Manager’s and Member Amendments Version

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).

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

This Recommendation offers best practices for the recruitment and hiring of federal agency attorneys in the excepted service (explained below), who comprise the majority of attorneys in the federal government.² The laws applicable to excepted service hiring generally, and to hiring of attorneys particularly, are more flexible than those applicable to hiring other federal employees. This Recommendation suggests ways agencies can structure their recruitment

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and hiring to attract good candidates for attorney positions make optimal use of these flexibilities.

and attract highly qualified attorneys.

Background on Federal Personnel Law

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

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

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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.


5 Alternatively, agencies may adopt a system in which they establish two or 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.
the rules are generally the same as the above except that agencies need not post an announcement
on USAJobs or use OPM-generated minimum qualifications.\(^6\)

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

There are, however, some legal requirements to which agencies must adhere when hiring
attorneys. Agencies may not, among other things, make hiring decisions based on protected
characteristics (e.g., race, sex, or national origin), nepotism, political affiliation, whistleblower
activities, or other factors unrelated to the candidate’s ability to perform the work.\(^8\) Agencies also
must “follow the [statutory] principle of veteran preference as far as administratively feasible
and, on the request of a qualified and available [veteran or preference eligible family member of
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*

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

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\(^7\) 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.

\(^9\) 5 C.F.R. § 302.101(c).
disseminating them.\textsuperscript{10} Although some agencies undertake these practices knowing they are optional, other agencies adopt them because HR and hiring officials mistakenly believe they are legally required.\textsuperscript{11} A possible reason is that, in 1993, OPM stopped publishing the \textit{Federal Personnel Manual}, a compendium of guidance that served as a reference guide for agencies. Sucessor publications have taken the form of discrete handbooks and operating manuals that are not updated regularly.\textsuperscript{49}

\textbf{Considering Whether to Attract Broad or Discrete Applicant Pools}

Agencies may benefit from availing themselves of the flexibility the law affords them in hiring attorneys by using different practices in different situations. Sometimes agencies may wish to attract broad applicant pools, in which case they will typically benefit from posting an announcement in locations likely to reach a large number of qualified potential candidates.

Agencies that wish to do so may decide to post the position on USAJobs. There is, however, a monetary cost to posting on USAJobs, and posting an announcement solely on USAJobs without further dissemination may not produce the optimal applicant pool. At other times, agencies might wish to attract discrete candidate pools, consisting of, for example, attorneys who previously worked for the agency, former legal interns, presidential management fellows, or highly recommended candidates. This might be the case when, for example, an agency requires a unique set of skills. In such cases, agencies may not want to post or broadcast an announcement (which the law generally permits).\textsuperscript{12}

\textbf{Drafting Announcements}


\textsuperscript{11} Id.

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

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

Recruiting Interns and Using Honors Programs

Agencies’ recruitment efforts might include recruiting former interns to work as attorneys. Hiring these candidates allows agencies to employ those who have previously worked 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.
hiring is akin to summer associate programs at some law firms, in which firms hire students to
work for the summer after their second year of law school and then, after observing the students’
work, may offer them permanent employment upon graduation.

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

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

\textit{Accruing Merit Systems Protection Board (MSPB) Rights}

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

\textsuperscript{16} 5 C.F.R. § 213.3102(d).

\textsuperscript{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
Hiring Procedures for Non-ALJ Adjudicators

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

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Required and Which Are Optional

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

Helping Agencies Recruit Qualified Applicants

2. When hiring attorneys, agencies should recognize that they have flexibility in recruiting. They should recognize that, among other things, they can employ recruitment strategies designed to reach either a broad or narrow pool of applicants as they deem appropriate.
3. When seeking broad applicant pools for attorney positions, agencies should post vacancy announcements in multiple locations where they are likely to reach qualified applicants. Options for posting include agencies’ own websites, job recruiting websites, or USAJobs.gov, the federal hiring portal. In addition to posting announcements, agencies should widely disseminate such announcements to a variety of sources, such as bar associations, other professional legal associations, law school career offices, professional listservs, former and current agency employees and interns, other agencies, and other professional networks.

4. When seeking narrower applicant pools, agencies should consider whether to post limiting the posting of vacancy announcements at all or otherwise advertise the vacancy to the agencies’ websites and specialized forums.

Drafting Vacancy Announcements

5. Agencies should ensure that hiring officials draft and review vacancy announcements for attorney positions.

6. Attorney vacancy announcements should be written in plain language, adhering closely to the principles in Administrative Conference Recommendation 2017-3, Plain Language in Regulatory Drafting, and the Federal Plain Writing Guidelines.

7. Announcements should specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include under mandatory criteria only essential elements, such as bar membership and citizenship status.

8. Announcements should not include language that is applicable only to competitive service positions or that is otherwise inapplicable to attorney positions.

9. If agencies intend not to consider additional applications after receiving a certain number, the announcement should so indicate and specify the limit.

10. Agencies should recognize that they have the option of requiring a conventional résumé from applicants instead of requiring applicants to create a USAJobs résumé. Agencies that require a conventional résumé should so state in the vacancy announcement.
11. If, after drafting a vacancy announcement, hiring officials send the announcement to human resources (HR) officials to be posted on USAJobs or elsewhere, hiring officials should collaborate with HR officials to review and approve the final version of the announcement exactly as it will appear to the public. Hiring officials should review the announcement to ensure that it is consistent with Paragraphs 6 through 10 before it is posted.

12. Hiring officials should continue to review open-ended or long-term vacancy announcements to ensure they do not become outdated.

Improving OPM’s Applicant Tracking System

13. OPM should include a notice on its applicant tracking system instruct agencies that HR users developing job vacancy announcement templates in the talent acquisition system (that is, the system that allows agencies to use to post announcements on USAJobs and to track applications) that encourages agencies to must specify exactly and clearly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include under mandatory criteria only essential elements, such as bar membership and citizenship status, as specified in Paragraph 7.

14. OPM should clearly inform agencies to exclude from their vacancy announcement templates that any language inapplicable to attorney hiring that automatically populates in its tracking system should be excluded from attorney vacancy announcements.

15. OPM should include a link on its applicant tracking system to the Plain Language Guidelines and to Administrative Conference Recommendation 2017-3, Plain Language in Regulatory Drafting, and encourage agencies to apply all relevant provisions to their drafting of vacancy announcements, as specified in Paragraph 6.

16. OPM should make clear in the instructions for its applicant tracking system that agencies have the option of requiring applicants to submit a conventional résumé instead of a résumé generated by USAJobs.
Evaluating Applicants for Attorney Positions

17. Agencies should develop policies or processes governing how attorney applications will be reviewed and assessed. These policies or processes may include creating teams to select applicants for interviews or recommend applicants for appointment.

18. Agency leadership should decide which responsibilities HR officials should have in evaluating applications. If HR officials will screen applicants, hiring officials should determine the screening criteria and clearly communicate it to the screeners.

19. If feasible, agencies should ensure applicants are notified when their applications have been received and when the agency has made a hiring decision.

20. Supervisors should be aware that most, but not all, newly hired attorneys accrue the right to challenge [termination/Removal] before the MSPB after two years [for one year, if the person is a veteran or an eligible family member of a veteran]. HR officials should send reminders to supervisors approximately three to six months before such rights accrue for any given attorney.

Using Law Clerk Trainee Positions and Honors Programs to Hire Attorneys

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

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