

## EEO JOINT EMPLOYER GUIDANCE

### Interim Guidance Oct. 98

1. Given the relatively recent increase in “contracting out” by the Department of the Army, EEO Officers and Labor Counselors should anticipate receiving increased numbers of complaints or contacts from individuals who are not federal employees, alleging discrimination or reprisal involving the Army personnel with whom they interact. This memorandum is intended to provide guidance in the processing of such complaints. **This guidance applies to complaints brought by independent contractors, volunteers, employees of government contractors, individuals participating in training, work-study or fellowship programs and all other individuals working on Army installations or projects without being on the activity’s payroll or meeting the definition of a civil service employee under 5 U.S.C. 2105(a) or a nonappropriated fund employee described at 2105(c).**

2. The Equal Employment Opportunity Commission has recently issued guidance to its private sector case investigators on the Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice 915.002 (12 /3/97). This Notice can be found after Section 605 of Volume II of the EEOC Compliance Manual (published by CCH or BNA), or on the EEOC Home Page under Enforcement and Litigation at [www.eeoc.gov/publicat.html](http://www.eeoc.gov/publicat.html).

3. EEOC Notice 915.002 (12/3/97) makes clear the EEOC’s position that a contractor and its client can be held jointly and severally liable for discrimination against an individual who qualifies as a “joint employee,” without regard to the method by which the individual is paid. The Notice expresses EEOC’s intent to allocate responsibility for front pay, back pay, compensatory, punitive, liquidated and other damages between and among liable “joint employers” in the manner that maximizes the potential relief to the complainant. Relying upon the District Court case of King v. Dalton, 895 F.Supp 831 (E.D. Va. 1995), EEOC Notice 915.002 asserts that this joint employer theory is applicable to federal agencies, but it does not explain how such allocation would be effected across sector lines. The EEOC Notice acknowledges that a federal agency may be held liable for discrimination only in its capacity as a common law “employer” of the complainant, and not for interference with an individual’s employment opportunities with a third party employer.

**4. All inquiries made to EEO counselors from individuals not Title 5 employees should be referred directly to the EEO Officer. EEO Officers who are contacted by the employee of a government contractor, indicating (s)he wishes to file a complaint against that contractor, should provide the address and phone number for private sector complaints processing at the nearest EEOC Field Office. If the**

**individual indicates (s)he wishes to file a complaint against the Department of the Army, the complaint should be processed initially as any other EEO complaint under AR 690-600 and 29 CFR 1614; an EEO counselor should be promptly assigned. If the EEO Counselor is unable to effect an informal resolution, the Counselor should give the Complainant a Notice of Right to File a Discrimination Complaint**

**5. EEO Officers shall coordinate with their servicing Labor Counselor (who could be, e.g., the Staff Judge Advocate or other military or civilian attorney assigned to perform labor counselor functions) prior to the acceptance of any formal complaint filed by an individual not meeting the “employee” test of 5 U.S.C. 2105(a) or 2105(c). Under the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, the Age Discrimination in Employment Act, 29 U.S.C. 633a, and the Rehabilitation Act of 1973, as amended, 29 U.S.C. 790, the United States has waived sovereign immunity only regarding personnel actions affecting employees or applicants for employment. In all formal complaints filed by individuals who are not Title 5 employees or applicants, Labor Counselors must provide a fact-based analysis and legal opinion on whether the complainant is covered under 42 U.S.C. 2000e-16 or the other discrimination laws. To expedite and aid this analysis, upon the assignment of an EEO Counselor, EEO Officers shall contact the appropriate agency management officials to obtain the information referenced on Attachment 1, Working Relationship Information; this information shall be forwarded to the Labor Counselor with the formal complaint for review.**

6. The Supreme Court has not yet addressed the standards that govern who is an “employee” for the purposes of 42 USC 2000e-16. For its part the EEOC has rejected the use of Title 5 or OPM regulations in defining an “employee” for Title VII purposes; the EEOC has instead adopted the test found in Spirides v. Reinhardt, 613 F. 2d 826 (D.C. Cir. 1979) (independent contractor case) to determine both whether an individual is an employee as opposed to an independent contractor, as well as whether an employer can be held liable as the joint employer of an individual not on its payroll. **Labor Counselors should therefore use the Spirides framework for their analysis, including the factors listed at pages 5-6 of the EEOC Notice.**

