



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

AUG 05 2003

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MEMORANDUM

TO: : HEADS OF ALL FEDERAL AGENCIES

FROM : David L. Frank
Legal Counsel *David L. Frank*

SUBJECT : Coordination of the Rule Implementing Title III of the No Fear Act

Attached for your review pursuant to Executive Order 12067 is an interim final rule that the Commission proposes to publish for notice and comment. It implements Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No Fear Act). The regulation adds a new subpart G to 29 C.F.R. Part 1614.

Title III of the No Fear Act requires agencies to post certain statistical information on their public websites concerning complaints of employment discrimination filed with them under 29 C.F.R. Part 1614. The interim final rule defines what information must be posted and the time, form and manner of those postings.

The interagency coordination period for the interim final rule will terminate on August 29, 2003. If there are any questions about the rule, please contact Richard Roscio (richard.rosocio@eeoc.gov), Thomas Schlageter (thomas.schlageter@eeoc.gov), Gary Hozempa (gary.hozempa@eeoc.gov) or Mona Papillon (mona.papillon@eeoc.gov). These individuals can also be reached by telephone at (202) 663-4669.

Attachment

[6570-01P]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1614

RIN: Federal Sector Equal Employment Opportunity

AGENCY: Equal Employment Opportunity Commission

ACTION: Interim final rule.

SUMMARY: The Equal Employment Opportunity Commission is issuing implementing rules under the No Fear Act regarding the posting of EEO complaint processing data. The rules tell Federal agencies what information to post, how to post it and when to post it.

DATES: This interim final rule is effective on October 1, 2003. Comments must be submitted on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments should be submitted to Frances M. Hart, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 1801 L Street, N.W., Washington, D.C. 20507. As a convenience to commenters, the Executive Secretariat will accept comments of six pages or less transmitted by facsimile ("FAX") machine. The telephone number of the FAX receiver is (202) 663-4114. This is not a toll free number. The six-page limitation is necessary to assure access to the equipment. Receipt of FAX transmissions will not be acknowledged although a sender may request confirmation by calling the Executive Secretariat at (202) 663-4078 (voice) or (202) 663-4077 (TTY). These are not toll free numbers. Copies of comments submitted by the public will be available for review at the Commission's library, room

6502, 1801 L Street N.W., Washington, D.C., between the hours of 9:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Thomas J. Schlageter, Assistant Legal Counsel, Gary John Hozempa, Senior General Attorney or Mona Papillon, Senior General Attorney at (202) 663-4669 (voice) or (202) 663-7026 (TTY). Copies of this interim final rule are also available in the following alternate formats: large print, braille, audiotape and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publication Center at 1-800-669-3362.

SUPPLEMENTARY INFORMATION:

Introduction: EEOC is issuing rules to implement the posting requirements set forth in Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (the No Fear Act), P.L. 107-174. Pursuant to the No Fear Act, a federal agency must post on its public web site certain information pertaining to complaints of employment discrimination filed under 29 CFR Part 1614 (*i.e.*, individual complaints, class complaints, and mixed-case complaints – but not mixed-case appeals that are filed with the U.S. Merits Systems Protection Board or grievances raising claims of employment discrimination filed under collective bargaining agreements). Title III authorizes EEOC to issue rules concerning the “time, form and manner” of the postings, to define the terms “issue” and “basis,” and to issue any other “rules necessary to carry out” Title III.

Section 301 of the No Fear Act specifically sets forth the “summary statistical data” that each agency must post. It requires an agency to post this data for the current fiscal year on a cumulative basis (year-to-date information), updated quarterly. An agency also must post year end data for the five previous fiscal years for comparison purposes. In addition, under section

302 of the No Fear Act, EEOC must post fiscal year data pertaining to hearing requests and appeals corresponding to that which agencies are required to post under section 301. The proposed regulations use the same categories for posting hearings and appeals data that agencies will be using for complaint processing to the extent those categories are applicable to hearings and appeals.

As to the "form" of the information posted, EEOC considered mandating the format and layout that all agencies would adhere to so that one agency's posted data would be indistinguishable from another's in terms of look and feel. EEOC decided against this approach because a review of various agency web sites establishes that there is no uniformity as to content, appearance and means of navigation. EEOC is reluctant, therefore, to impose unilaterally a standardized posting design. The proposed regulations do require an agency to post its data in two computer-readable formats, PDF and one text format that complies with section 508 of the Rehabilitation Act. EEOC also proposes that a link to an agency's No Fear Act data be prominently displayed on the agency's home web page.

Congress has directed the time periods for which complaint data must be captured, and the proposed regulations track these time frames. Additionally, because Congress requires agencies to post processing times "for each step of the [complaint] process," EEOC has set forth definitions delineating the following major steps of the complaint process – EEO counseling, investigation, hearing, final agency action, and appeal. Lastly, Congress wants agencies to list the number of complaints by basis and issue, so EEOC has defined these terms.

