

Committee-Approved Version



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recruiting and Hiring Agency Attorneys

Ad Hoc Committee

Proposed Recommendation from Committee | November 20, 2019

1 Attorneys serve crucial roles within federal agencies. For example, they defend agencies
2 in litigation, draft regulations, investigate complaints, and resolve legal issues surrounding
3 information disclosure. Attorneys support nearly all the operations of agencies, helping to ensure
4 their fair and successful functioning as well as the legality of their actions. Therefore, it is critical
5 to ensure that agencies hire a highly qualified corps of attorneys.¹

6 The term “agency attorney” can have many different meanings. To clarify the kind of
7 agency attorneys to which this Recommendation refers, it is necessary to briefly examine the
8 background of the civil service hiring laws.

9 Title 5 of the U.S. Code creates three categories of civil service positions: (1) competitive
10 service, (2) excepted service, and (3) senior executive service.² Most civil service positions are in
11 the competitive service.

12 Agencies that wish to fill a position in the competitive service must generally offer all
13 U.S. citizens and nationals the opportunity to compete in a public and open examination, and
14 those who rank highest are eligible for selection.³ The procedures that agencies must follow in

¹ The Administrative Conference addressed a similar set of practices with respect to administrative law judges (ALJs) in Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*, 84 Fed. Reg. 38,930 (Aug. 8, 2019).

² The senior executive service is not addressed in this Recommendation.

³ 5 U.S.C. §§ 3304–3319; Civil Service Rule II, VII (5 C.F.R. §§ 2.1, 7.3).



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15 administering this competition and ultimately making selections are extremely detailed and
16 complex. Although a full accounting of them is beyond the scope of this Recommendation, they
17 include (1) posting a vacancy announcement on USAJobs.gov, the federal jobs portal
18 (hereinafter “USAJobs”); (2) formally assigning numerical ratings to applicants and selecting
19 among the top three candidates (or, alternatively, adopting a rating system in which applicants
20 are placed into “categories”); (3) hiring only from lists of candidates prepared by an agency
21 delegated examining unit; (4) using Office of Personnel Management (OPM)-generated
22 “qualification standards” within the vacancy announcement; and (5) adhering to detailed
23 procedures for giving veterans and certain family members of veterans (hereinafter “preference
24 eligibles”) priority consideration.

25 Title 5’s civil service positions are placed in the excepted service rather than the
26 competitive service when the President or OPM finds that conditions of good administration so
27 warrant or when Congress itself excepts such positions from the competitive service (which may
28 involve establishing agency-specific rules for how positions may be filled). When the President
29 or OPM makes the requisite finding for a position to be in the excepted service, OPM places it
30 into a “schedule” (of which there are currently five, lettered A through E, within the Code of
31 Federal Regulations (C.F.R.)),⁴ based upon the underlying basis for the exception.⁵

32 OPM has placed Title 5 attorney positions under “Schedule A” of the excepted service.
33 Although there are different hiring rules depending on which schedule an excepted service
34 appointment is in, selection for excepted service appointments other than appointments for
35 attorney positions generally must be made “in the same manner and under the same conditions
36 required for the competitive service by sections 3308–3318 of [Title 5].”⁶ Included within
37 sections 3308 to 3318 are the detailed procedures, mentioned above, for giving preference

⁴ See Civil Service Rule VI (5 C.F.R. § 6.2).

⁵ See 5 U.S.C. § 3302.

⁶ *Id.* § 3320.



