

Alternative Dispute Resolution:

In the NPRM, the Commission proposed to require all agencies to establish or make available an alternative dispute resolution (ADR) program for the EEO pre-complaint process. In addition, EEOC proposed to require that counselors advise aggrieved persons at the initial counseling session that they may choose between participation in the ADR program offered by the agency and the traditional counseling activities provided for in the current regulation.

The commenters generally supported both proposals, agreeing that providing an ADR mechanism in the pre-complaint stage of the EEO process will resolve more claims earlier in the process. Many of the agency commenters emphasized their need for flexibility in developing their ADR programs. Small agencies, in particular, requested that they have the authority to determine on a case-by-case basis whether to offer ADR to an aggrieved person for his or her claim. Other agencies urged the Commission to ensure that the election provision take into account that ADR should be voluntary for both parties, the aggrieved person and the agency. Commenters also requested that EEOC clarify how the pre-complaint process will operate when ADR is involved and address the responsibilities of the Counselors throughout that process.

The Commission has revised the ADR and counseling provisions in response to the comments. Agencies will be required to establish or make available an ADR program. The ADR program must be available during both the pre-complaint process and the formal complaint process. Counselors will be required to inform individuals about the existence and nature of the agency's ADR program. The Commission encourages agencies to use ADR as a valuable tool in resolving EEO disputes at all stages of the EEO process.

Agencies are free to develop ADR programs that best suit their particular needs. While many agencies have adopted the mediation model, other resolution techniques are acceptable, provided that they conform to the core principles set forth in EEOC's policy statement on ADR, contained in Management Directive 110. The Commission believes that agencies should have flexibility in designing their ADR programs. EEOC expects that, overall, agencies will develop an array of ADR programs, designed to suit their particular circumstances. Agencies with limited funds and resources can use the services, in whole or in part, of another agency, a volunteer organization or other resources to make available an ADR program.

In keeping with the Commission's emphasis on voluntariness as a component of ADR, agencies may decide on a case-by-case basis whether it is appropriate to offer ADR in a given circumstance. EEOC does not anticipate that ADR will be used in connection with every matter brought to a Counselor. For example, some agencies may wish to limit pre-complaint ADR geographically (if extensive travel would be required), or by issue (excluding, for example, all claims alleging discriminatory termination). Some agencies may wish to exclude class allegations from their ADR programs. Agencies may not, however, exclude entire bases of discrimination from ADR programs. For example, it would be inappropriate for an agency to exclude from its ADR program all claims alleging race discrimination. [from an ADR program]

In response to a comment, the Commission has revised the regulatory provision governing the initial counseling session. The Commission has removed from section 1614.105(b)(1) the requirement that Counselors advise individuals both orally and in writing of their rights and responsibilities, revising the section to require only that Counselors provide that information in writing. Counselors are encouraged to discuss the rights and responsibilities involved in the EEO process orally with individuals, but are only required to provide that information to the individuals in writing.

When an agency offers ADR to an individual during the pre-complaint process, the individual may choose to participate in the ADR program at any point in the pre-complaint process. In all cases, the Counselor will conduct an initial counseling session, as currently provided, identifying claims and fully informing individuals about their rights. When ADR is selected, resolution attempts through traditional counseling will be eliminated and the limited inquiry of the traditional counseling will change. Counselors must also inform individuals that if the ADR process does not result in a resolution of the dispute, they will receive a final interview and have the right to file a formal complaint. Management Directive 110 will contain additional guidance on these pre-complaint procedures.

The Commission's intention in requiring an ADR program is that agencies establish informal processes to resolve claims. Thus any activity conducted in connection with an agency ADR program during the EEO process would not be a formal discussion within the meaning of the Civil Service Reform Act. Generally, the agency should have an official at any ADR session with full authority to resolve the dispute. To the extent consultations with other agency officials would be necessary during any

session, the agency is accountable for making sure those consultations can be accommodated.

If the ADR attempt succeeds in resolving the claim, the agency must notify the Counselor that the claim was resolved. If the ADR attempt is unsuccessful, the agency must return the claim to the Counselor to write the counseling report. That report will describe the initial counseling session, frame the issues, and report only that ADR was unsuccessful.

' 1614.102 **Agency program.**

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(b) * * *

(2) Establish or make available an **alternative dispute resolution** program. Such program must be available for both the pre-complaint process and the formal complaint process.

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4. Section 1614.105 is amended by redesignating paragraph (b) as paragraph (b)(1), revising the first sentence of redesignated paragraph (b)(1), adding paragraph (b)(2), revising the first sentence of paragraph (d) and revising paragraph (f) to read as follows:

' 1614.105 **Pre-complaint processing.**

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(b)(2) Counselors shall advise aggrieved persons that, where the agency agrees to offer **ADR** in the particular case, they may choose between participation in the alternative dispute resolution program and the counseling activities provided for in paragraph (c) of this section.

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(d) Unless the aggrieved person agrees to a longer counseling period under paragraph (e) of this section, or the aggrieved person chooses an **alternative dispute resolution** procedure in accordance with paragraph (b)(2) of this section, the Counselor shall conduct the final interview with the aggrieved person within 30 days of the date the aggrieved person contacted the agency's EEO office to request counseling. * * *

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(f) Where the aggrieved person chooses to participate in an **alternative dispute resolution** procedure in accordance with paragraph (b)(2) of this section, the pre-complaint processing period shall be **90 days**. If the claim has not been resolved before the **90th day**, the notice described in paragraph (d) of this section shall be issued.

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