



OFFICE OF  
**INSPECTOR  
GENERAL**  
UNITED STATES POSTAL SERVICE

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**Postal Service Challenges in the  
Equal Employment Opportunity  
Process  
Management Advisory Report**

September 21, 2012

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**Report Number HR-MA-12-003**



## **BACKGROUND:**

Various statutes, regulations, and executive orders provide the framework of the Equal Employment Opportunity (EEO) policy that prohibits unlawful discrimination. The U.S. Postal Service's EEO Program is consistent with the federal government's efforts to establish a bias-free workplace. The Equal Employment Opportunity Commission (EEOC) investigates discrimination complaints based on an individual's race, color, national origin, religion, sex, age, disability, and retaliation for reporting and/or opposing a discriminatory practice. Our objective was to review EEOC rules and regulations for processing class action complaints and how these rules apply to the Postal Service and private companies. This report responds to a request from the Postal Service's general counsel and executive vice president.

## **WHAT THE OIG FOUND:**

The EEOC's process for certifying class action complaints by federal employees is less rigorous than the legal process governing class actions filed in federal court under the Federal Rules of Civil Procedure (FRCP) by employees in the private sector. Specifically, federal employees are required to meet fewer requirements for a case to be certified as a class action by the EEOC. Most importantly, federal agencies can only appeal the EEOC's class certification

decision to the Office of Federal Operations, which is an office within the EEOC. If the Office of Federal Operations upholds the EEOC's decision, the agency has exhausted its appeal rights regarding certification. Moreover, an independent review by the court system of critical class certification decisions is not an option for the Postal Service. As a result, the Postal Service can be required to expend significant resources litigating a class action complaint that may not meet requirements for class certification in federal court.

We also attempted to review time employees spent on EEO matters and found the Postal Service does not segregate EEO case activity time. As a result, management is not able to determine how much official time employees spend on EEO-related activities.

## **WHAT THE OIG RECOMMENDED:**

We recommended that management pursue changes to the EEOC's class certification process consistent with the process and appeals procedures set forth in the FRCP, as applied by federal courts. We also recommended management implement measures to track official time spent on EEO activities.

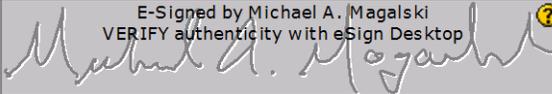
[\*Link to review the entire report\*](#)



September 21, 2012

**MEMORANDUM FOR:** MARY ANNE GIBBONS  
GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT

DOUG TULINO  
VICE PRESIDENT, LABOR RELATIONS

E-Signed by Michael A. Magalski  
VERIFY authenticity with eSign Desktop   


**FROM:** Michael A. Magalski  
Deputy Assistant Inspector General  
for Support Operations

**SUBJECT:** Management Advisory Report – Postal Service  
Challenges in the Equal Employment Opportunity Process  
(Report Number HR-MA-12-003)

This report presents the results of our review of U.S. Postal Service Challenges in the Equal Employment Opportunity Process (Project Number 11YG047HR000).

We appreciate the cooperation and courtesies provided by your staff. If you have any questions or need additional information, please contact Andrea Deadwyler, director, Human Resources and Security, or me at 703-248-2100.

Attachments

cc: Patrick R. Donahoe  
Anthony J. Vegliante  
Thomas Marshall  
Eloise Lance  
Corporate Audit and Response Management

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## Introduction

This report presents the results of our review of U.S. Postal Service challenges in the Equal Employment Opportunity (EEO) Process (Project Number 11YG047HR000) and responds to a request from the general counsel and executive vice president. Our objective was to review Equal Employment Opportunity Commission (EEOC) rules and regulations for processing class action complaints and how these rules apply to the Postal Service and private companies. This review addresses operational risk. See [Appendix A](#) for additional information about this review.

The U.S. Post Office Department was organized on July 26, 1775, by decree of the Second Continental Congress. In 1971, the department was reorganized under the Postal Reorganization Act<sup>1</sup> as a quasi-independent agency of the federal government and acquired its present name, the U.S. Postal Service. As an independent agency of the executive branch, it is self-sustained by covering its operating costs with revenues generated through the sales of postage and postal related products and services. The Postal Service receives no appropriations for purposes other than revenue forgone on free and reduced rate mail.<sup>2</sup>

Like other employers, the Postal Service must comply with federal laws, such as those that protect employees from discrimination in the work place. While it is required to operate like a business, the Postal Service is not governed by the same EEOC regulations and procedures that apply to private sector employers; instead, in this regard, it is treated like a federal entity. For example, under EEOC regulations, the Postal Service can appeal EEOC class action certification decisions only at one level whereas, in the private sector, such decisions may be appealed at two levels in federal court.

In fiscal year (FY) 2011, Postal Service employees filed 5,117 complaints and 2,719 of those complaints were accepted by the Postal Service's National EEO Investigative Services Office in Tampa, FL. The Postal Service has 183 employees responsible for processing EEO complaints and ensuring compliance with federal sector EEOC regulations. The staff consists of EEO managers, specialists, analysts, and administrative support personnel located nationwide. The Postal Service also has about 986 individuals under contract who assist in processing complaints.<sup>3</sup> In FYs 2010 and 2011, the Postal Service spent about \$20 million for investigations, final agency decisions, mediation, and operation of its EEO office in Tampa, FL.

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<sup>1</sup> P.L. 91-375.

<sup>2</sup> The Postal Service receives annual appropriations for revenue forgone in providing (1) free and reduced rate mail for the blind, (2) people with disabilities, and (3) overseas voting material for U.S. elections.

<sup>3</sup> According to Postal Service officials, they contract with 834 mediators, 120 investigators, and 32 contractors who prepare final agency decisions. Not all contractors are used throughout a given year and some handle multiple cases. For example, mediators were used on 298 occasions in FY 2011.

## Conclusion

The EEOC process for certifying class action complaints by federal employees has fewer requirements than are required under the Federal Rules of Civil Procedure (FRCP) that is applied by the federal courts in private sector cases. Moreover, federal agencies, including the Postal Service, have limited rights to appeal EEOC class certification decisions. As such, the Postal Service can be required to expend significant resources litigating a class action complaint that, under the FRCP, may not meet the requirements for class certification. The Postal Service is currently involved in two very large class action suits<sup>4</sup> filed with the EEOC. The differences in the EEOC's class action certification process can pose challenges to the Postal Service, especially in the current economic climate, as it struggles to provide affordable postal services and comply with EEOC rules and regulations that can have a significant financial impact on the agency.

