

**August 2024**

# **Effectiveness of Alternative Dispute Resolution in the Federal Sector**



**U.S. Equal Employment Opportunity Commission**

Research, Evaluation, & Applied Data Division | Office of Federal Operations

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## Executive Summary

Alternative Dispute Resolution (ADR) is a process in which a neutral third party helps parties to reach an agreement without litigation. Mediation is the most widely utilized method for dispute resolution. All Federal agencies are required to have an ADR program that is fair.<sup>1</sup> Since Federal agencies may conduct ADR programs differently, the U.S. Equal Employment Opportunity Commission (EEOC) sought to better understand agencies' ADR policies, practices, and complaint activity.

This report follows up on an EEOC report published in fiscal year (FY) 2021<sup>2</sup> with comprehensive information and data on the effectiveness of ADR programs at Federal agencies in FY 2019. In this current report, the EEOC continued its review of agency ADR programs in FY 2021—specifically, examining Management Directive 715<sup>3</sup> program deficiencies and relevant Form 462<sup>4</sup> complaint data. The report focuses on the experiences of complainants and managers who participated in ADR, primarily mediation.

### Main Findings

- In FY 2021, Federal agencies offered ADR more often during the pre-complaint stage (87.8 percent of all completed counselings) than during the formal EEO complaint stage (17.0 percent of all complaint closures).
- In FY 2021, Federal agencies accepted ADR more often during the pre-complaint stage (55.5 percent of all completed counselings) than during the formal EEO complaint stage (6.4 percent of all complaint closures).
- During the formal EEO complaint stage, approximately 33.6 percent of ADR closures led to resolutions (i.e., settlements or withdrawals).
- The rate of counselings and complaints was roughly proportional to the agency's size. Notably, large agencies (those with 15,000 or more employees) accounted for 94.1 percent of the Federal workforce, 95.9 percent of completed counselings, and 93.9 percent of formal complaints.
- Among 72 complainants surveyed, the majority (46) expressed dissatisfaction with the fairness of the ADR process. In contrast, of the 23

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<sup>1</sup> "Alternative Dispute Resolution (ADR) Overview," EEOC, <https://www.eeoc.gov/Federal-sector/alternative-dispute-resolution-adr-overview>.

<sup>2</sup> *Alternative Dispute Resolution in the Federal Sector*, EEOC, 2021, <https://www.eeoc.gov/federal-sector/reports/alternative-dispute-resolution-federal-sector>.

<sup>3</sup> The EEOC provides Management Directive 715 (MD-715) as policy guidance to Federal agencies for their use in establishing and maintaining effective programs of equal employment opportunity for all employees as required by Title VII of the Civil Rights Act of 1964 and the Rehabilitation Act. MD-715 took effect on October 1, 2003.

<sup>4</sup> Federal agencies covered by 29 CFR 1614 must report to the EEOC data on EEO complaint processing, beginning with pre-complaint counseling and ending with final disposition. Agencies report this information on the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (Form 462).

responsible management officials (RMOs) surveyed, nearly all (22) indicated satisfaction with its fairness.

- A total of 41 complainants said they were considering leaving their agency in the next year, compared to only 6 RMOs. The top reason complainants gave for wanting to leave was retaliation due to ADR participation.

## **Main Recommendations**

The EEOC recommends that Federal agencies:

- Provide training and education on the ADR process to employees, managers, supervisors, and settlement officials. Specifically, training should focus on the roles and expectations of management as well as outcomes from negotiated settlements.
- Keep ADR participants informed of the procedural steps throughout the ADR process, including the development of an ADR toolkit with FAQs for the ADR services offered, timelines for processing EEO complaints during the ADR process and information on their agency website explaining the ADR services offered.
- Create an agency tool (i.e., post-ADR survey or template) to collect feedback after the mediation process. This feedback can provide insights into the mediator's effectiveness and whether the mediation was perceived as fair. Agencies should address any concerns raised through this feedback.
- Encourage good faith cooperation and participation among all parties in the ADR process to improve chances of reaching an agreement.
- Review and use the recommendations from the EEOC's fiscal year 2021 ADR report.
  - Quarterly ADR status briefings with senior agency leaders.
  - Share ADR data on acceptance, participation, and declination rates.
  - Improve collaboration between EEO and ADR program.
  - Develop required training course for ADR program administration.
  - Provide ADR training for managers, staff, and mediators.
  - Provide quarterly ADR awareness training.
  - Update ADR policies every three years at a minimum.

Ongoing research is needed to understand employee perceptions of ADR. Federal agencies should evaluate their internal ADR programs and assess their effectiveness.

## Introduction

Alternative Dispute Resolution (ADR) is a process in which a neutral third party helps parties to reach an agreement without litigation. ADR uses various techniques, such as mediation, peer review, fact finding, and facilitation. These techniques help to reduce conflict as well as the cost, delay, and unpredictability of the traditional adjudicatory processes.<sup>5</sup>

Despite the limited research found on this topic, past literature in legal counseling found that ADR has both advantages and disadvantages. Professors O'Leary and Raines (2001) studied the ADR program at the U.S. Environmental Protection Agency and found high survey satisfaction on the fairness of the ADR proceedings and the number of settlement options available. Professors Riley, Prenzler, and McKillop (2020) analyzed complaint cases from all police stations and oversight agencies in Australia and found high satisfaction after complainants used ADR options. Similarly, attorneys Schiffer and Juni (1996) analyzed complaint cases using ADR in the U.S. Department of Justice, and also found high satisfaction among complainants who used in-person mediations.

Furthermore, researchers Saundry et al. (2018) highlighted numerous benefits of mediation in the UK's public sector towards facilitating employee voice, asserting that ADR practices were more amenable to employees' grievances than formal litigation. However, they also found a power imbalance in the mediation room that resembled a management process designed to stifle dissent rather than remedy discrimination (Saundry et al., 2018). Interview responses from aggrieved employees indicated that mediation was often used as a mechanism to get employees back to work, instead of addressing the underlying problems between management officials and their staff. Therefore, it's essential to continue to study employee perceptions of ADR to identify and mitigate issues that limit the fairness and efficiency of these proceedings (Saundry et al., 2018).

In the Federal sector, the Administrative Dispute Resolution Act (ADRA) of 1990<sup>6</sup> was the first legislation requiring every Federal agency to implement a policy for the use of ADR. By 2000, the EEOC required all Federal agencies to establish or provide access to an ADR program for both the pre-complaint and formal complaint stages of the EEO process.<sup>7</sup> Additionally, under EEOC regulation 29 C.F.R. § 1614.603, agencies must make reasonable efforts to voluntarily resolve EEO discrimination complaints as early as possible and throughout the administrative process.

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<sup>5</sup> "Types of ADR Techniques," EEOC, <https://www.eeoc.gov/Federal-sector/types-adr-techniques>.

<sup>6</sup> Re-enacted in 1996 as the Administrative Dispute Resolution Act of 1996.

<sup>7</sup> "Alternative Dispute Resolution (ADR) Overview," EEOC, <https://www.eeoc.gov/Federal-sector/alternative-dispute-resolution-adr-overview>.

