



## **Administrative Conference Recommendation 2019-9**

### **Recruiting and Hiring Agency Attorneys**

**Adopted December 12, 2019**

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.<sup>1</sup>

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.<sup>2</sup> The laws applicable to excepted service hiring of attorneys are more flexible than those applicable to hiring other federal employees. This Recommendation suggests ways agencies can structure their recruitment and hiring to use these flexibilities to 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<sup>3</sup> are in the

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<sup>1</sup> 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).

<sup>2</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-521, *FEDERAL HIRING: OPM NEEDS TO IMPROVE MANAGEMENT AND OVERSIGHT OF HIRING AUTHORITIES* (2016).

<sup>3</sup> 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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.<sup>4</sup> 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 to determine who is qualified and eligible to be rated for an agency assessment; (3) formally assigning numerical ratings to qualified applicants and selecting among the top three candidates<sup>5</sup>; (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”). For most excepted service appointments, 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.<sup>6</sup>

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 eligible family members, and hire from lists of candidates prepared by the agency.<sup>7</sup> The result is that the laws governing the hiring process for attorney positions are

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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.

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

<sup>5</sup> 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.

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

<sup>7</sup> *See* 5 C.F.R. § 302.101(c).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.<sup>8</sup> 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 eligible family member of a veteran who is not selected] . . . furnish him/her with the reasons for his/her nonselection."<sup>9</sup>

### **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 disseminating them.<sup>10</sup> 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.<sup>11</sup> A possible reason is that, in 1993, OPM stopped publishing the *Federal Personnel Manual*, a compendium of guidance that served as a reference guide for agencies. Successor publications have taken the form of discrete handbooks and operating manuals that are not updated frequently.

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<sup>8</sup> 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).

<sup>9</sup> 5 C.F.R. § 302.101(c).

<sup>10</sup> 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](http://www.acus.gov/report/recruiting-and-hiring-agency-attorneys-final-report) (Dec. 4, 2019).

<sup>11</sup> *Id.*



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### *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).<sup>12</sup>

### *Drafting Announcements*

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.<sup>13</sup> 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 a talent acquisition system (i.e., a system that allows government officials to post vacancy announcements and track applicants on USAJobs), the HR officials may select generic agency-developed job vacancy announcement templates, which populate language that may be incorrect

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<sup>12</sup> 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).

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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. Hiring officials might not realize that inapplicable language has been inserted until after the announcements have been posted.

Resources exist to help agencies draft position announcements in plain language, including Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*,<sup>14</sup> and the *Federal Plain Language Guidelines*.<sup>15</sup>

### *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 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.<sup>16</sup>

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

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

<sup>16</sup> 5 C.F.R. § 213.3102(d).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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.

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

Once an attorney is hired, he or she must, in general, 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 removal before the MSPB.<sup>17</sup> Supervisors may evaluate the appointee’s performance during this period and decide whether to retain the appointee.

### *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.<sup>18</sup> There may be additional procedures agencies need to adopt to screen for this attribute and others specific to attorneys hired as non-ALJ adjudicators.

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<sup>17</sup> See 5 U.S.C. § 7511. 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. 5 C.F.R. § 315.803.

<sup>18</sup> 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

### RECOMMENDATION

#### **Ensuring Agencies Know Which Procedures Are Required and Which Are Optional**

1. The Office of Personnel Management (OPM), in conjunction with the Merit Systems Protection Board (MSPB) and the Office of Special Counsel as necessary, should offer, and agencies should request, training 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 and 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 limiting the posting of vacancy announcements to the agencies' websites and specialized forums.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Drafting Vacancy Announcements**

5. Agencies should ensure that hiring officials take the lead in drafting and reviewing final vacancy announcements for agency 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.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

### **Improving OPM's Talent Acquisition System**

13. OPM should instruct agencies that HR users developing job vacancy 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.
14. OPM should clearly inform agencies to exclude from their vacancy announcement templates any language inapplicable to attorney hiring.
15. OPM should include a link on its talent acquisition 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 talent acquisition 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 them 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 newly hired attorneys accrue the right to challenge removal before the MSPB after two years (or one year, if the person is a veteran or an



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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*.