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Recruiting and Hiring Agency Attorneys

Ad Hoc Committee

Proposed Recommendation for Committee | October 28, 2019

Attorneys serve crucial roles within federal agencies. To give a few examples, they
defend agencies in litigation, draft regulations, investigate complaints, and resolve legal issues
surrounding information disclosure. Attorneys support nearly all the operations of agencies,
helping to ensure their fair and successful functioning. As such, it is critical to ensure that
agencies can effectively hire a highly qualified corps of attorneys.¹

The term "agency attorney" can have many different meanings. To fully understand the kind of agency attorneys to which this Recommendation refers, it is necessary to briefly examine the background of the civil service laws.

Title 5 of the U.S. Code and Title 5 of the Code of Federal Regulations (CFR) contain the rules that govern most of the civil service's hiring. Title 5 of the U.S. Code defines civil service positions, "for the purposes of this title," as all positions in the government, excluding the uniformed services but including the judicial and legislative branches.² The phrase "for the purposes of this title" is an important qualifier: not all civil service positions are within Title 5 of the U.S. Code. It creates three categories of civil service positions: 1) competitive service; 2) excepted service; and 3) senior executive service.³

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 5 U.S.C. § 2101 (2016).

³ The senior executive service will not be discussed in this Recommendation.



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By default, all civil service positions are in the competitive service. 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, and the winner of this "competition" is offered the position. The rules to which agencies must adhere in administering this competition are extremely detailed and complex. A full accounting of them is beyond the scope of this Recommendation. Several of them are: 1) posting a vacancy announcement on USAJobs.gov, the federal jobs portal (hereafter "USAJobs"); 2) formally assigning numerical ratings to applicants and selecting among the top three candidates (or, alternatively, adopting a rating system in which applicants are placed into "categories"); 3) only hiring from lists of candidates prepared by an agency human resources (HR) department; 4) using Office of Personnel Management (OPM)-generated "qualification standards" within the vacancy announcement; and 5) adhering to detailed procedures for giving veterans and family members of veterans priority consideration.

Title 5's civil service positions end up in the excepted service, rather than the competitive service, when the President or OPM has designated a position to be in the excepted service. When a position is in the excepted service, OPM places it into one of five "schedules," lettered A through E, within the CFR. OPM has placed Title 5 attorney positions under "Schedule A" of the excepted service. Although there are different hiring rules depending on which schedule an excepted service appointment is in, it is generally true that excepted service appointments are subject to a much less stringent set of requirements than the competitive service. For example, if an agency chooses to post a vacancy announcement for an excepted service position, it need not post it on USAJobs.

With this background, it is now possible to understand the scope of the Recommendation. Namely, this Recommendation applies only to agency attorneys who are under Schedule A of the excepted service. It does not apply to attorney positions that may be found in parts of the U.S. Code other than Title 5, nor does it apply to people who happen to be attorneys but who serve in non-attorney positions (e.g., competitive service positions). Attorney positions that are the subject of this Recommendation are the majority of attorney positions in the federal



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government.⁴ Those holding these positions are referred to as "0905 attorneys," in reference to the occupational code assigned to these positions by OPM.⁵

The laws governing the hiring process for 0905 attorney positions are generally much less restrictive than the laws governing the hiring process for competitive service positions and even the laws governing the hiring process for other excepted service positions. For example, with respect to 0905 attorney positions, agencies need not post announcements on USAJobs, use HR officials to screen applicants, use qualifications established by OPM, or use category or numerical rating systems for hiring.

Still, there are legal requirements to which agencies must generally adhere when hiring 0905 attorneys. These include not making hiring decisions based on: protected characteristics (e.g., race, sex, and national origin); political affiliation; whistleblower activities; and other merit-irrelevant considerations such as friendship, sympathy, or loyalty.⁶ They also include affording priority consideration to certain candidates, including veterans "to the extent administratively feasible" and to people who were separated or furloughed from the agency, without misconduct, due to a compensable injury; taking actions to achieve workforce diversity, such as recruiting from a variety of sources that will likely yield a diverse workforce; hiring

⁴ U.S. Gov't Accountability Office, GAO-16-521, Federal Hiring: OPM Needs to Improve Management and Oversight of Hiring Authorities (2016).

⁵ Some 0905 attorneys are covered by collective bargaining agreements. Agencies should consult and abide by the terms of their agreements as they implement this Recommendation.

⁶ 5 U.S.C. § 2302 (2016).

⁷ 5 C.F.R. § 302.101 (2019).

⁸ 5 U.S.C. § 8151 (2016).