A 2021 study published by the Administrative Conference of the United States found that Federal agencies faced several challenges that impacted the effectiveness of ADR. These challenges included budgetary constraints, lack of trained personnel, and varying levels of support from agency leadership (Blankley et al., 2021). The study recommended that Federal agencies increase their ADR program visibility (e.g., through their website, speeches, and press releases), increase interagency collaboration, improve data collection and reporting (e.g., feedback from ADR participants), and provide more comprehensive training for ADR practitioners, among other recommendations (Blankley et al., 2021).

In its fiscal year (FY) 2021 report, [Alternative Dispute Resolution in the Federal Sector](#), the EEOC found that about 40 percent of Federal agencies had incomplete ADR policies in FY 2019, with “failing to state the timeline involved in the ADR process” being the most common issue. In addition, 4.3 percent of agencies had critical ADR program deficiencies, such as not requiring managers and supervisors to participate in ADR, allowing the manager named in the complaint to be the settlement authority, and failing to regularly assess the effectiveness of the ADR program.<sup>8</sup> Lastly, survey results showed that a third of agencies did not conduct regular self-assessments of their ADR program’s effectiveness, while nearly a quarter did not annually evaluate their programs at all.<sup>9</sup>

### **Purpose and Scope**

This follow-up report examines the impacts of Federal ADR programs on complaint activity and complainant satisfaction. In this report, EEOC researchers sought to answer:

- How often is ADR used?
- Does ADR reduce the number of formal complaints?
- How satisfied in ADR process were complainants and managers who participated?
- Does the ADR format (i.e., video conference, in-person, or phone) impact participant satisfaction?

This report offers findings and recommendations to improve the ADR process for participants and reduce the number of formal complaints filed at Federal agencies. This report is intended to serve as a resource to assist Federal agencies in improving the utilization and effectiveness of ADR.

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<sup>8</sup> *Alternative Dispute Resolution in the Federal Sector*, EEOC, 2021, <https://www.eeoc.gov/federal-sector/reports/alternative-dispute-resolution-federal-sector>.

<sup>9</sup> *Alternative Dispute Resolution in the Federal Sector*, EEOC, 2021, <https://www.eeoc.gov/federal-sector/reports/alternative-dispute-resolution-federal-sector>.

## Methodology

This report analyzed three years of complaint data from the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints Data (Form 462), from FY 2019 to FY 2021. Form 462 tracks equal employment opportunity (EEO) complaint activity at Federal agencies throughout each stage of the complaint process—pre-complaint, formal complaint, investigations, and closure. The EEOC’s Office of Federal Operations collects Form 462 data annually in accordance with 29 C.F.R. § 1614.

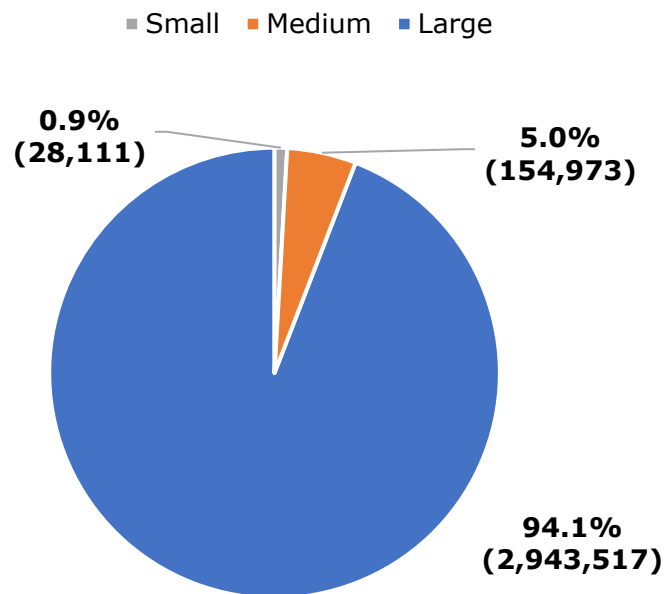
The EEOC examined data collected from 154 Federal agencies out of a total of 526 agencies and subagencies reported by the U.S. Office of Personnel Management (OPM). Agencies with less than 100 employees were removed from the analysis, as the prevalence of low or no EEO activity among these agencies skewed aggregate results. Agencies required to redact data for national security reasons were also removed. This removed a total of 6,456 employees from the overall analysis, not counting those removed from national security agencies. The discussion that follows analyzed data on the remaining 3.1 million Federal employees.

In addition, EEOC researchers conducted a survey to gauge participant satisfaction and opinions on the ADR process. To gather more detailed feedback, the EEOC also conducted a focus group with ADR professionals, including mediators and counselors.

## Profile of Federal Sector ADR

The sample data drawn from Form 462 included approximately 3.1 million Federal employees in FY 2021. Figure 1 shows that the vast majority of them—94.1 percent—worked at large Federal agencies (15,000 or more employees). By comparison, medium agencies (1,001 to 14,999 employees) employed 5.0 percent of workers, and small agencies (100 to 1,000 employees) another 0.9 percent of workers.

**Figure 1. Federal Employees by Agency Size, FY 2021**



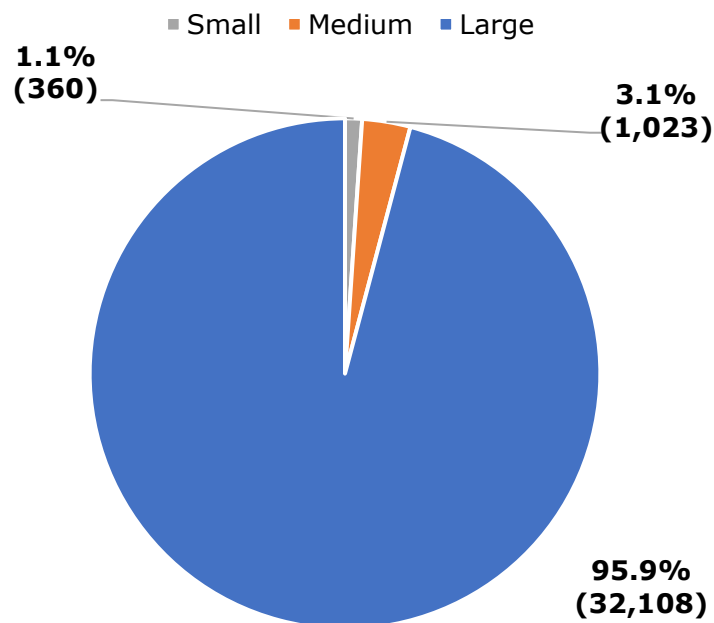
Notes: Small agencies had between 100 and 1,000 employees. Medium agencies had between 1,001 and 14,999 employees. Large agencies had 15,000 or more employees.

Source: U.S. Equal Employment Opportunity Commission, Statistical Report of Discrimination Complaints Data (Form 462), FY 2021, Table B-1.



Across all sampled agencies in FY 2021, there were a total of 33,496 EEO counselings. Figure 2 shows that the number of counselings were roughly proportionate to agency size. For example, small agencies represented 0.9 percent of the workforce and 1.1 percent of all completed counselings, while large agencies represented 94.1 percent of the workforce and 95.9 percent of counselings.

