

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR PART 724

RIN 3206-AK38

Implementation of Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The Office of Personnel Management (OPM) is proposing regulations to carry out the notification and training requirements of the Notification and Federal Employees Antidiscrimination and Retaliation Act of 2002 (No FEAR Act). This rule will implement the notice and training provisions of the No FEAR Act.

DATES: Comments must be received on or before April 29, 2005.

ADDRESSES: Send or deliver written comments to Ana A. Mazzi, Deputy Associate Director for Workforce Relations and Accountability Policy, Office of Personnel Management, Room 7H28, 1900 E Street, NW., Washington, DC, 20415; by fax at (202) 606-0967; or by e-mail at NoFEAR@opm.gov.

FOR FURTHER INFORMATION CONTACT: Gary D. Wahler by telephone at (202) 606-2920; by fax at (202) 606-2613; or by e-mail at NoFEAR@opm.gov.

SUPPLEMENTARY INFORMATION: The United States and its citizens are best served when the Federal workplace is free of discrimination and retaliation. In order to maintain a productive workplace that is fully engaged with the many important missions before the Government, Congress noted that it is essential that the rights of employees, former employees and applicants for Federal employment under Federal antidiscrimination, whistleblower, and retaliation laws be steadfastly protected. Congress also stated that agencies cannot be run effectively if those agencies practice or tolerate

discrimination. Congress has found that notification of present and former Federal employees and applicants for Federal employment of their rights under antidiscrimination and whistleblower laws, combined with training of current employees, should increase Federal agency compliance with the laws. Congress entrusted the President with the authority to promulgate rules to carry out this title, and the President, in turn, delegated to OPM the authority to issue proposed regulations to implement the notification and training provisions of Title II of the No FEAR Act, Pub. L. 107-174. These regulations carry out that authority.

Notification Obligations

Section 202 of the No FEAR Act requires Federal agencies to notify their employees, former employees, and applicants for employment of their rights and protections under Federal antidiscrimination, whistleblower and retaliation laws. These proposed regulations prescribe the "time, form, and manner" of the notice required by the No FEAR Act, including the requirement to place the notice on each agency's Internet Web site.

The proposed regulations provide model paragraphs that must, at a minimum, be included in the notice. Agencies have the discretion to insert additional provisions as they deem appropriate. Agencies must provide the first notice within 60 days after final publication of this rule. Thereafter, such notice must be provided by the end of each successive fiscal year and remain posted until replaced or revised to help ensure that employees are kept informed of their rights and protections against discrimination and/or retaliation. After the initial notice deadline, new employees will be given notice during each agency's new employee orientation session(s) or, in the absence of such a program, within 60 days of the individual's appointment.

The notice requires language that agencies retain the right, where appropriate, to discipline a Federal employee who has engaged in discriminatory or retaliatory conduct, up to and including removal. It also requires language that unfounded disciplinary action or violation of the procedural rights of a Federal employee accused of discrimination is not

permitted. Another part of the notice advises readers how to get additional information about their rights and protections.

Training Obligations

Section 202 of the No FEAR Act also requires that Federal agencies provide training to all their employees regarding the rights and remedies under Federal antidiscrimination, whistleblower and retaliation laws. The regulations propose to require all agencies to develop written plans describing how they will meet their training obligations under the Act. Agencies have the discretion to develop the content and method of their own training programs. Agencies may also consult the Equal Employment Opportunity Commission and/or the Office of Special Counsel for information and/or assistance regarding the agency's training program.

Recognizing the importance of the required training under the No FEAR Act, OPM *encourages* all agencies to implement training programs as soon as possible and *requires* all agencies to complete initial training by the end of fiscal year 2005. Thereafter, the training must be completed on a training cycle of no longer than every two years.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because the regulations pertain only to Federal employees and agencies.

E.O. 12866, Regulatory Review

This proposed rule has been reviewed by the Office of Management and Budget under Executive Order 12866.

E.O. 13132

This regulation will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

E.O. 12988, Civil Justice Reform

This regulation meets the applicable standard set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

This action pertains to agency management, personnel and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 5 CFR Part 724

Administrative practice and procedure, Discrimination, Prohibited personnel practices, Civil rights, Claims, Discipline.

U.S. Office of Personnel Management.

Dan G. Blair,

Acting Director.

Accordingly, OPM proposes to amend part 724 to title 5, Code of Federal Regulations, as follows:

PART 724—IMPLEMENTATION OF TITLE II OF THE NOTIFICATION AND FEDERAL EMPLOYEE ANTIDISCRIMINATION AND RETALIATION ACT OF 2002

1. The authority citation for part 724 continues to read as follows:

Authority: Sec. 204 of Pub. L. 107-174; Presidential Memorandum dated July 8, 2003, "Delegation of Authority Under Section 204(a) of the Notification and Federal Employee Antidiscrimination Act of 2002."

