

with subpart D of part 531 of this chapter.

(5 U.S.C. 3301, 3302, E.O. 10577, 3 CFR, 1954-1958 Comp., p. 218, as amended by E.O. 10641, 3 CFR, 1954-1958 Comp., p. 274)

**Subpart C—Overseas Employees Eligible for Noncompetitive Appointment Upon Return to the United States**

AUTHORITY: E.O. 12362, 47 FR 21231, 3 CFR, 1982 Comp., p. 182.

SOURCE: 48 FR 52868, Nov. 23, 1983, unless otherwise noted. Correctly designated at 49 FR 5601, Feb. 14, 1984.

**§ 301.301 Eligibility under the authority of Executive Order 12362.**

Employees who serve under overseas local hire appointments as defined in § 315.608(b) of this chapter and meet the eligibility criteria of § 315.608(a) of this chapter are eligible for noncompetitive career-conditional, term, or temporary limited appointment when they return to the United States.

**§ 301.302 Overseas appointing procedures.**

Overseas agencies are required to insure that selection of employees for local hire appointments in the overseas area is made on the basis of the ability, knowledge, and skills of eligible candidates, in accordance with applicable law and regulation.

**§ 301.303 Performance appraisal.**

As soon as practicable, but beginning not later than January 1, 1984, overseas agencies are required to evaluate the performance of employees who serve under overseas local hire appointments as defined in § 315.608(b) of this chapter and who are eligible to meet the criteria established in § 315.608(a) of this chapter in accordance with the agency's performance appraisal plan established under chapter 43 of title 5, U.S. Code, unless the agency is exempt from the provisions of that chapter.

**PART 302—EMPLOYMENT IN THE EXCEPTED SERVICE**

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AUTHORITY: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151, E.O. 10577 (3 CFR 1954-1958 Comp., p. 218); § 302.105 also issued under 5 U.S.C. 1104, Pub. L. 95-454, sec. 3(5); § 302.501 also issued under 5 U.S.C. 7701 *et seq.*; § 302.107 also issued under 5 U.S.C. 9201-9206 and Pub. L. 116-92, sec. 1122(b)(1).

EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, the authority citation for part 302 was revised, effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

## § 302.101

AUTHORITY: 5 U.S.C. 1302, 3301, 3302, 3317, 3318, 3319, 3320, 8151. E.O. 10577, 19 FR 7521, 3 CFR 1954-1958 Comp., p. 218. Sec. 302.105 also issued under 5 U.S.C. 1104; sec. 3(5), Pub. L. 95-454, 92 Stat. 1111. Sec. 302.501 also issued under 5 U.S.C. ch. 77. Sec. 302.107 also issued under 5 U.S.C. 9201-9206; sec. 1122(b)(1), Pub. L. 116-92, 133 Stat. 1607. Secs. 302.108 and 302.203 also issued under E.O. 13764, 82 FR 8115, 3 CFR, 2017 Comp., p. 243.

SOURCE: 55 FR 9407, Mar. 14, 1990, unless otherwise noted.

### Subpart A—General Provisions

#### § 302.101 Positions covered by regulations.

(a) *Positions covered.* With respect to the application of veteran preference, this part applies to each position in the Executive Branch of the Federal Government that is not in the competitive service and that is subject to the provisions of title 5, United States Code, or subject to a statutory requirement to follow the veteran preference provisions of title 5. With respect to restoration rights that are due to compensable injury and appeals therefrom, this part applies to those positions covered by 5 U.S.C. 8101(1) that are not in the competitive service.

(b) *Positions not covered.* This part does not apply to a position or appointment that is required by the Congress to be confirmed by, or made with the advice and consent of, the Senate.