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38 eligibles priority consideration.⁷ OPM’s regulations prescribe procedures on how agencies are to
39 accord preference eligibles priority consideration when filling excepted service positions other
40 than attorney positions.⁸

41 Congress has restricted OPM from examining authority over excepted service attorney
42 positions through annual appropriations law.⁹ Such positions are therefore placed in the excepted
43 service and exempt from most of the rules that otherwise apply to excepted service positions.¹⁰

44 This Recommendation applies to agency attorneys who are hired for positions under
45 Schedule A of the excepted service. It does not apply to (a) attorney positions provided for in
46 parts of the U.S. Code other than Title 5; (b) attorney positions in the senior executive service;
47 and (c) attorneys who serve in non-attorney capacities. Attorney positions addressed in this
48 Recommendation are the majority of attorney positions in the federal government.¹¹ Those
49 holding these positions are often referred to as “0905 attorneys” in reference to the occupational
50 series assigned by OPM to those attorneys who are in the General Schedule pay system.¹²

51 Because of the exemption from the rules that apply to other excepted service positions
52 under 5 C.F.R. part 302, the laws governing the hiring process for 0905 attorney positions are
53 generally much less restrictive than the laws governing the hiring process for competitive and
54 other excepted service positions. For example, agencies need not post announcements on
55 USAJobs, use human resources (HR) officials to screen applicants, use qualifications established
56 by OPM, or use category or numerical rating systems for hiring. Agencies must, however,

⁷ See, e.g., *id.* § 3317.

⁸ See, e.g., 5 C.F.R. § 302.304.

⁹ See *Memorandum Opinion for the Associate Attorney General*, 2 Op. O.L.C. 179 (1978).

¹⁰ See 5 C.F.R. § 302.101(c)(8).

¹¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-521, FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES (2016).

¹² Although the occupational series “0905” refers specifically to attorneys under the General Schedule pay system, as used in this Recommendation, it includes attorneys performing equivalent functions in other statutory pay systems.



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57 “follow the principle of veteran preference as far as administratively feasible and, on the request
58 of a qualified and available preference eligible . . . furnish him/her with the reasons for his/her
59 nonselection.”¹³

60 There are other legal requirements to which agencies must generally adhere when hiring
61 0905 attorneys. These include prohibiting hiring decisions based on protected characteristics
62 (e.g., race, sex, and national origin), nepotism, political affiliation, whistleblower activities, and
63 other non-merit considerations.¹⁴ They also include affording priority consideration to people
64 who were separated or furloughed from the agency, without misconduct, due to a compensable
65 injury¹⁵ and generally not hiring males born after 1959 who have not registered for the selective
66 service.¹⁶

67 Despite the less restrictive legal requirements for hiring 0905 attorneys, many agencies
68 choose to follow 0905 attorney hiring practices that are not legally required, such as involving
69 HR officials in screening out applicants based on substantive criteria (e.g., nature of legal
70 experience) and posting announcements exclusively on USAJobs without further disseminating
71 them.¹⁷ Although some agencies undertake these practices knowing they are optional, in other
72 agencies, HR officials and selecting officials wrongly believe these actions are legally required.¹⁸
73 A possible reason for this confusion is that in 1993, OPM stopped publishing the *Federal*
74 *Personnel Manual*, a compendium of guidance that served as an easy reference guide for
75 agencies; successor publications take the form of discrete handbooks and operating manuals and
76 are not published systematically.

¹³ 5 C.F.R. § 302.101(c)(8).

¹⁴ 5 U.S.C. § 2302.

¹⁵ *Id.* § 8151.

¹⁶ *Id.* § 3328.

¹⁷ See Todd Phillips & Todd Rubin, Recruiting and Hiring Agency Attorneys 18 (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/attorney-hiring-draft-report> (Oct. 7, 2019).

¹⁸ *Id.*



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77 Because federal hiring law actually is quite flexible regarding the processes used to select
78 0905 attorneys, agencies may benefit from using different practices in different situations. In
79 certain circumstances, for example, agencies may wish to attract broad applicant pools, whereas
80 in others, they might have more discrete candidate pools (such as attorneys who used to work for
81 the agency, former legal interns, presidential management fellows, or highly recommended
82 candidates) under consideration. In such situations, agencies may not want to post or broadcast
83 an announcement, and it is generally permissible for them not to do so.¹⁹ However, when
84 agencies want to have a broad applicant pool, they will typically benefit from posting an
85 announcement in locations likely to reach potential optimal candidates. This may or may not
86 include USAJobs, which agencies generally need not use for excepted service hiring.²⁰ Although
87 agencies may decide USAJobs is among the best places to post an announcement, there is a
88 monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without
89 further dissemination may be insufficient to produce the optimal applicant pool.