Additionally, we determined that time complainants and their representatives spend on EEO matters is not segregated or tracked. Specifically, management has not established a timekeeping code specific to EEO activity. Therefore, the audit team could not determine how much official time employees spend on EEO related activities.

## Differences in Class Action Certifications and Appeals

Rules and regulations governing class complaints differ between the private and federal sectors. For instance, the EEOC has a separate process for certifying class action complaints filed by federal employees.<sup>5</sup> There are no EEOC regulations specifically addressing class complaints filed by private sector employees. The certification process for class action suits brought against private sector employers is governed by Rule 23 of the FRCP because these suits are litigated in federal court.<sup>6</sup>

Both Rule 23<sup>7</sup> and the EEOC's class action regulations (§1614.204) list requirements that must be met in order for a complaint to proceed as a class action. The four requirements — applicable to both federal and private sector class complaints — are numerosity, commonality, typicality, and adequacy of representation. However, for private sector class actions filed in federal courts, plaintiffs must satisfy one of three additional requirements before a class will be certified. The class must show that either:

- Individual adjudication of the class members' claims would prejudice the opposing party (employer) or other class members.

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<sup>4</sup> Class action suits provide a mechanism for an entire group of employees who share the same protected characteristic (race, color, sex, age, religion, national origin, or disability status) to challenge an agency policy or practice that allegedly discriminates against the whole group.

<sup>5</sup> See 29 C.F.R. §1614.204.

<sup>6</sup> The class certification requirements contained in the FRCP apply to all federal court class actions, regardless of whether the parties to the action are from the public or private sector. Therefore, if a Postal Service (or other public sector) employee brings a class action complaint in federal court, Rule 23 of the FRCP would apply.

<sup>7</sup> FED. R. CIV. PRO. 23(a) & (b).

- Injunctive or declaratory (for example, non-monetary) relief sought by class agent is proper on a class-wide basis.
- Common questions of fact among class members predominate over any questions affecting only individual members, and class action is superior to other available methods for fair and efficient adjudication of the claim.<sup>8</sup>

See [Appendix B](#) for a description of these requirements.

While EEOC regulations mandate that class complaints must generally satisfy the same requirements found in Rule 23(a), the EEOC does not require a class to satisfy the Rule 23(b) requirement to be certified by an administrative judge.<sup>9</sup> Additionally, Rule 23<sup>10</sup> outlines who can be included and excluded and how the class members are to be notified about the nature of the action, definition of the class certified, and class issues or defenses. For private sector cases presented in federal court, if the case involves individualized money damages,<sup>11</sup> members must be notified of the class action<sup>12</sup> and be permitted to opt-out of the class.<sup>13</sup> EEOC regulations, on the other hand, stipulate that once a class is certified all potential complainants are automatically included and notified, and members are not permitted to opt-out of the class.<sup>14</sup>

The additional requirements in Rule 23(b) add rigor to a class certification process, whose end result can have serious financial implications for employers like the Postal Service. For example, the Postal Service has two ongoing EEO complaints involving alleged violations of the Rehabilitation Act, which were certified under EEOC regulations as class actions. One case has 36,000 class members and the other 130,000. In each case, the EEOC determined that class treatment of the complaints was more appropriate than having employees file separate individual actions. The Postal Service was then required to provide the EEOC with the list of individuals that should be included in the class. Under this obligation, the Postal Service has to do all the research at its own expense to determine class membership and notify all potential class members about the nature of the action, definition of the class certified, and class issues or defenses. Moreover, in one case, the EEOC ordered the Postal Service to do investigative work to determine the individual damage claims of the class members before making any determination on liability.

The Postal Service appealed the EEOC's class certification decisions on the two cases in question, stating the necessity of separate, individualized fact-driven determinations for class-action treatment of disability discrimination claims. It also appealed the

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<sup>8</sup> FED. R. CIV. PRO. 23(b)(1)-(3).

<sup>9</sup> 29 C.F.R. § 1614.204(d)(2).

<sup>10</sup> Fed. R. Civ. Pro. 23(c).

<sup>11</sup> Classes primarily seeking money damages are typically certified under Rule 23(b)(3).

<sup>12</sup> A court has the discretion to order notice to putative members of Rule 23(b)(1) and (2) classes; however, notice is not mandatory.

<sup>13</sup> FED. R. CIV. PRO. 23(b)(3) & 23(c)(2)(B). The purpose of the mandatory notice and opt-out requirements is to ensure that all class members have the choice to pursue their claim individually and not "tie their fates to that of the class representative." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. --- 131 S. Ct. 2541, 2559 (2011).

<sup>14</sup> 29 C.F.R. §1614.204(e).

EEOC's order to investigate damage claims before a finding of discrimination has been made. However, under EEOC procedures, both appeals were reviewed and decided upon by EEOC officials. Specifically, if an agency decides not to accept an administrative judge's class certification decision, it can only appeal the decision to the Office of Federal Operations, an office within the EEOC.<sup>15</sup> If the Office of Federal Operations upholds the administrative judge's decision, the agency has exhausted its appeal rights (regarding certification) and cannot appeal it any further. However, if the class complaint is dismissed by the administrative judge, the class agent may appeal the dismissal to the Office of Federal Operations, or file a new civil action in federal court (which can then be further appealed in the federal court system).<sup>16</sup>

In federal court, a judge's decision to grant or deny class certification on a private sector complaint may be appealed to the appropriate federal court of appeals in accordance with Rule 23.<sup>17</sup> However, the appellate court has sole discretion over whether to permit an appeal from either party and the appeal must be filed within 14 days of the certification order. Additionally, the court of appeals' decision may be appealed to the U.S. Supreme Court.<sup>18</sup> Thus, class certification orders may be appealed at two levels in federal court, whereas certification orders in EEOC proceedings may only be appealed at one level to an office within the EEOC.

