEAR@opm.gov).

#### SUPPLEMENTARY INFORMATION:

#### Background

The United States and its citizens are best served when the Federal workplace is free of discrimination and retaliation. In order to maintain a productive workplace that is fully engaged with the many important missions before the

Government, it is essential that the rights of employees, former employees and applicants for Federal employment under antidiscrimination and whistleblower protection laws be protected and that agencies that violate these rights be held accountable. Congress has found that agencies cannot be run effectively if those agencies practice or tolerate discrimination. Furthermore, Congress has found that requiring Federal agencies to provide annual reports on discrimination, whistleblower, and retaliation cases should enable Congress to improve its oversight of compliance by agencies with laws covering these types of cases. Finally, Congress has required that the President or his designee conduct a study of discipline taken against Federal employees for conduct that is inconsistent with Federal antidiscrimination and whistleblower protection laws. The results of this study are then to be used to develop advisory guidelines that Federal agencies may follow to take such disciplinary actions. Therefore, under authority delegated by the President, OPM is issuing final regulations to implement the annual reporting and best practices provisions of Title II of the Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act), Pub. L. 107-174.

#### Introduction

On January 25, 2006, OPM published at 71 FR 4053 (2006) a proposed rule implementing the reporting and best practices provisions of the No FEAR Act and providing a 60-day comment period. On March 31, 2006, in response to requests by the No FEAR Coalition and Members of Congress, OPM at 71 FR 16246 (2006) reopened the initial comment period until May 1, 2006. OPM received 13 comments from Federal agencies or departments, 5 comments from associations/organizations/coalitions (including the No FEAR Coalition), 4 comments from unions, 92 comments from individuals, and 2 comments from Members of Congress. OPM thanks all who provided comments—each comment has been carefully considered.

## Reporting Obligations

### Definition of Discipline

The No Fear Act requires agencies to create annual reports on a number of items, including disciplinary actions taken for conduct that is inconsistent with Federal antidiscrimination and whistleblower protections. These reports are to be submitted to Congress, the Equal Employment Opportunity Commission (EEOC), the Attorney General, and OPM. OPM proposed at § 724.102 to define discipline for reporting purposes to include a range of actions from reprimands through adverse actions such as removals and reductions in grade. OPM also stated that it was considering expanding the range of disciplinary actions reported to include unwritten actions such as oral admonishments. OPM asked for comments on whether such additional actions should be reported.

Most commenters raised no objection to the definition of disciplinary actions as proposed, i.e., reprimands through adverse actions, but many expressed strong disagreement with the notion of expanding that definition to include unwritten actions such as oral admonishments. Many of those, including the No FEAR Coalition, were concerned that an expanded definition would undermine what they assert was the intent of Congress that stiff penalties be imposed on those who violate Federal antidiscrimination and whistleblower protection laws. Many believed that reporting such additional actions would improperly inflate the numbers of actions taken to discourage improper activities. Others felt that the reporting of non-written actions would be inconsistent with the concept of progressive discipline or would encourage agencies to take types of actions that might impinge upon the recipients' procedural rights. Federal agencies were opposed to reporting unwritten actions for primarily two reasons: (1) Oral admonishments, unwritten warnings, and similar actions are not true disciplinary actions and (2) it would be an administrative burden to report such actions because of their undocumented nature. Some thought that documentation of unwritten actions by agencies would negatively impact their ability to attempt to resolve workplace issues informally.

Commenters in favor of reporting unwritten actions such as oral admonishments generally felt that it is important for there to be a complete record of what agencies have done when they discover conduct inconsistent with Federal antidiscrimination and whistleblower protection laws. For example, one organization stated that such reporting would "give some indication of how serious the agencies are when it comes to combating discrimination." One union stated that "[t]his information is necessary to fully understand the scope of agencies' practices in this area and, particularly, whether agencies have failed to adequately discipline employees who may have committed serious breaches of the discrimination and whistleblower protection laws by imposing only minor, unwritten discipline." Another union in favor of reporting unwritten actions stated that extensive reporting helps ensure that there is "an accurate and detailed portrait of any given agency's compliance with the letter and spirit of the No FEAR Act." One commenter recommended that the definition of discipline be further expanded to include "reassignment from a supervisory to a non-supervisory position" because such actions occur "frequently" for disciplinary reasons.