**Figure 2. Completed Counselings by Agency Size, FY 2021**

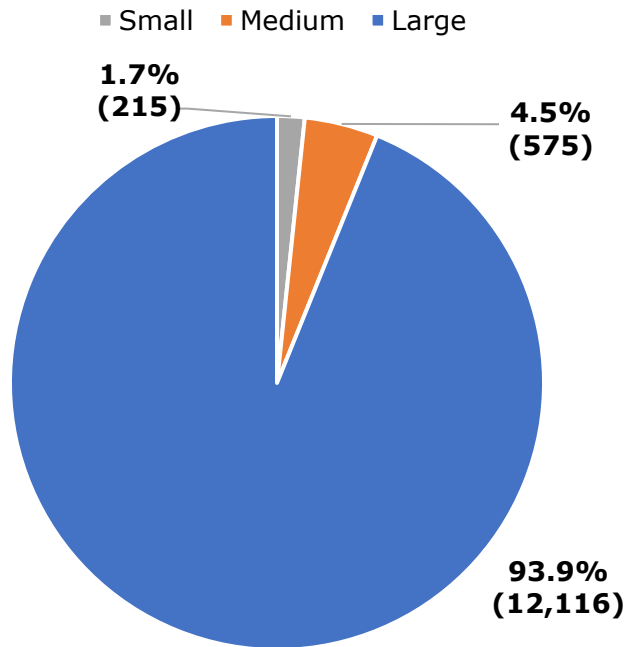


Notes: Small agencies had between 100 and 1,000 employees. Medium agencies had between 1,001 and 14,999 employees. Large agencies had 15,000 or more employees.

Source: U.S. Equal Employment Opportunity Commission, Statistical Report of Discrimination Complaints Data (Form 462), FY 2021, Table B-1.

Formal complaints were also roughly proportionate to agency size. Figure 3 shows that large agencies accounted for the vast majority of formal complaints (93.9 percent), while small agencies accounted for the fewest (1.7 percent). Overall, there were 12,906 formal complaints in FY 2021.

**Figure 3. Formal Complaints Filed by Agency Size, FY 2021**

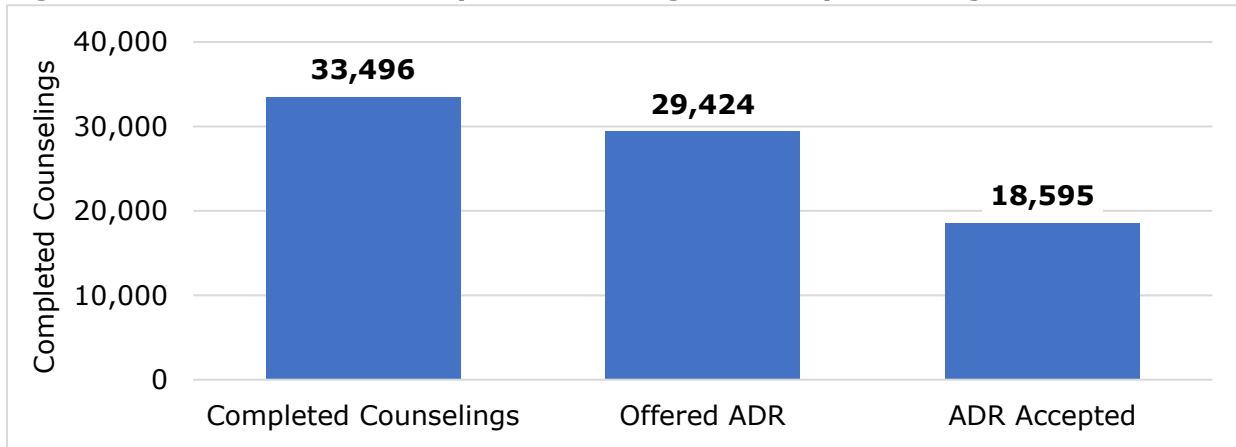


Notes: Small agencies had between 100 and 1,000 employees. Medium agencies had between 1,001 and 14,999 employees. Large agencies had 15,000 or more employees.

Source: U.S. Equal Employment Opportunity Commission, Statistical Report of Discrimination Complaints Data (Form 462), FY 2021, Table B-1.

ADR was offered and accepted by complainants at different rates during different stages of the complaint process. Figure 4 shows that there were 33,496 completed counselings in FY 2021. During the pre-complaint stage, ADR was offered at 29,424 (87.8 percent) of these counselings. Complainants accepted ADR in 18,595 (55.5 percent) counselings.

**Figure 4. ADR Offers and Acceptances During Pre-Complaint Stage, FY 2021**

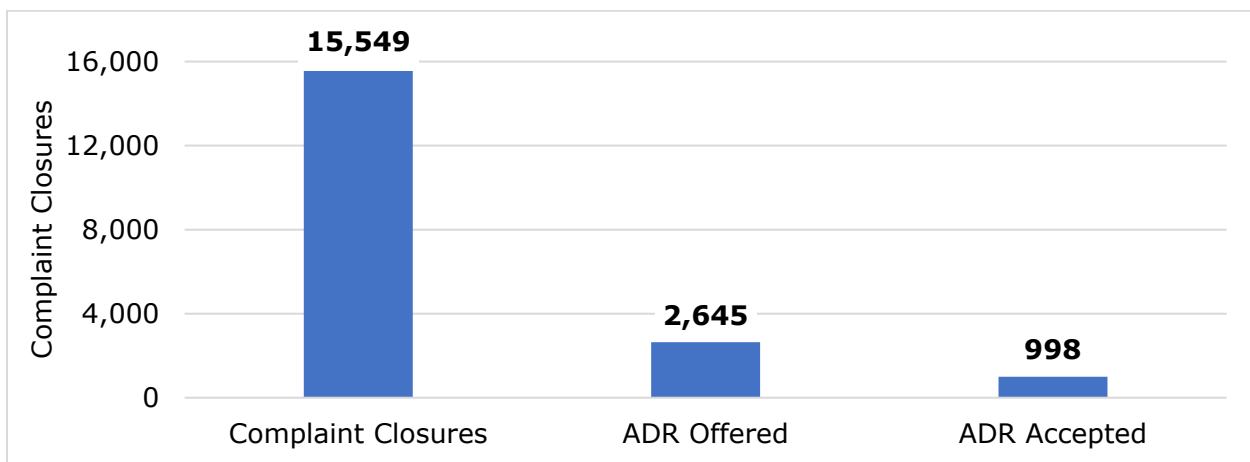


Note: ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission, Statistical Report of Discrimination Complaints Data (Form 462), FY 2021, Table B-4.

By comparison, figure 5 shows that ADR was offered and accepted by complainants far less often during the formal complaint stage. Out of 15,549 total complaint closures, ADR was offered for 2,645 closures (17.0 percent) and accepted for 998 closures (6.4 percent).