In drafting the proposed regulations, EEOC has been cognizant of the fact that agencies already report to EEOC some of the data they are required to post under the No Fear Act. Every

executive branch agency must submit to EEOC an "Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints," otherwise known as EEOC Form 462. Wherever possible, EEOC has attempted to conform an agency's posting requirements under the Act with the agency's Form 462 reporting obligations. In the event of future changes to Form 462 reporting requirements, the Commission will examine whether such changes are relevant to the posting requirements under the Act.

Form and manner of data: EEOC believes that some uniformity in how data is posted is necessary in order to make each agency's data easily accessible to the public. Proposed regulation 29 CFR 1614.703 therefore specifies that the data must be posted in two formats: Portable Document Format (PDF) and an accessible text format of the agency's choosing that complies with the agency's obligation under section 508 of the Rehabilitation Act.

The proposed regulations require each agency to prominently post on its primary web homepage a link to the data required to be posted under the Act and designate the link and that data as "Equal Opportunity Data required to be posted by the No Fear Act." This is to make finding and then viewing the data as easy as possible, with a minimum of navigation clicks or jumps. It is further proposed that the agency prominently post the date its data was last updated.

EEOC believes that posted data will be more meaningful and useful if, in addition to showing agency-wide statistics, certain large agencies show how each subelement of the particular agency is performing. Given that many agency subelements employ more employees than are employed by entire agencies, EEOC believes it simply makes good sense to see how each subelement is complying with the EEO laws, especially when compared to the parent agency. Therefore, it is proposed that certain large agencies post both agency-wide aggregate

data and subelement-specific data. Section 1614.702(j) sets forth the subelements for each agency for which subelement-specific data must be posted.

Data to be posted: *Number of complaints.* No Fear requires an agency to post the number of EEO complaints filed with it under 29 CFR Part 1614 in a given fiscal year. If the same individual files four separate complaints, they should be counted as four complaints. Even if complaints later are consolidated for processing, they should still be counted as separate complaints for purposes of this posting requirement.

Number of filers. An agency must post the number of individuals who file complaints with the agency in a given fiscal year. Where the same individual files multiple complaints, the agency counts the complainant only once under this category. For example, if the same person files five complaints in a given fiscal year, the agency will count five complaints as having been filed, but only one filer. Where there are multiple complainants filing the same complaint, the proposed regulations envision that the agency will post the total number of complainants who filed that complaint. Thus, if four individuals allege in a single complaint that they were subject to sexual harassment, the agency must list the filing of one complaint under "number of complaints filed," but list four individuals as having filed a complaint under "number of individuals who filed complaints." If each of the four individuals files her own complaint, the agency would list four filers under "the number of individuals filing complaints."

If a class complaint is filed, the agency shall treat the class agent as the filer. If the class complaint lists multiple class agents, they should all be considered filers. An agency should not post the total number of class members involved in a class complaint.

Number of repeat filers. The No Fear Act requires an agency to post the number of

individuals who file multiple complaints during a fiscal year. By "multiple" the proposed regulations mean more than one. If a single individual files two or more complaints during the fiscal year, then that person is counted once as a repeat filer regardless of how many complainants he or she files. If a person files an individual complaint and is a class agent for a separate class complaint during the reporting period, then that person is counted as a repeat, or multiple, filer.

The basis of a complaint. Each agency must post the number of complaints in which each of the various bases of discrimination is alleged. The basis of the complaint is the discriminatory factor asserted by the complainant that is protected by the statute under which the complaint is filed. The bases protected by the EEO statutes are race, color, religion, national origin, sex, disability, age and reprisal. (A complaint brought under the Equal Pay Act can constitute a separate claim - there the basis always is sex). To the extent any other "basis" is alleged (*e.g.*, marital status, sexual orientation, union membership), the proposed regulations contemplate that such bases will be listed in a "non-EEO basis" category. The "non-EEO basis" category will signify that the complainant did not raise a basis prohibited by Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Rehabilitation Act of 1973, as amended, or the Equal Pay Act of 1963.

Where multiple bases are alleged, the agency must post data showing that a complaint was filed on each basis. Thus, if a complainant alleges discrimination based on race and national origin, the agency is to count that complaint as one filed based on race and one filed based on national origin. Consequently, if one complaint is filed based on sex and age, a second complaint is filed based on race, sex and age, and a third complaint is based on national origin, disability

and sex, the required (and correct) posting would be that for the basis of race one complaint was filed, for the basis of disability one complaint was filed, for the basis of national origin one complaint was filed, for the basis of age two complaints were filed, and for the basis of sex three complaints were filed.

The issue raised in a complaint. Each agency must post the number of complaints in which each of the various issues of alleged discrimination is alleged. The issue of a complaint is the matter about which the individual is complaining. The issue sets forth the alleged discriminatory incident for which the individual seeks redress. To be actionable, a complaint must include an issue that arises out of the employment relationship.

As with bases of discrimination, the agency must list each issue that is raised and the number of complaints that raised that issue. Thus, if a complainant alleges in a single complaint that he was denied training and not promoted, the agency should count this as one complaint on the issue of training and one complaint on the issue of promotion/non-selection.