OPM received numerous comments suggesting that an expanded definition of discipline would be seen by many as an impediment to, rather than in support of, an effective Federal workforce. Moreover, expanding the definition could incorrectly suggest that OPM, through the No FEAR Act, is authorized to establish disciplinary penalties beyond the normal definition of discipline. Therefore, OPM has decided not to expand the definition of discipline to include unwritten actions such as oral admonishments or any other actions suggested by commenters. The role of OPM under the No FEAR Act is not to dictate what disciplinary actions are appropriate to be taken by agencies but rather OPM's role is to address what is to be reported under the Act.

#### *Agency Training Plans*

Section 724.302(a)(9) proposed a new reporting element that required agencies to provide copies of their written training plans developed under the earlier (February 28, 2005) proposed rule at § 724.203(a). Several commenters suggested that this element be dropped since it is not required by the No FEAR Act or suggested that the requirement be held up since § 724.203(a) was only in proposed form at the time the current regulations were proposed. Training is a

critical component of obligations imposed under the No FEAR Act to ensure that the workplace is free of discrimination and reprisal. Because it is critical, OPM has decided to retain the proposed reporting element on training plans. OPM also declines to drop the proposal as premature since Subpart B (Notification and Training) along with § 724.203(a) was published as a final regulation on July 20, 2006.

One agency noted that proposed § 724.203(a) requires agencies to write training plans. Since these plans, in turn, are to be reported annually under § 724.302(a)(9), the agency asked whether it is required to resubmit the agency's written plan in each annual report even when there are no amendments to a previously reported plan. Each report should be complete and able to stand on its own independent of other reports that might have been filed by an agency. Thus, a written training plan should be submitted with each annual report by an agency.

#### *Agency Disciplinary Policies*

One commenter asked whether OPM's "review of agencies' discussions" under § 724.402(b) refers to future discussions that OPM will have with an agency or refers to discussions that an agency may have had internally about their disciplinary policies. OPM notes that the discussions referenced are synonymous with the "detailed description" of an agency's policy for taking disciplinary action under § 724.302(a)(6). Another commenter wondered whether this "detailed description" means that agencies would be required to develop new disciplinary policies under the regulations. While agencies may decide to develop new disciplinary policies, the regulations do not require such action. One agency stated that, with regard to the obligation to provide a detailed discussion of agency policies in § 724.302(a)(6), significant changes in agencies' reports from year to year should not be expected since agency disciplinary policies aren't often changed. OPM takes no position on this observation.

One commenter noted that the regulations refer to disciplinary actions taken for "conduct that is inconsistent with" Federal antidiscrimination and whistleblower protection laws. The commenter asked that OPM clarify the phrase "conduct that is inconsistent with." In this regard, while agencies have the authority to take disciplinary actions against employees for misconduct, this misconduct may or may not be associated with a formal finding of a violation of Federal

antidiscrimination and whistleblower protection laws. For example, a case may be settled with no admission of liability but is clearly a case where the law would be found to have been violated if there were a formal finding. Discipline taken in such a case should not go unreported under the No Fear Act. It should be noted, however, that entering into a settlement agreement should never be construed as proof of wrongdoing by either party because settlements may be reached for a variety of reasons. In sum, it is the conduct of the employee that dictates whether a disciplinary action is to be reported under the regulations, not whether there is a formal finding of a violation.

#### *Case Reporting*

As proposed, § 724.302(a)(1) would require agencies to report on cases involving Federal antidiscrimination and whistleblower protection laws that are pending or resolved in Federal courts in each fiscal year. One commenter asked whether this applies to cases in both U.S. District Court and Courts of Appeals. OPM states that it does.

