

Comment on Proposed ACUS Recommendation: Recruiting and Hiring Agency Attorneys
Robert J. Girouard, Government Member

Page 1, lines 4-5: Replace “highly-qualified” with “qualified.” Reason for amendment: in the Federal hiring context it is sufficient to say “qualified” because that means the hiring agency has determined the candidate has the requisite knowledge, skill and ability to perform the duties of the position successfully.

Page 1, lines 8-9: The text states that “The laws applicable to excepted service hiring generally, and to hiring of attorneys particularly, are more flexible” Amend to read, “The laws applicable to excepted service hiring of attorney are more flexible” Reason for amendment: as we have advised, under 5 U.S.C. 3320, the rules applicable to non-exempt excepted service hiring are not really much more flexible than the rules applicable to the competitive service.

Page 1, lines 10-11: The text states that “This Recommendation suggests ways agencies can structure their recruitment and hiring to make optimal use of these flexibilities and attract highly-qualified attorneys.” Amend to read, “This Recommendation suggests ways agencies can structure the recruitment and hiring to attract good candidates for attorney positions.” Reason for amendment: as currently drafted, the text suggests that by design, attorney hiring incorporates special “flexibilities” that agencies need to take active steps to employ, which is not correct. (Attorney hiring is exempt from excepted service appointment procedures by operation of appropriations law.)

Page 2, lines 20-22: strike “using minimum qualifications generated by the Office of Personnel Management (OPM) to determine who is qualified for a position” and replace with “using minimum qualifications to determine who should be admitted to the agency’s assessment process and then administering an assessment.” Reason for amendment: agencies are expected to use validated assessments to determine who is actually qualified to perform the duties of the particular position in addition to using them to determine ratings/rankings. That is the purpose of the “passing grade” referenced in 5 U.S.C. 3309 and the meaning of the phrase “qualified in examinations” in section 3313.

Page 2, line 22: Page 2, line 22: insert “qualified” in front of “applicants.” Reason for amendment: as noted with the prior amendment, only an applicant who qualifies is then eligible to be rated and ranked.

Page 4, lines 49-50: strike “not updated regularly” and replace with “updated only periodically.” Reason for amendment guidance flows regularly through transmissions from the Director of OPM to Chief Human Capital Officers (CHCOs), and historical transmissions are available (and searchable) on the CHCO Council web site.

Page 10, lines 181-182: Add the phrase, “and some may accrue the right to challenge removal after one year” to the end of the sentence. Reason for amendment: in light of 5 U.S.C. 7511(a)(1)(B), appointees to attorney positions who are preference eligible will accrue adverse action rights in one year, regardless of any exemption from part 302 procedures.

Amendments to Preamble:

Page 2, lines 30-31: strike “use detailed procedures for giving veterans and their family members priority consideration” and replace with “use detailed procedures for giving preference to veterans and eligible family members.” Reasons for amendment: (1) the sentence concerns the “preference” given to veterans in excepted-service hiring under 5 C.F.R. part 302, not to the “priority consideration” given to displaced applicants and applicants with compensable workplace injuries under that part, so the correct term is “preference,” not “priority consideration.” (2) Not all “family members” of veterans receive preference, only a spouse, widow, widower, parent, or sole survivor who is a “preference eligible” under the specific eligibility criteria set forth in 5 U.S.C. 2108.

Conforming amendments on page 3, line 40 and on page 6, line 103: replace “family member of a veteran” with “preference-eligible family member.”

Page 2, supra note 5: change “two or three rating categories” to read “two or more rating categories.” Reason for amendment: 5 U.S.C. 3319 and 5 C.F.R. 337.303 place no cap on the number of quality categories that an agency can adopt as part of its category rating system.

Page 3, line 32: strike “OPM or a DEU” and replace with “the agency”. Reason for amendment: this sentence refers to the excepted-service appointment procedures in 5 C.F.R. part 302. The part 302 procedures do not involve examination by OPM or by a DEU, but by an agency. See 5 C.F.R. 302.102(a), 302.104.