(c) *Positions exempt from appointment procedures.* In view of the circumstances and conditions surrounding employment in the following classes of positions, an agency is not required to apply the appointment procedures of this part to them, but each agency shall follow the principle of veteran preference as far as administratively feasible and, on the request of a qualified and available preference eligible, shall furnish him/her with the reasons for his/her nonselection. Also, the exemption from the appointment procedures of this part does not relieve agencies of their obligation to accord persons entitled to priority consideration (see § 302.103) their rights under 5 U.S.C. 8151:

(1) Positions filled by persons appointed without pay or at pay of \$1 a year;

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(2) Positions outside the continental United States and outside the State of Hawaii and the Commonwealth of Puerto Rico when filled by persons resident in the locality, and positions in the State of Hawaii and the Commonwealth of Puerto Rico when paid in accordance with prevailing wage rates;

(3) Positions which the exigencies of the national defense program demand be filled immediately before lists of qualified applicants can be established or used, but appointments to these positions shall be temporary appointments not to exceed 1 year which may be renewed for 1 additional year at the discretion of the agency;

(4) Positions filled by appointees serving on an irregular or occasional basis whose hours or days of work are not based on a prearranged schedule and who are paid only for the time when actually employed or for services actually performed;

(5) Positions paid on a fee basis;

(6) Positions included in Schedule A (see subpart C of part 213 of this chapter) for which OPM agrees with the agency that the positions should be included hereunder and states in writing that an agency is not required to fill positions according to the procedures in this part.

(7) Positions included in Schedule C (see subpart C of part 213 of this chapter) and positions excepted by statute which are of a confidential, policy-determining, policy-making, or policy-advocating character;

(8) Attorney positions; and

(9) Positions filled by reemployment of an individual in the same agency and commuting area, at the same or lower grade, and under the same appointing authority as the position last held; *Provided That*, there are no candidates eligible for the position on the agency's priority reemployment list established in accordance with § 302.303.

(10) Positions for which a critical hiring need exists when filled under § 213.3102(i)(2) of this chapter.

(11) Appointment of persons with intellectual disabilities, severe physical disabilities, or psychiatric disabilities

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to positions filled under 5 CFR 213.3102(u).

[55 FR 9407, Mar. 14, 1990, as amended at 58 FR 58260, Nov. 1, 1993; 60 FR 10006, Feb. 23, 1995; 77 FR 28214, May 11, 2012; 85 FR 63191, Oct. 7, 2020; 89 FR 25046, Apr. 9, 2024]

**§ 302.102 Method of filling positions and status of incumbent.**

(a) To the extent permitted by statute and this chapter, each appointment, position change, and removal in the excepted service shall be made in accordance with any regulations or practices that the head of the agency concerned finds necessary.

(b) Except as authorized under paragraph (c) of this section, a person appointed to an excepted position does not acquire a competitive status by reason of the appointment. When an employee serving under a non-temporary appointment in the competitive service is selected for an excepted appointment, the agency must—

(1) Inform the employee that, because the position is in the excepted service, it may not be filled by a competitive appointment, and that acceptance of the proposed appointment will take him/her out of the competitive service while he/she occupies the position; and

(2) Obtain from the employee a written statement that he/she understands he/she is leaving the competitive service voluntarily to accept an appointment in the excepted service.

(c) Upon a finding by OPM that in a particular situation the action will be in the interest of good administration, OPM may authorize an agency to make appointments to specified positions in the excepted service in the same manner as to positions in the competitive service. Persons given career-conditional or career appointments pursuant to a specific authorization by OPM under this paragraph may acquire a competitive status as provided in part 315 of this chapter.

[55 FR 9407, Mar. 14, 1990, as amended at 58 FR 58261, Nov. 1, 1993]

**§ 302.103 Definitions.**

*Person entitled to priority consideration* means a person who was furloughed or separated without misconduct, from a position without time limit, because of a compensable injury and whose recov-

ery takes longer than 1 year from the date compensation began. To be eligible under this part the person must apply for reappointment to his or her former agency within 30 days of the date of cessation of compensation.

**§ 302.104 Applicability of regulations to applicants and employees.**

Each agency shall follow the provisions of this part relating to examination, rating, and selection for appointment of an applicant when a qualified preference eligible or person entitled to priority consideration applies for appointment to a position covered by this part. Each agency, in its discretion, may follow these provisions when no preference eligible or person entitled to priority consideration applies.

**§ 302.105 Special agency plans.**

An agency having a position subject to this part may establish a system which will result in granting to eligible persons the preference or priority consideration referred to in sections 1302(c) or 8151 of title 5, United States Code, but which does not conform to all the procedural requirements set forth in this part. The agency establishing such a system must ensure that all eligible applicants entitled to veteran preference or priority consideration receive at least as much advantage in referral as they would receive under the procedures set forth in this part.

