

Council Substitute Amendment Version (Clean)



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recruiting and Hiring Agency Attorneys

Ad Hoc Committee

Proposed Recommendation | December 12, 2019

This document contains the Council amendment in the nature of a substitute.

1 Attorneys serve crucial roles within federal agencies. They defend agencies in litigation,
2 draft regulations, investigate complaints, and resolve legal issues surrounding information
3 disclosure, among their many functions. Attorneys support nearly all the operations of agencies,
4 helping to ensure their fair and lawful functioning. Therefore, it is critical that agencies hire a
5 corps of highly-qualified attorneys.¹

6 This Recommendation offers best practices for the recruitment and hiring of federal
7 agency attorneys in the excepted service (explained below), who comprise the majority of
8 attorneys in the federal government.² The laws applicable to excepted service hiring generally,
9 and to hiring of attorneys particularly, are more flexible than those applicable to hiring other
10 federal employees. This Recommendation suggests ways agencies can structure their recruitment
11 and hiring to make optimal use of these flexibilities and attract highly-qualified attorneys.

¹ The Administrative Conference addressed hiring 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 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-521, *FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES* (2016).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Background on Federal Personnel Law

12 Title 5 of the U.S. Code creates three categories of civil service positions: (1) competitive
13 service, (2) excepted service, and (3) senior executive service. Most civil service positions are in
14 the competitive service. The attorney positions addressed in this Recommendation³ are in the
15 excepted service. As explained below, however, they are not subject to most of the rules
16 governing the hiring of excepted service positions.

17 Agencies that wish to fill a position in the competitive service must generally offer all
18 U.S. citizens and nationals the opportunity to compete in a public and open examination.⁴ The
19 procedures that agencies must follow include (1) posting a vacancy announcement on
20 USAJobs.gov, the federal jobs portal (hereinafter “USAJobs”); (2) using minimum qualifications
21 generated by the Office of Personnel Management (OPM) to determine who is qualified for a
22 position; (3) formally assigning numerical ratings to applicants and selecting among the top three
23 candidates⁵; (4) adhering to detailed procedures for giving veterans and certain family members
24 of veterans priority consideration.; and (5) hiring only from lists of candidates prepared by OPM
25 or, if OPM has delegated this function to an agency, by the agency’s own human resources (HR)
26 office (formally called a “delegated examining unit” (DEU)). For most excepted service
27 appointments, the rules are generally the same as the above except that agencies need not post an
28 announcement on USAJobs or use OPM-generated minimum qualifications.⁶

³ Those holding these positions are often referred to as “0905 attorneys” in reference to the occupational series that the Office of Personnel Management assigns to those attorneys who are in the General Schedule pay system. Many agencies use “0905” to refer to attorneys performing equivalent functions in other statutory pay systems. All such attorneys are within the scope of this Recommendation. This Recommendation does not apply, however, to (a) attorney positions provided for in titles of the U.S. Code other than Title 5, (b) attorney positions in the senior executive service, and (c) licensed attorneys who serve in non-attorney positions.

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

⁵ Alternatively, agencies may adopt a system in which they establish two or three rating categories (e.g., “unqualified,” “qualified,” and “highly qualified”) and place each applicant into one of the categories. Agencies may not offer employment to any candidate in a lower category before they offer it to a candidate in a higher category. *See* 5 U.S.C. § 3319.

⁶ *See* 5 U.S.C. § 3320; 5 C.F.R. § 302.103 *et seq.*



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

29 Although attorney positions are placed in the excepted service, OPM regulations further
30 exempt agencies from having to formally rank applicants, use detailed procedures for giving
31 veterans and their family members priority consideration, and hire from lists of candidates
32 prepared by OPM or a DEU.⁷ The result is that the laws governing the hiring process for attorney
33 positions are generally much less restrictive than those governing the hiring process for
34 competitive and other excepted service positions.