The Postal Service lost its appeals to the Office of Federal Operations in the two referenced class actions, which if subject to the additional requirements of Rule 23 might never have been certified as class actions. Having the cases certified as class actions increases the Postal Service's costs in defending against both complaints because of the large number of employees involved, especially when considering the purported individualized nature of the class members' damages. Moreover, seeking changes to EEOC regulations, such as the right to challenge class certification decisions in federal court, would be challenging for the Postal Service because the EEOC is authorized by Congress to establish its own rules, regulations, orders, and instructions in order to enforce anti-discrimination laws.<sup>19</sup> Thus, congressional action would be necessary to effect changes to existing EEOC authority.

### **Employee Time Spent on Equal Employment Opportunity Matters**

The Postal Service does not track the time employees spend on EEO-related activities. Time spent on EEO activity is captured in the payroll system under pay code 065. However, pay code 065 is designated for meeting time; it does not specify EEO or grievance activity time. Without specific tracking of employee EEO activity, management is unable to determine how much time employees spend on EEO-related

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<sup>15</sup> 29 C.F.R. §1614.204(d)(7). This is the same process the agency would follow when appealing an EEOC decision on an individually filed complaint. See *id.* §1614.110.

<sup>16</sup> *Id.* §1614.204(d)(7).

<sup>17</sup> Fed. R. Civ. Pro. 23(f)

<sup>18</sup> This is what happened in the Wal-Mart case. See *Wal-Mart* at 2541 (noting the case was appealed from the District Court for the Northern District of California to the U.S. Court of Appeals for the Ninth Circuit, and then finally to the U.S. Supreme Court).

<sup>19</sup> See 42 U.S.C. §2000e-16(b).

activities; if supervisors and managers are adequately monitoring employee's time in this regard; or the related costs of EEO activity for the Postal Service. Postal Service officials stated that time spent on EEO activity is not specifically tracked and that abuse of official time is not as much of a problem as it had been in the past because supervisors and managers are doing a better job of monitoring official time. However, we were not able to verify whether that is the case.

Federal sector EEOC regulations provide that both the complainants and their representatives, if they are employees of the agency where the complaint arose and was filed, are entitled to a reasonable amount of official time to present the complaint and to respond to agency requests for information.<sup>20</sup> EEOC guidance further defines a reasonable amount of official time generally as hours rather than days, weeks, or months.<sup>21</sup>

While recognizing that what is considered a reasonable amount of official time may vary depending on the circumstances of the complaint, the EEOC considers it reasonable for agencies to expect their employees to spend most of their time doing the work for which they are employed. Postal Service policy requires that employees obtain approval from their supervisors and managers to engage in reasonable EEO activity on the clock.

## Recommendations

We recommend the general counsel and executive vice president:

1. Develop an action plan to pursue changes to the Equal Employment Opportunity Commission's class certification process consistent with the process and appeal procedures set forth in the Federal Rules of Civil Procedure, as applied by the federal courts.

We recommend the vice president, Labor Relations:

2. Implement procedures to track official time spent specifically on Equal Employment Opportunity activities to ensure employees are not spending excessive time on these activities in lieu of performing their assigned duties.

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<sup>20</sup> 29 C.F.R. §1614.605. Private sector employees must pursue EEO activity on their personal time.

<sup>21</sup> See *Management Directive* 110, Chapter. 6, VIII(C).

## Management's Comments

Concerning recommendation 1, management concurred that EEOC class action rules should be changed. Management disagreed, however, that such changes may be effected through the general counsel's development of an action plan.

Management agreed with recommendation 2, stating that it has already implemented the standard rules to track official time spent by employees on Equal Employment Opportunity activities. Management also attached a document to their response that provided details. Specifically, management provided a memorandum to Human Resources and Labor Relations managers, dated August 28, 2012, which provides guidance on administering EEO official time. See [Appendix C](#) for management's comments in their entirety.

## Evaluation of Management's Comments

The U.S. Postal Service Office of Inspector General (OIG) considers management's comments regarding recommendation 1 non-responsive. While management agreed that changes to the EEOC's class action rules are necessary, management disagreed on the need to develop an action plan to effect such changes. Further, management did not provide an alternative means of pursuing changes to EEOC class action rules, especially given the financial impact these rules can have on the Postal Service, as acknowledged by management throughout this review. We do not plan to pursue this through the formal audit resolution process; however, we maintain our position that management should develop a plan of action to address the issue identified in the report. The action plan is a necessary first step to effect changes to the EEOC class action rules. Such a plan should identify areas in and out of management's control along with projected milestones.

The OIG considers management's comments regarding recommendations 2 responsive to the report.

The OIG considers both of the recommendations significant and they will be closed in the Postal Service's follow-up tracking system upon issuance of this report. Although management disagreed with recommendation 1, since we do not plan to pursue the issue through the audit resolution process, this recommendation will be closed, not implemented. Regarding recommendation 2, management provided adequate support that this recommendation has been implemented and no further documentation is required.

## Appendix A: Additional Information

### Background

The EEOC is a separate agency that was created by Title VII of the Civil Rights Act of 1964 (Title VII), as amended, to enforce federal antidiscrimination laws.<sup>22</sup> The EEOC investigates discrimination complaints based on an individual's race, color, national origin, religion, sex, age, disability, and retaliation for reporting and/or opposing a discriminatory practice. It is empowered to file discrimination suits against private employers on behalf of alleged victims and to adjudicate claims of discrimination brought against federal agencies.

The EEOC derives its authority to enforce anti-discrimination laws in both the public and private sectors from a variety of statutes, including Title VII, the Rehabilitation Act of 1973, as amended (which governs the public sector),<sup>23</sup> the Americans with Disabilities Act of 1990, as amended (which governs the private sector),<sup>24</sup> the Age Discrimination in Employment Act,<sup>25</sup> and the Equal Pay Act.<sup>26</sup>

The EEOC provides leadership and guidance to federal agencies on all aspects of the federal government's EEO program. It also ensures federal agency and department compliance with EEOC regulations, provides technical assistance to federal agencies concerning EEO complaint adjudication, provides guidance and assistance to administrative judges who conduct hearings on EEO complaints, and adjudicates appeals from administrative decisions made by federal agencies on EEO complaints.