Subpart A—Reimbursement of Judgment Fund

2. In § 724.102 of subpart A, add new definitions for *Antidiscrimination Laws*, *Notice*, *Training*, and *Whistleblower Protection Laws* in alphabetical order to read as follows:

§ 724.102 Definitions:

Antidiscrimination Laws refers to 5 U.S.C. 2302(b)(1), 5 U.S.C. 2302 (b)(9) as applied to conduct described in 5 U.S.C. 2302 (b)(1), 29 U.S.C. 206(d), 29 U.S.C.

631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e-16.

* * * * *

Notice means the written information provided by Federal agencies about the rights and protections available under Federal Antidiscrimination Laws and Whistleblower Protection Laws.

* * * * *

Training means the process by which Federal agencies instruct their employees regarding the rights and remedies applicable to such employees under the Federal Antidiscrimination Laws and Whistleblower Protection Laws.

Whistleblower Protection Laws refers to 5 U.S.C. 2302(b)(8) or 5 U.S.C. 2302(b)(9) as applied to conduct described in 5 U.S.C. 2302(b)(8).

3. A new subpart B to Part 724 is added to read as follows:

Subpart B—Notification of Rights and Protections and Training

Sec.

724.201 Purpose and Scope.

724.202 Notice Obligations.

724.203 Training Obligations.

§ 724.201 Purpose and Scope.

(a) This subpart implements Title II of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 concerning the obligation of Federal agencies to notify all employees, former employees, and applicants for Federal employment of the rights and protections available to them under the Federal Antidiscrimination Laws and Whistleblower Protection Laws. This subpart also implements Title II concerning the obligation of agencies to train the agencies' employees regarding such rights and remedies. The regulations describe agency obligations and the procedures for written notification and training.

(b) Pursuant to section 205 of the No FEAR Act, neither that Act nor this notice creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

§ 724.202 Notice Obligations.

(a) Each agency must provide notice to all of its employees, former employees, and applicants for Federal employment about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection Laws applicable to them.

(b) The notice under this part must be titled "No FEAR Act Notice."

(c) Each agency must provide the initial notice within sixty (60) days after [date of final rule]. Thereafter, the notice must be provided by the end of each successive fiscal year and remain posted until replaced or revised.

(d) After the initial notice, each agency must provide the notice to new employees within 60 business days of their appointment.

(e) Each agency must provide the notice in paper (*e.g.*, letter, poster or brochure) and/or electronic form (*e.g.*, e-mail or internal agency electronic site). In addition, each agency must post the notice on their Internet web sites, in compliance with section 508 of the Rehabilitation Act of 1973, as amended. For agencies with components that operate Internet Web sites, the notice shall be made available by hyperlinks from the Internet Web sites of both the component and the parent agency. For former employees and applicants, an agency may meet its paper and/or electronic notice obligation by publishing an annual notice in the **Federal Register**.

(f) Upon request by employees, former employees and applicants, each agency must provide the notice in alternative, accessible formats.

(g) Unless an agency is exempt from the cited statutory provisions, the following is the minimum text to be included in the notice. Each agency may incorporate additional information within the model paragraphs, as appropriate.

Model Paragraphs

No Fear Act Notice

On May 15, 2002, Congress enacted the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002," which is now known as the No FEAR Act. One purpose of the Act is to "require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws." Pub. L. 107-174, Summary. In support of this purpose, Congress found that "agencies cannot be run effectively if those agencies practice or tolerate discrimination." Pub. L. 107-74, Title I, General Provisions, Section 101(1).

The Act also requires this agency to provide this notice to Federal employees, former Federal employees and applicants for Federal employment to inform you of the rights and protections available to you under Federal antidiscrimination, whistleblower protection and retaliation laws.

Antidiscrimination Laws

A Federal agency cannot discriminate against an employee or applicant with respect to the terms, conditions or privileges of employment on the basis of race, color, religion, sex, national origin, age, disability, marital status or political affiliation. Discrimination on these bases is prohibited by one or more of the following statutes: 5

U.S.C. 2302(b) (1), 29 U.S.C. 206(d), 29 U.S.C. 631, 29 U.S.C. 633a, 29 U.S.C. 791 and 42 U.S.C. 2000e-16.

If you believe that you have been the victim of unlawful discrimination on the basis of race, color, religion, sex, national origin or disability, you must contact an Equal Employment Opportunity (EEO) counselor within 45 calendar days of the alleged discriminatory action, or, in the case of a personnel action, within 45 calendar days of the effective date of the action, before you can file a formal complaint of discrimination with your agency. *See, e.g.*, 29 CFR 1614. If you believe that you have been the victim of unlawful discrimination on the basis of age, you must either contact an EEO counselor as noted above or give notice of intent to sue to the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory action. If you are alleging discrimination based on marital status or political affiliation, you may file a written complaint with the U.S. Office of Special Counsel (OSC) (*see* contact information below). In the alternative (or in some cases, in addition), you may pursue a discrimination complaint by filing a grievance through your agency's administrative or negotiated grievance procedures, if such procedures apply and are available.