One agency commented that reporting on pending cases "does not further the purpose of the No FEAR Act" because the number of pending cases is "not an accurate reflection of violations" since complaints are often filed pro se and plaintiffs often fail to accurately identify their cause of actions. The agency noted that many cases are filed under multiple statutes and causes of actions and it's difficult to understand what cases are about. As a result, the agency recommended that agencies only report an aggregate number of cases resolved in Federal court and without relating each case to provision(s) of law involved as required by the proposed rule. Another commenter suggested that the Department of Justice be tasked with obtaining the status and coverage of cases. As discussed elsewhere in the Supplementary Information, the No FEAR Act calls on agencies to discuss the status or disposition of cases in the Federal courts. The provision would be meaningless if the status of all cases reported is "resolved." Therefore, OPM declines to limit agencies' reporting obligation only to cases in Federal court that have been resolved. OPM also declines to modify the reporting requirement to just reporting the aggregate number of cases in Federal court. The Act requires that each case be related to a provision(s) of law involved. OPM has no authority under the Act to task the Department of Justice as suggested by one commenter.

One agency asked that OPM define what is considered to be a "pending case" in Federal court. The regulations call for reporting about cases in Federal court that are pending or resolved in each fiscal year. That is, if a case is filed in court during a current reporting cycle's fiscal year or resolved during that fiscal year or filed and resolved in that fiscal year, it is to be reported. Cases filed in previous years but not resolved would be counted as (pending) cases in the current reporting year. Cases filed in previous years and resolved in the current year would be counted as (resolved) cases. Some cases may be pending for a number of years in Federal court.

Section 724.302(a)(5) requires that agencies report the number of employees disciplined in accordance with any agency policy described in § 724.302(a)(5) regardless of whether it was in connection with a case in the Federal courts. One commenter wondered why administrative cases are covered in this reporting element when other reporting elements only apply to cases in the Federal courts. OPM believes that the No FEAR Act at section 203(a)(6)(B) asks, without restriction, for reports on all discipline in connection with Federal antidiscrimination and whistleblower protection laws. Another commenter suggested that the phrase "whether or not" in § 724.302(a)(5) be deleted. OPM declines to adopt the suggestion.

Section 724.302(a)(5) also requires agencies to report on the number of employees disciplined for conduct inconsistent with Federal antidiscrimination and whistleblower protection laws, whether or not in connection with cases in Federal court, and to identify the specific nature of the disciplinary actions (e.g., reprimand, etc.). One agency asked whether former employees should be included in this reporting requirement. OPM states that any discipline taken during the reporting period for conduct inconsistent with the laws noted previously is to be reported even if the individual is no longer employed when the report is prepared.

Based on its analysis of the relationship between section 203(a)(1) and section 201(a) of Title II of the No FEAR Act, one agency concluded that the "plain meaning" of the Act is that agencies, under § 724.302(a)(1) of the proposed rule, are only required to report on cases in Federal court in which Judgment Fund payments have been made. OPM notes that section 203(a)(2) of the Act requires reporting on the "status or disposition" of cases described in section 203(a)(1) of the Act.

If the only cases reported are those in which Judgment Fund payments have been made, section 203(a)(2) would be meaningless since the status or disposition of all cases would be similar. Accordingly, OPM declines to modify § 724.302(a)(1) and agencies must report on all cases in Federal court whether or not there has been Judgment Fund payment.

The same agency also suggested that the proposed rule § 724.302(a)(3) be modified so that agencies are not obligated to report on the nature of each disciplinary action and the provision of law concerned in each case, but rather report solely on the numbers of disciplinary actions taken. Here the agency cites to section 203(a)(4) of Title II of the No FEAR Act which calls for reporting disciplinary actions but does not speak to the nature of the action or the provision of law concerned. The agency also comments that the phrase "provision of law" is unclear and asks whether the phrase applies to the Federal antidiscrimination and whistleblower protection laws concerned or whether it refers to laws authorizing disciplinary actions (such as the law codified at 5 CFR 752 concerning adverse actions).

In response to the comment on the issue of whether the Act requires agencies to identify the nature of an action and the provision of law concerned in each case, section 203(a)(6)(B) of Title II calls for identification of the nature of the disciplinary actions reported. This reporting requirement is codified at § 724.302(a)(5). In addition, section 203(a)(1) of Title II calls for reporting on the cases arising under "the respective provisions of law" and that requirement is reflected in § 724.302(a)(3). The reporting requirements under both § 724.302(a)(3) and § 724.302(a)(5) should be consistent with regard to labeling discipline in order to provide the most meaningful and useful data to Congress and others. Thus, OPM declines to modify § 724.302(a)(3).