**Figure 5. ADR Participation Rate During Formal Complaint Stage, FY 2021**

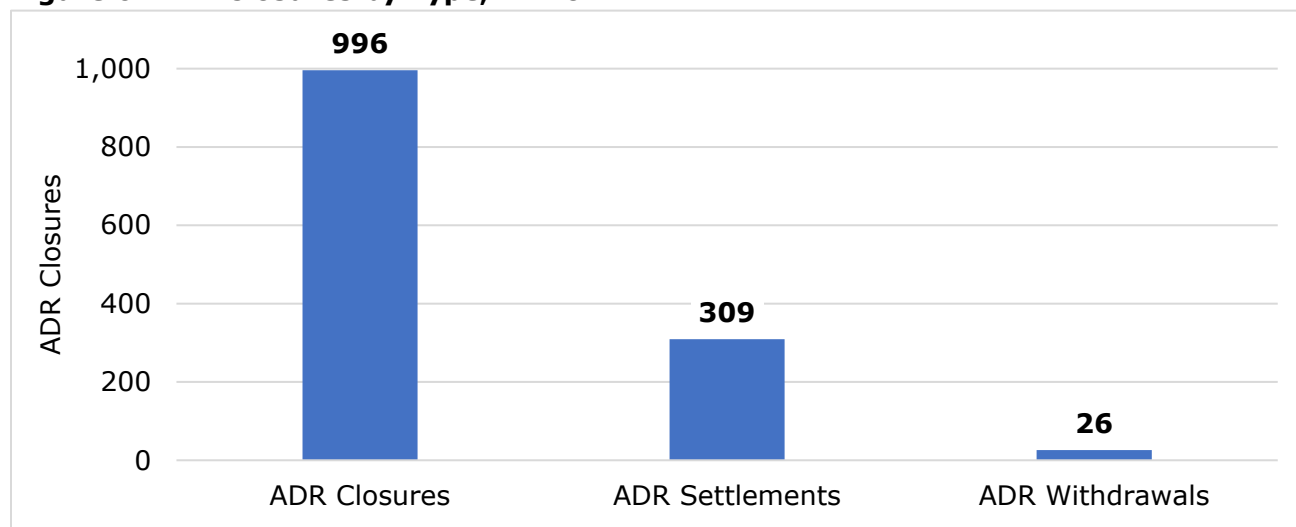


Note: ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission, Statistical Report of Discrimination Complaints Data (Form 462), FY 2021, Table B-19.

ADR closures mark a pivotal stage in the ADR process where parties either reach a settlement and subsequently draft and sign an agreement or proceed with the complaint if no settlement is reached. In the latter case, the investigation continues as if mediation had not occurred. Figure 6 shows that ADR proceedings had various outcomes in FY 2021. Out of 996 ADR closures, 31.0 percent (309 ADR closures) resulted in settlements. Another 2.6 percent (26 closures) ended in withdrawals. Thus, a total of 33.6 percent of all ADR closures led to resolutions (i.e., settlements and withdrawals).

**Figure 6. ADR Closures by Type, FY 2021**



Note: ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission, Statistical Report of Discrimination Complaints Data (Form 462), Fiscal Year (FY) 2021, Table B-20.

Overall, the data presented in this section suggests that ADR was more effective during the pre-complaint stage than the formal complaint stage—likely because during the pre-complaint phase both parties may still have an opportunity to preserve their relationships and prevent an escalation of conflict. ADR methods like mediation and negotiation allow each party to communicate directly and find mutually acceptable solutions without the adversarial nature of formal proceedings. Additionally, resolving disputes early in the ADR process can save a significant amount of time and resources compared to formal litigation or arbitration. It avoids the lengthy procedural steps and costs associated with formal proceedings, such as discovery, motions, and court appearances. ADR processes are generally less formal and rigid than formal litigation. This informality allows parties to tailor the process to their specific needs and issues, making it easier to explore creative solutions that may not be available through formal legal channels. Finally, some

focus groups participants believed that by the time ADR reaches the formal stage, both parties are firmly committed to their positions and ADR begins to lose its effectiveness.

In FY 2021, ADR was offered at a rate five times higher during the pre-complaint stage compared to the formal stage, and it was accepted by complainants at a rate eight times higher. While only 6.4 percent of complainants accepted ADR during the formal stage, approximately one-third of all ADR closures resulted in resolutions, primarily through settlements. This highlights the effectiveness of ADR in achieving mutually agreeable outcomes even when initially met with resistance.

### **Survey on ADR Process**

The EEOC conducted a survey<sup>10</sup> to gather data on participant satisfaction with the ADR process. Due to limited resources, EEOC researchers restricted the survey to the same 24 agencies surveyed in the fiscal year 2021 ADR report. This survey was voluntary and remained open from May 17 to June 23, 2022—a total of 27 business days. Out of an estimated Federal workforce of 2 million, only 217 employees responded to the survey. Due to the small sample size, the EEOC did not use the survey results to produce findings or recommendations. However, the EEOC still encourages agencies to review this information to improve their ADR programs.

The survey included a disqualifier (“Does your agency provide annual agency-wide ADR training?”) to focus only on the views of ADR participants. Out of the 217 respondents, 99 did not know whether their agency provided annual agency-wide ADR training and 60 said their agency did not provide annual ADR training. Only 58 respondents reported that their agency provided agency-wide ADR training annually.

The survey asked whether respondents had participated in ADR as either complainants or responsible management officials (RMOs). Out of the 217 respondents, 82 had not participated in ADR, 13 had participated but not as a complainant or RMO, and 10 did not answer. That left 112 respondents—83 who participated as complainants and 29 as RMOs. However, only 72 complainants and 23 RMOs answered the remaining questions.

### **Perceptions of ADR Process**

The EEOC’s Management Directive 110 states that, to ensure fairness, the ADR process should be voluntary, neutral, confidential, and enforceable.<sup>11</sup> The survey asked all respondents whether they felt the ADR process was fair (figure 7). Of the

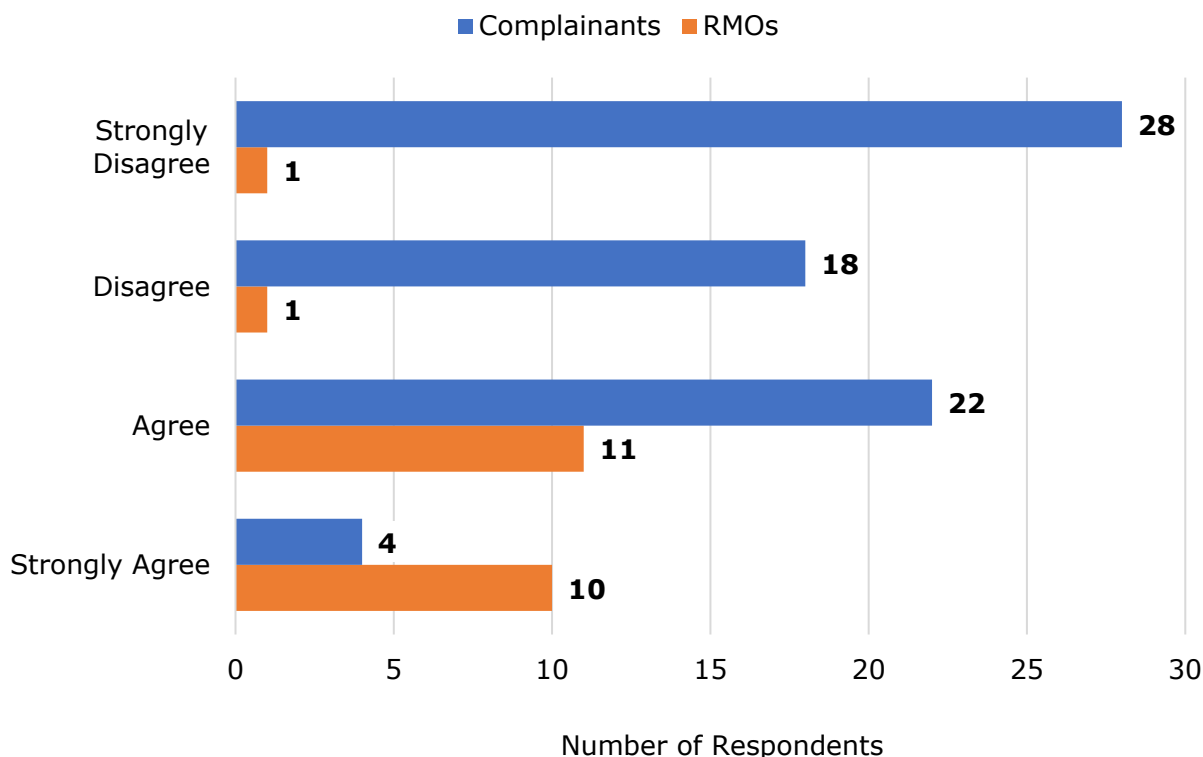
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<sup>10</sup> For the purpose of this report survey data is explained by the number of responses in lieu of percentage because the participation rate was extremely low.