Whistleblower Protection Laws

A Federal employee with authority to take, direct others to take, recommend or approve any personnel action must not use that authority to take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant because of disclosure of information by that individual that is reasonably believed to evidence violations of law, rule or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety, unless disclosure of such information is specifically prohibited by law and such information is specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

Retaliation against an employee or applicant for making a protected disclosure is prohibited by 5 U.S.C. 2302(b)(8). If you believe that you have been the victim of whistleblower retaliation, you may file a written complaint (Form OSC-11) with the U.S. Office of Special Counsel at 1730 M Street NW., Suite 218, Washington, DC 20036-4505 or online through the OSC Web site—www.osc.gov.

Retaliation for Engaging in Protected Activity

A Federal agency cannot retaliate against an employee or applicant because that individual exercises his or her rights under any of the Federal antidiscrimination or whistleblower protections laws listed above. If you believe that you are the victim of retaliation for engaging in protected activity, you must follow, as appropriate, the procedures described in the Antidiscrimination Laws and Whistleblower Protection Laws sections or, if applicable, the administrative or negotiated grievance procedures in order to pursue any legal remedy.

Disciplinary Actions

Under the existing laws, each agency retains the right, where appropriate, to discipline a Federal employee who has engaged in discriminatory or retaliatory conduct, up to and including removal. If OSC has initiated an investigation under 5 U.S.C. 1214, however, according to 5 U.S.C. 1214(f), agencies must seek approval from the Special Counsel to discipline employees for, among other activities, engaging in prohibited retaliation. Nothing in the No FEAR Act alters existing laws or permits an agency to take unfounded disciplinary action against a Federal employee or to violate the procedural rights of a Federal employee who has been accused of discrimination.

Additional Information

For further information regarding the No FEAR Act regulations, refer to 5 CFR 724, as well as the appropriate offices within your agency (*e.g.*, EEO/civil rights office, human resources office or legal office). Additional information regarding Federal antidiscrimination, whistleblower protection and retaliation laws can be found at the EEOC Web site—www.eeoc.gov and the OSC Web site—www.osc.gov.

Existing Rights Unchanged

Pursuant to section 205 of the No FEAR Act, neither the Act nor this notice creates, expands or reduces any rights otherwise available to any employee, former employee or applicant under the laws of the United States, including the provisions of law specified in 5 U.S.C. 2302(d).

§ 724.203 Training Obligations.

(a) Each agency must develop a written plan to train all of its employees (including supervisors and managers) about the rights and remedies available under the Antidiscrimination Laws and Whistleblower Protection Laws applicable to them.

(b) Each agency shall have the discretion to develop the content and method of its training plan. Each agency training plan shall describe:

- (1) The content and method of the training,
- (2) The training schedule, and
- (3) The means of documenting completion of training.

(c) Each agency may contact EEOC and/or OSC for information and/or assistance regarding the agency's training program. Neither agency, however, shall have authority under this regulation to review or approve an agency's training plan.

(d) Each agency is *encouraged* to implement its training as soon as possible, but *required* to complete the initial training under this subpart for all employees (including supervisors and managers) by the end of fiscal year 2005. Thereafter, each agency must train all existing employees on a training cycle of no longer than every 2 years.

(e) After the initial training is completed, each agency must train new

employees as part of its agency orientation program. Any agency that does not have a new employee orientation program must train new employees within 60 business days of the new employees' appointment.

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DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Rural Utilities Service

7 CFR Part 4279

RIN 0570-AA34

Business and Industry Guaranteed Loan Program Annual Renewal Fee

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Business-Cooperative Service (RBS) proposes to amend its regulation for Business and Industry (B&I) Guaranteed Loans to remove all references to a one-time, specific loan guarantee fee and provide the authority for the charging of an annual renewal fee on all loans obligated after the publication of the final rule. The intended effect of this rule is to reduce the subsidy rate for guaranteed loans and its associated budget authority dollar level, which will result in a greater level of assistance to the public (*i.e.*, higher supportable loan level). A notice will be published in the **Federal Register** each fiscal year that will establish the guarantee fee and any annual renewal fees for loans obligated during that fiscal year.

DATES: Written or e-mail comments must be received on or before April 29, 2005 to be assured of consideration.

ADDRESSES: Submit written comments via U.S. Postal Service, in duplicate, to the Regulations and Paperwork Management Branch, Attention: Cheryl Thompson, Rural Development, U.S. Department of Agriculture, STOP 0742, 1400 Independence Avenue, SW., Washington, DC 20250-0742. Submit written comments via Federal Express Mail, in duplicate, to the Regulations and Paperwork Management Branch, Attention: Cheryl Thompson, USDA-Rural Development, 7th Floor, 300 7th St., SW., Washington, DC 20546. Also, comments may be submitted via the Internet by addressing them to comments@rus.usda.gov. The comment must contain the word *Fee* in the subject line. All comments will be available for