In response to another agency's question about reporting disciplinary actions, agencies are required to associate the nature of a disciplinary action with each case in such a manner that the report will list the types of disciplinary actions taken and then state the numbers of employees affected by each particular type of action.

With regard to the issue of what the phrase "provision of law" means, it means the Federal antidiscrimination or whistleblower protection laws involved in a particular case wherever that phrase is used in § 724.302. Another agency asked how specific an agency must be

when it relates individual cases to these laws, e.g., whether the agency needs to cite laws such as the Civil Rights Act, Age Discrimination in Employment Act, etc. or whether it can just broadly refer to antidiscrimination laws or whistleblower protection laws. The No FEAR Act requires specificity and thus agencies need to identify the specific laws involved such as those cited in the commenter's question.

One agency commented on OPM's proposed §§ 724.301 and 724.302(a)(1) stating that they should contain the same language as that proposed in § 724.202(a) on February 28, 2005. That section calls on agencies to give notice to employees about Antidiscrimination Laws and Whistleblower Protection Laws applicable to them. OPM agrees the regulation should be consistent and has modified §§ 724.301 and 724.302(a)(1) to include the phrase "applicable to them" to modify Antidiscrimination Laws and Whistleblower Protection Laws.

One organization suggested that administrative cases also should be reported by agencies under the regulations. In this regard, the commenter noted that the regulations ignore the "thousands of cases which are processed administratively through the MSPB [Merit Systems Protection Board] and the EEOC." The commenter stated that, to be truly reflective of both the magnitude of these cases and whether an agency is disciplining employees who are found liable in forums other than courts, those cases must be reported. The commenter also recommends that all settlement agreements be reported regardless of any no fault clauses. With regard to reporting administrative cases, OPM notes that, apart from the data required pursuant to section 203(a)(5), Title II of the No FEAR Act is very clear that the cases to be reported are those that have gone to Federal courts. Under Title III of the Act, the EEOC already collects information regarding administrative cases within its jurisdiction. These regulations are consistent with the requirements of the Act and the suggestion is not adopted.

With regard to settlements, OPM notes that agencies are required to report on all cases that have gone to Federal court. Some of these cases may result in settlement agreements and they must be reported. OPM takes no position on the same commenter's proposal regarding EEOC's administrative judges' salaries because the comment is beyond the scope of these regulations and that issue is not a part of the No FEAR Act.

One agency commented that employees in Federal courts often receive lump sum payments from the Judgment Fund that provide no information about how the payment is to be divided among the employee, attorney(s), and other recipients. As a result, it is difficult for an agency to report what attorney's fees were paid in connection with cases in court. Since agencies are required to report under the regulations on attorney's fees, the commenting agency suggested that the Department of Justice advise agencies of the payment breakdown since the Department is involved in most cases in Federal court. OPM notes that the regulation at § 724.302(a)(2)(iii) only requires the reporting of attorney's fees where they have been "separately designated." If they have not been separated out in any part of the proceeding, agencies are not required to report on them.

A commenter suggested inserting for clarity the word "calendar" into the phrase "each agency must report no later than 180 days" in § 724.302(a). OPM adopts this suggestion.

Section 724.302(a)(9)(b)(5) provides that agencies are to submit their annual reports to "Each Committee of Congress with jurisdiction relating to the agency." One agency commented that this provision is unclear and asked whether it is within each agency's discretion to determine which Committees have jurisdiction relating to that agency. OPM notes that, while the No FEAR Act does not elaborate on this requirement, OPM has concluded the provision covers committees with subject-matter jurisdiction over a particular agency's mission as well as other committees with oversight responsibility for a particular agency such as appropriations committees. Beyond these committees, it is left with agencies to determine what other committees, if any, have jurisdiction relating to their agencies.