90 Regardless of whether agencies decide to post on USAJobs or elsewhere, announcements
91 are effective recruiting tools only if they are written clearly and in a way designed to welcome
92 qualified applicants. Too often, however, 0905 attorney vacancy announcements contain dense,
93 boilerplate language, descriptions of job responsibilities that are difficult to decipher, and
94 warnings of jail time or fines for false statements.²¹ It seems that this problem is caused at least
95 in part by how HR employees craft their vacancy announcements. (Agencies generally have
96 discretion concerning the language used in the announcement.) For example, a selecting official
97 may be the one who drafts the announcement but may then send it to HR for posting on
98 USAJobs. As an HR employee is posting the announcement on USAJobs, that employee may
99 insert inapplicable boilerplate language, facilitated by USAStaffing (an applicant tracking system
100 created by OPM and accessible only to government officials to post vacancy announcements and

¹⁹ Recruitment “should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society,” 5 U.S.C. § 2301(b)(1), and must not result in an unlawful employment practice based on disparate impact, 42 U.S.C. § 2000e-2(k)(1)(A).

²⁰ 5 U.S.C. § 3330.

²¹ For examples of such announcements, see Phillips & Rubin, *supra* note 17, at 28–30.



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101 track applicants on USAJobs). The selecting official might not realize that such language was
102 inserted until after the announcement has been posted. This Recommendation addresses this
103 issue by encouraging selecting officials, if they send announcements to HR to post, to review the
104 final versions of all vacancy announcements exactly as they will appear to the public before they
105 are posted.

106 This Recommendation's appendix offers an example of a 0905 attorney announcement
107 that is written clearly and in a welcoming manner, which avoids the problems discussed above.
108 Resources exist to assist agencies in using plain language, including Administrative Conference
109 Recommendation 2017-3, *Plain Language in Regulatory Drafting*²² and the *Federal Plain*
110 *Language Guidelines*.²³

111 Agencies' recruitment efforts might include recruiting former interns to work as 0905
112 attorneys. Hiring these candidates allows agencies to employ those who have previously worked
113 in the agency and have proved that they can successfully carry out the position's responsibilities.
114 Such hiring is akin to summer associate programs at some law firms, in which firms hire students
115 to work for the summer after their second year of law school and, after observing the students'
116 work, may offer them permanent employment upon graduation.

117 Agencies, however, cannot extend an offer of employment as a 0905 attorney to an
118 applicant until after he or she has been admitted to a bar, which can take nearly a year or longer
119 after graduation from law school. If an agency wishes to hire an applicant for an attorney
120 position before he or she has been admitted to a bar, the agency must hire him or her as a "0904
121 law clerk trainee" under Schedule A. The 0904 law clerk trainee position is a temporary excepted
122 service appointment in which a candidate for an attorney position could serve while waiting to be

²² Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

²³ PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. 2011), <http://www.plainlanguage.gov/guidelines/>.



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123 admitted to a bar. The appointment can last only 14 months.²⁴ OPM takes the position that the
124 appointment procedures of 5 C.F.R. part 302 apply.²⁵

125 Some agencies have routinized the use of the law clerk trainee hiring authority by hiring
126 attorneys through honors programs, which are generally two-year employment and training
127 programs for recent law school graduates. Applicants generally apply to an honors program in
128 their final year of law school or during a clerkship and, if they are accepted to the honors
129 program, may join the agency with the official position designation “0904 law clerk trainee” if
130 they are not yet admitted to a bar. Law clerk trainees in honors programs serve under the
131 supervision of licensed attorneys until they are admitted to a bar, at which time they may be
132 appointed to 0905 attorney positions. This Recommendation suggests that agencies with honors
133 programs encourage successful interns to apply to them and that agencies without honors
134 programs nonetheless consider hiring successful interns as law clerk trainees and then appoint
135 them to 0905 attorneys upon admission to a bar before the end of 14 months.

