

**PROPOSALS FOR FEDERAL SECTOR EMPLOYMENT REFORM
OF THE EEO PROCESS**

December 19, 2008

Statutory Changes:

1. Statutory change to permit the EEOC to issue and enforce subpoenas in its adjudicatory role.
2. Statutory change so EEOC and MSPB “judges” would have to be administrative law judges.
3. Transfer EEO investigation functions from the agencies to the EEOC. (This would require Congressional reallocation of funds from the agencies to the EEOC.)
4. Statutory change to make EEOC Administrative Judges’ decisions final, unless appealed, without the need for “Final Agency Decisions.”
5. Statutory change to “mixed case” procedures to allow any case involving a claim of discrimination to be heard by EEOC judges. (Currently, EEOC has jurisdiction of disciplinary cases, but not adverse actions such as demotion or removal, and has jurisdiction of terminations of probationers.)
6. The ADEA should be amended to make it comparable to Title VII and the ADA in allowing federal employees to recover attorney fees for the administrative process. (The ADEA should also be made comparable to Title VII and the ADA in authorizing, for both federal and private-sector employees, recovery of compensatory damages and trial by jury for *de novo* District Court review.)
7. There should be a private cause of action for federal employees to enforce the Family and Medical Leave Act. The easiest way to accomplish this would be to have federal-sector FMLA violations redressed the same as violations of the anti-discrimination statutes, specifically, through the EEO administrative process, followed by *de novo* district court review.

Regulatory or Procedural Changes

1. Promulgate a “case suspension” rule to allow for automatic suspension of case processing upon request of either party if needed for discovery or settlement.

2. Regarding EEO complaints, upon request of the complainant, there should be mandatory participation in ADR at the informal stage and at the EEOC hearing stage.¹
3. Agencies should be required to issue a “180-day letter,” informing the complainants of their right to immediately request a hearing.
4. Cases should be assigned to one of three “litigation tracks” depending upon the complexity and detail of the issues involved.
5. Agency EEO directors must report directly to the agency head. (*This may best be accomplished via Presidential Executive Order.*) To ensure compliance with this requirement, in its annual report to Congress, the EEOC should specifically identify which agencies are not in compliance with this requirement.
6. Agency counsel must be prohibited from interfering with the EEO investigation.
7. The EEOC must take steps to regain its prominence as the agency of the United States government responsible for ensuring compliance with anti-discrimination laws and to become a “change agent” for those agency cultures where discrimination is tolerated. (This is less a “rule” change than it is an “attitudinal” change.) The EEOC has various mechanisms at its disposal to be the bully pulpit.
8. For adjudications, the EEOC should adopt a uniform standard for what complaints “state a claim”; the standard should be acceptable to all stakeholders, consistent with law.

Staffing

The EEOC federal sector process is backlogged due to a lack of a sufficient number of administrative judges and their paraprofessional support staff.

¹ In 2003, a coalition of the complainants’ bar and third-party organizations, including NELA, the NAACP, AFGE, Blacks in Government Region XI Council, and the Council of Federal EEO and Civil Rights Executives, proposed seven changes to improve the federal-sector EEO process. This item and the six following it were those seven proposals; they are still necessary.