#### *Supplemental Reports*

Section 724.302(b) requires agencies that submitted their annual reports before these regulations become final to ensure that their reports contain data elements 1 through 8 of paragraph (a) of that section. If the earlier reports do not cover all of those data elements as written, agencies would be obligated to submit supplemental reports. Data element 9 concerns agency training plans and agencies are only required to include it in their future reports. One agency commented that comparing earlier reports to the final rules and providing supplemental reports would be an "unnecessary administrative burden" on agencies. Another agency

said that it would be "overly burdensome" for those that complied with the Act earlier in "good faith." That agency strongly recommended that the final rule apply only to future reports. Because the proposed regulations on reporting closely track the provisions of the No FEAR Act itself, OPM believes that the differences between what was submitted earlier and the requirements of the regulations will be minimal. OPM commends those agencies that have taken the initiative and submitted reports based on the Act even though OPM's regulations had not been finalized. However, because differences are likely to be minimal and because OPM believes that Congress needs consistent reports from all agencies in order to see how well the Federal Government is working toward a discrimination and reprisal-free workplace, OPM declines to eliminate the supplemental reporting requirement of § 724.302(b).

#### **Best Practices**

##### *Best Practices Study*

One commenter stated that OPM "has not gone far enough" concerning its determination of best practices because it appears that OPM plans a "reactive response" based on reports developed by agencies. The commenter said that OPM should provide "thoroughly researched, comprehensive, proactive guidelines which could help agencies avoid inappropriate discipline actions and would provide managers with sound guidance \* \* \*." OPM notes the proposed rule stated only that the study "will include," rather than "will be limited to" a review of agencies' discussions provided in their reports under the No FEAR Act.

Another commenter recommended that disciplinary best practices be shared with Federal agencies. Under § 724.403, disciplinary best practices will be incorporated in the advisory guidelines that OPM will provide to Federal agencies.

##### *Advisory Guidelines*

Some agencies suggested that OPM change the manner in which they are to reply to the advisory guidelines issued under § 724.403, eliminate the reply as an unnecessary burden, make the guidelines non-mandatory, change the recipient list, delay implementation of the guidelines after they are issued, and/or change the amount of time allocated for replying (provide more time). The No FEAR Act is very specific about agencies' obligations regarding this topic. Therefore, OPM declines to adopt these suggestions.

One agency suggested that agencies be given maximum flexibility in administering disciplinary actions and that the guidelines be focused essentially on program measures to determine effectiveness. Such program measures might be the reduction in agency complaints, policies issued to deter discriminatory behavior, and effective implementation of recommendations from previous agency reports. OPM will consider these suggestions in drafting the advisory guidelines.

One commenter suggested that OPM provide agencies with an opportunity to comment on advisory guidelines drafted under the No FEAR Act and/or publish them in the **Federal Register** for public comment. While the Act does not provide the opportunity for such comments, the President's delegation of authority to OPM does require that its activities concerning regulations under the No FEAR Act be accomplished in consultation with the Attorney General and other officers of the executive branch OPM determines appropriate. Thus, OPM has consulted with the Department of Justice, the Equal Employment Opportunity Commission, the Office of Special Counsel, and the Department of the Treasury and may do so in connection with the advisory guidelines.

With regard to agencies' obligation to state in writing whether or to what extent they are going to follow the advisory guidelines, one commenter wanted to know what will happen if an agency "opts out". Will there be consequences? The No FEAR Act requires agencies to provide their written statements to the Congress, the EEOC, and the Attorney General. The Act contains no "opt out" provision.

#### **Miscellaneous Comments**

##### *Training*

One of the union commenters recommended that there be "mandatory training requirements" and proposed that managers who have violated discrimination laws attend education and awareness training pertaining to managing a diverse workforce. OPM notes that the No FEAR Act requires training for all employees including managers. Agencies have flexibility to develop training curricula as appropriate for their needs. OPM declines to adopt this recommendation.

##### *Enforcement*

One organization suggested that EEOC and MSPB amend their regulations so that they could dismiss on jurisdictional grounds complaints and appeals filed by

employees who are disciplined in accordance with best practices guidance on disciplinary matters as set forth by OPM. OPM takes no position on this comment because it is beyond the scope of these regulations.

Another organization suggests that, for enforcement purposes, when there are violations of Federal antidiscrimination and whistleblower protection laws within an agency, that agency should be required to post a public notice similar to what is done when an agency is found by the Federal Labor Relations Authority to have committed an unfair labor practice. Another enforcement-related proposal would be to create a central repository of all information collected under the No FEAR Act and posted in one location on a public Web site such as EEOC's. This commenter also suggested that the regulations set penalties for failing to report as required by the Act. Another organization suggests that OPM measure agencies' performance in implementing the No FEAR Act. Part of this process would involve identifying an office at OPM with primary responsibility for assessing policy performance. Agencies would submit policy to this office and a selected group of interested employees from agencies would determine important aspects to be included in agency performance assessment. The group's results then would be used to compile a list of agency performance criteria and success indicators. OPM takes no position on these comments because they are beyond the scope of these regulations.