In the private sector, the EEOC primarily serves in the role of investigator and mediator. Its mission is to seek a resolution between the parties outside the courtroom by facilitating voluntary settlement or conciliation agreements between the complainant and the employer. The EEOC's enforcement authority is limited to the investigation of 'charges' of discrimination filed by employees and, based on its own investigation, determining whether there is 'reasonable cause' to believe that unlawful discrimination occurred.

### History of Equal Employment Opportunity Commission's Class Action Regulations

In 1977, the EEOC added a class complaints section to its regulations and stated that ". . . definitions, scope, and criteria for rejection of class complaints [contained within were designed] . . . to conform as closely as possible to Rule 23, Federal Rules of Civil Procedure."<sup>27</sup> In 1992, in response to pressure from Congress to reform the way federal agencies processed EEOC complaints, the EEOC revised its regulations and removed

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<sup>22</sup> 42 U.S.C. §2000 *et seq.*

<sup>23</sup> 29 U.S.C. §791 *et seq.*

<sup>24</sup> 42 U.S.C. §12101 *et seq.*

<sup>25</sup> 29 U.S.C. §621 *et seq.*

<sup>26</sup> *Id.* § 206(d).

<sup>27</sup> 42 Fed. Reg. 11807 (EEOC, March 1, 1977).

a provision that allowed class members to opt out of the class complaint.<sup>28</sup> Under the original EEOC class complaint regulations, members were given the right to opt out of a class complaint and avoid being bound by the administrative judge's decision regarding the complaint.<sup>29</sup>

In explaining this revision, the EEOC stated that most employment discrimination class action suits were brought under Rule 23(b)(2), meaning the class alleged that the defendant-employer “. . . acted or refused to act on grounds applicable to the class, thereby making appropriate final relief to the class as a whole.”<sup>30</sup> The EEOC found that allowing class members to opt out of a complaint was “. . . inconsistent with the prerequisite of a (b)(2) class that relief is appropriate for the class as a whole.”<sup>31</sup> The EEOC added that the opt-out provision increased the likelihood that agencies would be forced to repeatedly litigate class claims in separate individual suits, “. . . a consequence the class action procedure was designed to prevent.”<sup>32</sup>

### Objective, Scope, and Methodology

Our objective was to review EEOC rules and regulations for processing class action complaints and how these rules apply to the Postal Service and private companies. Our scope covered 5 years of historical data from 2006 through 2010, regarding various metrics of EEO performance. It also covered current processes related to EEO compliance and reporting consistent with federal law and Postal Service policy. To accomplish our objective, we:

- Consulted with OIG and Postal Service Offices of General Counsel regarding the EEO complaint process and class action filings as they relate to the Postal Service, other federal agencies, and the private sector.
- Compared and documented the differences in the processes used by the Postal Service and the private sector.
- Reviewed existing and recently closed class action EEO complaints made against the Postal Service.
- Conducted interviews with Postal Service Headquarters officials to gain a better understanding of concerns regarding EEO issues.
- Obtained and analyzed data from Postal Service officials on costs related to investigations, final agency decisions, mediation, and the operation of the EEO office in Tampa, FL.

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<sup>28</sup> 57 Fed. Reg. 12634-01 (EEOC April 10, 1992).

<sup>29</sup> *Id.* at Major Features §G.

<sup>30</sup> *Id.* (quoting FED. R. CIV. PRO. 23(b)(2)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (citing *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981)). The EEOC also noted that allowing members to opt out of a class complaint rendered “the class action mechanism less effective.” *Id.*

- Assessed the availability of time and attendance records for time spent on EEO issues.

We conducted this review from September 2011 through September 2012 in accordance with the Council of the Inspectors General on Integrity and Efficiency, *Quality Standards for Inspection and Evaluation*. We discussed our observations and conclusions with management on August 16, 2012, and included their comments where appropriate.

We assessed the reliability of the data reported to the EEOC by interviewing Postal Service officials knowledgeable about the EEO process and agency reporting requirements. Furthermore, agencies reporting to the EEOC have to certify that data submitted are accurate and complete. Therefore, we determined the data were sufficiently reliable for the purposes of this report.

### **Prior Audit Coverage**

The OIG did not identify any prior audits or reviews related to the objective of this audit.

## Appendix B: Class Action Certification Requirements

Federal Court Requirements	EEOC Requirements
<p style="text-align: center;"><b>Rule 23(a)</b></p> <p>Numerosity – the class must be so numerous that a consolidated complaint by all class members is impractical.</p>	<p>Numerosity – the class must be so numerous that a consolidated complaint by all class members is impractical.</p>
<p>Commonality – there are questions of fact common to the class.</p>	<p>Commonality – there are questions of fact common to the class.</p>
<p>Typicality – the claims of the class agent(s) are typical of the claims of the entire class.</p>	<p>Typicality – the claims of the class agent(s) are typical of the claims of the entire class.</p>
<p>Adequacy of representation – the class agent will fairly and adequately protect the interests of the class.</p>	<p>Adequacy of representation – the class agent will fairly and adequately protect the interests of the class.</p>
<p style="text-align: center;"><b>Rules 23(b)<sup>33</sup></b></p> <p>Individual adjudication of the class members’ claims would prejudice the opposing party (employer) or other class members; or</p>	<p style="text-align: center;">N/A</p>
<p>Injunctive or declaratory (for example, non-monetary) relief sought by class agent is proper on a class-wide basis; or</p>	<p style="text-align: center;">N/A</p>
<p>Common questions of fact or law among class members predominate over any questions affecting only individual members and class action is superior to other available methods for fair and efficient adjudication of the claim.</p>	<p style="text-align: center;">N/A</p>

Source: EEOC’s class action regulations (§1614.204) and Federal Rules of Civil Procedure 23(a) and (b).

<sup>33</sup> Unlike the EEOC’s regulations, before a class can be certified in federal court it must satisfy the four requirements outlined in Rule 23(a), plus one of the three additional requirements in Rule 23(b).

## Appendix C: Management's Comments



September 14, 2012

LUCINE M. WILLIS

SUBJECT: Draft Management Advisory Report – Postal Service Challenges in  
the Equal Employment Opportunity Process  
(Report No. HR-MA-12 –DRAFT)

Thank you for the opportunity to respond to your August 30 draft audit report on Challenges in the Equal Employment Opportunity Process. Below is our response to each recommendation in the report.