<sup>11</sup> For more detailed information, see Chapter 3 of EEOC Management Directive 110 (<https://www.eeoc.gov/Federal-sector/management-directive/chapter-3-alternative-dispute-resolution-eeo-matters>).

72 complainants who responded, most complainants did not feel it was fair, with 28 strongly disagreeing and another 18 disagreeing. The opposite was true for RMOs; most of the 23 RMOs who responded felt that the ADR process was fair (10 strongly agreed and 11 agreed). Only 2 RMOs either strongly disagreed or disagreed.

**Figure 7. Was the ADR Process Fair?**



Notes: RMOs = Responsible Management Officials. ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission.

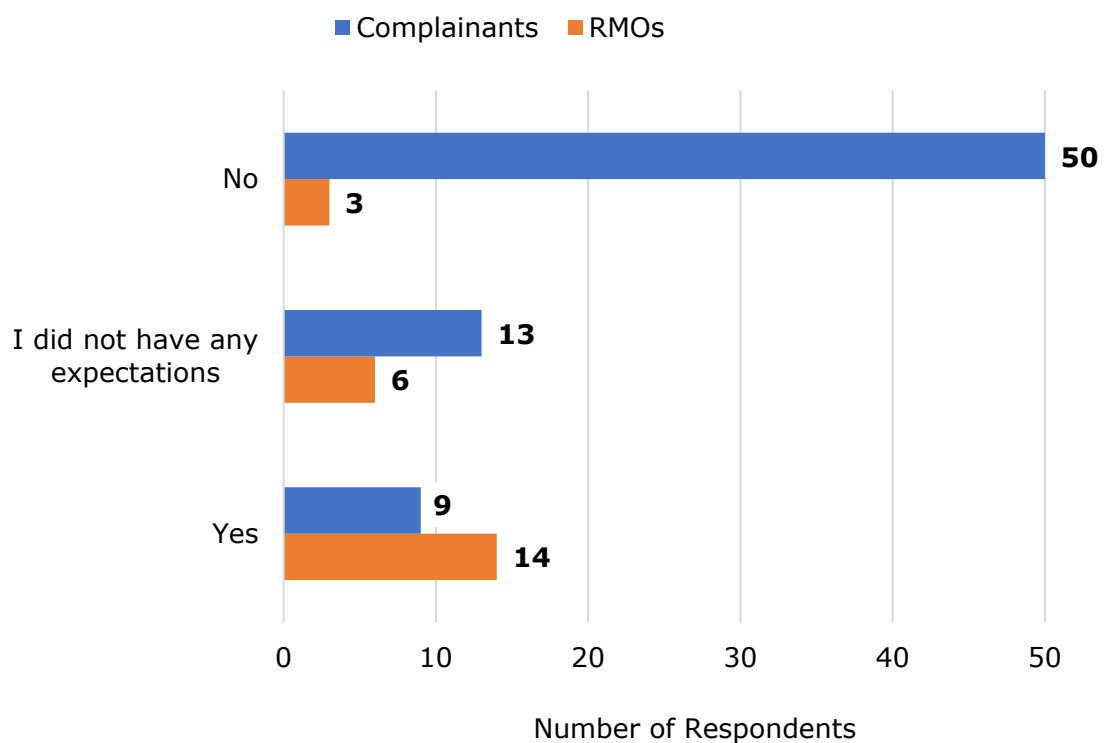
The EEOC also asked complainants whether their complaint was fully resolved during ADR. Only ten out of 72 respondents said yes. In addition, most complainants (33) felt that the ADR process took too long. By comparison, 20 complainants said the process was too short and 19 said ADR was completed in a fair amount of time. The EEOC asked RMOs whether their agency had sought feedback after ADR—14 said no, while nine said yes.

Next, the EEOC surveyed both complainants and RMOs regarding their satisfaction with their ADR participation (see figure 8). Thirteen complainants and six RMOs reported having no prior expectations. Among complainants, 50 responded negatively, while only nine responded affirmatively. In contrast, most RMOs (14) reported that the ADR process met their expectations, with only three indicating

dissatisfaction. Respondents were able to specify reasons why the ADR process did not meet their expectations. Respondent responses included:

- *Yes, it's common knowledge that ADR will NOT result in anything. ADR is viewed as "part of the process."*
- *The mediator was not familiar with agency policies and appeared to side with the agency because of that lack of understanding.*
- *I had a 15-minute phone call to state my case.*
- *The behavior decreased slightly and became more gaslighting, sabotage and less visible. This behavior was not due to the ADA process but to a lack of supervisory follow up and lack of accountability.*
- *I felt like the process was a waste of time and no reasonable solution was ever met, even with my willingness to meet them somewhere halfway.*

