

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 724

RIN 3206-AK55

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

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

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

DATES: Comments must be received on or before March 27, 2006.

ADDRESSES: Send or deliver written comments to Ana A. Mazzi, Deputy Associate Director for Workforce Relations and Accountability Policy, Office of Personnel Management, Room 7H28, 1900 E Street NW., Washington, DC, 20415; by FAX at (202) 606-2613; or by e-mail at NoFEAR@opm.gov.

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

SUPPLEMENTARY INFORMATION: The United States and its citizens are best served when the Federal workplace is free of discrimination and retaliation. In order to maintain a productive

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

Reporting Obligations

Section 203 of the No FEAR Act requires Federal agencies to create annual reports on a number of items concerning Federal antidiscrimination and whistleblower protection laws as defined in section 201 of 5 CFR part 724. The reports are to be submitted to Congress, the Equal Employment Opportunity Commission, the Attorney General, and OPM. These regulations describe the required content and time line for the reports. Agencies are required to include in their first reports a one-time submission of five years of historical data, to the extent the data is available.

The regulations call on agencies to report on numbers and types of disciplinary actions they have taken

against their employees for conduct that is inconsistent with these laws. For purposes of these regulations, we propose to define "discipline" to include a range of actions that might be taken from reprimands through adverse actions such as removals and reductions in grade. This range reflects the types of actions that adjudicators and neutrals (mediators or others) have considered to be elements of an employee's past disciplinary record for purposes of determining the appropriateness of a penalty in an appeal of a subsequent disciplinary action. In addition, OPM is considering expanding the range of disciplinary actions reported to include unwritten actions such as oral admonishments. Consequently, OPM requests that respondents include in their comments any views as to whether unwritten actions, such as oral admonishments should be reported under the No FEAR Act.

The regulations also require that agencies discuss in detail their policies for taking appropriate disciplinary action(s) against their employees for conduct that is inconsistent with Federal antidiscrimination and whistleblower protection laws. This information, in turn, will assist OPM in conducting a comprehensive study of the best practices in the Executive Branch for taking appropriate disciplinary actions for conduct that is inconsistent with these laws.

Agencies are also required by the regulations to report the amounts reimbursed to the Judgment Fund for payments made in connection with litigation in Federal court about alleged violations of Federal antidiscrimination and whistleblower protection laws. To the extent such payments are made as part of a settlement agreement, those payments alone, and absent any other information, should not be construed as an admission of wrong-doing by any party to the proceedings.

The regulations require reporting the dollar amounts involved, including a category for attorneys' fees where such fees are separately designated. Agencies are also required to discuss any adjustments to their agencies' budgets needed to meet their obligations to reimburse the Fund.

Finally, the regulations note that the reports are due 180 days after the end of each fiscal year. The first reports under the No FEAR Act were due on

March 30, 2005, based on the express terms of the statute and without regard to the status of the regulations. Thereafter, under the terms of the statute, these reports are due annually on March 30th. We recognize that many agencies already have submitted their reports based on their interpretations of the Act. In those cases, within 60 calendar days after the regulations become final, agencies will need to compare their reports with the regulations, supplement their earlier reports as necessary, and submit the supplemental information to the agencies receiving the annual reports, including OPM. Any such supplemental information would be due within 60 calendar days after the regulations become final. Agencies submitting supplemental reports must cover the data elements described in section 302(a)(1–8)(9 is excluded) of the regulations. Agencies submitting their reports after these regulations become final and any future reports must cover all data elements described in section 302(a). In all cases, agencies' first reports (and/or supplements) would cover information as of September 30, 2004. In addition, agencies that submitted reports before these regulations became final must submit copies of the entire reports to OPM within 60 calendar days after the regulations become final.

Best Practices

Section 204 of the No FEAR Act requires that the President or his designee issue rules to require a comprehensive study of the Executive Branch to determine the best practices concerning appropriate disciplinary actions agencies take against their employees for conduct that is inconsistent with Federal antidiscrimination and whistleblower protection laws. The Act also requires the President or his designee to develop advisory guidelines based on this study that agencies can follow in taking appropriate disciplinary actions in such circumstances.

The regulations establish that the comprehensive study will be conducted by OPM. OPM welcomes comments on what and how performance should be measured to determine the effectiveness of agency disciplinary actions subject to the No FEAR Act. The regulations also provide that, as part of the study, OPM will review what agencies submit in their first reports under section 302 of the regulation. These regulations call for agencies to describe in detail their policies for taking disciplinary actions against employees for conduct that is inconsistent with the above laws.