#### *Timeliness*

A number of commenters expressed concern about the amount of time it has taken for regulations to be promulgated under the No FEAR Act. OPM notes that with the publication of final regulations on Subpart A (Judgment Fund) on May 10, 2006, Subpart B (Notification and Training) on July 20, 2006, and the current rule, Subparts C & D (Reporting and Best Practices), 5 CFR part 724 is now complete.

#### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal employees and agencies.

#### **E.O. 12866, Regulatory Review**

This final rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

#### **E.O. 13132**

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

#### **E.O. 12988, Civil Justice Reform**

This regulation meets the applicable standard set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

#### **Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### **Congressional Review Act**

This action pertains to agency management, personnel and organization and does not substantially affect the rights of obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

#### **List of Subjects in 5 CFR Part 724**

Administrative practice and procedure, Civil rights, Claims.

U.S. Office of Personnel Management.

**Linda M. Springer,**  
*Director.*

■ Accordingly, OPM is amending part 724, title 5, Code of Federal Regulations, as follows:

#### **PART 724—IMPLEMENTATION OF TITLE II OF THE NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2002**

■ 1. In § 724.102 of subpart A, add a new definition for discipline in alphabetical order to read as follows:

#### **§ 724.102 Definitions.**

\* \* \* \* \*

*Discipline* means any one or a combination of the following actions: reprimand, suspension without pay, reduction in grade or pay, or removal.

\* \* \* \* \*

■ 2. In part 724, add subparts C and D to read as follows:

#### **Subpart C—Annual Report**

Sec.

724.301 Purpose and scope.

724.302 Reporting obligations.

#### **Subpart C—Annual Report**

##### **§ 724.301 Purpose and scope.**

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to report on specific topics concerning Federal Antidiscrimination Laws and Whistleblower Protection Laws applicable to them covering employees, former employees, and applicants for Federal employment.

##### **§ 724.302 Reporting obligations.**

(a) Except as provided in paragraph (b) of this section, each agency must report no later than 180 calendar days after the end of each fiscal year the following items:

(1) The number of cases in Federal court pending or resolved in each fiscal year and arising under each of the respective provisions of the Federal Antidiscrimination Laws and Whistleblower Protection Laws applicable to them as defined in § 724.102 of subpart A of this part in which an employee, former Federal employee, or applicant alleged a violation(s) of these laws, separating data by the provision(s) of law involved;

(2) In the aggregate, for the cases identified in paragraph (a)(1) of this section and separated by provision(s) of law involved:

(i) The status or disposition (including settlement);

(ii) The amount of money required to be reimbursed to the Judgment Fund by the agency for payments as defined in § 724.102 of subpart A of this part;

(iii) The amount of reimbursement to the Fund for attorney's fees where such fees have been separately designated;

(3) In connection with cases identified in paragraph (a)(1) of this section, the total number of employees in each fiscal year disciplined as defined in § 724.102 of subpart A of this part and the specific nature, e.g., reprimand, etc., of the disciplinary actions taken, separated by the provision(s) of law involved;

(4) The final year-end data about discrimination complaints for each

fiscal year that was posted in accordance with Equal Employment Opportunity Regulations at subpart G of title 29 of the Code of Federal Regulations (implementing section 301(c)(1)(B) of the No FEAR Act);

(5) Whether or not in connection with cases in Federal court, the number of employees in each fiscal year disciplined as defined in § 724.102 of subpart A of this part in accordance with any agency policy described in paragraph (a)(6) of this section. The specific nature, e.g., reprimand, etc., of the disciplinary actions taken must be identified.