**Figure 8. Were Your Expectations for Participating in ADR Met?**

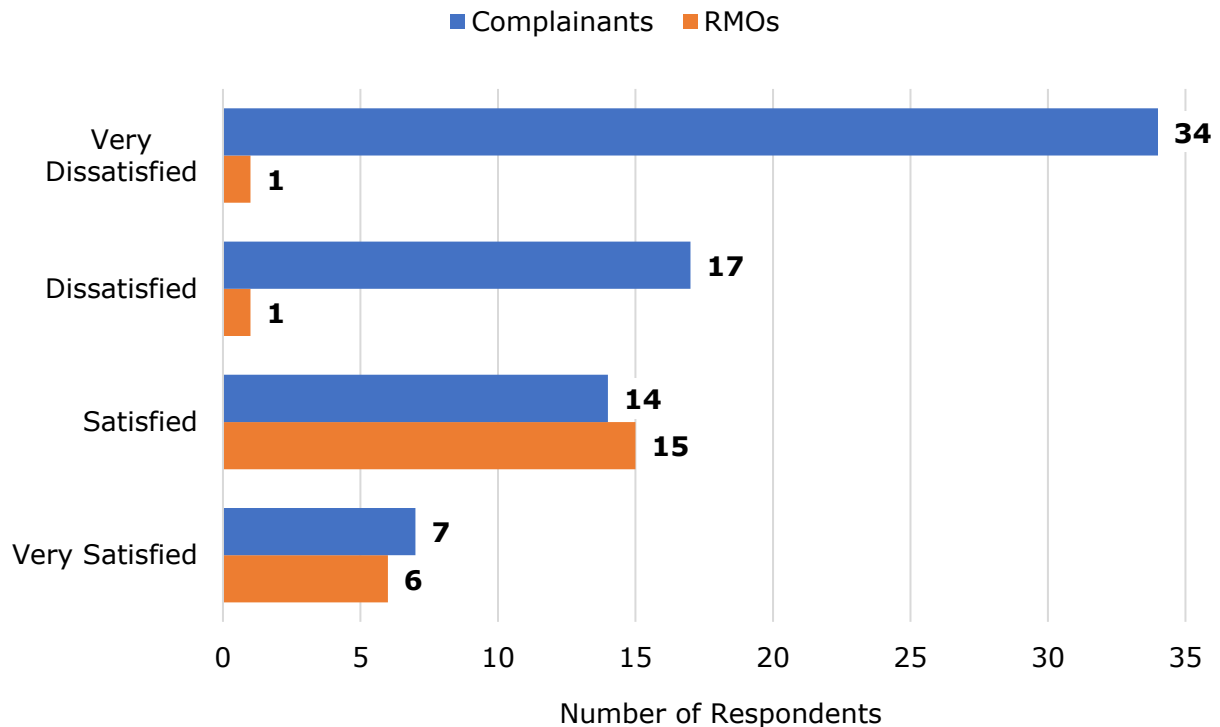


Notes: RMOs = Responsible Management Officials. ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission.

The EEOC also assessed the satisfaction level with the ADR process (figure 9). The majority of complainants felt either very dissatisfied (34) or dissatisfied (17). In contrast, only 2 RMOs felt that way. Most RMOs felt either satisfied (14) or very satisfied (7) with the ADR process.

**Figure 9. Overall, How Satisfied Were You with the ADR Process?**



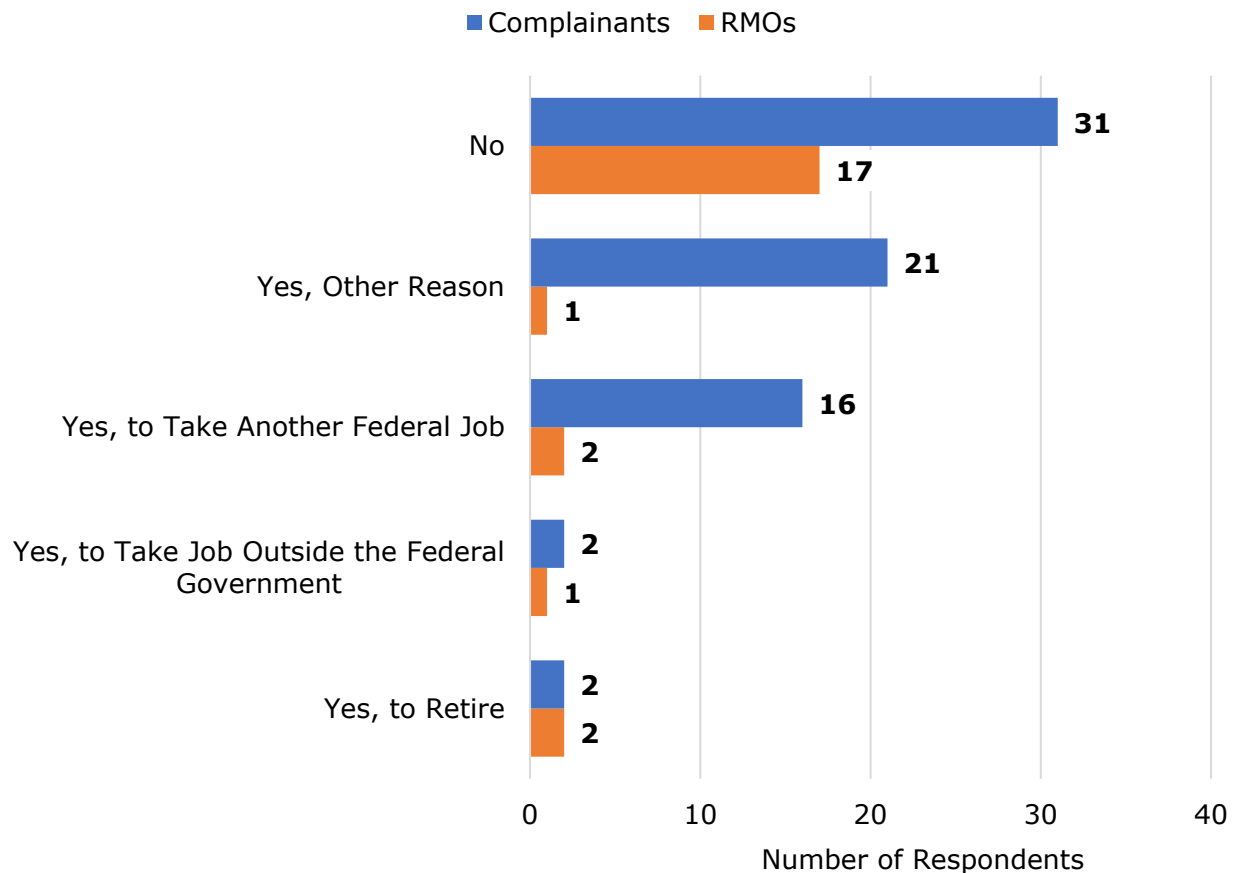
Notes: RMOs = Responsible Management Officials. ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission.

To dig deeper, the EEOC asked respondents whether they were considering leaving their organization within the next year (figure 10). Most RMOs (17) said no, as well as 31 complainants. However, a total of 41 complainants said they were considering leaving for various reasons. For example, 16 complainants said they were considering taking another job in the Federal Government and 2 complainants were considering taking a job in the private sector. By comparison, only a total of 6 RMOs said they were considering leaving their agency within the next year.



**Figure 10. Are You Considering Leaving Your Organization within the Next Year?**



Notes: RMOs = Responsible Management Officials. ADR = Alternative Dispute Resolution.

Source: U.S. Equal Employment Opportunity Commission.