**§ 302.106 Vacancy announcements.**

When an agency announces a vacancy in the excepted service, the announcement must contain a reasonable accommodation statement that complies with requirements in part 330, subpart A of this chapter.

[66 FR 63906, Dec. 11, 2001, as amended at 75 FR 67593, Nov. 3, 2010]

**§ 302.107 Suitability inquiries regarding criminal history.**

Agency inquiries regarding criminal history must be done in accordance with the requirements under chapter 92 of title 5, U.S. Code and part 920 of this chapter.

[88 FR 60329, Sept. 1, 2023]

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EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, § 302.107 was amended by revising the section heading, effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

### § 302.107 Suitability and fitness inquiries regarding criminal history.

### § 302.108 Determinations of fitness for employment in an Excepted Service position.

(a) An agency must make fitness determinations for excepted service positions in accordance with the applicable requirements of part 731 of this chapter.

(b) An agency must record its reasons for making fitness determinations under part 731 of this chapter and must furnish a copy of those reasons to an applicant upon their request.

EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, § 302.108 was added, effective Jan. 17, 2025.

## Subpart B—Eligibility Standards

### § 302.201 Persons entitled to veteran preference.

In actions subject to this part, each agency shall grant veteran preference as follows:

(a) When numerical scores are used in the evaluation and referral, the agency shall grant 5 additional points to preference eligibles under section 2108(3)(A) and (B) of title 5, United States Code, and 10 additional points to preference eligibles under section 2108(3)(C) through (G) of that title.

(b) When eligible candidates are referred without ranking, the agency shall note preference as “CP” for preference eligibles under 5 U.S.C. 2108(3)(C), as “XP” for preference eligibles under 5 U.S.C. 2108(3)(D) through (G), as “SSP” for preference eligibles under 5 U.S.C. 2108(3)(H) and as “TP” for all other preference eligibles under that title.

[55 FR 9407, Mar. 14, 1990, as amended at 85 FR 63191, Oct. 7, 2020]

### § 302.202 Qualification requirements.

Before making an appointment to a position covered by this part, each agency shall establish qualification standards such as those relating to ex-

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perience and training, citizenship, minimum age, physical condition, etc., which shall relate to the duties to be performed. An agency may delegate the establishment of standards relating to a group of positions or a specific position to the appropriate administrative level or subdivision in accordance with the needs of the locality in which the position is located, but the agency shall determine that each standard established is in conformity with this part. Each agency shall make its standards a matter of record in the appropriate office of the agency, and shall furnish information concerning the standards for a position to an applicant on his/her request. Each agency shall apply the standards for a position uniformly to all applicants, except for such waivers as are provided in this part for a preference eligible. An agency shall not include a minimum educational requirement in qualification standards, except for a scientific, technical, or professional position the duties of which the agency decides cannot be performed by a person who does not have a prescribed minimum education. An agency shall not establish a maximum age requirement for any position. Each agency shall make a part of its records the reasons for its decision under this section and shall furnish those reasons to an applicant on his/her request. The qualification standards shall include:

(a) A provision for waiver by the agency of requirements as to age, height, and weight for each preference eligible when the requirements are not essential to the performance of the duties of the position; and

(b) A provision for waiver by the agency of physical requirements for each preference eligible when the agency, after giving due consideration to the recommendation of an accredited physician, finds that the applicant is physically able to discharge the duties of the position.

### § 302.203 Disqualifying factors.

(a) The qualification standards established by an agency or by an administrative level or subdivision of an agency may provide that certain reasons disqualify an applicant for appointment. The following, among others,

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may be included as disqualifying reasons:

- (1) Dismissal from employment for delinquency or misconduct;
- (2) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;
- (3) Intentional false statement or deception or fraud in examination or appointment;
- (4) Habitual use of intoxicating beverages to excess;
- (5) Reasonable doubt as to the loyalty of the person involved to the Government of the United States;
- (6) Any legal or other disqualification which makes the individual unfit for service; or
- (7) Lack of United States citizenship.

(b) An agency may not disqualify an applicant solely because of his/her retired status.