With regard to the first recommendation, management concurs that EEOC class action rules should be changed. However, management disagrees that this change may be effected through the General Counsel's formulation of an action plan. Management concurs in the second recommendation and has already implemented the standard rules recommended by the report.

The audit report and management's response do not contain information that may be exempt from disclosure under the Freedom of Information Act (FOIA).

If you have any questions regarding our response to the first recommendation, please contact Eric Scharf, Managing Counsel, Employment and Labor Law, at 202-268-8540. If you have questions regarding our response to the second recommendation, please contact Eloise Lance, Manager EEO Compliance and Appeals, at 202-268-3820.

  
Mary Anne Gibbons

  
Doug A. Tulino

cc: Eloise Lance  
Eric Scharf  
Sally Haring

Attachment

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WASHINGTON DC 20260  
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NATIONAL EEO COMPLIANCE & APPEALS PROGRAMS



August 28, 2012

MANAGERS, HUMAN RESOURCES (AREA/DISTRICT)  
MANAGERS, LABOR RELATIONS (AREA/DISTRICT)

SUBJECT: Administering EEO Official Time

Title 29, Code of Federal Regulations (CFR) Part 1614, Section 1614.605, provides that complainants are entitled to a representative of their choice during pre-complaint counseling and at all stages of the complaint process.

Therefore, a policy has been developed to provide a consistent method in administering Equal Employment Opportunity (EEO) Official Time. This is to ensure that employment discrimination complaints are processed fairly, promptly, and in strict accordance with 29 C.F.R. Part 1614 and the EEO Management Directive 110: Complaint Processing Manual.

The policy outlines the different stages of the process and management's responsibility to respond to requests for official EEO time. Each request will be processed using the newly created PS Form 1110, Request for Official EEO Time for EEO Processing. This form needs to be completed and signed by the requestor and the management official. The management official will select one of the four (4) established official EEO codes to track time spent in processing EEO complaints.

The supervisor/manager will be responsible for reviewing the policy prior to approval of any request for EEO official time for the complainant or his/her representative. If consultation is necessary regarding reasonable amount of official time, the field EEO staff or the appropriate Field Law Office of the Law Department should be contacted.

Attached, you will find a copy of the policy for Administering EEO Official Time and the PS Form 1110, Request for Official EEO Time for EEO Processing. If you have any questions, please contact me at (202) 268-3820 or Tracy Wattree-Bond, Manager EEO Programs at (202) 268-4464.

Sincerely,

A handwritten signature in cursive script that reads "Eloise Lance".

Eloise Lance  
Manager, National EEO Compliance and Appeals

cc: William Caldwell, Manager, National EEO Services  
Eric Scharf, Managing Counsel Employee & Labor Law  
Andrea Deadwyler, OIG

Attachments

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## ADMINISTERING EEO OFFICIAL TIME

### I. BACKGROUND

Regulations of the Equal Employment Opportunity Commission (EEOC) entitle employees and their representatives to prepare and present EEO complaints and requests for pre-complaint counseling while in a pay status with certain limitations. The entitlement is referred to as "official time" and supervisors and managers must be aware of the proper way to administer this entitlement to adhere to the EEOC's regulations while, at the same time, not unduly disrupting their operations or wasting work hours. This policy provides guidance on how to determine when and to what extent official time may be granted to complainants, their representatives, and witnesses.

### II. REGULATIONS

Title 29, Code of Federal Regulations, §1614.605 provides, in pertinent part:

- (a) At any stage in the processing of a complaint, including the counseling stage under §1614.105, the complainant shall have the right to be accompanied by, represented, and advised by a representative of complainant's choice.
- (b) If the complainant is an employee of the agency, he or she shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. If the complainant is an employee of the agency and designates another employee of the agency as his or her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint and respond to agency and EEOC requests for information. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. The complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, ..., or hearing on the complaint.
- \* \* \* \* \*
- (e) The complainant shall at all times be responsible for proceeding with the complaint whether or not he or she has designated a representative.
- (f) Witnesses who are Federal employees, regardless of their tour of duty and regardless of whether they are employed by the respondent agency or some other Federal agency, shall be in a duty status when

their presence is authorized or required by Commission or agency officials in connection with a complaint.

The EEOC's official time regulations are further explained in the Commission's Management Directive 110, *Federal Sector Complaint Processing Manual*. This policy will identify helpful references to this EEOC guidance.

### III. EXCEPTIONS

**Merit Systems Protection Board** - This policy does not apply to appellants, representatives, or witnesses in proceedings before the Merit Systems Protection Board (MSPB). Seek guidance from the appropriate Field Law Office concerning the circumstances under which appellants, representatives, and witnesses participate in and are compensated in connection with MSPB proceedings.

**United States District Court** - This policy also does not apply to proceedings in connection with civil actions filed in United States District Courts, including civil actions raising employment discrimination claims. "Official time" under the EEOC's regulations does not extend to District Court litigation which is covered by the Federal Rules of Civil Procedure and local rules promulgated by the courts. Refer to Part 516 of the *Employee and Labor Relations Manual* and seek guidance from the appropriate Field Law Office concerning how to treat plaintiffs and witnesses involved in District Court litigation.

### IV. DUTY STATUS

A. **DEFINITION.** The EEOC defines "duty status" (or "otherwise on duty") as "...the complainant's or representative's normal work hours." See Management Directive 110, Chapter 6, Section VIII.D. This means that a complainant has no right to official time if he or she wants to prepare an EEO complaint or meet with a representative outside his or her regular schedule since he or she would not be in a "duty status." Also, a representative has no right to paid official time to meet with a complainant who has a different schedule than the representative since the representative would not be "otherwise on duty" at the same time as the complainant.

Note: Representatives who are current employees may be entitled to official time to represent former employees who have challenged a matter which arose during their former employment. However, representatives who are current employees are not entitled to official time to represent applicants for employment or employees of other government agencies.

#### B. CHANGES OF SCHEDULE

1. **PREPARATION TIME.** EEOC regulations make it clear that, "The agency is not obligated to change work schedules, incur overtime wages, or pay

travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. See 29 C.F.R. §1614.605(b). The **complainant** is entitled to official time to prepare the complaint, prepare his/her affidavit, and respond to agency discovery, prepare for a hearing, and process an appeal. If the complainant's **representative** is also otherwise in a duty status, he or she is entitled to official time to assist in those tasks. The complainant's representative is not entitled to a change of schedule to assist the complainant in preparation activities. See 29 C.F.R. §1614.605(b).