 $^{^9}$ See U.S. Office of Personnel Mgmt., Government-Wide Diversity and Inclusion Strategic Plan 6 (2011).



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only those who have a bar license;¹⁰ generally not hiring males born after 1959 who have not registered for the selective service;¹¹ and not engaging in nepotism.¹²

Despite the less restrictive legal requirements for hiring 0905 attorneys, many agencies institute 0905 attorney hiring practices that are not legally required, such as involving HR officials in screening out applicants based on substantive criteria (e.g., number of years of certain kinds of legal experience) and posting announcements exclusively on USAJobs without further disseminating them. Although some agencies undertake these practices knowing they are optional, in other agencies, HR officials and hiring managers believe these actions are legally required. Until 1993, OPM published the Federal Personnel Manual, a compendium of personnel laws that served as an easy reference guide for agencies; currently, there appears to be a dearth of helpful guidance on the civil service hiring laws.

Because federal hiring law permits agency discretion regarding the processes used to select 0905 attorneys, agencies may wish to use different practices for different situations. In certain circumstances, for example, agencies may wish to attract broad applicant pools, while in others, they might have presumptive candidates (such as former attorneys, former legal interns, or highly recommended candidates) in mind. When agencies have presumptive candidates in mind, they may not wish to post or broadcast an announcement at all, and it is legally permissible for them not to do so. When agencies want to have a broad applicant pool, they will likely benefit from posting an announcement in locations where potential optimal candidates frequent. This may or may not include USAJobs, and agencies would be within their legal rights to decide not to use USAJobs. Although agencies may decide USAJobs is among the best places to post an announcement, there is a monetary cost to posting on USAJobs, and posting an

¹⁰ U.S. OFFICE OF PERSONNEL MGMT., POSITION CLASSIFICATION STANDARD FOR GENERAL ATTORNEY SERIES, GS-0905, at 2 (May 1974).

¹¹ 5 U.S.C. § 3328 (2016).

¹² *Id.* § 3110 (2016).



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announcement solely on USAJobs without further dissemination may be insufficient to produce the optimal applicant pool.

Regardless of whether agencies decide to post on USAJobs or elsewhere, announcements are only effective recruiting tools if they are written clearly, in a way designed to welcome applicants. Many 0905 attorney announcements appear not to be, and often contain dense, boilerplate language, job responsibilities that are difficult to decipher, and threats of facing jail time or paying fines. It seems that this problem is caused at least in part by how HR officials use USAJobs to post announcements. For example, a hiring manager may be the one who drafts the announcement but then sends the announcement to HR to post it on USAJobs. When posting on USAJobs, an HR official may insert boilerplate language, facilitated by the USAJobs employer interface, which the hiring manager does not realize was added until after the announcement is posted. The Recommendation addresses this issue by encouraging hiring managers, if they send announcements to HR to post, to review versions of all vacancy announcements exactly as they will appear to the public before they are posted.

This Recommendation's appendix offers two examples of announcements that illustrate the problems discussed above, along with an announcement that is written clearly and in a welcoming manner. There are resources to assist agencies in using plain language, including Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*¹³ and the *Federal Plain Language Guidelines*. ¹⁴

Agencies' recruitment efforts might include recruiting former interns and Presidential Management Fellows (PMFs) (described below) 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 handle the position's responsibilities. Such hiring is akin to

¹³ Admin. Conf. of the U.S., Recommendation 2017-3, *Plain Language in Regulatory Drafting*, 82 Fed. Reg. 61,728 (Dec. 29, 2017).

¹⁴ PLAIN LANGUAGE ACTION & INFORMATION NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (Rev. ed. May 2011), http://www.plainlanguage.gov/guidelines/.



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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.

With respect to former interns, agencies cannot extend an offer of 0905 employment immediately after the student's graduation. Instead, they have to wait until the person is admitted to a bar, ¹⁵ a process that can take nearly a year or longer after the person graduates. Agencies that have honors programs can hire such students as honors attorneys immediately after the person graduates and then convert them to 0905 attorneys upon being admitted to a bar. However, not every agency has an honors program. Accordingly, this Recommendation encourages agencies to establish attorney honors programs and offers one additional suggestion for hiring interns after graduation and before admission to a bar: hiring such graduates as Law Clerk Trainees under Schedule D of the excepted service, and then hiring them as 0905 attorneys upon admission to a bar. Law Clerk Trainees need not have a bar license.