EFFECTIVE DATE NOTE: At 89 FR 102691, Dec. 18, 2024, § 302.203 was revised, effective Jan. 17, 2025. For the convenience of the user, the revised text is set forth as follows:

### § 302.203 Standard and criteria for determining fitness for employment in an Excepted Service position.

- (a) The minimum standard and criteria for determining fitness for employment based on character and conduct are prescribed in part 731, subpart B, of this chapter.
- (b) Agencies may prescribe additional factors to protect the integrity and promote the efficiency of the service when job-related and consistent with business necessity.

## Subpart C—Accepting, Rating, and Arranging Applications

### § 302.301 Receipt of applications.

- (a) Each agency shall establish definite rules regarding the acceptance of applications for employment in positions covered by this part and shall make these rules a matter of record.

(b) Each agency shall apply its rules uniformly to all applicants who meet the conditions of the rules and shall furnish information concerning the rules to an applicant on his/her request.

### § 302.302 Examination of applicants.

- (a) *Eligibility.* An evaluation of the qualifications of applicants for positions covered by this part may be conducted at any time before an appoint-

ment is made. The evaluation may involve only determination of eligibility or ineligibility or may include qualitative rating of candidates. If the evaluation involves only basic eligibility numerical scores will not be assigned and eligible candidates will be referred in accordance with the procedures described in paragraph (b)(5) of § 302.304. If qualitative ranking is desired, numerical scores may be assigned in accordance with paragraph (b) of this section. Each agency shall make a part of the records the reasons for its decision to use ranked or unranked referral and, for ranked actions, the quality ranking factors used. This information shall be made available to an applicant on his/her request.

(b) *Rating.* Numerical scores will be assigned on a scale of 100. Each applicant who meets the qualification requirements for the position established under § 302.202 will be assigned a rating of 70 or more and will be eligible for appointment. Candidates scoring 70 or more will receive additional points for veteran preference as provided in § 302.201. Numerical ratings are not required when all qualified applicants will be offered immediate appointment. When there is an excessive number of applicants, numerical ratings are required only for a sufficient number of the highest qualified applicants to meet the anticipated needs of the agency within a reasonable period of time. The agency must, however, adopt procedures to insure the consideration of preference eligibles in the order in which they would have been considered if all applicants had been assigned numerical ratings. An agency shall furnish a notice of the rating assigned to an applicant on his/her request.

(c) *Nonpreference applicants for certain positions.* An agency may not consider or rate an application for the position of elevator operator, messenger, guard, or custodian submitted by a non-preference eligible as long as at least three qualified preference eligibles are available for the position.

(d) *Evaluating experience.* When experience is a factor in determining eligibility, an agency shall credit a preference eligible (1) with time spent in the military service of the United States if the position for which he/she

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is applying is similar to the position which he/she held immediately before his/her entrance into the military service; and (2) with all valuable experience, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether pay was received therefor.

### § 302.303 Maintenance of employment lists.

(a) *Establishment*—(1) *Agency's obligation*. An agency must establish a priority reemployment list whenever any applicants rated eligible under § 302.302 meet the conditions set out in paragraphs (b)(1) through (b)(3) of this section and must consider candidates from that list in accordance with § 302.304(a). All applicants not included on the priority reemployment list will be listed on the regular employment list unless the agency elects to establish a reemployment list as provided in paragraph (c) of this section.

(2) *Agency discretion*. In establishing its lists, an agency may, but is not required to: Afford priority consideration to non-preference eligibles who meet the conditions set out in paragraph (b)(4) of this section; afford priority consideration under paragraph (b) of this section for a longer time and/or in a broader geographic area than the minimum requirement; and/or provide reemployment consideration after the priority list is exhausted to additional current and former employees in accordance with paragraph (c) of this section. An agency may limit consideration granted at its discretion to applicants for specific positions or applicants who meet specific conditions, but must make those conditions a matter of record and must apply its policy uniformly to all eligible employees. Generally, full-time employees may be considered only for full-time positions and other-than-full-time employees only for other-than-full-time positions. However, full-time employees may be considered for other-than-full-time positions if there are no other-than-full-time employees on the appropriate priority or reemployment list; and other-than-full time employees may be considered for full-time positions if there are no full-time employees on the appropriate list.