2. **MEETINGS.** EEOC regulations state, "[t]he complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation ... or hearing on the complaint." See 29 C.F.R. §1614.605(b). Therefore, necessary meetings called by management or an EEOC Administrative Judge, REDRESS mediations, EEOC pre-hearing conferences, and EEOC hearings should, to the extent possible, be scheduled to coincide with the complainant's schedule. Such meetings do not include the preparation activities between the complainant and his or her representative discussed in B.1 above.

When a necessary meeting called by management or an EEOC Administrative Judge, a REDRESS mediation, an EEOC pre-hearing conference, or an EEOC hearing do not coincide with the complainant's or the representative's work schedule, to avoid having to pay out-of-schedule premium, management must offer them the opportunity to request a change of their schedules for their own convenience. The Commission's complaint processing guidance implies that agencies must pay premium wages only where it is unavoidable as in the case of a complainant or representative who has already worked a full work schedule and must attend a necessary meeting or hearing which happens to extend beyond their regular schedule. See Management Directive 110, Chapter 6, Section VIII.C.2. If the complainant or representative refuses to cooperate and request a change of schedule for his/her own convenience, the complainant must attend the meeting or hearing on his or her own time; *i.e.* will not be on official time.

C. **OVERTIME.** Overtime will only be appropriate where: 1) a complainant and/or representative are authorized or required to attend a meeting called by management or an EEOC Administrative Judge, a REDRESS mediation, an EEOC pre-hearing conference, or an EEOC hearing; 2) the employees have been offered the opportunity to change their schedules for their own convenience; and 3) the length of the required meeting, mediation, conference, *etc.* causes the need to pay overtime in accordance with the Fair Labor Standards Act or the provisions of the applicable collective bargaining agreement. See Management Directive 110, Chapter 6, Section VIII.C.2. To the extent possible, meetings should be scheduled at the beginning of the complainant's tour to minimize the chance that the complainant would be entitled

to overtime. In certain circumstances, planning for the meeting to end at a time certain and reconvening at another time might be an appropriate alternative to paying overtime.

D. **WITNESSES.** Complainants and representatives cannot compel a witness to meet with them. In addition, representatives are not entitled to reinvestigate the complaint in preparation for a hearing, inasmuch as the agency has already compiled an investigative report, and representatives are not authorized official time to contact witnesses directly. If the complainant or his/her representative seeks permission to interview witnesses, he or she must do so through the Postal Service's designated representative. If the representative files a notice of his/her intention to depose a witness or witnesses with the Postal Service's designated representative, the agency is obligated to make those employees available for the deposition on official time. Any arrangements for the deposition must be coordinated by the complainant's representative with the Postal Service's designated representative. To the extent possible, any authorized contacts with witnesses should be scheduled to coincide with the witnesses' normal duty hours and not for the convenience of the complainant or representative.

EEOC regulations state that witnesses whose attendance at a hearing or presence at a meeting is required must be in a duty status to participate in the hearing/meeting regardless of their tour of duty. See 29 C.F.R. §1614.605(f) and Management Directive 110, Chapter 6, Section VIII.D. These individuals should be offered the opportunity to change their schedules if they so desire. In certain circumstances, overtime might be required; *e.g.* a hearing scheduled on the witness' day off.

#### **V. TRAVEL TIME AND MILEAGE**

A. **GENERAL.** Under certain circumstances, complainants and representatives who are otherwise in a duty status may be entitled to be paid for the time spent traveling to certain EEO complaint processing events. Generally, complainants and representatives are in a duty status and entitled to be compensated for travel time and mileage when travelling from a postal installation to a meeting called by management or an EEOC Administrative Judge, a REDRESS mediation, an EEOC pre-hearing conference, or an EEOC hearing. However, every effort should be made to minimize the need for such compensable travel time.

To the extent possible, complainants and representatives should not clock in at their work locations and then travel to the meeting/hearing location. This can be accomplished, in part, by scheduling meetings at the beginning of the complainant's tour and instructing the complainant to report directly to the meeting from home. EEOC guidance indicates that travel time is not appropriate for the time spent commuting from the complainant's or the representative's home to an authorized EEO meeting, hearing, *etc.* since this would be a

substitute for the employees' normal commute to work. Management Directive 110, Chapter 6, Section VIII.C.1. However, the employee would be entitled to mileage for any difference between the normal mileage commuting to his/her work location and the mileage to the meeting/hearing location. If the approved meeting/hearing is located outside the commuting area, the complainant would be entitled to travel expenses approved in advance by his/her supervisor in consultation with appropriate officials.

Travel time and mileage are not appropriate to facilitate the complainant's selection of a particular representative or for meetings between the complainant and representative to prepare a complaint. Alternatives, such as telephone consultations, are available.

**B. REPRESENTATIVES.** A representative is not entitled to official time or mileage for travel to or from a postal installation if the representative's installation is more than 50 miles (outside commuting distance as defined by Postal Service regulations) from the installation in which the complaint arose. If a representative is otherwise in a duty status and is to attend a meeting called by management or an EEOC Administrative Judge, a REDRESS mediation, an EEOC pre-hearing conference, or an EEOC hearing, he or she is entitled to be compensated for the time spent travelling to the approved meeting, and to be paid mileage, if he or she is travelling from a postal installation to the meeting (but not from home to the meeting) and the installation is within commuting distance of the meeting site. If the approved meeting is outside the commuting area of the representative's installation, the representative would not be entitled to travel expenses.

**C. WITNESSES.** Witnesses approved by an Administrative Judge to testify at a hearing are entitled to be compensated for the time spent travelling from a postal installation to the hearing and to be reimbursed for mileage. If the hearing is outside the commuting area, the approved witnesses are entitled to be reimbursed for travel expenses approved in advance by their supervisors.

#### **VI. REQUESTS FOR OFFICIAL TIME**

**A. IN WRITING.** All requests for official time by complainants and representatives must be in writing. PS Form 1110 has been created to facilitate the processing of requests for official time and to track the amount of time granted to/used by representatives. Supervisors and managers must require employees requesting official time to use this form.