(6) A detailed description of the agency's policy for taking disciplinary action against Federal employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Protection Laws or for conduct that constitutes another prohibited personnel practice revealed in connection with agency investigations of alleged violations of these laws;

(7) An analysis of the information provided in paragraphs (a)(1) through (6) of this section in conjunction with data provided to the Equal Employment Opportunity Commission in compliance with 29 CFR part 1614 subpart F of the Code of Federal Regulations. Such analysis must include:

(i) An examination of trends;

(ii) Causal analysis;

(iii) Practical knowledge gained through experience; and

(iv) Any actions planned or taken to improve complaint or civil rights programs of the agency with the goal of eliminating discrimination and retaliation in the workplace;

(8) For each fiscal year, any adjustment needed or made to the budget of the agency to comply with its Judgment Fund reimbursement obligation(s) incurred under § 724.103 of subpart A of this part; and

(9) The agency's written plan developed under § 724.203(a) of subpart B of this part to train its employees.

(b) The first report also must provide information for the data elements in paragraph (a) of this section for each of the five fiscal years preceding the fiscal year on which the first report is based to the extent that such data is available. Under the provisions of the No FEAR Act, the first report was due March 30, 2005 without regard to the status of the regulations. Thereafter, under the provisions of the No FEAR Act, agency reports are due annually on March 30th. Agencies that have submitted their reports before these regulations became final must ensure that they contain data elements 1 through 8 of paragraph (a) of

this section and provide any necessary supplemental reports by April 25, 2007. Future reports must include data elements 1 through 9 of paragraph (a) of this section.

(c) Agencies must provide copies of each report to the following:

- (1) Speaker of the U.S. House of Representatives;
- (2) President Pro Tempore of the U.S. Senate;
- (3) Committee on Governmental Affairs, U.S. Senate;
- (4) Committee on Government Reform, U.S. House of Representatives;
- (5) Each Committee of Congress with jurisdiction relating to the agency;
- (6) Chair, Equal Employment Opportunity Commission;
- (7) Attorney General; and
- (8) Director, U.S. Office of Personnel Management.

#### Subpart D—Best Practices

Sec.

- 724.401 Purpose and scope.
- 724.402 Best practices study.
- 724.403 Advisory guidelines.
- 724.404 Agency obligations

#### Subpart D—Best Practices

##### § 724.401 Purpose and scope.

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of the President or his designee (OPM) to conduct a comprehensive study of best practices in the executive branch for taking disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws and the obligation to issue advisory guidelines for agencies to follow in taking appropriate disciplinary actions in such circumstances.

##### § 724.402 Best practices study.

(a) OPM will conduct a comprehensive study in the executive branch to identify best practices for taking appropriate disciplinary actions against Federal employees for conduct that is inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws.

(b) The comprehensive study will include a review of agencies' discussions of their policies for taking such disciplinary actions as reported under § 724.302 of subpart C of this part.

##### § 724.403 Advisory guidelines.

OPM will issue advisory guidelines to Federal agencies incorporating the best practices identified under § 724.402 that

agencies may follow to take appropriate disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Laws.

##### § 724.404 Agency obligations.

(a) Within 30 working days of issuance of the advisory guidelines required by § 724.403, each agency must prepare a written statement describing in detail:

(1) Whether it has adopted the guidelines and if it will fully follow the guidelines;

(2) If such agency has not adopted the guidelines, the reasons for non-adoption; and

(3) If such agency will not fully follow the guidelines, the reasons for the decision not to do so and an explanation of the extent to which the agency will not follow the guidelines.

(b) Each agency's written statement must be provided within the time limit stated in paragraph (a) of this section to the following:

- (1) Speaker of the U.S. House of Representatives;
- (2) President Pro Tempore of the U.S. Senate;
- (3) Chair, Equal Employment Opportunity Commission;
- (4) Attorney General; and
- (5) Director, U.S. Office of Personnel Management.

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Parts 916 and 917

[Docket No. AMS–FV–06–0189; FV07–916/917–1 IFR]

#### Nectarines and Peaches Grown in California; Revision of Regulations on Production Districts, Committee Representation, and Nomination Procedures

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Interim final rule with request for comments.

**SUMMARY:** This rule revises the administrative rules and regulations that define production districts, allocate committee membership, and specify nomination procedures for the Nectarine Administrative Committee (NAC) and the Peach Commodity Committee (PCC) (committees). The committees are responsible for local administration of the Federal marketing