



Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment

A Guide to Employment Rights, Protections, and Responsibilities

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This resource guide was developed by the Office of Personnel Management, the Equal Employment Opportunity Commission, the Office of Special Counsel, and the Merit Systems Protection Board.

Disclaimer: This resource guide is a general introduction to the possible avenues available for addressing discrimination based on sexual orientation and gender identity. It is not intended to be a substitute for legal advice on the best course of action for a particular individual.

Introduction

It is the policy of the Federal Government to provide equal employment opportunity to all individuals. Executive Order 11478, as amended, expressly prohibits discrimination based on sexual orientation and gender identity within executive branch civilian employment. It also prohibits discrimination based on race, color, religion, sex, national origin, disability, parental status, and age. The Executive Order states that this non-discrimination policy “must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government, to the extent permitted by law.”

There are a number of administrative and legal protections available to federal workers who believe they have been discriminated against because of their sexual orientation or gender identity, including:

- Title VII of the Civil Rights Act of 1964;
- Civil Service Reform Act of 1978; and/or
- Other Procedures.

Title VII’s prohibition on sex discrimination protects persons who have been discriminated against based on sexual orientation and gender identity. Further, civil service laws prohibit certain employment decisions or personnel actions when the decisions or actions are based on conduct that does not adversely affect job performance, including sexual orientation and gender identity. In addition, individual agencies and unions may establish procedures to resolve disputes, including complaints of discrimination based on sexual orientation and gender identity.

This resource guide provides basic and general information about these various procedures and the circumstances under which federal applicants and employees may be able to take a particular course of action. Under some circumstances, more than one procedure may be available, and the choice of one procedure may preclude the use of others.

Most of the available avenues require employees to raise the allegations within a specific time frame from the date that the alleged discrimination occurred. The remedies available may also differ depending on the course of action that is chosen.

Federal employees should review the rules and processes specific to their agencies, and those issued by agencies that decide complaints and appeals, before deciding whether and how to proceed. Individuals also should consider consulting with an attorney experienced in federal employment issues or, where applicable, a knowledgeable union officer.

I. Agency Responsibilities

As the nation’s largest employer, the Federal Government should set an example for other employers that employment discrimination based on sexual orientation or gender identity is not acceptable. All federal workers—including lesbian, gay, bisexual, and transgender (LGBT) individuals—should be able to perform their jobs free from any unlawful discrimination.

Key Definitions

Sexual orientation means one’s emotional or physical attraction to the same and/or opposite sex.

Gender identity means one’s inner sense of one’s own gender, which may or may not match the sex assigned at birth. Different people choose to express their gender identity differently. For some, gender may be expressed through, for example, dress, grooming, mannerisms, speech patterns, and social interactions. Gender expression usually ranges between masculine and feminine, and some transgender people express their gender consistent with how they identify internally, rather than in accordance with the sex they were assigned at birth.

Agencies, including federal officials and managers, should commit to promoting a work environment that is free from sexual orientation and gender identity discrimination, in accordance with existing federal law. Agencies should notify employees about avenues of redress and encourage them to report instances of discrimination to their supervisors and to the agency's Equal Employment Opportunity (EEO) office. When made aware of problems, managers should consult with their human resources office or agency legal counsel to ensure that appropriate steps are taken. All reports of sexual orientation or gender identity discrimination should be taken seriously and addressed promptly and properly. In some circumstances, this may involve taking corrective steps or disciplining those who discriminate, as applicable.

II. Employment Rights and Protections

A. Title VII of the Civil Rights Act of 1964 (EEOC and Agencies)

Title VII of the Civil Rights Act of 1964 states, "All personnel actions affecting employees or applicants for employment . . . [in the Federal Government] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. §2000e-16(a). The Equal Employment Opportunity Commission (EEOC) is the agency charged with interpreting and enforcing Title VII in the Federal Government. The EEOC has recognized that Title VII's prohibition on sex discrimination provides protections for persons who have been discriminated against based on sexual orientation and gender identity.

EEOC and Agencies – Filing a Claim under the Federal EEO Process (29 C.F.R. Part 1614)

Individuals who believe they have been discriminated against based on sexual orientation or gender identity may file a complaint through their agency's federal sector EEO complaint process. The EEOC has instructed agencies to accept claims alleging sexual orientation or gender identity discrimination as claims of sex discrimination and to investigate those claims to determine if discrimination on the basis of sex occurred (including discrimination based on sex stereotypes).