136 Another facet of the hiring process is the use of the period before adverse action rights
137 accrue to observe the appointee’s performance and determine whether to retain the appointee.
138 After an individual is appointed to a 0905 position, the person must continuously serve for two
139 years before he or she accrues adverse action rights (or one year, if the person is a preference
140 eligible). During this period the attorney can be dismissed from federal service with minimal
141 procedural protections.²⁶ In the competitive service, there is a period called “the probationary
142 period,” during which agencies are required “to determine the fitness of the employee and shall
143 terminate his services . . . if he fails to demonstrate fully his qualifications for continued

²⁴ 5 C.F.R. § 213.3102(d).

²⁵ The appointment procedures of 5 C.F.R. part 302, although different from the competitive service’s appointment procedures, are still very detailed and complex. They require, among other things, that agencies adhere to a set of detailed procedures for according preference eligibles priority consideration. *See, e.g.*, 5 C.F.R. § 302.304. They also require agencies to establish qualification standards for excepted service positions. *See, e.g., id.* § 302.202.

²⁶ *See* 5 U.S.C. § 7511.



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144 employment.”²⁷ The preliminary period during which 0905 appointees serve before they become
145 “employees” with adverse action rights may be used for the same purpose.²⁸ This
146 Recommendation encourages agency HR officials to send reminders to supervisors when this
147 period will soon be ending, and encourages supervisors to make a considered decision whether to
148 retain the employee while the ability to do so without additional procedures is still available.

149 The Administrative Conference recognizes that agencies filling specific attorney
150 positions may require additional criteria. One such position is an attorney hired as a non-ALJ
151 adjudicator. As discussed above, the Administrative Conference addressed the hiring of ALJs in
152 Recommendation 2019-2. At the very least, like ALJs, attorneys hired as non-ALJ adjudicators
153 must demonstrate an ability to discharge the duties of an adjudicator with impartiality.²⁹ There
154 may be additional criteria agencies need to apply to screen for this quality and others specific to
155 attorneys hired as non-ALJ adjudicators.

156 The paragraphs below are all intended to apply specifically to 0905 attorney positions,
157 even when this limitation is not specifically noted.

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional for Hiring 0905 Attorneys

158 1. The Office of Personnel Management (OPM), in conjunction with the Merit Systems
159 Protection Board and the Office of Special Counsel as necessary, should provide training
160 for agencies on the minimum procedural requirements in statute, regulations, and
161 executive orders for hiring 0905 attorneys. That training should, in particular, clarify the
162 distinction between excepted service hiring for attorneys and other hiring and would

²⁷ 5 C.F.R. § 315.803.

²⁸ See, e.g., U.S. DEP’T OF COMMERCE, DAO 202-315, PROBATIONARY AND TRIAL PERIODS (2017).

²⁹ See Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).



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163 explain the alternative processes and flexibilities available to such positions. Such
164 training could take any number of forms, including written materials and in-person
165 presentations or webinars.

Helping Agencies Recruit Qualified Applicants for 0905 Attorney Positions

- 166 2. When hiring 0905 attorneys, agencies should recognize they have flexibility in recruiting.
167 They may exercise broad or targeted recruitment strategies.
- 168 3. When seeking broad applicant pools for 0905 attorney positions, agencies are encouraged
169 to post vacancy announcements in multiple locations where they are likely to reach
170 qualified applicants. Options for posting include agencies' own websites, job recruiting
171 websites, or USAJobs. In addition to publicly posting announcements, agencies should
172 widely disseminate such announcements to a variety of sources, such as bar associations,
173 other professional legal associations, law school career offices, non-profit organizations,
174 former and current agency employees and interns, other agencies, and other professional
175 networks.
- 176 4. If agencies have smaller groups of potential candidates under consideration, they may
177 choose not to post announcements or otherwise disseminate the announcements widely.

