

Manager's and Member Amendments Version



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recruiting and Hiring Agency Attorneys

Ad Hoc Committee

Proposed Recommendation | December 12, 2019

This document accepts the changes in the Council amendment in the nature of a substitute and contains additional Manager's Amendments (with no source shown in margin) and Conference Member Amendments (with source shown in the margin).

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

Commented [CMA1]: Proposed Amendment from Robert Girouard #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

Commented [CMA2]: Proposed Amendment from Robert Girouard #2

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

11 and hiring to ~~attract good candidates for attorney positions, make optimal use of these flexibilities~~
12 ~~and attract highly qualified attorneys.~~

Commented [CMA3]: Proposed Amendment from Robert Girouard #3

Background on Federal Personnel Law

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

18 Agencies that wish to fill a position in the competitive service must generally offer all
19 U.S. citizens and nationals the opportunity to compete in a public and open examination.⁴ The
20 procedures that agencies must follow include (1) posting a vacancy announcement on
21 USAJobs.gov, the federal jobs portal (hereinafter “USAJobs”); (2) using minimum qualifications
22 ~~generated by the Office of Personnel Management (OPM) to determine who is qualified and~~
23 ~~eligible to be rated for an agency assessment is qualified for a position;~~ (3) formally assigning
24 numerical ratings to **qualified** applicants and selecting among the top three candidates⁵; (4)
25 adhering to detailed procedures for giving veterans and certain family members of veterans
26 priority consideration; and (5) hiring only from lists of candidates prepared by OPM or, if OPM
27 has delegated this function to an agency, by the agency’s own human resources (HR) office
28 (formally called a “delegated examining unit” (DEU)). For most excepted service appointments,

Commented [CMA4]: Proposed Amendment from Robert Girouard #4

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 more** 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.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

29 the rules are generally the same as the above except that agencies need not post an announcement
30 on USAJobs or use OPM-generated minimum qualifications.⁶

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

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

Practices in Hiring Attorneys

Distinguishing Between Optional and Mandatory Hiring Practices

44 Many agencies adopt additional hiring practices that are not legally required. They
45 include involving HR officials in screening out applicants based on substantive criteria (e.g.,
46 nature of legal experience) and posting announcements exclusively on USAJobs without further

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

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

47 disseminating them.¹⁰ Although some agencies undertake these practices knowing they are
48 optional, other agencies adopt them because HR and hiring officials mistakenly believe they are
49 legally required.¹¹ A possible reason is that, in 1993, OPM stopped publishing the *Federal*
50 *Personnel Manual*, a compendium of guidance that served as a reference guide for agencies.
51 Successor publications have taken the form of discrete handbooks and operating manuals that are
52 not updated ~~regularly~~frequently.

Considering Whether to Attract Broad or Discrete Applicant Pools

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

Drafting Announcements

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).

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

67 Whatever approach agencies take, it is important that their job announcements are written
68 clearly and in a way designed to attract qualified applicants. Too often, however, attorney
69 vacancy announcements contain dense language and descriptions of job responsibilities that are
70 difficult to decipher.¹³ This problem can arise when hiring officials send announcements to HR
71 after they draft the position’s description. Once HR employees receive the announcements, they
72 sometimes insert language that does not apply to hiring attorneys (e.g., language applicable only
73 to competitive service hiring). In addition, when HR employees post the announcement through
74 an applicant tracking system (that is, e., a system that allows government officials to post
75 vacancy announcements and track applicants on USAJobs), the ~~system automatically populates
76 additional language inapplicable to the hiring of attorneys, which HR officials do not remove~~ HR
77 ~~officials may select generic agency-developed job vacancy announcement templates, which
78 populate language that may be incorrect or inapplicable to the hiring of attorneys. If Hiring HR
79 officials do not remove or correct that language, the announcements can be confusing or
80 incorrect for specialized positions such as attorneys.~~ Hiring officials might not realize that
81 inapplicable language has been inserted until after the announcements have been posted.

Commented [CMA5]: Proposed Amendment from Robert Girouard #5

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

Recruiting Interns and Using Honors Programs

86 Agencies’ recruitment efforts might include recruiting former interns to work as
87 attorneys. Hiring these candidates allows agencies to employ those who have previously worked
88 in the agency and have proved that they can successfully carry out the agency’s work. Such

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

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

89 hiring is akin to summer associate programs at some law firms, in which firms hire students to
90 work for the summer after their second year of law school and then, after observing the students’
91 work, may offer them permanent employment upon graduation.

92 Agencies, however, cannot extend an offer of employment as an attorney to an applicant
93 until after he or she has been admitted to a bar, which can take nearly a year or longer after
94 graduation from law school. If an agency wishes to hire an applicant for an attorney position
95 before he or she has been admitted to a bar, the agency must hire him or her as a “law clerk
96 trainee.” The law clerk trainee position is a temporary excepted service appointment in which a
97 candidate for an attorney position could serve while waiting to be admitted to a bar. The
98 appointment can last no more than 14 months.¹⁶

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

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

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

Commented [CMA6]: Proposed Amendment from Robert Girouard #6

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.” In the~~



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Hiring Procedures for Non-ALJ Adjudicators

111 The Administrative Conference recognizes that specific attorney positions may require
112 additional procedures to screen for certain attributes. One important example arises when an
113 agency hires an adjudicator other than an administrative law judge (ALJ). Non-ALJ adjudicators,
114 like ALJs, must demonstrate an ability to discharge the duties of an adjudicator with
115 impartiality.¹⁸ There may be additional procedures agencies need to adopt to screen for this
116 attribute and others specific to attorneys hired as non-ALJ adjudicators.