Unlike bases of discrimination, the number and types of potential issues are not finite. Therefore, defining an issue will not always be as exact as defining a basis. This is because the same issue can be described in different ways. When a complainant alleges she was discriminated against because she is female, there is no dispute that the alleged basis is sex. On the other hand, if an individual files a complaint challenging her nonselection for a promotion, the issue could be described in a number of ways, including "promotion," "nonpromotion," "non-selection," "failure to be promoted," or "not selected for a promotion."

Consequently, in order to avoid the confusion that can result from varying descriptions of the same issue, and to make the posted data as uniform as possible, EEOC is proposing a list of

issues most commonly raised in complaints. This proposed list of issues contains the same issues currently used by agencies in reporting statistics to EEOC on EEOC Standard Form 462. Agencies must choose an issue from this list when posting the type of issue that is alleged. A list of the issues appears on page 2 of Form 462 and are included in the definition of "issue" in the regulation. EEOC also is proposing that an "other" category be included that will capture all issues not listed on Form 462. Unlike Form 462, however, where an agency must describe the "other" issue, here the agency merely will note the number of complaints that raise issues not listed on Form 462. EEOC invites comment on whether there should be more, fewer, or redefined issues for purposes of posting No Fear Act data than those that appear on Form 462.

With respect to the posting of bases and issues pursuant to proposed sections 1614.704(d) and (e), an agency must list all bases and issues initially raised regardless of whether a complainant withdraws or an agency dismisses a basis or issue. This is to ensure that a complete picture is presented as to the matters that are being raised in filed complaints.

For the same reason, agencies must include in the data posted pursuant to proposed sections 1614.704(d) and (e) pertinent information reflecting amendments to complaints when such amendments add bases or issues. For example, if a complainant files a complaint during the first quarter of a fiscal year and alleges she was denied training because of her sex, the agency will post as part of its first quarter data that the issue of training was raised in one complaint and the basis of sex was raised in one complaint. If the complainant amends her original complaint during the second quarter (as opposed to filing a new complaint) to add the allegation that she was denied an award because of her age, the agency will post as part of its cumulative second

quarter data that the issues of training and awards were raised in one complaint and the bases of sex and age were raised in one complaint.

Amendments that add bases or issues are to be included in the quarterly data during which the amendment is made. Issues and bases that are added through amendments shall be reflected in the agency's year-end aggregate data as well. Amendments will not change the number of complaints filed, or the number of complainants filing complaints.

Processing time. The No Fear Act requires an agency to post the average length of time it takes an agency to complete "each step of the [complaint] process" for every complaint that is pending during any time of the then fiscal year. The proposed regulations track this requirement. If any processing step of a complaint is pending during the fiscal year for which data is being posted, regardless of when the complaint was filed or is resolved, the agency must post data pertaining to discrete processing times. For example, if a complaint is filed in July 2003 (fiscal year 2003), is investigated between October 2003 and March 2004, is resolved in August 2004, and the agency is reporting data for fiscal year 2004, the agency will have to factor into its fiscal year 2004 average processing time data that the complaint took eight months to investigate.

Moreover, the Act requires an agency to post average processing times under three categories: all complaints pending during the fiscal year; complaints in which a hearing is not requested; and complaints in which a hearing is requested. Using the above example, if at the completion of the investigation the complainant requests a hearing, the agency must use the time it took to investigate the complaint in calculating average processing times when it reports those times for both all complaints and complaints for which a hearing was requested. The operative

word here is "requested." Regardless of whether a hearing is actually held, the agency is to report processing times based on whether a hearing request is made.

The Act does not define the phrase "each step of the process." Consequently, EEOC has proposed definitions pursuant to its rulemaking authority under the Act. We propose dividing the EEO complaint process into five steps: counseling; investigation; hearing; final agency action after an investigation or hearing; and appeal. Under proposed section 1613.704, an agency must report, for the then fiscal year, the average time it takes to complete three of these steps: counseling; investigations; and final agency action after an investigation or hearing. The precise time when each of these steps begins and ends is part of the definition of the respective steps. It is contemplated, therefore, that the steps as defined by their beginning and ending times will control for posting purposes under the Act regardless of when an agency may deem a step to begin or end for its own internal purposes. This means, of course, that an agency will have to track its processing times according to the definitions set forth in the proposed regulations if it does not do so already.

Another aspect of the EEO complaint process which is not actually a "step of the process" is when an agency dismisses a complaint without addressing the underlying issue of discrimination. Such complaints are dismissed pursuant to 29 C.F.R. § 1614.107(a). These dismissals constitute an important aspect in the processing time of complaints. The proposed regulations therefore require an agency to post for the fiscal year the number of complaints that are dismissed pursuant to 29 C.F.R. § 1614.107(a), and the average length of time such complaints were pending at the time of dismissal.

