

Recruiting and Hiring Agency Attorneys

Ad Hoc Committee

Proposed Recommendation | December 12, 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
15	administering this competition and ultimately making selections are extremely detailed and

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).



complex. Although a full accounting of them is beyond the scope of this Recommendation, they 16 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.

Title 5's civil service positions are placed in the excepted service rather than the competitive service when the President or OPM finds that conditions of good administration so warrant or when Congress itself excepts such positions from the competitive service (which may involve establishing agency-specific rules for how positions may be filled). When the President or OPM makes the requisite finding for a position to be in the excepted service, OPM places it into a "schedule" (of which there are currently five, lettered A through E, within the Code of 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 38 eligibles priority consideration.⁷ OPM's regulations prescribe procedures on how agencies are to

⁶ Id. § 3320.

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

⁵ See 5 U.S.C. § 3302.

⁷ See, e.g., *id.* § 3317.



accord preference eligibles priority consideration when filling excepted service positions other
 than attorney positions.⁸

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

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

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

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.



of a qualified and available preference eligible . . . furnish him/her with the reasons for his/her
 nonselection."¹³

There are other legal requirements to which agencies must generally adhere when hiring 0905 attorneys. These include prohibiting hiring decisions based on protected characteristics (e.g., race, sex, and national origin), nepotism, political affiliation, whistleblower activities, and other non-merit considerations.¹⁴ They also include affording priority consideration to people who were separated or furloughed from the agency, without misconduct, due to a compensable injury¹⁵ and generally not hiring males born after 1959 who have not registered for the selective 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 them.¹⁷ Although some agencies undertake these practices knowing they are optional, in other 71 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.



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 include USAJobs, which agencies generally need not use for excepted service hiring.²⁰ Although 86 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 warnings of jail time or fines for false statements.²¹ It seems that this problem is caused at least 94 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.



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

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

Agencies' recruitment efforts might include recruiting former interns to work as 0905 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 position's responsibilities. Such 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, after observing the students' work, may offer them permanent employment upon graduation.

Agencies, however, cannot extend an offer of employment as a 0905 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 "0904 law clerk trainee" under Schedule A. The 0904 law clerk trainee position is a temporary excepted 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/.



admitted to a bar. The appointment can last only 14 months.²⁴ OPM takes the position that the
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 eligible). During this period the attorney can be dismissed from federal service with minimal 140 procedural protections.²⁶ In the competitive service, there is a period called "the probationary 141 period," during which agencies are required "to determine the fitness of the employee and shall 142 143 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.



144 employment."²⁷ The preliminary period during which 0905 appointees serve before they become "employees" with adverse action rights may be used for the same purpose.²⁸ This 145 146 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

Recommendation 2019-2. At the very least, like ALJs, attorneys hired as non-ALJ adjudicators must demonstrate an ability to discharge the duties of an adjudicator with impartiality.²⁹ There may be additional criteria agencies need to apply to screen for this quality and others specific to 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).



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

Helping Agencies Recruit Qualified Applicants for 0905 Attorney Positions

- When hiring 0905 attorneys, agencies should recognize they have flexibility in recruiting.
 They may exercise broad or targeted recruitment strategies.
- 3. When seeking broad applicant pools for 0905 attorney positions, agencies are encouraged
 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 professional175 networks.
- If agencies have smaller groups of potential candidates under consideration, they may
 choose not to post announcements or otherwise disseminate the announcements widely.

Drafting Vacancy Announcements for 0905 Attorney Positions

- Agencies should ensure that selecting officials (i.e., those agency officials who make the
 ultimate hiring decision) draft and review vacancy announcements for 0905 attorney
 positions.
- 6. Announcements for 0905 attorney vacancies should be written in plain language,
 adhering closely to the principles from Administrative Conference Recommendation
- 183 2017-3, Plain Language in Regulatory Drafting, and the Federal Plain Writing
 184 Guidelines.
- 1857. Announcements should specify exactly and clearly which documents are required to186constitute a complete application; distinguish between mandatory and desirable criteria;



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.



- 15. Wherever boilerplate language relating to competitive service hiring practices appears in
 USAStaffing, OPM should make clear that it does not apply to 0905 attorney hiring, and
 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
- 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

- 18. Agencies should develop policies or processes covering 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.
- 19. Agency leadership should decide which responsibilities HR officials should have in the
 process of evaluating applications. If HR officials will screen applicants, selecting
 officials should determine the screening criteria HR officials will use and clearly
 communicate the criteria to them.

Evaluating 0905 Attorneys During The Period Before Adverse Action Rights Accrue

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



sufficient time to take any necessary action before the attorney attains tenuredemployment 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.



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.