Finally, the regulations state that OPM will issue advisory guidelines to agencies on best practices they may follow in taking such disciplinary actions. Congress requires that agencies state specifically and in detail the extent to which they will follow the guidelines. The regulations require that these statements be in writing and state the extent to which the agency expects to implement the guidelines and the reasons for the stated degree of implementation. These statements must be submitted to Congress, the Attorney General, the Equal Employment Opportunity Commission, and OPM within 30 working days from the date OPM issues the advisory guidelines.

Regulatory Flexibility Act

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

E.O. 12866—Regulatory Review

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

E.O. 13132

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

E.O. 12988—Civil Justice Reform

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

Unfunded Mandates Reform Act of 1995

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

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights of obligations of non-agency parties and, accordingly, is not

a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 5 CFR Part 724

Administrative practice and procedure, Civil rights, Claims.
U.S. Office of Personnel Management.
Linda M. Springer,
Director.

Accordingly, OPM proposes to amend part 724, title 5, Code of Federal Regulations, as follows:

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

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

§ 724.102 Definitions.

* * * * *

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

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

Subpart C—Annual Report

Sec.
724.301 Purpose and scope.
724.302 Reporting obligations.

Subpart C—Annual Report

§ 724.301 Purpose and scope.

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

§ 724.302 Reporting obligations.

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

(1) The number of cases in Federal court pending or resolved in each fiscal year and arising under each of the respective provisions of the Federal Antidiscrimination Laws and Whistleblower Protection Laws as defined in § 724.102 of subpart A of this

part in which an employee, former Federal employee, or applicant alleged a violation(s) of these laws separating data by the provision(s) of law involved;

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

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

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

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

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

(4) The final year-end data about discrimination complaints for each fiscal year that was posted in accordance with Equal Employment Opportunity Regulations at subpart G of title 29 of the Code of Federal Regulations (implementing § 301(c)(1)(B) of the No FEAR Act);

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

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

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

(i) An examination of trends;

(ii) Causal analysis;

(iii) Practical knowledge gained through experience; and

(iv) Any actions planned or taken to improve complaint or civil rights programs of the agency with the goal of

eliminating discrimination and retaliation in the workplace;

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

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

(b) The first report also must provide information for the data elements in paragraph (a) of this section for each of the five fiscal years preceding the fiscal year on which the first report is based to the extent that such data is available. Under the provisions of the No FEAR Act, the first report was due March 30, 2005 without regard to the status of the regulations. Thereafter, under the provisions of the No FEAR Act, agency reports are due annually on March 30th. Agencies that have submitted their reports before these regulations became final must ensure that their reports contain data elements 1 through 8 of paragraph (a) of this section and provide any necessary supplemental reports within 60 calendar days after the regulations become final. Future reports must include all of the data elements of paragraph (a) of this section.

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

(1) Speaker of the U.S. House of Representatives;

(2) President Pro Tempore of the U.S. Senate;

(3) Committee on Governmental Affairs, U.S. Senate;

(4) Committee on Government Reform, U.S. House of Representatives;

(5) Each Committee of Congress with jurisdiction relating to the agency;

(6) Chair, Equal Employment Opportunity Commission;

(7) Attorney General; and

(8) Director, U.S. Office of Personnel Management.

Subpart D—Best Practices

Sec.

724.401 Purpose and scope.

724.402 Best practices study.

724.403 Advisory guidelines.

724.404 Agency obligations.

Subpart D—Best Practices

§ 724.401 Purpose and scope.

This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of the President or his designee (OPM) to conduct a comprehensive study of best practices in the Executive Branch for taking disciplinary actions against employees for conduct that is

inconsistent with Federal Antidiscrimination and Whistleblower Protection Laws and the obligation to issue advisory guidelines for agencies to follow in taking appropriate disciplinary actions in such circumstances.

§ 724.402 Best practices study.

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

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

§ 724.403 Advisory guidelines.

OPM will issue advisory guidelines to Federal agencies incorporating the best practices identified under § 724.402 that agencies may follow to take appropriate disciplinary actions against employees for conduct that is inconsistent with Federal Antidiscrimination Laws and Whistleblower Laws.

§ 724.404 Agency obligations.

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

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

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

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

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

(1) Speaker of the U.S. House of Representatives;

(2) President Pro Tempore of the U.S. Senate;

(3) Chair, Equal Employment Opportunity Commission;

(4) Attorney General; and

(5) Director, U.S. Office of Personnel Management.

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