Final agency actions involving discrimination: The No Fear Act requires an agency to post for the then fiscal year the total number of final agency actions involving a finding of discrimination. EEOC interprets this to mean that an agency must post the total number of complaints in which the agency's final action addresses a finding of discrimination, whether that finding is rendered by the agency or an administrative judge. Even if an agency issues a final order informing a complainant that it will not implement an administrative judge's finding of discrimination, the agency's final action "involves" a finding of discrimination and therefore must be listed as a final agency action involving discrimination.

Of the total number of final agency actions involving discrimination, the Act requires an agency to post the number and percentage that pertain to findings of discrimination "rendered without a hearing" and the number and percentage having to do with findings of discrimination after a hearing has been held.

It is clear that final action is taken without a hearing when a complainant requests an agency decision without a hearing, or fails to request a hearing within the requisite time period and the agency takes final action by issuing a final decision pursuant to 29 C.F.R. 1614.110(b). It is also clear that final action is taken without a hearing when the complainant requests a hearing and subsequently withdraws that request, or events occur which cause the administrative judge to cancel the hearing. Thus, if a hearing is requested and then cancelled and the agency ultimately issues a finding of discrimination, the finding would be noted in the subcategory pertaining to a decision without a hearing.

In those cases in which a hearing is held and an agency final order informs the complainant that the agency will or will not implement the finding of discrimination issued by an

administrative judge, this will be deemed to constitute an agency final action involving a finding of discrimination "after a hearing" for posting purposes. In this regard, the form of the administrative judge's decision is irrelevant. That is, it does not matter whether the administrative judge issues a bench decision following the hearing, or issues a written decision some time after the hearing. Both types of decisions are decisions "with a hearing."

There are also instances when a hearing is requested but the administrative judge renders a decision without holding a hearing. Under the federal sector complaint processing procedures, an administrative judge can issue a decision without a hearing pursuant to 29 C.F.R. 1614.109(f)(3)(iv) (sometimes referred to as an adverse inference finding) or section 1614.109(g) (sometimes referred to as a summary judgement decision). The proposed regulation envisions that any agency final order that informs the complainant that the agency will or will not implement a finding of discrimination issued by an administrative judge, regardless of what preceded the administrative judge's decision, will be deemed to constitute an agency final action involving a finding of discrimination "after a hearing" for posting purposes. Thus, the form of the administrative judge's decision is irrelevant, as is whether a hearing actually took place. An agency's implementation or appeal of an administrative judge's finding of discrimination, including a bench decision or a finding issued without a hearing pursuant to 29 C.F.R. §§ 1614.109(f)(3)(iv) or (g), is to be reported under the subcategory pertaining to a finding of discrimination upon completion of a hearing. EEOC adopts this position because we believe it most closely adheres to the intent of Congress, which is to track how often an agency chooses to implement or not implement a finding of discrimination rendered by an administrative judge.

Findings of discrimination sorted by basis and whether there was a hearing. In posting the total number of final agency actions in which a finding of discrimination is made during a fiscal year, the No Fear Act requires an agency to post the number and percentage of such findings according to the basis on which discrimination was found. The Act requires an agency to further subdivide such data and post the total number and percentage of such findings of discrimination based on the type of discrimination that is found according to whether a hearing was held. The proposed regulations track these requirements. For purposes of this posting requirement, the identification of bases and whether a hearing was held will be governed by the same factors noted in the discussions above concerning postings by basis and postings by findings of discrimination.

With respect to posting findings of discrimination according to basis, what is determinative is the basis on which the finding of discrimination is made. This usually will be the same as the basis initially alleged in the complaint, but not always. If a person alleges multiple bases of discrimination, such as race, sex and reprisal, and the agency finds that the complainant was discriminated against solely because she had engaged in prior EEO activity, the agency will post information reflecting that it rendered a finding of reprisal.

Findings of discrimination sorted by issue and whether there was a hearing. In posting the total number of final agency actions in which a finding of discrimination is made during a fiscal year, the No Fear Act requires an agency to post the number and percentage of such findings according to the issue on which the complainant prevailed. The Act requires an agency to further subdivide such data and post the total number and percentage of such findings of discrimination sorted by issue according to whether a hearing was held. The proposed

regulations track this requirement. For purposes of this posting requirement, the identification of issues and whether a hearing was held will be governed by the same factors noted in the discussions above concerning postings by issue and postings by findings of discrimination.

The data posted under this subsection of the proposed regulations will be characterized based on what action or actions the agency found to be discriminatory, regardless of what was initially challenged in the complaint.

Number of pending complaints that were filed in prior fiscal years. The No Fear Act specifies that an agency must look at all complaints pending in a current fiscal year and post the number that were filed before the start of that fiscal year. The proposed regulation tracks this requirement. "Filed" is to be given its generally accepted meaning. Thus, a complaint is deemed filed on the date it is postmarked. If there is no postmark or the complaint is hand-delivered, the complaint is deemed filed on the date it is received by the agency. See 29 C.F.R. § 1614.604(b). A complaint also is deemed filed on the date it is e-mailed and on the date it is submitted through facsimile transmission. An agency is to use these filing dates in ascertaining which complaints were filed before the start of the current fiscal year.