7. Improper contracting out should not circumvent civil service employment laws, including the rules requiring competitive appointment. If the civil service rules are followed, ordinarily independent contractors and employees on a government contractor’s payroll will not obtain status as Department of the Army employees even under the EEOC’s analysis. See, e.g., Mares v. March, 777 F. 2d 1066 (5<sup>th</sup> Cir. 1985), King v. Dalton, 895 F. Supp. 831 (E.D. Va. 1995), Watson v. Veterans Administration, EEOC OFO No. 01851413 (9/24/86)(psychological association and clinical psychologist); Powell v. Department of the Army, EEOC OFO No 05930076, 01923000 (8/2/93)(family care

provider); Grosselfinger v. Agency for International Development, EEOC OFO No 01921949 (5/27/92); Wenli Ma v. Department of Health and Human Services, EEOC OFO No 01962390 (5/29/98)(research fellows); **Unless the Labor Counselor determines that the complainant is an “employee” or “applicant” within the meaning of 42 USC 2000e-16, the complaint should be dismissed on the grounds that it fails to state a claim, as well as any other applicable grounds.**

8. Whenever a formal complaint filed by an individual not meeting the Title 5 definition of a federal employee or applicant is dismissed on jurisdiction, timeliness or any other grounds, **the Notice of Dismissal should include notice of appeal rights to the EEOC Office of Federal Operations.**

9. Since the status of a complainant as an employee is a jurisdictional issue, **Labor Counselors may raise the issue at any point in the processing of an EEO complaint and should preserve the issue in all phases of litigation.**

10. EEOC Notice 915.002 advises EEOC investigators handling private sector complaints (e.g., against the government contractors) to contact the EEO Office if the complainant also files a federal sector complaint against the agency. The Notice encourages the investigator to coordinate the private and federal sector investigations with the EEO Office, but acknowledges at page 23, footnote 36, that the EEO Office is under no obligation to do so. **If contacted by an EEOC investigator, the EEO Officer should refer the investigator to the Labor Counselor. The EEO Officer will serve as the point of contact in responding to document requests or arranging interviews with management officials. Coordination with the EEOC’s private sector investigation is encouraged if and when the EEO Officer accepts the formal complaint. However no interviews or document requests by the EEOC investigator should be honored without the prior concurrence of the Labor Counselor. Although not fully applicable, general guidance regarding such requests may be found in Chapter 7, AR 27-40, Litigation, concerning matters in which the United States has an interest.** If the complainant has standing as an “employee” or “applicant for employment” and the Army issues a final decision that discrimination for which the Army is liable has occurred, the Army must fashion a remedy to provide full relief to the complainant. **Labor counselors shall work with contract attorneys to determine what contractual rights may be effected.** If there is the potential to share liability with the complaint’s employer (for example, if the contractor participated to any extent in, or condoned, the discrimination), **the Labor Counselor may wish to enter into settlement discussions with both the complainant and the government contractor (or their representatives, if applicable).** No settlement agreement should contain an acknowledgment or admission that an individual who does not qualify as a Title 5 employee is an “employee” for purposes of title VII or any other law prohibiting discrimination.

**11. Labor Counselors and EEO Officers shall advise their command to take prompt investigative (and, where appropriate, corrective) action if discrimination against any individual is alleged to be occurring on the installation or in a contractor's assignment practices. If there is reason to believe that a government contractor is engaging in discriminatory actions against its own or federal employees, the command should take appropriate action including the exercise of any contractual right it might have to resist it.** Note that Executive Orders 11246, September 24, 1965, and 11141, February 12, 1964 and the Federal Acquisition Regulations, Part 22.810, require most government contracts to include provisions prohibiting discrimination by contractors. The FAR provides guidance to contracting officers in the event of breach at 22.808 and 22.902, to include referral of complaints to the Department of Labor, Office of Federal Contract Compliance Programs.

## **ATTACHMENT 1**

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#### **Working Relationship Information**

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- 1) Does a contract describing the working relationship between the Complainant and the Army exist? If so, submit a copy.
- 2) Are you the Contracting Officer's Representative or Army official responsible for the project the Complainant is working on? Please provide your name, title, and phone number and the same information for any other key players.
- 3) How is the Complainant paid and who determines his/her rate of pay?
- 4) What type of work does the Complainant do for the Army?
- 5) Is there an end product you expect at the completion of Complainant's contract? If so, what is it and when it is due?
- 6) Who assigns work to the Complainant?
- 7) Does the Complainant report to an office provided by the Army?
- 8) What equipment, materials and supplies does the Complainant need to do his/her work for the Army and who provides them?
- 9) Does the Complainant do work for anyone else besides the Army?
- 10) If a government contractor employs the Complainant, does that contractor provide an on-site supervisor?
- 11) Does the Army/DFAS withhold social security taxes or other taxes from the Complainant's compensation?
- 12) Does the Army provide medical insurance for temporary or long-term disabilities?
- 13) Does the Army reimburse the Complainant for any expenses? If so, please describe.
- 14) How were the Complainant's working hours established?
- 15) Who determines whether the relationship between the Complainant and the Army will continue and on what basis is that determination made?
- 16) Is a performance evaluation prepared on the Complainant? If so, who prepares it and what input do Army officials have in to it?
- 17) To whom does the Complainant submit leave requests, and who approves those requests?
- 18) What are the details of any documents or conversations showing that the Complainant was not being hired as an employee of the Army?