**B. IN ADVANCE.** Requests for official time for complainants and representatives must be made in advance. Most events in the EEO complaint process are scheduled well in advance. Consequently, it is not unreasonable for supervisors and managers to require advance notice of the need for official time so as not unduly to disrupt operations and to enable supervisors and managers properly to provide service to postal customers.

C. **IN DETAIL.** Each request must provide sufficient detail to enable supervisors and managers to determine the following information:

1. Who is requesting the time.
2. The date of the request.
3. The complaint to which the request relates.
4. The amount of time requested and a justification.
5. The stage of the EEO complaint process involved.

D. **MANAGEMENT'S RESPONSE.** The lower portion of PS Form 1110 is used to document management's response to the employee's request for official time. If the release of the employee to use official time or the amount of official time requested by the employee are different from what was requested, the supervisor or manager must explain the difference. This is very important. These forms memorializing decisions made concerning requests for official time must be available to EEO Dispute Resolution Specialists; Managers, Dispute Resolution; contract EEO Investigators; Law Department attorneys; and EEOC Administrative Judges. See Management Directive 110, Chapter 6, Section VIII.C.6.

#### **VII. TIMING AND RELEASE**

Most events in the EEO complaint process are scheduled well in advance. Consequently, it is not unreasonable for management to expect advance notice from a complainant or a representative of the need for official time to prepare a complaint, participate in a REDRESS mediation, respond to a request for an affidavit, respond to discovery, participate in an EEOC pre-hearing conference, participate in an EEOC hearing, or file or respond to an appeal. Management is not required to release an employee on official time whenever the complainant or representative requests and may reasonably delay the employees' release if operational considerations such as dispatch schedules, mail volume, short staffing, *etc.* require the employees' attention to their regular duties. If management believes that a delay in the grant of official time is required, the supervisor or manager making that decision must describe the reason for the delay on PS Form 1110. The reasoning for the delay must be such that a neutral third party will understand why the delay was necessary. A complainant's or representative's access to appropriate official time must not be delayed unreasonably and any delay should be only enough to address the legitimate work requirements necessitating the delay.

#### **VIII. REASONABLE AMOUNT OF OFFICIAL TIME**

A. **GENERAL.** Supervisors and managers should consult with the field EEO staff concerning the amount of official time which is reasonable given the stage of the EEO complaint process involved and the specific task for which the official

time is being requested. Complainants and representatives must request and obtain prior authorization to use official time and are not entitled to use time to work on EEO matters and request reimbursement after the fact. Every effort should be made to reach a mutual understanding concerning the amount of official time warranted in any given situation.

EEOC guidance indicates that the amount of official time warranted will depend upon, "...nature and complexity of the complaint and considering the mission of the agency and the agency's need to have its employees available to perform their normal duties on a regular basis." See Management Directive 110, Chapter 6, Section VIII.C.1. Elsewhere in the Management Directive, the Commission notes that "reasonable" in the context of preparation time is not calculated in terms of days. MD 110, Chapter 6, Section VIII.C.3.

**B. REQUEST FOR PRE-COMPLAINT COUNSELING.** Initial requests for pre-complaint counseling involve calling a toll-free number and answering a few voice prompts. A few minutes would be adequate to accomplish this purpose if an employee requests to make the call while on the clock. Official time for an employee's representative would not be appropriate to assist in this task.

PS Form 2564-A, *Information for Pre-Complaint Counseling*, should take less than thirty (30) minutes to complete, including consultation with the complainant's representative. That consultation need not be in person if the representative is located at another facility or installation, assuming that the complainant and the representative are both in a duty status.

The time necessary for meeting or speaking by telephone with the Dispute Resolution Specialist will vary depending upon the claims involved in the request for pre-complaint counseling. Supervisors and managers should consult with the Dispute Resolution Specialist assigned to the complaint concerning the time he or she believes will be appropriate to discuss the claims.

**C. FORMAL COMPLAINT.** A complainant must complete PS Form 2565, *EEO Complaint of Discrimination in the Postal Service*, a one-page form, to file a formal complaint. Some complainants include narratives in addition to completing the form. In either case, thirty (30) minutes or less would appear appropriate at this stage of the process in most cases.

**D. COMPLETION OF THE AFFIDAVIT.** The time necessary to complete the complainant's affidavit will depend upon the number of allegations included in the complaint and the number of questions posed by the Investigator to which the complainant must respond. Supervisors and managers are entitled to request this information in order to determine the amount of official time to be approved. Supervisors and managers are encouraged to consult with the field EEO staff to determine the amount of official time appropriate. In general, approximately two hours or less would be adequate to prepare most affidavits.

**E. RESPONDING TO DISCOVERY.** Supervisors and managers must consult with the Postal Service attorney assigned to represent the agency at the hearing concerning the amount of time that would be reasonable to respond to discovery requests sent to the complainant. Once again, a few hours are generally adequate to respond to whatever requests for admissions or interrogatories have been directed to the complainant.

**F. PRE-HEARING CONFERENCES AND THE EEOC HEARING.** Supervisors and managers must consult with the Postal Service attorney assigned to represent the agency at the hearing concerning the amount of time deemed reasonable for the complainant's and representative's participation in these events. Since these events are scheduled well in advance, supervisors and managers can legitimately expect that they will receive adequate advance notice from the agency's representative.

**G. APPEALS.** Complainants may appeal a final agency decision dismissing a complaint, a final agency decision on the merits of a complaint, or a Notice of Final Action implementing or appealing a decision by an Administrative Judge. The time for preparing an appeal, or responding to the agency's appeal, will vary depending upon the complexity of the case. Supervisors and managers should consult with the appropriate Field Law Office concerning this subject but less than an hour is generally adequate to appeal a dismissal and a few hours is generally adequate to prepare an appeal of a decision on the merits of a claim.

#### **IX. REPRESENTATIVES**

**A. LIMITATION ON THE AMOUNT OF OFFICIAL TIME.** The EEOC has indicated that it is reasonable for agencies to expect that employees would spend the majority of their work hours on the job for which they were employed. See Management Directive 110, Chapter 6, Part VIII.C.4.