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(b) *Priority reemployment list*. Candidates are entered on the priority reemployment list in the geographic areas specified in paragraph (b)(1) of this section and remain on the list for 2 years unless the agency elects to provide a longer period of eligibility. The priority reemployment list includes:

(1) The name of each former employee of the agency who is a preference eligible, has been furloughed or separated from a continuing appointment without delinquency or misconduct, and applies for reemployment. Candidates in this category are considered for positions in the commuting area where they were separated unless the agency elects to provide broader consideration.

(2) The name of each former employee of the agency who is a preference eligible and who, as the result of an appeal under part 752 of this chapter, is found by the Merit Systems Protection Board to have been unjustifiably dismissed from the agency, but who is not entitled to immediate restoration under the Board's decision. Candidates in this category are considered in the commuting area from which separated unless the Board's decision specifies a broader or different area or the agency elects to afford broader geographic consideration.

(3) The name of each former employee of the agency who has been furloughed or separated due to compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter I, who is not entitled to immediate restoration, and who is eligible for priority consideration under this part. Candidates in this category are considered in the commuting area where they last served and, if the agency determines that an appropriate vacancy is unlikely to occur in that area during the candidates' period of reemployment priority, in other locations for which they are available.

(4) At the agency's discretion, the name of each former employee of the agency who is not a preference eligible, has been furloughed or involuntarily separated from a continuing appointment without delinquency or misconduct, and applies for reemployment.

Candidates in this category are considered in the geographic area specified by the agency.

(c) *Reemployment list.* A reemployment list may be established at the agency's discretion to include the names of current employees of the agency and of former employees of the agency who are to be considered for future employment and who are not eligible for inclusion on the priority reemployment list. Employees may be entered on the reemployment list only for positions in which tenure and/or work schedule is no greater than that of the position previously held.

(d) *Order of entry.* An agency shall enter the names of all applicants rated eligible under § 302.302 on the appropriate list (priority reemployment, reemployment, or regular employment) in the following order:

(1) *When candidates have been rated only for basic eligibility under § 302.302(a).*

(i) Preference eligibles having a compensable, service-connected disability of 10 percent or more (designated as "CP") unless the list will be used to fill professional positions at the GS-9 level or above, or equivalent;

(ii) All other candidates eligible for 10-point veteran preference;

(iii) All candidates eligible for 5-point veteran preference;

(iv) All candidates eligible for sole survivorship preference and

(v) Qualified candidates not eligible for veteran preference.

(2) *When qualified candidates have been assigned numerical scores under § 302.302(b).*

(i) Preference eligibles having a compensable, service-connected disability of 10 percent or more, in the order of their augmented ratings, unless the list will be used to fill professional positions at the GS-9 level or above, or equivalent;

(ii) All other qualified candidates in the order of their augmented ratings. At each score, qualified candidates eligible for 10-point preference will be entered first, followed, second, by 5-point preference eligibles, third, by sole survivorship preference eligibles, and last, by nonpreference eligibles.

[55 FR 9407, Mar. 14, 1990, as amended at 85 FR 63191, Oct. 7, 2020]

**§ 302.304 Order of consideration.**

(a) *Consideration of priority reemployment candidates.* An agency must consider all qualified candidates on its priority reemployment list before it may refer candidates from its reemployment list, if any, or regular employment list. When a qualified candidate is available on the priority list, the agency may appoint an individual who is not on the priority list or who has lower standing than others on that list *only* when necessary to obtain an employee for duties that cannot be taken over without undue interruption to the agency by an individual who is entitled to reemployment priority or has higher standing on the priority reemployment list than the one appointed. The agency must notify each individual on the priority reemployment list who is adversely affected by an appointment under this paragraph of the reasons for the exception and must further notify each such individual who is a preference eligible of his or her right of appeal to the Merit Systems Protection Board.

(b) *Consideration of other candidates.* Except as provided in paragraphs (b)(4) and (b)(5) of this section, an agency shall consider applicants on the reemployment and/or regular employment list who have been assigned eligible ratings for a given position in Order A, Order B, or Order C, as described in paragraphs (b)(1) through (b)(3) of this section. Order A must be used when the agency has not established a reemployment list.