Very generally, the EEO complaint process works as follows:

- The person has **45 days** from the date of the alleged discrimination to notify an EEO counselor at his or her agency.
- The agency counselor may then attempt to resolve the claim informally through alternative dispute resolution or other practices.
- If the attempts to resolve the claim informally are unsuccessful, the applicant or employee is given a notice of right to file a complaint. The applicant or employee has **15 days** from the date he or she receives that formal notice to file a formal complaint.
- If the agency accepts the claim, it will conduct an investigation, which generally must be completed within 180 days. Upon completion of the investigation, it will issue to the applicant or employee the investigative file and provide notice of his or her choice of receiving a final agency decision (FAD) based on the results of the investigation or requesting a hearing from an EEOC Administrative Judge.

- If a hearing is requested, an EEOC Administrative Judge may hold a hearing on the complaint and will issue a decision as to whether discrimination occurred. The agency will then issue a Final Order either accepting the decision of the EEOC Administrative Judge or rejecting it and appealing the matter to the EEOC.
- The applicant or employee has the option of accepting the FAD, appealing the decision of the EEOC Administrative Judge or FAD to the EEOC (this must be done within **30 days** of receiving the FAD), or filing a claim in federal court (this must be done within **90 days** of receiving the FAD). Under Title VII, an applicant or employee **MUST** work through the administrative EEO process before he or she can file a claim in federal court.
- Decisions appealed to the EEOC are reviewed by attorneys in its Office of Federal Operations. In adjudicating the appeal, the EEOC will determine whether the agency dealt with the claim appropriately and applied the correct legal analysis.
- Decisions from the EEOC are final and binding on the agency. The applicant or employee, however, retains the option of taking his or her claim to federal court after the EEOC issues a decision on an appeal (this must be done within **90 days** of receiving the EEOC decision).

Additional information regarding the federal sector EEO complaint process may be found on the EEOC's website at www.eeoc.gov/federal/fed_employees/complaint_overview.cfm. The EEOC's website also has information about the enforcement protections for LGBT workers at www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

Individuals with questions should contact the relevant agency EEO Office or the EEOC's Office of Federal Operations at 202-663-4599 or ofe.eeoc@eeoc.gov.

B. Civil Service Reform Act of 1978 (OSC and MSPB)

The Civil Service Reform Act of 1978 describes prohibited personnel practices. Two provisions prohibit discrimination based on sexual orientation and gender identity. First, 5 U.S.C. § 2302(b)(1) parallels Title VII's prohibitions against workplace discrimination based on sex. As described above, the EEOC has held that sex discrimination can include discrimination based on sexual orientation and gender identity. Second, 5 U.S.C. § 2302(b)(10) prohibits agencies from discriminating against employees based on conduct that does not adversely affect job performance. This prohibition has long been recognized as barring discrimination based on sexual orientation and gender identity.

When individuals believe that they have been subjected to a prohibited personnel practice based on sexual orientation or gender identity, they may seek assistance under certain circumstances from the U.S. Office of Special Counsel (OSC) and/or the Merit Systems Protection Board (MSPB).

OSC – Filing Prohibited Personnel Practice Complaints

OSC is an independent investigative and prosecutorial agency that investigates complaints alleging prohibited personnel practices, including those involving discrimination based on sexual orientation and gender identity. OSC often defers to the agencies' federal sector EEO complaint processes and the EEOC when an individual brings a claim under section 2302(b)(1).

Very generally, the OSC complaint process works as follows:

- A person may file a complaint with OSC, which will determine whether there are reasonable grounds to believe that the agency has committed or will commit a prohibited personnel practice.
- OSC may request that the agency stop certain personnel actions from taking place while OSC is investigating whether the personnel actions were taken as a result of a prohibited personnel practice.
- If a violation is found, OSC may petition MSPB for corrective action to provide a remedy for the affected individual and/or may seek disciplinary action by MSPB against the individual(s) who committed the prohibited personnel practice.
- In some cases, OSC may achieve favorable results for applicants or employees without litigation before MSPB by obtaining settlements of complaints prior to the initiation of any formal complaint to MSPB. OSC also may act as an intermediary between the individual and the agency to resolve issues.

Complaints to OSC must be in writing. Complaint forms may be electronically filed through OSC's e-filing system (www.osc.gov/e-file) or downloaded from OSC's website (www.osc.gov/form11).

The procedures for corrective action by OSC are set forth in detail in 5 U.S.C. § 1214. The procedures for disciplinary action are contained in 5 U.S.C. § 1215.

Additional information about prohibited personnel practices may be found at OSC's website at www.osc.gov. OSC's website also has information about the federal protections for LGBT workers at <https://osc.gov/Resources/2014%20LGBT%20Handout.pdf>.