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional

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

Commented [CMA7]: Proposed Amendment from Robert Girouard #7

Helping Agencies Recruit Qualified Applicants

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

competitive service, adverse action rights accrue at the end of a probationary or trial period, or after completion of one year of current continuous service under other than a temporary appointment limited to one year or less. 5

C.F.R. § 315.803.

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

- 128 3. When seeking broad applicant pools for attorney positions, agencies should post vacancy
129 announcements in multiple locations where they are likely to reach qualified applicants.
130 Options for posting include agencies’ own websites, job recruiting websites, or USAJobs.
131 gov, the federal hiring portal. In addition to posting announcements, agencies should
132 widely disseminate such announcements to a variety of sources, such as bar associations,
133 other professional legal associations, law school career offices, professional listservs,
134 former and current agency employees and interns, other agencies, and other professional
135 networks.
- 136 4. When seeking narrower applicant pools, agencies should consider ~~whether to post~~
137 ~~limiting the posting of vacancy announcements at all or otherwise advertise the vacancy~~
138 ~~to the agencies’ websites and specialized forums.~~

Commented [CMA8]: Proposed Amendment from Robert Girouard #8

Drafting Vacancy Announcements

- 139 5. Agencies should ensure that hiring officials draft and review vacancy announcements for
140 attorney positions.
- 141 6. Attorney vacancy announcements should be written in plain language, adhering closely to
142 the principles in Administrative Conference Recommendation 2017-3, *Plain Language in*
143 *Regulatory Drafting*, and the *Federal Plain Writing Guidelines*.
- 144 7. Announcements should specify exactly and clearly which documents are required to
145 constitute a complete application; distinguish between mandatory and desirable criteria;
146 and include under mandatory criteria only essential elements, such as bar membership
147 and citizenship status.
- 148 8. Announcements should not include language that is applicable only to competitive
149 service positions or that is otherwise inapplicable to attorney positions.
- 150 9. If agencies intend not to consider additional applications after receiving a certain
151 number, the announcement should so indicate and specify the limit.
- 152 10. Agencies should recognize that they have the option of requiring a conventional résumé
153 from applicants instead of requiring applicants to create a USAJobs résumé. Agencies
154 that require a conventional résumé should so state in the vacancy announcement.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 155 11. If, after drafting a vacancy announcement, hiring officials send the announcement to
156 human resources (HR) officials to be posted on USAJobs or elsewhere, hiring officials
157 should collaborate with HR officials to review and approve the final version of the
158 announcement exactly as it will appear to the public. Hiring officials should review the
159 announcement to ensure that it is consistent with Paragraphs 6 through 10 before it is
160 posted.
- 161 12. Hiring officials should continue to review open-ended or long-term vacancy
162 announcements to ensure they do not become outdated.

Improving OPM’s Applicant Tracking System

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

Commented [CMA9]: Proposed Amendment from Robert Girouard #9

Commented [CMA10]:

Commented [CMA11]: Proposed Amendment from Robert Girouard #10



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Evaluating Applicants for Attorney Positions

- 180 17. Agencies should develop policies or processes governing how attorney applications will
181 be reviewed and assessed. These policies or processes may include creating teams to
182 select applicants for interviews or recommend applicants for appointment.
- 183 18. Agency leadership should decide which responsibilities HR officials should have in
184 evaluating applications. If HR officials will screen applicants, hiring officials should
185 determine the screening criteria and clearly communicate ~~it~~ to them to the screeners.
- 186 19. If feasible, agencies should ensure applicants are notified when their applications have
187 been received and when the agency has made a hiring decision.
- 188 20. Supervisors should be aware that most ~~but not all~~ newly hired attorneys accrue the right
189 to challenge ~~termination/removal~~ before the MSPB after two years or one year, if the
190 person is a veteran or an eligible family member of a veteran. HR officials should send
191 reminders to supervisors approximately three to six months before such rights accrue for
192 any given attorney.

Using Law Clerk Trainee Positions and Honors Programs to Hire Attorneys

- 193 21. Agencies with honors programs should encourage successful interns to apply to them.
194 Agencies without honors programs should consider hiring high-performing legal interns
195 after graduation but before they have been admitted to a bar, using the authority to hire a
196 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

- 197 22. Agencies' guidelines and procedures for hiring attorneys who will act as non-ALJ
198 adjudicators should be designed and administered to ensure that those hired will act



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

199 impartially and maintain the appearance of impartiality, as suggested in Recommendation
200 2018-4, *Recusal Rules for Administrative Adjudicators*.

201



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.

1