Drafting Vacancy Announcements for 0905 Attorney Positions

- 178 5. Agencies should ensure that selecting officials (i.e., those agency officials who make the
179 ultimate hiring decision) draft and review vacancy announcements for 0905 attorney
180 positions.
- 181 6. Announcements for 0905 attorney vacancies should be written in plain language,
182 adhering closely to the principles from Administrative Conference Recommendation
183 2017-3, *Plain Language in Regulatory Drafting*, and the *Federal Plain Writing*
184 *Guidelines*.
- 185 7. Announcements should specify exactly and clearly which documents are required to
186 constitute a complete application; distinguish between mandatory and desirable criteria;



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- 187 and include under mandatory criteria only essential elements, such as bar membership
188 and citizenship status, as applicable.
- 189 8. Announcements should not contain inapplicable boilerplate language, such as
190 competitive service rules that do not apply to 0905 attorneys.
- 191 9. If agencies intend to limit applications to a certain number, the announcement should say
192 so and specify what the limit is.
- 193 10. Agencies should recognize that they have the option of requiring a conventional resume
194 from applicants instead of requiring the applicant to create a USAJobs resume. Agencies
195 that want to require a conventional resume should state this clearly in the vacancy
196 announcement.
- 197 11. If, after drafting a vacancy announcement, selecting officials send the announcement to
198 human resources (HR) officials to be posted on USAJobs or elsewhere, selecting officials
199 should ask HR officials to see the version of the announcement exactly as it will appear
200 to the public. Selecting officials should then carefully review the announcement to ensure
201 that it is consistent with Paragraphs 6 through 9 before it is posted.
- 202 12. Selecting officials should continue to review open-ended or long-term vacancy
203 announcements to ensure they do not become outdated.
- 204 13. When feasible, agencies should ensure applicants are notified that their applications have
205 been received and if they were not selected.

Improving USAStaffing for 0905 Attorney Positions

- 206 14. OPM should include a notice on USAStaffing (a commonly used applicant tracking
207 system) that encourages agencies to specify exactly and clearly which documents are
208 required to constitute a complete application; distinguish between mandatory and
209 desirable criteria; and include under mandatory criteria only essential elements, such as
210 bar membership and citizenship status, as specified in Paragraph 7.



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- 211 15. Wherever boilerplate language relating to competitive service hiring practices appears in
212 USAStaffing, OPM should make clear that it does not apply to 0905 attorney hiring, and
213 should be excluded in 0905 attorney vacancy announcements.
- 214 16. OPM should include a link on USAStaffing to the *Plain Language Guidelines* and to
215 Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory*
216 *Drafting*, and encourage agencies to apply all relevant provisions of them to their drafting
217 of vacancy announcements, as specified in Paragraph 6.
- 218 17. OPM should make clear in the instructions for USAStaffing that agencies have the option
219 of requiring applicants to submit a conventional resume instead of the resume generated
220 by USAJobs.

Evaluating Applicants for 0905 Attorney Positions

- 221 18. Agencies should develop policies or processes covering how attorney applications will be
222 reviewed and assessed. These policies or processes may include creating teams to select
223 applicants for interviews or recommend applicants for appointment.
- 224 19. Agency leadership should decide which responsibilities HR officials should have in the
225 process of evaluating applications. If HR officials will screen applicants, selecting
226 officials should determine the screening criteria HR officials will use and clearly
227 communicate the criteria to them.