Individuals with questions should contact OSC at (202) 254-3670 (TDD-ready) or toll-free at (800) 872-9855 (TDD-ready), or by mail at:

Office of Special Counsel
Complaints Examining Unit
1730 M Street, N.W., Suite 218
Washington, D.C. 20036-4505

MSPB – Filing Certain Personnel Action Appeals

The MSPB is an independent, adjudicative agency that hears, among other things: (1) appeals of certain agency personnel actions brought by employees, former employees, or applicants, including removals, suspensions for more than 14 days, and reductions in grade and pay of certain federal employees who possess tenure; and (2) complaints brought by OSC involving prohibited personnel practices (see above).

Very generally, an MSPB appeal proceeds as follows:

- An individual files an appeal with one of the MSPB's regional offices.
- The MSPB Administrative Judge assigned to the case determines whether an appeal is filed within the time limits and whether the MSPB is authorized to adjudicate the appeal of the agency action.

- If an appeal meets these requirements, the individual has the right to choose between a hearing or a decision on the written record.
- When an MSPB Administrative Judge issues a decision, either the individual or the agency may ask the three-member board at MSPB Headquarters in Washington, D.C., to review any part of the Administrative Judge's decision believed to be erroneous.
- Individuals, but not agencies, may seek judicial review of an MSPB decision in federal court. However, the Office of Personnel Management (OPM) may seek judicial review when the Director of OPM believes that the MSPB's decision is erroneous and will have a substantial impact on civil service law.

The procedures that the MSPB follows are contained in 5 C.F.R. Part 1201.

Additional information about the MSPB appeal process may be found at the MSPB's website at www.mspb.gov. The MSPB's website also has information about the MSPB's regulations, the MSPB's decisions, and forms for filing appeals and petitions for review.

Individuals with questions about the MSPB process may contact the MSPB at (202) 653-7200 or toll-free at (800) 877-8339 (TDD-ready), or by mail at:

Merit Systems Protection Board
1615 M Street, N.W.
Washington, D.C. 20419

The addresses of MSPB's regional offices can be found at Appendix II, 5 C.F.R. Part 1201.

C. Other Procedures (Unions and Agencies)

Negotiated Grievance Procedures

If employees think they have been the victims of sexual orientation or gender identity discrimination, they may also wish to contact their union.

Employees who are in a certified bargaining unit—that is, who are represented by a duly recognized labor organization and covered by a collective bargaining agreement—may file grievances in accordance with 5 U.S.C. § 7121.

- The definition of a grievance is contained in 5 U.S.C. § 7103(a)(9) and generally permits an employee to complain about most matters relating to employment.
- Certain subject matters are excluded from the negotiated grievance procedure, including complaints related to retirement, life insurance, and health insurance.
- Unless specifically excluded from the grievance procedures by collective bargaining agreement, a grievance may allege the commission of a prohibited personnel practice, including one related to sexual orientation or gender identity discrimination.

- As part of the negotiated grievance procedure, the union that represents the employee may elect to place the dispute before an arbitrator, who is usually jointly selected by the union and the agency as provided in the collective bargaining agreement. Grievants may not take the case to arbitration on their own.
- Under current law, an arbitrator hearing a case concerning an alleged prohibited personnel practice may:
 - Stop any personnel action from taking place while hearing the case if the arbitrator determines that there are reasonable grounds to believe that a prohibited personnel practice has been committed or will be committed; and
 - Order certain disciplinary action by an agency against the person committing the prohibited personnel practice.
- The rules for appealing adverse arbitration decisions differ depending upon the subject of the grievance. Generally, matters that may be heard by MSPB may be appealed to the United States Court of Appeals for the Federal Circuit. Otherwise, they may be appealed to the Federal Labor Relations Authority (FLRA). Ordinarily, one may not appeal a decision of the FLRA arising from arbitration in the courts. It is important to become informed about the proper appeals route in any particular circumstance.

Agency-Specific Procedures

Another possible area of redress for those who believe they have been discriminated against based on their sexual orientation or gender identity is the availability of any agency-specific procedures.

Many agencies have their own systems to resolve disputes between an employee and the agency that may not be available elsewhere. In general, these systems try to achieve an informal resolution so that disputes do not have to be decided by higher levels of management. Specific procedures and time limitations vary by agency.

An employee considering such procedures must become familiar with the rules governing the particular agency's system. Employees who believe that they have been discriminated against due to their sexual orientation or gender identity should ask their human resource office for a copy of their agency procedures to determine the procedures to follow and subjects they cover.

III. Other Procedural Issues

Election of Remedies

Federal applicants and employees may seek protection from discrimination based on sexual orientation or gender identity under both Title VII and the Civil Service Reform Act. In other words, they may file EEO complaints and complaints of prohibited personnel practices.

As discussed above, while an individual may file both types of complaints, the complaint alleging a prohibited personnel practice must proceed under one and only one of the following processes:

- OSC;
- MSPB;

- Negotiated grievance procedures; or
- Agency-specific procedures.