Pages 4-5, lines 71-76: The text currently states, “In addition, when HR employees post the announcement through an applicant tracking system (that is, 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. Hiring officials might not realize that inapplicable language has been inserted until after the announcements have been posted.” Amend to read as follows: “In addition, when HR employees post the announcement through an applicant tracking system (that is, a system that allows government officials to post vacancy announcements and track applicants on USAJOBS), the HR officials may select generic agency-developed job opportunity announcement templates, which populate language that may be incorrect or inapplicable to the hiring of attorneys. If HR officials do not remove or correct that language, the announcements can be confusing or incorrect for specialized positions such as attorneys.”

Reason for amendment: OPM’s talent acquisition system (USA Staffing) does not drive the language appearing in the USAJOBS job opportunity announcement. That language is configurable by agencies, and they have full discretion in what appears on their announcements. Agencies can create templates specific to the vacancy (i.e., Attorney) with relevant information for that position. Note: There is some language USAJOBS adds to the bottom of every job opportunity announcement that is not controlled by the talent acquisition systems related to, e.g., equal employment opportunity and reasonable accommodation. But we do not believe that the draft recommendation is taking issue with this language.

Page 6, line 104: change “termination” to “removal.” “Removal” is the statutory term for this action under 5 U.S.C. 7512(1).

Page 6, supra note 17: The second sentence, beginning with “There is a similar period in the competitive service,” oversimplifies when adverse action rights accrue. Please strike and replace with the following: “In the 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.”

Amendments to Recommendation:

Page 6, line 112, recommendation 1: Instead of saying that “The Office of Personnel Management (OPM) . . . should provide” training related to attorney hiring, say that “Agencies should consider requesting training from” OPM on this topic. Reason for amendment: the training statute makes agency heads, not OPM, responsible for determining their own training needs and for planning, operating, and evaluating their training programs. 5 U.S.C. 4103(a). OPM may provide training “on request of an agency” and if such request is accepted, OPM performs the training as a reimbursable service under its revolving fund statute. 5 U.S.C. 1304(e)(1), 4116.

Page 8, lines 131-132, recommendation 4: As currently drafted, the recommendation is that “[w]hen seeking narrower applicant pools, agencies should consider whether to post announcements at all or otherwise advertise the vacancy.” As drafted, this recommendation appears to endorse hiring without notice of any kind, and is therefore in tension with E.O. 11478, as amended (which requires agency heads, “to the maximum extent possible,” to “assure that recruitment activities reach all sources”) and with section 717 of the Civil Rights Act of 1964 and 5 U.S.C. 2301(b)(1). Please amend to read as follows: “[w]hen seeking narrower applicant pools, agencies should consider limiting the vacancy announcements to the agency’s Web site and specialized forums.”

Page 9, lines 157-162, recommendation 13: The recommendation currently reads, “OPM should include a notice on its applicant tracking system (that is, the system that allows agencies to post announcements on USAJobs and track applications) that encourages agencies to 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.” Amend to read as follows: “OPM should instruct agencies that HR users developing job opportunity announcement templates in the talent acquisition system used to post announcements on USAJobs and to track applications 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.”

Reason for amendment: to reflect that fact that agency HR users are developing agencies’ job opportunity announcement templates on USAStaffing and other talent acquisition systems.

Page 9, lines 163-165, recommendation 14: The recommendation currently reads, “OPM should clearly inform agencies that any language inapplicable to attorney hiring that automatically populates in its tracking system should be excluded from attorney vacancy announcements.” Amend to read as follows: “OPM should clearly inform agencies to improve their job opportunity announcement templates for attorney vacancy announcements, and to exclude, from those templates, any language inapplicable to attorney hiring.”

Reason for amendment: to focus on the source of the concern, the templates programmed by agency HR users.

Page 10, line 182, recommendation 20: change “termination” to “removal.” “Removal” is the statutory term under 5 U.S.C. 7512(1).

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