35 There are, however, some legal requirements to which agencies must adhere when hiring
36 attorneys. Agencies may not, among other things, make hiring decisions based on protected
37 characteristics (e.g., race, sex, or national origin), nepotism, political affiliation, whistleblower
38 activities, or other factors unrelated to the candidate’s ability to perform the work.⁸ Agencies also
39 must “follow the [statutory] principle of veteran preference as far as administratively feasible
40 and, on the request of a qualified and available [veteran or family member of a veteran who is
41 not selected] . . . furnish him/her with the reasons for his/her nonselection.”⁹

Practices in Hiring Attorneys

Distinguishing Between Optional and Mandatory Hiring Practices

42 Many agencies adopt additional hiring practices that are not legally required. They
43 include involving HR officials in screening out applicants based on substantive criteria (e.g.,
44 nature of legal experience) and posting announcements exclusively on USAJobs without further
45 disseminating them.¹⁰ Although some agencies undertake these practices knowing they are
46 optional, other agencies adopt them because HR and hiring officials mistakenly believe they are

⁷ See 5 C.F.R. § 302.101(c).

⁸ See 5 U.S.C. § 2302. Among other restrictions on agencies’ hiring practices, agencies must not recruit in a way that results in an unlawful disparate impact based on race, sex, or certain other protected characteristics under federal law. See 42 U.S.C. § 2000e-2(k)(1)(A).

⁹ 5 C.F.R. § 302.101(c).

¹⁰ See Todd Phillips & Todd Rubin, Recruiting and Hiring Agency Attorneys 18 (report to the Admin. Conf. of the U.S.), www.acus.gov/report/recruiting-and-hiring-agency-attorneys-final-report (Dec. 4, 2019).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

47 legally required.¹¹ A possible reason is that, in 1993, OPM stopped publishing the *Federal*
48 *Personnel Manual*, a compendium of guidance that served as a reference guide for agencies.
49 Successor publications have taken the form of discrete handbooks and operating manuals that are
50 not updated regularly.

51 *Considering Whether to Attract Broad or Discrete Applicant Pools*

52 Agencies may benefit from availing themselves of the flexibility the law affords them in
53 hiring attorneys by using different practices in different situations. Sometimes agencies may
54 wish to attract broad applicant pools, in which case they will typically benefit from posting an
55 announcement in locations likely to reach a large number of qualified potential candidates.
56 Agencies that wish to do so may decide to post the position on USAJobs. There is, however, a
57 monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without
58 further dissemination may not produce the optimal applicant pool. At other times, agencies might
59 wish to attract discrete candidate pools, consisting of, for example, attorneys who previously
60 worked for the agency, former legal interns, presidential management fellows, or highly
61 recommended candidates. This might be the case when, for example, an agency requires a
62 unique set of skills. In such cases, agencies may not want to post or broadcast an announcement
63 (which the law generally permits).¹²

64 *Drafting Announcements*

65 Whatever approach agencies take, it is important that their job announcements are written
66 clearly and in a way designed to attract qualified applicants. Too often, however, attorney
67 vacancy announcements contain dense language and descriptions of job responsibilities that are
68 difficult to decipher.¹³ This problem can arise when hiring officials send announcements to HR
69 after they draft the position's description. Once HR employees receive the announcements, they

¹¹ *Id.*

¹² 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).

¹³ For examples of such announcements, see Phillips & Rubin, *supra* note 10, at 28–30.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

70 sometimes insert language that does not apply to hiring attorneys (e.g., language applicable only
71 to competitive service hiring). In addition, when HR employees post the announcement through
72 an applicant tracking system (that is, a system that allows government officials to post vacancy
73 announcements and track applicants on USAJobs), the system automatically populates additional
74 language inapplicable to the hiring of attorneys, which HR officials do not remove. Hiring
75 officials Hiring officials might not realize that inapplicable language has been inserted until after
76 the announcements have been posted.