(1) *Order A.* (i) The name of each qualified preference eligible who has a compensable, service-connected disability of 10 percent or more and is entitled to 10-point preference under section 3309 of title 5, United States Code, in the order of his/her numerical ranking.

(ii) The name of each other qualified applicant in the order of his/her numerical ranking.

(2) *Order B.* (i) The name of each qualified preference eligible who has a compensable, service-connected disability of 10 percent or more and is entitled to 10-point preference under section 3309 of title 5, United States Code,

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and whose name appears on the agency's reemployment list, in the order of his/her numerical ranking.

(ii) The name of each qualified preference eligible who has a compensable, service-connected disability of 10 percent or more and is entitled to 10-point preference under section 3309 of title 5, United States Code, and whose name appears on the agency's regular employment list, in the order of his/her numerical ranking.

(iii) The name of each other qualified applicant on the agency's reemployment list, in the order of his/her numerical ranking.

(iv) The name of each other qualified applicant on the agency's regular employment list, in the order of his/her numerical ranking.

(3) *Order C.* (i) The name of each qualified preference eligible who has a compensable, service-connected disability of 10 percent or more and is entitled to 10-point preference under section 3309 of title 5, United States Code, and whose name appears on the agency's reemployment list, in the order of his/her numerical ranking.

(ii) The name of each other qualified applicant on the agency's reemployment list, in the order of his/her numerical ranking.

(iii) The name of each qualified preference eligible who has a compensable, service-connected disability of 10 percent or more and is entitled to 10-point preference under section 3309 of title 5, United States Code, and whose name appears on the agency's regular employment list, in the order of his/her numerical ranking.

(iv) The name of each other qualified applicant on the agency's regular employment list, in the order of his/her numerical ranking.

(4) *Professional order.* An agency shall consider applicants who have been assigned eligible ratings for professional and scientific positions at the GS-9 level and above, or equivalent, in the following order:

(i) *Applicants on the agency's reemployment list, if any.* If numerical scores have been assigned, the applicants will be considered in the order of their augmented scores. If numerical scores have not been assigned, all preference eligibles will be considered together re-

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gardless of the type of preference, followed by all other priority reemployment candidates.

(ii) *Applicants on the agency's regular employment list.* If numerical scores have been assigned, the applicants will be considered in the order of their augmented scores. If numerical scores have not been assigned, all preference eligibles will be considered together regardless of the type of preference, followed by all other candidates.

(5) *Unranked order.* When numerical scores are not assigned, the agency may consider applicants who have received eligible ratings for positions not covered by paragraph (b)(4) of this section in either of the following orders:

(i) *By preference status.* Under this method, preference eligibles having a compensable service-connected disability of 10 percent or more are considered first, followed, second, by other 10-point preference eligibles, third, by 5-point preference eligibles, fourth by sole survivorship preference eligibles, and last, by nonpreference eligibles. Within each category, applicants from the reemployment list will be placed ahead of applicants from the regular employment list.

(ii) *By reemployment/regular list status.* Under this method, all applicants on the reemployment list are considered before applicants on the regular employment list. On each list, preference eligibles having a compensable service-connected disability of 10 percent or more are considered first, followed, second, by other 10-point preference eligibles, third, by 5-point preference eligibles, fourth by sole survivorship preference eligibles, and last by nonpreference eligibles.

[55 FR 9407, Mar. 14, 1990, as amended at 85 FR 63919, Oct. 7, 2020]

## Subpart D—Selection and Appointment; Reappointment; and Qualifications for Promotion

### § 302.401 Selection and appointment.

(a) *Selection.* When making an appointment from a priority reemployment, reemployment, or regular list on which candidates have not received numerical scores, an agency must make

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its selection from the highest available preference category, as long as at least three candidates remain in that group. When fewer than three candidates remain in the highest category, consideration may be expanded to include the next category. When making an appointment from a list on which candidates have received numerical scores, the agency must make its selection for each vacancy from not more than the highest three names available for appointment in the order provided in § 302.304. Under either method, an agency is not required to—

(1) Accord an applicant on its priority reemployment or reemployment list the preference consideration required by § 302.304 if the list on which the applicant's name appears does not contain the names of at least three preference eligibles; or

(2) Consider an applicant who has previously been considered three times or a preference eligible if consideration of his/her name has been discontinued for the position as provided in paragraph (b) of this section.