Under the PMF Program, agencies can hire people immediately upon graduation from a graduate-level program, including law programs, to work for two years as a PMF. During the employee's time as a PMF, the employee is within Schedule D of the excepted service. Upon completion of the two-year program, the agency has the option of converting the PMF to a permanent competitive service employee. The agency does *not* have the option of converting the PMF to an 0905 attorney, even if that person has been admitted to a bar. Instead, if the agency wishes to hire the PMF as an 0905 attorney, it must complete a separate hiring track. This introduces an additional administrative step that might not always be obvious to agencies. Accordingly, this Recommendation reminds agencies that they can offer successful PMFs who have been admitted to a bar 0905 attorney positions.

The Administrative Conference recognizes that specific attorney positions may require additional criteria. One of these is non-ALJ adjudicators. As discussed above, the Administrative

¹⁵ See Position Classification Standard, supra note 10.



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130 Conference addressed the hiring of ALJs in Recommendation 2019-2. At the very least, these 131 individuals must be impartial.¹⁶ There may be additional criteria agencies need to apply to screen 132 for this quality and others specific to adjudicator positions.

RECOMMENDATION

Ensuring Agencies Know Which Procedures Are Optional and Which Are Required For Attorney Hiring

1. The Office of Personnel Management (OPM) (in conjunction with the Merit Systems Protection Board and the Office of Special Counsel as necessary) should provide training for agencies on the minimum procedural requirements in statute, regulations, and executive orders for hiring 0905 attorneys. This training should include the requirement to not make hiring decisions based on: protected characteristics (e.g., race, sex, and national origin); political affiliation; whistleblower activities; and other merit-irrelevant considerations such as friendship, sympathy, or loyalty. Such training could take any number of forms, including written materials and in-person presentations or webinars. This training should also make clear that posting 0905 attorney announcements on USAJobs.gov (the federal jobs portal, hereafter "USAJobs") and involving human resources (HR) personnel in screening applicants are not required under the law.

Helping Agencies Achieve Broad Pools of Qualified Applicants

2. Agencies need not post announcements or otherwise solicit applications for attorney positions so long as they comply with all EEO laws and other legal requirements. If agencies have presumptive candidates or small groups of candidates in mind, they may not wish to post announcements or otherwise announce the positions widely and need not do so. Agencies that *do* wish to achieve broad applicant pools should follow the subsequent paragraphs within this section.

¹⁶ See Admin. Conf. of the U.S., Recommendation 2018-4, Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139 (Feb. 6, 2019).



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- 3. Officials from hiring offices, as opposed to HR offices, should draft all vacancy announcements for 0905 attorney positions.
 - 4. Announcements should be written in plain language, hewing closely to the principles from Administrative Conference Recommendation 2017-3, *Plain Language in Regulatory Drafting*, and the *Federal Plain Writing Guidelines*. They should also specify exactly which documents are required to constitute a complete application; distinguish between mandatory and desirable criteria; and include only essential elements, such as bar membership and citizenship status, under mandatory criteria.
 - 5. Announcements should not threaten applicants with facing jail time or paying fines and should not contain inapplicable boilerplate language.
 - 6. If agencies intend to cut off applications after receiving a certain number, the announcement should specify what the limit is.
 - 7. If, after drafting a vacancy announcement, officials from hiring offices send the announcement to HR officials to be posted on USAJobs or elsewhere, officials from hiring offices should ask HR officials to see a version of the announcement exactly as it will appear to the public. Officials from hiring offices should then carefully review the announcement to ensure it is consistent with Paragraphs 4 through 6 before it is posted.
 - 8. Agencies should publicly post 0905 attorney announcements in locations where they are likely to reach qualified applicants. Options for posting include their own websites, private networking and job recruiting websites, and USAJobs. Agencies should not limit their posting to any one source.
 - 9. In addition to publicly posting 0905 attorney announcements, agencies should widely disseminate such announcements to a variety of sources, including bar associations, other professional legal associations, law school career offices, law firms, corporate legal departments, non-profit organizations, former and current agency employees, former and current agency interns, and other agencies. The purpose of such dissemination is to ensure that vacancies are likely to reach a diverse range of qualified applicants.
 - 10. Hiring managers should continue to review vacancy announcements even when announcements are live to ensure they do not become outdated.



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11. When feasible, agencies should notify applicants that their applications have been received (USAJobs sends such notifications automatically) and if they were not selected.

USAJobs-Specific Recommendations

- 12. OPM should include notices in prominent places on the USAJobs employer interface that encourage agencies to not include nonessential boilerplate language.
- 13. OPM should include notices in prominent places on the USAJobs employer interface that encourage agencies to specify exactly which materials are needed to constitute a complete application for 0905 attorneys.
- 14. OPM should include a link in a prominent place on the USAJobs employer interface 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 of them to their drafting of vacancy announcements.