77 This Recommendation's appendix offers an example of an attorney announcement that is
78 written clearly. Resources exist to help agencies draft position announcements in plain language,
79 including Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory*
80 *Drafting*,¹⁴ and the *Federal Plain Language Guidelines*.¹⁵

Recruiting Interns and Using Honors Programs

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

87 Agencies, however, cannot extend an offer of employment as an attorney to an applicant
88 until after he or she has been admitted to a bar, which can take nearly a year or longer after
89 graduation from law school. If an agency wishes to hire an applicant for an attorney position
90 before he or she has been admitted to a bar, the agency must hire him or her as a "law clerk

¹⁴ Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

¹⁵ PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. 2011), <http://www.plainlanguage.gov/guidelines/>.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

91 trainee.” The law clerk trainee position is a temporary excepted service appointment in which a
92 candidate for an attorney position could serve while waiting to be admitted to a bar. The
93 appointment can last no more than 14 months.¹⁶

94 Some agencies regularly use the law clerk trainee hiring authority by hiring through
95 honors programs, which are generally two-year employment and training programs for recent
96 law school graduates. Applicants generally apply to an honors program in their final year of law
97 school or during a clerkship and, if they are accepted, may join the agency as a “law clerk
98 trainee” if they are not yet admitted to a bar. Licensed attorneys supervise law clerk trainees in
99 honors programs until they are admitted to a bar, at which time they may be appointed to
100 attorney positions.

101 *Accruing Merit Systems Protection Board (MSPB) Rights*

102 Once an attorney is hired, he or she must continuously serve for two years (or one year, if
103 the person is a veteran or a family member of a veteran) before accruing the right to challenge a
104 termination before the MSPB.¹⁷ Supervisors may evaluate the appointee’s performance during
105 this period and decide whether to retain the appointee.

Hiring Procedures for Non-ALJ Adjudicators

106 The Administrative Conference recognizes that specific attorney positions may require
107 additional procedures to screen for certain attributes. One important example arises when an
108 agency hires an adjudicator other than an administrative law judge (ALJ). Non-ALJ adjudicators,
109 like ALJs, must demonstrate an ability to discharge the duties of an adjudicator with

¹⁶ 5 C.F.R. § 213.3102(d).

¹⁷ See 5 U.S.C. § 7511. There is a similar period in the competitive service called the “probationary period,” which generally lasts for one year, during which agencies “shall . . . determine the fitness of the employee and shall terminate his services . . . if he fails to demonstrate fully his qualifications for continued employment.” 5 C.F.R. § 315.803.



110 impartiality.¹⁸ There may be additional procedures agencies need to adopt to screen for this
111 attribute and others specific to attorneys hired as non-ALJ adjudicators.

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional

112 1. The Office of Personnel Management (OPM), in conjunction with the Merit Systems
113 Protection Board (MSPB) and the Office of Special Counsel as necessary, should provide
114 training for agencies on the minimum procedural requirements in statutes, regulations,
115 and executive orders for hiring attorneys. That training should, in particular, clarify the
116 distinction between hiring attorneys and hiring other kinds of employees and explain the
117 alternative processes and flexibilities available for hiring attorneys. Such training could
118 take any number of forms, including providing written materials and in-person
119 presentations or webinars.

Helping Agencies Recruit Qualified Applicants

120 2. When hiring attorneys, agencies should recognize that they have flexibility in recruiting.
121 They should recognize that, among other things, they can employ recruitment strategies
122 designed to reach either a broad or narrow pool of applicants as they deem appropriate.

123 3. When seeking broad applicant pools for attorney positions, agencies should post vacancy
124 announcements in multiple locations where they are likely to reach qualified applicants.
125 Options for posting include agencies' own websites, job recruiting websites, or USAJobs.
126 gov, the federal hiring portal. In addition to posting announcements, agencies should
127 widely disseminate such announcements to a variety of sources, such as bar associations,
128 other professional legal associations, law school career offices, professional listservs,
129 former and current agency employees and interns, other agencies, and other professional
130 networks.

¹⁸ See Admin. Conf. of the U.S., Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*, 84 Fed. Reg. 2139 (Feb. 6, 2019).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 131 4. When seeking narrower applicant pools, agencies should consider whether to post
132 announcements at all or otherwise advertise the vacancy.