The survey asked respondents who were considering leaving their agency whether participating in the ADR process had influenced that decision. Only six complainants and five RMOs said no. By comparison, 35 complainants and one RMO said yes for various reasons. Some reasons for 'yes' responses were:

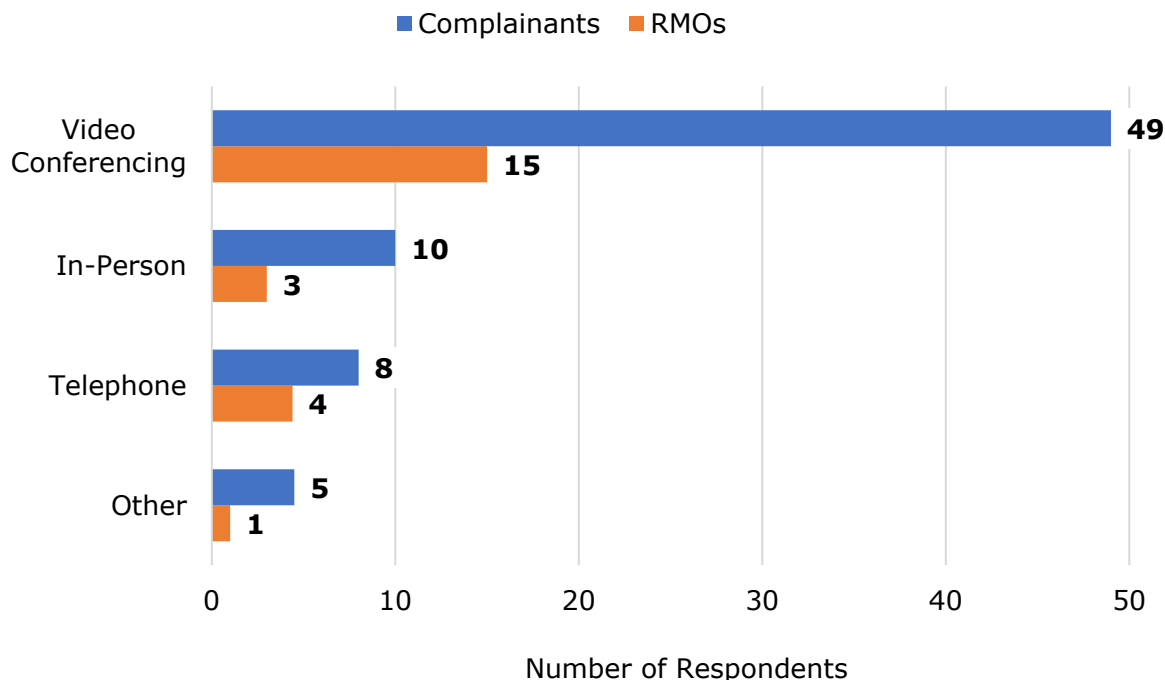
- Fear of reprisal and exclusion from future promotion considerations.
- The harassment continued and reprisal for engaging in the EEO process.
- Need to address personal family matters.

Notably, 17 complainants reported that retaliation after participating in the ADR process had led them to consider leaving.

## Other Survey Results

The EEOC asked all respondents about the format used to conduct ADR (figure 11). The majority of complainants (49) and RMOs (15) indicated that ADR was conducted via video conferencing. By comparison, 10 complainants and three RMOs stated that ADR was conducted in-person. And another eight complainants and four RMOs stated ADR was conducted by telephone. And another eight complainants and four RMOs stated ADR was conducted by telephone. And another eight complainants and four RMOs stated ADR was conducted by telephone.

**Figure 11. How was ADR Conducted?**



Notes: RMOs = Responsible Management Officials. ADR = Alternative Dispute Resolution. "Other" allowed respondents to submit their own answers, such as email, phone plus email, and in-person but without all parties present.

Source: U.S. Equal Employment Opportunity Commission.

In addition, the survey asked the 23 RMOs whether their participation in ADR was voluntary—13 said yes, while the other 10 said no. Some agencies require management participation in ADR. The survey also asked the RMOs whether they had settlement authority, and the majority (18) reported they did.

Next, the EEOC asked the complainants whether they were familiar with ADR before entering the process. Results were roughly split, with 39 answering no and the remaining 33 answering yes. The majority of complainants (53 out of 72) reported that ADR was completed during the pre-complaint stage. Furthermore, complainants had the option to specify one or more EEO issues and bases that

applied to their complaints. The top response was Harassment (Non-Sexual), which was selected 40 times, followed by Appointment/Hire, which was selected 26 times.

The EEOC also asked complainants if anyone from management had participated in their ADR. Most complainants (59) said yes. When asked whether they trusted that the mediator was a neutral party, 40 complainants said yes, but 32 said no. Furthermore, most complainants (52) said that they were aware that they could terminate ADR at any time. That left 20 complainants who were not aware, which is concerning. EEO Counselors are required to inform the complainant about the stages of the EEO process and that they may choose between the agency's ADR program and traditional EEO counseling.<sup>12</sup> The EEO Counselor must also advise about other appropriate statutory or regulatory forums, such as the Merit Systems Protection Board or a negotiated grievance process.

Most complainants (43) did not have a representative present. Only 15 complainants had an attorney present and another 7 had a union representative present. The remaining seven complainants reported other options, such as a family member, a supervisor, or not being aware they could have an attorney present.

### **Focus Group of ADR Professionals**

The EEOC initially sought to conduct a focus group of the RMOs who responded to the survey. However, not enough RMOs showed interest to conduct a focus group. As a result, the EEOC decided to conduct the focus group with Federally employed ADR professionals, such as counselors and mediators. This excluded EEO Directors, since they had already participated in a focus group discussed in the previous ADR report.

To gather participants, the EEOC reached out to one of its EEO Specialists for referrals. The focus group took place on July 6, 2022 with 11 participants. All the participants provided feedback on their experiences with the ADR process and suggestions for improvements.

The discussion centered around the following questions:

1. How many times in the last year have you conducted an ADR during the informal or formal complaint stage?
2. In your opinion, does the method and format in which ADR is conducted contribute to the success of the process? Why?
3. Does the format contribute to the participant satisfaction? Why?

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<sup>12</sup> See Chapter 2 of EEOC Management Directive 110 (<https://www.eeoc.gov/Federal-sector/management-directive/chapter-2>).

4. In your experience, how do you believe the ADR process is perceived by participants? Do they feel satisfied with their experience? Why?
5. As an ADR Professional, what have been some challenges you have faced in conducting ADR?
6. What is one obstacle that could explain low ADR participation rates at some agencies?
7. What are some “promising practices” you’ve seen conducted by participating agencies that could be helpful to other Federal agencies’ ADR process?

The vast majority of the ADR professionals (10 out of 11) mediated either informal or formal ADR sessions within the last three years. Overall, the group recommended that senior leadership, management officials, and legal representatives approach ADR not as adversaries but with the common goal of identifying the specific grievance and seeking a resolution to satisfy both parties. The group felt it was generally better to resolve issues at the lowest level possible before the formal complaint stage.

In order to reach consensus, the group stressed that the right participants must be present during the ADR process. Any progress made may be derailed if an agreement is reached but later changed or denied. One ADR professional said that even changing a single word could nullify the entire agreement. Overall, the group felt that the interaction between the complainant and the alleged discriminating official was essential to work toward healing and resolution—especially early on. By the time the complaint reaches the formal stage, the parties are often entrenched in their positions.

When asked about the impact of the ADR format, opinions within the group were divided. Prior to the COVID-19 pandemic, most members had not utilized formats such as video conferencing, email, or telephone. The group acknowledged that COVID-19 necessitated a reevaluation of ADR options. However, the group expressed concerns that these remote formats sometimes made it challenging to discern whether others were actively engaged, potentially undermining trust in the ADR process. Ultimately, the group valued the interpersonal connections facilitated by face-to-face mediations.

However, complainants may feel differently about the ADR format. For example, in cases that involve harassment, complainants often preferred not to meet in-person because they did not want to be in the same room as the alleged harasser. As an alternative, the ADR professionals preferred conducting ADR through video conferencing rather than telephone or email. Video conferencing offers the complainant the opportunity to be heard and the mediator the opportunity to observe the participants’ body language. As a result, the group felt that virtual

meetings played a positive role in ADR participant satisfaction in some cases, such as harassment cases.