The Act further requires an agency to post the number of individuals who filed the complaints that were filed before the start of the current fiscal year. This number is to be based on the original number of persons who filed the complaints.

The Act requires that, of the complaints that were filed prior to the current fiscal year and are still pending, the agency shall specify how many of the complaints are at each specific processing step. The proposed regulation requires an agency to account for all prior fiscal year complaints including those pending at the hearings and appeals processing steps. The proposed

regulation contemplates that the step at which a prior fiscal year complaint is pending shall be based on its status as of the end of the applicable reporting quarter.

Finally, the Act requires, as a general rule, that an agency look at all complaints pending in the current fiscal year, determine how many of the complaints were in the investigative step for more than 180 days, and post that total number of complaints. As set forth in proposed section 1614.702(h), the investigative step is deemed to commence on the date the complaint is filed. This is consistent with 29 CFR 1614.106(e)(2), specifically cited in the Act, which requires that the investigation be completed within 180 days of the date the complaint is filed, with certain exceptions (*e.g.*, the parties can agree to extend the time period).

Under 29 C.F.R. §§ 1614.108(e) & (f), the normal time in which a complaint must be investigated can be extended by mutual agreement between the parties and is automatically extended when a complaint is amended or a file needs to be redacted for national security reasons. In requiring that agencies report the total number of complaints that were not investigated within 180 days, Section 301(b)(10)(C) of the No Fear Act implies that the time to complete an investigation is 180 days for all complaints despite that section's reference to 29 C.F.R. § 1614.106(e)(2) which clearly states that the normal 180-day period may be extended in specific situations. Thus, the Commission interprets this part of the statute as requiring an agency to post the total number of complaints in which an agency completes an investigation beyond 180 days and any applicable extensions.

Types of Complaints Covered. As noted in the "Introduction" above, the posting requirement appears to apply to all complaints filed with the agency under Part 1614. This would appear to include individual complaints, class complaints and mixed-case complaints but

not mixed-case appeals or grievances. Posting data for class complaints and mixed-case complaints will, however, present some difficulty in some of the categories because of the different procedures that apply to them. For class complaints, agencies do not investigate the class complaint and class agents do not request hearings. For mixed-case complaints, the time limits for investigation (120 days) and decision (45 days) are different and complainants do not request or have hearings before an EEOC administrative judge. Thus, some adjustments will have to be made when posting data. We propose that agencies post data on all individual, class and mixed-case complaints except as follows: (1) agencies should not include data on class complaints for §§ 1614.704(f)(2), (f)(3), (k) and the part of (f)(1) requiring data on complaints pending at the investigation step; and (2) agencies should not include data on mixed-case complaints for §§ 1614.704(f)(2), (f)(3), (g)(2), (g)(3), (h)(2), (h)(3), (i)(2), (i)(3) and (k).

Timing of posting data: When posting data for a current fiscal year, the No Fear Act requires an agency to post on a year-to-date basis, updated quarterly. When posting data for prior years, the Act requires an agency to post on a fiscal year basis. These requirements are reflected in proposed section 1614.703(e). Using fiscal year 2004 as an example, the agency's first posting of data will occur within thirty (30) calendar days of December 31, 2003 (the end of the first quarter). That posting must then be updated to reflect all pertinent data through March 31, 2004, no later than 30 calendar days after March 31 (the end of the second quarter). Another update will occur at the end of the third quarter. Within 30 calendar days of the end of fiscal year 2004, the agency shall post its final fiscal year data. This pattern then continues for each subsequent fiscal year. In updating current fiscal year data on a quarterly basis, the agency should not post separate data for each relevant quarter. Rather, an agency must post only one set of cumulative

data that has been updated quarterly.

In addition to posting current fiscal year data, updated quarterly, an agency must maintain on its web site year-end data for each of the five immediately preceding fiscal years. Taking fiscal year 2004 as an example, this means that in February 2004, the agency's web site will contain year-end data for fiscal years 1999, 2000, 2001, 2002, and 2003, as well as first quarter interim year-to-date data for fiscal year 2004. In subsequent years, when first quarter data for a new fiscal year is posted, the fiscal year comparison data that is more than six (6) years old will be dropped, *i.e.*, when first quarter 2005 data is posted, the year-end totals for 2004 will become the most recent comparison year-end data and the 1999 year-end data will be omitted. If an agency does not have data for one or more of the preceding five fiscal years, the Act requires that the agency post whatever data it has available for any of those five years. The year-end data that is to be posted for past fiscal years is to be in the same form and manner as current fiscal year data and contain the same categories of information with corresponding content.

Additional information to be posted by EEOC: Pursuant to the Act, EEOC is required to post government-wide statistical data on hearings and appeals in addition to the data EEOC must post as an employing agency on the complaints filed against it. This additional information is of the same type, consists of the same categories, and will have the same time requirements, as that posted by an employing agency concerning complaints that are filed with that agency, except that the additional data EEOC posts will reflect information about requests for hearings and appeals filed with EEOC. Proposed subsections 1614.706(a) and (b) on hearings and appeals track the Act's posting requirements on complaints as closely as possible. The posting of this data is intended to give a viewer an instant government-wide view of the number of hearings requested

and appeals filed, what issues and bases are raised, the average processing times for each step, and how often discrimination is found at each step.