(b) *Passing over a preference applicant.* When an agency, in making an appointment as provided in paragraph (a) of this section, passes over the name of a preference eligible, it shall follow the procedures in 5 U.S.C. 3318(c) and 3319(c) as described in the *Delegated Examining Operations Handbook*. An agency may discontinue consideration of the name of a preference eligible for a position as described in 5 U.S.C. 3318(c).

[55 FR 9407, Mar. 14, 1990, as amended at 85 FR 63191, Oct. 7, 2020]

### § 302.402 Reappointment.

An agency may reappoint a current or former nontemporary employee of the executive branch of the Federal Government who is a preference eligible to a position covered by this part without regard to the names of qualified applicants on the agency's priority reemployment, reemployment, or regular employment list.

### § 302.403 Qualifications for promotion.

In determining qualifications for promotion with respect to an employee who is a preference eligible, an agency shall waive:

(a) Requirements as to age, height, and weight unless the requirement is essential to the performance of the duties of the position; and

(b) Physical requirements if, in the opinion of the agency, after considering the recommendation of an accredited physician, the preference eligible is physically able to perform efficiently the duties of the position for which the promotion is proposed.

### Subpart E—Appeals

#### § 302.501 Entitlement.

An individual who is covered by 5 U.S.C. 8101(1) and is entitled to priority consideration under this part (see § 302.103) may appeal a violation of his/her restoration rights to the Merit Systems Protection Board under the provisions of the Board's regulations by presenting factual information that he or she was denied restoration rights because of the employment of another person.

### Subpart F—Moving Employees and Positions into and Within the Excepted Service

SOURCE: 89 FR 25046, April 9, 2024, unless otherwise noted.

#### § 302.601 Scope.

(a) This subpart applies to any situation where an agency moves:

(1) A position from the competitive service to the excepted service, or between excepted services, whether pursuant to statute, Executive Order, or an OPM issuance, to the extent that this subpart is not inconsistent with applicable statutory provisions; or

(2) An employee who has accrued status and civil service protections under 5 U.S.C. chapter 75, subchapter II, involuntarily to any position that is not covered by that chapter or subchapter.

(b) This subpart also applies in situations where a position previously governed by title 5, United States Code will be governed by another title of the United States Code going forward, unless the statute governing the exception provides otherwise.

## § 302.602

### § 302.602 Basic requirements.

(a) In the event the President, Congress, OPM, or their designees direct agencies to move positions from the competitive service into the excepted service under Schedule A, B, or C, or any schedule in the excepted service created after May 9, 2024, or to move positions from a schedule in the excepted service to a different schedule in the excepted service, the following requirements must be met, as relevant:

(1) If the directive explicitly delineates the specific positions that are covered, the agency need only list the positions moved in accordance with that directive, and their location within the organization and provide the list to OPM.

(2) If the directive requires the agency to select the positions to be moved pursuant to criteria articulated in the directive, then the agency must provide OPM with a list of the positions to be moved in accordance with those criteria, denote their location in the organization, and explain, upon request from OPM, why the agency believes the positions met those criteria.

(3) If the directive confers discretion on the agency to establish objective criteria for identifying the positions to be covered, or which specific slots of a particular type of position the agency intends to move, then the agency must, in addition to supplying a list of the identified positions or specific slots of particular types of position, supply OPM with the locations in the organization, the objective criteria to be used, and an explanation of how these criteria are relevant.

(b) An agency is also required to—

(1) Identify the types, numbers, and locations of positions that the agency proposes to move into the excepted service.

(2) Document the basis for its determination that movement of the positions is consistent with the standards set forth by the President, Congress, OPM, or their designees as applicable.

(3) Obtain certification from the agency's Chief Human Capital Officer (CHCO) that the documentation is sufficient and movement of the positions is both consistent with the standards set forth by the directive, as applicable, and with merit system principles.

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(4) Submit the CHCO certification and supporting documentation to OPM (to include the types, numbers, and locations of positions) in advance of using the excepted service authority, which OPM will then review.