Evaluating 0905 Attorneys During The Period Before Adverse Action Rights Accrue

- 228 20. Supervisors should be aware of the length of the period during which newly hired 0905
229 attorneys (for most, but not all, two years) may be removed without affording them
230 adverse action rights. Supervisors should evaluate attorneys during this period. HR
231 officials should send reminders to supervisors approximately three to six months before
232 the end of this period informing the supervisors that the period will soon end. Before the
233 end of this period, supervisors should decide or make a recommendation about whether
234 attorneys should be retained before this period elapses. The decision should be made in



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235 sufficient time to take any necessary action before the attorney attains tenured
236 employment with adverse action rights.

Using Law Clerk Trainee Positions to Hire 0905 Attorneys

237 21. Agencies with honors programs should encourage successful interns to apply to them.
238 Agencies without honors programs should consider hiring high-performing legal interns
239 after graduation but before they have been admitted to a bar, using the authority to hire a
240 0904 law clerk trainee who can be appointed to a 0905 attorney upon admission to a bar,
241 assuming the agency wishes to do so. Agencies should note that OPM takes the position
242 that 5 C.F.R. part 302 procedures will apply.

Ensuring Impartiality of 0905 Attorneys Hired as Non-Administrative Law Judge (ALJ) Adjudicators

243 22. Agencies' guidelines and procedures for the hiring of attorneys who will act as non-ALJ
244 adjudicators should be designed and administered to ensure the hiring of applicants who
245 will both carry out the functions of the office with impartiality and maintain the
246 appearance of impartiality.



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APPENDIX

As indicated above in the preamble at page 6, below is an example of an attorney job announcement that is written clearly and in a welcoming manner.

OFFICE OF MANAGEMENT AND BUDGET

OFFICE OF GENERAL COUNSEL

GENERAL ATTORNEY

Full-time, Permanent, GS-12/15 (Excepted Service)

The Office of Management and Budget (OMB) Office of General Counsel (OGC) is pleased to invite talented and enthusiastic attorneys to apply for a position in our office to serve as the lead attorney for matters involving the Office of the Federal Chief Information Officer (OFCIO) and the United States Digital Service (USDS). A successful candidate will have at least three years of focused experience with information technology laws and government contracting.

This position is a permanent position with a promotion potential to GS-15.

What Do We Do?

OMB OGC attorneys enjoy dynamic, exciting and fast-paced work, which includes regularly meeting with and advising staff and policy officials in the White House, OMB, and other agencies outside the Executive Office of the President (EOP).

OMB OGC provides legal advice and assistance on a full range of government-wide and agency-specific matters, including litigation matters and other consultation with the Department of Justice's litigation divisions and the Office of Legal Counsel. OMB OGC's practice spans the breadth of Federal practice, including novel and complex legal issues related to high-profile actions and important ethics law questions, legislative proposals, budget and appropriations, procurement policy, grants policy, financial management policy, cybersecurity, national security, trade policy, information technology, privacy, and litigation matters. The office also works on in-house legal matters, including personnel, compliance, ethics, and the Freedom of Information Act.

Position Summary

The attorney in this position will counsel OMB leadership, managers, and staff at all levels across OMB regarding a broad range of matters, including the Federal Information Systems Management Act (FISMA), the Federal Information Technology Reform Act (FITARA), and the Privacy Act, among others. The portfolio includes reviewing policy proposals for legality, soundness, advisability; legislative, fiscal, and programmatic implications; and overall effect on the operation of the Executive Branch.

The successful candidate will have experience in government procurement of information technology and software, including R&D contracts and those for sustainment and maintenance. He/she will also have knowledge of intellectual property licensing and data rights in government contracts, and a strong understanding of emerging issues in government contracting, IT procurement, and software development. A degree in computer science or other technical subject matter is desirable.

The successful candidate must be energetic, creative, and enjoy challenging and interesting legal challenges, and have the ability to work harmoniously with diverse groups of individuals.