EEOC is not proposing that EEOC take the data that is posted by all agencies under these proposed regulations, aggregate the data, and then post that data on EEOC's web site under a heading such as "Government-Wide EEO Complaint Data for Fiscal Year 200X." EEOC's only posting obligations under the No Fear Act are two: like any other executive branch agency, EEOC must post EEO complaint data pertaining to internal EEO complaints filed with EEOC; EEOC also must post government-wide aggregate summary statistical data, but only under two categories – hearing requests and appeals filed.

Regulatory Procedures

Executive Order 12866

Pursuant to Executive Order 12866, EEOC has coordinated this proposed rule with the Office of Management and Budget. Under section 3(f)(1) of Executive Order 12866, EEOC has determined that the regulation will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State or local tribal governments or communities. Therefore, a detailed cost-benefit assessment of the regulation is not required.

Paperwork Reduction Act

This proposal contains no new information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

Administrative Procedure Act

A determination has been made by the Commission that compelling reasons exist to promulgate

this interim rule without prior opportunity for public comment. This rule is necessary for effective implementation of the No Fear Act of 2002, which takes effect on October 1, 2003.

Comments received in response to the publication of this interim final rule will be considered before the adoption of a final rule.

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Regulatory Flexibility Act

The Commission certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities, because it does not affect any small business entities. The regulation affects only federal government entities. For this reason, a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act of 1995

This proposed rule will not result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million 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.

List of Subjects in 29 CFR Part 1614

Administrative practice and procedure, Age discrimination, Equal employment opportunity, Government employees, Individuals with disabilities, Race discrimination, Religious discrimination, Sex discrimination.

For the Commission,

Cari M. Dominguez
Chair

Accordingly, for the reasons set forth in the preamble, EEOC proposes to amend 29 C.F.R. Part 1614 as follows:

PART 1614 – FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

1. The authority citation for Part 1614 continues to read as follows:

Authority: 29 U.S.C. 206(d), 633a, 791 and 794a; 42 U.S.C. 2000e-16; E.O. 10577, 3 CFR, 1954-1958 Comp., p.218; E.O. 11222, 3 CFR, 1964-1965 Comp., p.306; E.O. 11478, 3 CFR, 1069 Comp., p.133; E.O. 12106, 3 CFR, 1978 Comp., p.263; Reorg. Plan No. 1 of 1978, 3 CFR, 1978 Comp., p.321.

2. Subpart G is added to read as follows:

Subpart G--Procedures under the Notification and Federal Employee

Antidiscrimination and Retaliation Act (No Fear Act) of 2002

Sec.

1614.701 Purpose and scope.

1614.702 Definitions.

1614.703 Manner and format of data.

1614.704 Information to be posted - all Federal agencies.

1614.705 Comparative data - all Federal agencies.

1614.706 Additional data to be posted by EEOC.

Authority: Sec. 303, Pub. L. 107-174, 116 Stat. 574.

Subpart G--Procedures under the Notification and Federal Employee

Antidiscrimination and Retaliation Act (No Fear Act) of 2002

§1614.701 Purpose and scope.

This subpart implements Title III of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No Fear Act), P.L. 107-174. It sets forth the basic responsibilities of federal agencies and the Commission to post certain information on their public web sites.

§1614.702 Definitions.

The following definitions apply for purposes of this subpart:

- (a) The term *Federal agency* means an Executive agency (as defined in 5 U.S.C. § 105), the United States Postal Service, or the Postal Rate Commission;
- (b) The term *Commission* means the Equal Employment Opportunity Commission and any subdivision thereof authorized to act on its behalf;
- (c) The term *counseling* refers to the step of the federal sector EEO process described in 29 CFR § 1614.105 and, for purposes of this subpart, it commences with receipt of a request for counseling, ends with the issuance of the notice of a right to file a complaint;
- (d) The term *investigation* refers to the step of the federal sector EEO process described in 29 CFR § 1614.108 and, for purposes of this subpart, it commences when the complaint is filed and ceases when the complainant is given notice under § 1614.108(f) of the right to request a hearing or to receive an immediate final decision without a hearing or the complaint is dismissed in its entirety;
- (e) The term *hearing* refers to the step of the federal sector EEO process described in 29 CFR § 1614.109 and, for purposes of this subpart, it commences when the EEOC Administrative

Judge (AJ) receives the complaint file from the agency and ceases when the AJ returns the case to the agency to take final action;

(f) The phrase *final agency action* refers to the step of the federal sector EEO process described in 29 CFR § 1614.110 and, for purposes of this subpart, it commences when the agency receives an AJ decision, receives a request for an immediate final decision without a hearing or fails to receive a response to a notice issued under § 1614.108(f) and ceases when the agency issues a final order or final decision on the complaint.