(5) For exceptions effectuated by the President or OPM, list positions to the appropriate schedule of the excepted service only after obtaining written approval from the OPM Director to do so. For exceptions effectuated by Congress, inform OPM of the positions excepted either before the effective date of the provision, if the statutory provisions are not immediately effective, or within 30 days thereafter.

(6) For exceptions created by the President or OPM, initiate any hiring actions under the excepted service authority only after OPM publishes any such authorizations in the FEDERAL REGISTER, to include the types, numbers, and locations of the positions moved to the excepted service.

(c) In accordance with the requirements provided in paragraphs (a) and (b) of this section—

(1) An agency that seeks to move an encumbered position from the competitive service to the excepted service, or from one excepted service schedule to another, must—

(i) Provide written notification to the incumbent employee of the intent to move the position 30 days prior to the effective date of the position being moved.

(ii) In the written notification required by paragraph (c)(1)(i) of this section, if the movement was involuntary, inform the employee that the employee retains any competitive status or procedural and appeal rights previously accrued under chapter 75, subchapter II, or section 4303 of title 5, United States Code, notwithstanding the movement of the position, and inform the employee of appeal rights conferred under § 302.603 and the timing for exercising such appeal rights.

(d) In addition to applying to the movement of positions, the requirements of this section apply to the involuntary movement of competitive service or excepted service employees with respect to any earned competitive status, any accrued procedural rights, or depending on the action involved,

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any appeal rights under chapter 75, subchapter II, or section 4303 of title 5, United States Code, even when moved to the new positions.

(e) Notwithstanding the use of the plural words "positions," "employees," "individuals," and "personnel actions," this section also applies if the directive of the President, Congress, OPM, or a designee thereof affects only one position or one individual.

**§ 302.603 Appeals.**

(a) A competitive service employee whose position is placed into the excepted service or who is otherwise moved involuntarily to the excepted service, or an excepted service employee whose position is placed into a different schedule of the excepted service or who is otherwise involuntarily moved to a position in a different schedule of the excepted service, may directly appeal to the Merit Systems Protection Board, as provided in paragraphs (b), (c), and (d) of this section. The appeal rights conferred in this section are in addition to, and not in derogation of, any right the individual would otherwise have to appeal a subsequent personnel action undertaken without following appropriate procedures under chapter 75, subchapter II, or section 4303 of title 5, United States Code.

(b) Where the agency, notwithstanding the requirements of section 302.602 of this part, asserts that the move of the original position or any subsequent position to which the individual is involuntarily moved thereafter will eliminate competitive status or any procedural and appeal rights that had previously accrued, the affected individual may appeal from that determination and request an order directing the agency:

(1) To correct the notice to provide that any previously accrued status or procedural and appeal rights under those provisions continue to apply; and

(2) To comply with the requirements of either chapter 75, subchapter II or section 4303, title 5, United States Code, in pursuing any action available under those provisions, except to the extent that any such order would be inconsistent with an applicable statute.

(c) Where the agency fails to comply with § 302.602(c)(1) of this part and fails to provide the individual with the requisite notice, the affected individual may appeal the failure to provide the requisite notice and request an order directing the agency to comply with that provision.

(d) An individual may appeal under this part on the basis that:

(1) A facially voluntary move was coerced or otherwise involuntary; or

(2) A facially voluntary move to a new position would require the individual to relinquish their competitive status or any civil service protections and the move was coerced or otherwise involuntary.

**PART 304—EXPERT AND CONSULTANT APPOINTMENTS**

Sec.

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AUTHORITY: 5 U.S.C. 3109.

SOURCE: 60 FR 45648, Sept. 1, 1995, unless otherwise noted.

**§ 304.101 Coverage.**

These regulations apply to the appointment of experts and consultants as Federal employees under 5 U.S.C. 3109. They do not apply to the appointments of experts and consultants under other employment authorities or to the procurement of services by contracts under the procurement laws.

**§ 304.102 Definitions.**

For purposes of this part:

(a) An *agency* is an executive department, a military department, or an independent agency.

(b) A *consultant* is a person who can provide valuable and pertinent advice generally drawn from a high degree of broad administrative, professional, or technical knowledge or experience. When an agency requires public advisory participation, a consultant also may be a person who is affected by a