It is the policy of the Postal Service to limit the amount of official time granted to all representatives to no more than ten percent (10%) of their actual, paid work hours tracked on a monthly basis. This policy does not establish an entitlement to that amount of time; only an allowable cap on the amount of time that might be allowable. This cap is unaffected by a representative's choice to represent a large number of employees in the EEO process and does not affect an employee's desire to have a particular individual represent him or her. The employee can still select anyone he or she wants. However, that individual's eligibility for official time will be governed by the ten-percent cap and any time required for representation activities beyond that will not be on official time. Representatives will have to perform their representational activity on their own time or request leave in accordance with the applicable provisions of the collective bargaining agreement and the local memoranda of understanding.

Official time will be calculated for the current month based on the representative's actual, paid work hours (*i.e.* actual work hours plus allowable official time) for the previous month. For example, if during the previous month a representative actually worked 32 hours and was granted 8 hours of official time, his or her potential, allowable official time for the current month would be 4 hours.

**B. DENIAL FOR EXCEEDING THE TEN-PERCENT CAP.** Management may legitimately deny paid official time to a representative to the extent that the representative will exceed the ten-percent monthly cap if the request is granted. See Section D below for alternative responses.

**C. NO ADVANCES OF OFFICIAL TIME.** Representatives may not be permitted to borrow future entitlements to official time to cover current representational activities once the ten-percent cap has been reached.

**D. ALTERNATIVES.** If operational considerations permit, and in accordance with the provisions of the applicable collective bargaining agreement and local memorandum of understanding, a representative who will exceed the ten-percent cap on official time for the month may be granted annual leave or leave without pay to assist the complainant in preparing and presenting a complaint, including attending required meetings such as a REDRESS mediation, a pre-hearing conference, or the hearing itself. Approval/disapproval of such leave will be consistent with the provisions of the applicable collective bargaining agreement and local memorandum of understanding and will include consideration of legitimate operational considerations.

**E. TECHNICAL ADVISOR.** A complainant is only entitled to one representative. Official time is not authorized for a technical advisor in addition to the designated representative or for anyone to assist the designated representative. If the complainant has selected an attorney as his or her representative, there is no entitlement to official time for an employee to assist the attorney or to act as a second representative.

#### **X. TRACKING AND RECORD KEEPING**

A. Copies of PS Forms 1110 must be maintained in a separate unit file so that they will be available upon request by EEO Dispute Resolution Specialists, contract EEO Investigators, and/or Law Department attorneys.

B. Supervisors and managers must use PS Form 1110 to keep track of the amount of official time requested by and granted to representatives to ensure that the ten-percent cap is not exceeded. In addition, official time used by representatives must be entered into the Time and Attendance Control System (TACS) under the applicable code listed below and on the PS Form 1110. TACS should be queried each time a representative requests official time to determine where that individual stands in relation to the ten-percent cap.

**Official EEO Codes:**

5110 - EEO Complainant	5130 - Management Representative
5120 - Complainant's Representative	5140 - EEO Witnesses (if any)

C. Supervisors and managers must also track the official time granted to complainants, witnesses, and other participants in the EEO complaint process to enable management to determine the actual costs associated with EEO complaint processing of which official time is a major segment.

**XI. APPEALS OF DENIALS OF OFFICIAL TIME**

When a complainant objects to a denial of official time, an unreasonable delay in granting official time, or the amount of official time granted, the Regional Manager, EEO Compliance and Appeals should be contacted since that office is responsible for determining whether or not the employee(s) was granted a reasonable amount of time and issuing a letter of determination on that subject. If an employee raises the objection in a request for pre-complaint counseling or a formal complaint, the National EEO Investigative Services Office will refer the matter to the appropriate Regional Manager, EEO Compliance and Appeals. If the complainant and representative raise the issue at the hearing stage of the EEO process, the Law Department attorney will address the issue with the Administrative Judge assigned to hear the complaint. See Management Directive 110. Chapter 6, Section VIII.C.6.



Request for Official  
EEO Time for EEO Processing

**I. Request for EEO Time**

Please complete Sections I and II before submission. Sign Section VI on page 2.

Name of Requestor: (Last, First, Middle Initial)	Complaint/Case No.:
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Work Facility:

Check the appropriate boxes below:

Your Role:	<input type="checkbox"/> Counselee	<input type="checkbox"/> Complainant	<input type="checkbox"/> Representative	<input type="checkbox"/> Witness
Stage of Complaint:	<input type="checkbox"/> Counseling	<input type="checkbox"/> Formal	<input type="checkbox"/> EEOC Hearing	<input type="checkbox"/> OFO Appeal
EEO Activity:	<input type="checkbox"/> Interview	<input type="checkbox"/> Mediation	<input type="checkbox"/> EEOC Hearing	<input type="checkbox"/> Affidavit Preparation
	<input type="checkbox"/> Pre-hearing Conference		<input type="checkbox"/> Other	

Location of EEO Activity:

Amount of Time Requested:	Proposed Date:	Proposed Starting Time:
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**II. Travel Request**

Travel request must be approved in advance.

Purpose of Activity:

Date:	Starting Time:	Ending Time:
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Starting Point for Travel: (Name and address of facility.)

Ending Point for Travel: (Name and address of facility.)

**III. Management Response**

Before responding to this request, review the EEO Official Time Policy and Handbook F-15, Travel and Relocation.

<b>A. Approved</b>	Date:	Date Returned to Employee:
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The request is granted to be taken on:	Date:	From:	To:
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Request is modified/delayed as follows: (Describe. Continue on page 2 if necessary.)

\_\_\_\_\_

\_\_\_\_\_

Request is modified/delayed because: (Explain. Continue on page 2 if necessary.)

\_\_\_\_\_

\_\_\_\_\_

**B. Disapproved** (If disapproved a copy of this form must be submitted to the Regional Manager.)

Date:	Date Returned to Employee
-------	---------------------------

Request is denied because (Explain. Continue on page 2 if necessary.)

\_\_\_\_\_

\_\_\_\_\_

**IV. Official EEO Codes — (Manager, please check appropriate box.)**

<input type="checkbox"/> 5110 - EEO Complainant	<input type="checkbox"/> 5120 - Complainant's Representative
<input type="checkbox"/> 5130 - Management Representative	<input type="checkbox"/> 5140 - EEO Witnesses (if any)