(g) The term *appeal* refers to the step of the federal sector EEO process described in 29 CFR § 1614.401 and, for purposes of this subpart, it commences when the appeal is received by the Commission and ceases when the appellate decision is issued;

(h) The term *basis of alleged discrimination* refers to the individual's protected status (i.e., race, color, religion, sex, national origin, age, disability, or retaliation). Only those bases protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and the Rehabilitation Act of 1973, 29 U.S.C. § 791 et.seq., are covered by the federal EEO process.

(i) The term *issue of alleged discrimination* means one the following challenged agency actions affecting a term or condition of employment as listed on EEOC Standard Form 462 (Annual federal Equal Employment Opportunity Statistical Report of Discrimination Complaints): appointment/hire; assignment of duties; awards; conversion to full time; disciplinary action (includes demotion, reprimand, suspension and removal); duty hours; evaluation/appraisal; examination/test; harassment (both sexual and non-sexual); medical

examination; pay/overtime; promotion/non-selection; reassignment; reasonable accommodation; reinstatement; retirement; termination; terms/conditions of employment; time and attendance; training; and, other.

(j) The term subelement refers to the organizational sub-unit directly below the agency department level. Subelement-specific data must be posted for the following: Agricultural Marketing Service; Agricultural Research Service; Rural Housing Service; Forest Service, Natural Resources Conservation Service; National Agricultural Statistics Service; Food and Nutrition Service; Animal and Plant Health Inspection Service; Food Safety and Inspection Service; Farm Service Agency; Bureau of the Census, International Trade Administration; National Institute of Standards and Technology; National Oceanic and Atmospheric Administration; Patent and Trademark; Army and Air Force Exchange Service; Defense Commissary Agency; Defense Contract Audit Agency; Defense Contract Management Agency; Defense Education Activity; Defense Finance and Accounting Service; Defense Human Resources Activity; Defense Information Systems Agency; Defense Inspector General; Defense Intelligence Agency; Defense Logistics Agency; Defense National Guard Bureau; Defense National Imagery/Mapping; Defense National Security Agency; Defense Office of the Secretary; Defense Security Service; Defense Threat Reduction; Defense TRI-Care Management Activity; Administration for Children and Families; Centers for Disease Control and Prevention; Centers for Medicare and Medicaid Services; Food and Drug Administration; Health Care Financing Administration; Health Resources and Services Administration; Indian Health Service; National Institutes of Health; Bureau of Indian Affairs; Bureau of Land Management; Bureau of Reclamation; Fish and Wildlife; Geological Survey; Mines and Minerals Service; National Park

Service; Office of Surface Mining Reclamation and Enforcement; Bureau of Prisons; Drug Enforcement Agency; Executive Office of the U.S. Attorneys; Federal Bureau of Investigation; U.S. Marshals Services; Bureau of Labor Statistics; Employment Standards Administration; Employment and Training Administration; Mine Safety and Health Administration; Occupational Safety and Health Administration; Ames Research Center; Dryden Flight Center; Glenn Research Center; Goddard Space Flight Center; Johnson Space Center; Kennedy Space Center; Langley Research Center; Marshall Space Flight Center; Stennis Space Center; Federal Aviation Administration; Federal Highway Administration; Bureau of Engraving and Printing; Bureau of Public Debt; Financial Management Service; Internal Revenue Service; Office of the Comptroller of the Currency; Office of Thrift Supervision; U.S. Mint; Veterans Health Administration; Veterans Benefits Administration; and National Cemetery Administration.

§1614.703 Manner and format of data.

(a) Agencies shall post their statistical data in the two following formats: Portable Document Format (PDF) and an accessible text format that complies with section 508 of the Rehabilitation Act.

(b) Agencies shall prominently post the date they last updated the statistical information on the web site location containing the statistical data.

(c) In addition to providing aggregate agency-wide data, each agency shall include separate data for each subelement listed in § 1614.702(j). Such data shall be identified as pertaining to the particular subelement.

(d) Data posted under this subpart will be titled "Equal Employment Opportunity Data Required by the No Fear Act" and a hyperlink to the data will be posted *prominently* on the

homepage of each agency's public web site. In the case of agencies with subelements the data shall be made available by hyperlinks from the web sites of both the subelement as well as the parent agency.

(e) Agencies must post cumulative data pursuant to § 1614.704 for the current fiscal year. Agencies may not post separate quarterly statistics for the current fiscal year.

§1614.704 Information to be posted - all Federal agencies.

Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, each federal agency must post the following current fiscal year statistics on its public Internet web site regarding EEO complaints filed under 29 CFR Part 1614:

- (a) the number of complaints filed in such fiscal year;
- (b) the number of individuals filing those complaints (including as the agent of a class);
- (c) the number of individuals who filed two or more of those complaints;
- (d) the number of those complaints raising each of the various bases of alleged discrimination;
- (e) the number of those complaints raising each of the various issues of alleged discrimination;
- (f) the average length of time it has taken an agency to complete respectively counseling, investigation and final agency action for (1) all complaints pending for any length of time during such fiscal year, (2) all complaints pending for any length of time during such fiscal year in which a hearing was not requested and (3) all complaints pending for any length of time during such fiscal year in which a hearing was requested;

(g) the number of complaints dismissed by an agency pursuant to 29 C.F.R. § 1614.107(a), and the average length of time such complaints had been pending prior to dismissal;

(h)(1) the total number of final agency actions rendered in such fiscal year involving a finding of discrimination and, of that number, (2) the number and percentage that were rendered without a hearing and (3) the number and percentage that were rendered after a hearing;

(i) of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination, (1) the number and percentage of those based on each respective basis, (2) the number and percentage for each respective basis that were rendered without a hearing and (3) the number and percentage for each respective basis that were rendered after a hearing;

(j) of the total number of final agency actions rendered in such fiscal year involving a finding of discrimination, (1) the number and percentage for each respective issue, (2) the number and percentage for each respective issue that were rendered without a hearing and (3) the number and percentage for each respective issue that were rendered after a hearing;

(k) of the total number of complaints pending for any length of time in such fiscal year, (1) the number that were first filed before the start of the then current fiscal year, (2) the number of individuals who filed those complaints in earlier years, and (3) the number of those complaints that are respectively pending at the counseling, investigation, hearing, final agency action and appeal step of the process; and

(l) of the total number of complaints pending for any length of time in such fiscal year, the total number of complaints in which the agency has not completed its investigation within the time required by § 1614.106(e)(2).

§1614.705 Comparative data - all Federal agencies.

Commencing on January 31, 2004 and no later than January 31 of each year thereafter, each federal agency shall post year-end data corresponding to that required to be posted by § 1614.704 for each of the five immediately preceding fiscal years (or, if not available for all five fiscal years, for however many of those five fiscal years for which data are available). For each category of data, the agency shall post a separate figure for each year.

§1614.706 Additional data to be posted by EEOC.

(a) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission must post the following current fiscal year statistics on its public Internet web site regarding hearings requested under section 1614:

- (1) the number of hearings requested in such fiscal year;
- (2) the number of individuals filing those requests;
- (3) the number of individuals who filed two or more of those requests;
- (4) the number of those hearing requests involving each of the various bases of alleged discrimination;
- (5) the number of those hearing requests involving each of the various issues of alleged discrimination;
- (6) the average length of time it has taken EEOC to complete the hearing step for all cases pending at the hearing step for any length of time during such fiscal year;
- (7)(a) the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination and, of that number, (b) the number and percentage that were rendered without a hearing and (c) the number and percentage that were rendered after a hearing;

(8) of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination, (a) the number and percentage of those based on each respective basis, (b) the number and percentage for each respective basis that were rendered without a hearing and (c) the number and percentage for each respective basis that were rendered after a hearing;

(9) of the total number of AJ decisions rendered in such fiscal year involving a finding of discrimination, (a) the number and percentage for each respective issue, (b) the number and percentage for each respective issue that were rendered without a hearing and (c) the number and percentage for each respective issue that were rendered after a hearing;

(10) of the total number of hearing requests pending for any length of time in such fiscal year, (a) the number that were first filed before the start of the then current fiscal year and (b) the number of individuals who filed those hearing requests in earlier years, and

(11) of the total number of hearing requests pending for any length of time in such fiscal year, the total number in which the Commission failed to complete the hearing step within the time required by § 1614.109(i).

(b) Commencing on January 31, 2004 and thereafter no later than 30 days after the end of each fiscal quarter beginning on or after January 1, 2004, the Commission must post the following current fiscal year statistics on its public Internet web site regarding EEO appeals filed under section 1614:

- (1) the number of appeals filed in such fiscal year;
- (2) the number of individuals filing those appeals (including as the agent of a class);
- (3) the number of individuals who filed two or more of those appeals;
- (4) the number of those appeals raising each of the various bases of alleged

discrimination;

(5) the number of those appeals raising each of the various issues of alleged

discrimination;

(6) the average length of time it has taken EEOC to issue appellate decisions for (a) all appeals pending for any length of time during such fiscal year, (b) all appeals pending for any length of time during such fiscal year in which a hearing was not requested and (c) all appeals pending for any length of time during such fiscal year in which a hearing was requested;

(7)(a) the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination and, of that number, the number and percentage that involved final agency action rendered without a hearing and (c) the number and percentage that involved final agency action after a hearing;

(8) of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination, (a) the number and percentage of those based on each respective basis of discrimination, (b) the number and percentage for each respective basis that involved final agency action rendered without a hearing and (c) the number and percentage for each respective basis that involved final agency action rendered after a hearing;

(9) of the total number of appellate decisions rendered in such fiscal year involving a finding of discrimination, (a) the number and percentage for each respective issue of discrimination, (b) the number and percentage for each respective issue that involved final agency action rendered without a hearing and (c) the number and percentage for each respective issue that involved final agency action rendered after a hearing; and

(10) of the total number of appeals pending for any length of time in such fiscal year, (a)

the number that were first filed before the start of the then current fiscal year and (b) the number of individuals who filed those appeals in earlier years.

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