Drafting Vacancy Announcements

- 133 5. Agencies should ensure that hiring officials draft and review vacancy announcements for
134 attorney positions.
- 135 6. Attorney vacancy announcements should be written in plain language, adhering closely to
136 the principles in Administrative Conference Recommendation 2017-3, *Plain Language in*
137 *Regulatory Drafting*, and the *Federal Plain Writing Guidelines*.
- 138 7. Announcements should specify exactly and clearly which documents are required to
139 constitute a complete application; distinguish between mandatory and desirable criteria;
140 and include under mandatory criteria only essential elements, such as bar membership
141 and citizenship status.
- 142 8. Announcements should not include language that is applicable only to competitive
143 service positions or that is otherwise inapplicable to attorney positions.
- 144 9. If agencies intend not to consider additional applications after receiving a certain
145 number, the announcement should so indicate and specify the limit.
- 146 10. Agencies should recognize that they have the option of requiring a conventional résumé
147 from applicants instead of requiring applicants to create a USAJobs résumé. Agencies
148 that require a conventional résumé should so state in the vacancy announcement.
- 149 11. If, after drafting a vacancy announcement, hiring officials send the announcement to
150 human resources (HR) officials to be posted on USAJobs or elsewhere, hiring officials
151 should collaborate with HR officials to review and approve the final version of the
152 announcement exactly as it will appear to the public. Hiring officials should review the
153 announcement to ensure that it is consistent with Paragraphs 6 through 10 before it is
154 posted.
- 155 12. Hiring officials should continue to review open-ended or long-term vacancy
156 announcements to ensure they do not become outdated.



Improving OPM's Applicant Tracking System

- 157 13. OPM should include a notice on its applicant tracking system (that is, the system that
158 allows agencies to post announcements on USAJobs and track applications) that
159 encourages agencies to specify exactly and clearly which documents are required to
160 constitute a complete application; distinguish between mandatory and desirable criteria;
161 and include under mandatory criteria only essential elements, such as bar membership
162 and citizenship status, as specified in Paragraph 7.
- 163 14. OPM should clearly inform agencies that any language inapplicable to attorney hiring
164 that automatically populates in its tracking system should be excluded from attorney
165 vacancy announcements.
- 166 15. OPM should include a link on its applicant tracking system to the *Plain Language*
167 *Guidelines* and to Administrative Conference Recommendation 2017-3, *Plain Language*
168 *in Regulatory Drafting*, and encourage agencies to apply all relevant provisions to their
169 drafting of vacancy announcements, as specified in Paragraph 6.
- 170 16. OPM should make clear in the instructions for its applicant tracking system that agencies
171 have the option of requiring applicants to submit a conventional résumé instead of a
172 résumé generated by USAJobs.

Evaluating Applicants for Attorney Positions

- 173 17. Agencies should develop policies or processes governing how attorney applications will
174 be reviewed and assessed. These policies or processes may include creating teams to
175 select applicants for interviews or recommend applicants for appointment.
- 176 18. Agency leadership should decide which responsibilities HR officials should have in
177 evaluating applications. If HR officials will screen applicants, hiring officials should
178 determine the screening criteria and clearly communicate it to the screeners.
- 179 19. If feasible, agencies should ensure applicants are notified when their applications have
180 been received and when the agency has made a hiring decision.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

181 20. Supervisors should be aware that most, but not all, newly hired attorneys accrue the right
182 to challenge termination before the MSPB after two years. HR officials should send
183 reminders to supervisors approximately three to six months before such rights accrue for
184 any given attorney.

Using Law Clerk Trainee Positions and Honors Programs to Hire Attorneys

185 21. Agencies with honors programs should encourage successful interns to apply to them.
186 Agencies without honors programs should consider hiring high-performing legal interns
187 after graduation but before they have been admitted to a bar, using the authority to hire a
188 law clerk trainee who can be appointed to an attorney position upon admission to a bar.

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

189 22. Agencies' guidelines and procedures for hiring attorneys who will act as non-ALJ
190 adjudicators should be designed and administered to ensure that those hired will act
191 impartially and maintain the appearance of impartiality, as suggested in Recommendation
192 2018-4, *Recusal Rules for Administrative Adjudicators*.

193



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

APPENDIX

The following is an example of an attorney job announcement that is written in a way that is consistent with this Recommendation.

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.