Next, the EEOC asked how ADR was perceived by participants. The group stated that some ADR participants felt like it was a “shakedown by management” or a “waste of time,” where agency attorneys were present to assess whether there was a legitimate case rather than to participate in good faith towards a resolution both parties could accept. One ADR professional said, “Once participants enter the process, reprisal becomes an issue because managers start to look for anything and everything to write up against the employee. People do not want sympathy. They want understanding.”

The group felt that educating participants about ADR early in the process and having the settlement authority present may lead to a resolution more quickly. Still, the ADR process requires some patience. It may take a few sessions to reach a resolution, especially in the more complex cases. The group recommended that mediators follow up ADR with a survey. One ADR professional stressed that when the mediation is run well, even if the parties do not settle, the parties are thankful for the chance to sit down and talk. The better run the mediation, the likelier participants may become advocates for the ADR program.

### **Summary of Findings**

In this report, the EEOC made several findings about the ADR process in FY 2021. The profile data revealed that ADR was offered and accepted far more often in the pre-complaint stage than during the formal complaint stage. During the pre-complaint stage, ADR was offered in 87.8 percent of counselings and accepted in 55.5 percent of them. In contrast, during the formal complaint stage, ADR was offered in 17.0 percent of closures and accepted in 6.4 percent of closures. Furthermore, only about a third of ADR closures in the formal complaint stage led to a resolution (either a settlement or withdrawal). This suggests that ADR was more effective early in the process.

The survey revealed that complainants and responsible management officials (RMOs) often had opposite perceptions of the ADR process. Most complainants felt dissatisfied with the ADR process, saying it was unfair and did not meet expectations. As a result, many complainants reported that their participation in the ADR process had made them consider leaving their agency. In contrast, most RMOs felt the ADR process was fair and met expectations. Few RMOs were considering leaving their agency within the next year.

Lastly, the focus group encouraged all ADR participants to be informed about the process before the first meeting. To reach a resolution more quickly, the group urged all parties and the settlement authority to be present throughout the ADR process. They also stressed that all parties should enter ADR in the spirit of

cooperating towards a mutually agreeable resolution. The group felt that management, more often than not, approached ADR with an adversarial mindset that eroded trust in the process.

## **Recommendations**

Given the above findings, the EEOC recommends that:

1. Agencies should ensure that employees and managers receive annual training on the ADR process to increase awareness and understanding of the process. In addition, employees should be kept informed throughout every step of the ADR process.<sup>13</sup>
2. Mediators should continue the best practice of meeting with complainants and RMOs separately during the pre-complaint stage. In addition, the settlement authority<sup>14</sup> should always be present in the room, in case a resolution is reached.
3. ADR professionals should focus on improving the experience of the ADR process for all parties, not just on reaching a resolution.
4. Agency leadership should show support for ADR by publicizing the agency's ADR policy statement.
5. Agencies should create an agency tool (i.e., post-ADR survey or template) to collect feedback after the mediation process. This feedback can provide insights into the mediator's effectiveness and whether the mediation was perceived as fair. Agencies should address any concerns raised through this feedback.
6. Agencies should review and implement the recommendations listed in the EEOC's FY 2021 ADR report.

## **Conclusion**

Disputes can happen in any workplace. Making all Federal employees aware of ADR can help agencies resolve disputes quicker and less costly than traditional adjudication methods. Ensuring that all parties come to the table with an open, cooperative mindset will contribute to a more effective ADR program.

The EEOC would like to thank the participants of the survey and focus group discussed in this report. The findings discussed in this report show that ADR offers a viable option to prevent and resolve complaints of employment discrimination. The findings and recommendations in this report are intended to provide some insight

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<sup>13</sup> For detailed guidance on providing ADR training, see Section II.C. of Chapter 3 of EEOC Management Directive 110 (<https://www.eeoc.gov/Federal-sector/management-directive/chapter-3-alternative-dispute-resolution-eeo-matters>).

<sup>14</sup> The RMO cannot be the individual with settlement authority.

into the use and effectiveness of ADR in the Federal sector. The information in this report is intended to assist Federal agencies in their efforts to combat discrimination and resolve EEO complaints in an effective manner. The EEOC will continue to offer guidance to Federal agencies on how to strengthen their EEO programs in an effort to become model employers.

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## Appendix A: Glossary

- **Alternative Dispute Resolution:** A variety of alternative approaches (such as mediation and arbitration) to resolving conflict instead of using traditional adjudicatory methods.
- **Complaints:** An EEO dispute during the formal complaint stage of the EEO process.
- **Counselings:** An EEO dispute during the pre-complaint stage of the EEO process.
- **Neutral:** "An individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy. This should be an impartial third party who has no vested interest in the outcome of a dispute."<sup>15</sup>
- **Resolution:** Resolutions include settlements where individuals received monetary and/or non-monetary benefits and matters where the individual withdrew a counseling or a complaint from the EEO process.
- **Settlements:** A counseling or complaint where the individual received monetary and/or non-monetary benefits from the agency to withdraw the matter from the EEO process.
- **Withdrawal:** A counseling or complaint where the individual withdrew the matter from the EEO process without receiving any monetary and/or non-monetary benefits from the agency. In the pre-complaint stage, a withdrawal is also referred to as "No Formal Complaint Filed."<sup>16</sup>

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<sup>15</sup> See Chapter 3 of EEOC Management Directive 110 (<https://www.eeoc.gov/Federal-sector/management-directive/chapter-3-alternative-dispute-resolution-eeo-matters>).

<sup>16</sup> See Section K of the FY 2005 ADR report from the EEOC (Conclusion of ADR Report: ADR in the Federal Sector EEO Process for FY 2005 (<https://www.eeoc.gov/Federal-sector/adr-report-adr-Federal-sector-eeo-process-fy-2005>)).

## **Appendix B: Survey Questions**

The EEOC survey on the ADR process asked 30 questions along two separate paths: one for complainants and another for responsible management officials (RMOs). However, both complainants and RMOs were asked the following 6 questions:

- How was ADR conducted?
- Were your expectations for participating in ADR met?
- To what extent do you agree with this statement: The ADR process was fair?
- Overall, how satisfied were you with the ADR process?
- Are you considering leaving your organization within the next year, and if so, why?
- Did participating in the ADR process influence your decision to consider leaving your organization?

Complainants only were asked:

- Were you familiar with ADR prior to entering into the process?
- Please identify the issue(s) involved in your complaint.
- What was the basis or bases of your complaint addressed during ADR?
- Did anyone from management participate in the ADR Process?
- As a complainant, did you trust that your mediator was a neutral party?
- Were you aware that you could terminate ADR at any point of the process?
- Did you have an attorney or other representative (e.g., union official) present during the ADR process to provide you with support and advice?
- Was your complaint fully resolved during ADR?
- As a complainant, what was the length of time it took to resolve the issue?

RMOs only were asked:

- As the individual named as the RMO, was your participation in ADR voluntary?
- As a RMO or Agency Official, do you have settlement authority?
- Did your agency seek feedback after your mediation?
- EEOC will convene a focus group of RMOs for further discussion on this topic. Would you be willing to be a member of this group?