The processes for each of these routes are described above in this resource guide. Individuals choosing to proceed should be careful to select the best process for them.

Differences in EEOC and OSC Processes

This resource guide describes a variety of avenues for applicants and employees to pursue complaints of sexual orientation or gender identity discrimination in the federal workplace. The two government-wide (with some exceptions) processes at EEOC and OSC for addressing these complaints are summarized in the table on the last page.

Conclusion

We hope that this resource guide will provide some important information to those who believe they have been the victims of discrimination based on sexual orientation or gender identity.

This resource guide should be widely distributed to federal workers and should be made available for review in central locations. Dissemination of information on procedural remedies is of great importance to individuals who may feel victimized by discrimination. But of primary importance is creating an atmosphere of fairness to applicants and employees. They should be secure in the knowledge that the federal agency for which they work will not treat them differently or less favorably on account of sexual orientation, gender identity, or any other consideration unrelated to merit.

Through the equitable treatment of all applicants and employees, the Federal Government can set an example for the nation that we serve.

More Resources

The Unique Role of OSC in Protecting LGBT Employees in the Federal Government (OSC 2014), go.usa.gov/3KP6h.

Sexual Orientation and the Federal Workplace (MSPB 2014), go.usa.gov/3KP6H.

Facts about Discrimination in Federal Government Employment Based on Sexual Orientation and Gender Identity (EEOC 2012), go.usa.gov/3KPFp.

Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (OPM 2015), go.usa.gov/3KPeJ.

OPM Final Regulation on Various Nondiscrimination Provisions, 79 Fed. Reg. 43919 – 43923 (OPM July 29, 2014), go.usa.gov/3KPz5.

	EEOC	OSC
Legal Authority	Title VII of the Civil Rights Act of 1964, specifically 42 U.S.C. § 2000e-16.	The Civil Service Reform Act of 1978, specifically 5 U.S.C. §§ 2302(b)(1) and 2302(b)(10).
Statute of Limitations for Filing a Claim	A complainant has 45 days from the date of the alleged discrimination to notify an EEO counselor at one's agency. If the attempts to resolve the claim informally are unsuccessful, the complainant is given a notice of right to file a formal complaint with one's agency and has 15 days from the date of that notice to file a formal complaint.	OSC does not have a statute of limitations for accepting prohibited personnel practice complaints. However, it is typically easier to investigate claims made close in time to when the alleged discrimination occurred.
Federal Agencies Covered by Legal Authority	EEOC has jurisdiction over the federal executive branch and certain other agencies. See 29 C.F.R. § 1614.103.	OSC has jurisdiction within the federal executive branch. OSC does not have section (b)(1) or (b)(10) jurisdiction in the following agencies: Federal Bureau of Investigation, U.S. Postal Service, Postal Regulatory Commission, intelligence agencies, Federal Aviation Administration, government corporations, and non-appropriated fund employees.
Investigative and Other Deadlines	The agency investigation generally must be completed within 180 days from the filing of the complaint. A complainant then has the option of getting a final agency decision or a hearing from an EEOC Administrative Judge.	OSC investigations do not have deadlines. However, if OSC investigates, an OSC investigator will contact a complainant at least once every 60 days.
Temporary Relief	N/A	OSC can request a delay, or "stay," of an adverse personnel action either informally from the agency involved or formally from MSPB. OSC will consider a stay request if there are reasonable grounds to believe that a prohibited personnel practice occurred.
Corrective Make-Whole Remedies	– job restoration – nondiscriminatory placement in a position the victim would have occupied if the discrimination had not occurred – reversal of suspensions and other adverse actions – back pay and lost benefits – compensatory damages and reasonable and foreseeable damages, including attorneys' fees – corrective or preventive actions taken to cure or correct the source of the identified discrimination	– job restoration – nondiscriminatory placement in a position the victim would have occupied if the discrimination had not occurred – reversal of suspensions and other adverse actions – back pay and lost benefits – compensatory damages and reasonable and foreseeable damages, including attorneys' fees – corrective or preventive actions taken to cure or correct the source of the identified discrimination
Disciplinary Action	EEOC cannot pursue disciplinary action against federal employees, but can refer cases to OSC.	OSC can decide to pursue disciplinary action against federal employees who discriminate.
Appeal Rights	A complainant has 30 days after either receiving a final agency decision or the dismissal of their complaint to file an appeal to the EEOC. Within 90 days of receipt of EEOC's decision on the appeal, a complainant can file a claim in federal court. A complainant must work through the administrative EEO process before they can file a claim in court.	If OSC makes a preliminary decision to close a section (b)(1) or (b)(10) complaint, complainants are provided 13 days to request review of this preliminary decision.