Helping Agencies Evaluate Applicants

- 15. Agencies should develop policies covering how attorney applications will be reviewed and assessed. These policies may include creating teams of hiring officials to select applicants for interviews and/or to recommend applicants for appointment.
- 16. Agencies (perhaps through political appointees or in partnership between hiring and HR offices) should decide which responsibilities, if any, HR officials are to have in the process of evaluating applications. If HR officials will screen applicants, hiring offices should determine the screening criteria they will use and clearly communicate the criteria to HR officials. Screening criteria should be easy for non-attorneys to manage, such as citizenship status and bar membership, rather than more amorphous criteria such as possessing a certain number of years of experience in a particular subject area.



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Helping Agencies Evaluate Attorneys During Their Trial Period

17. HR officials should send reminders to supervisors approximately 90 days before the end of an 0905 attorney's two-year trial period informing them that the period will soon end. Supervisors should make affirmative decisions about whether attorneys will be employed after the trial period.

Creating a Pathway From Legal Internship to 0905 Attorney Employment

18. Agencies should consider a variety of options for hiring high-performing legal interns after graduation, both before they have been admitted to a bar and after. Intern supervisors should encourage successful interns to apply to their agencies' attorney honors programs. Agencies without honors programs should consider establishing them. Agencies should also consider hiring successful interns as Law Clerk Trainees under Schedule D of the excepted service upon such students' graduation from law school, and then hiring them as 0905 attorneys immediately after admission to a bar.

Hiring Presidential Management Fellows as 0905 Attorneys

19. Agencies should consider hiring Presidential Management Fellows (PMFs) who hold law degrees as 0905 attorneys upon admission to a bar and successful completion of the PMF program.

Ensuring Impartiality of Non-Administrative Law Judge (ALJ) Adjudicators

20. Agencies' guidelines and procedures for the hiring of non-ALJ adjudicators should be designed and administered to ensure the hiring of such adjudicators who will carry out the functions of the office with impartiality and maintain the appearance of impartiality.



APPENDIX

Page 5 of the preamble reads, in part, "[m]any 0905 attorney announcements . . . often contain dense, boilerplate language, job responsibilities that are difficult to decipher, and threats of facing jail time or paying fines." The below language, excerpted from two recently posted vacancy announcements, demonstrates these problems.

VACANCY 1

SUMMARY

The incumbent serves as an attorney providing legal advice, research, analysis and interpretation of federal, state and local laws, as well as oral and written opinions, memoranda, pleadings, briefs and legal support of all [agency] programs and litigation, and performs other legal services as assigned.

RESPONSIBILITIES

Provides written and oral legal advice to [agency] officials in connection with the day-to-day operations of their programs.

Reviews . . . grants proposed to be made under various [agency] . . . programs to ensure legal sufficiency . . .

Conducts and assists with litigation involving . . . programs, and officials, including preparing pleadings, interviewing witnesses, conducting depositions, and negotiating with opposing parties.

Conducts legal research to ensure that advice provided is based upon a sound understanding of the law and facts, and anticipates foreseeable consequences of advice provided.

Recommends actions to ensure that decisions made and actions taken are practical, effective, and legally sound and defensible.

Reviews and prepares various kinds of legal documents for general and specific use, including documents related to contracts, real property transactions, and other commercials transactions.



QUALIFICATIONS

Mastery of statues, regulations, and legal precedents related to major [agency] program areas or relevant subject matter expertise to provide expert legal advice in regard to the assigned program area, develop or recommend litigation strategies and procedures, aid the [agency] in the trial of important or precedent-setting cases, and negotiate or participate in negotiating settlements on behalf of the [agency].

Mastery of a large and complex body of law in which precedents are frequently conflicting or non-existent to make determinations and reach conclusions which guide the Department or the Agency in resolving subsequent, similar problems; provide legal advice to heads of programs and Agencies on complex and difficult legal questions or factual issues; and write opinions and case assessment memoranda after conducting detailed factual and legal research.

Mastery of the principles and techniques of legal analysis and practice in order to prepare pleadings, motions, briefs, litigation reports, and related documents in connection with suits by and against the Government and determine in each case the nature of action or defense, the legal issues involved, the most effective course of action, and optimal strategies and tactics to be employed.

Comprehensive knowledge and understanding of missions and functions of the [agency] and its agencies or relevant subject matter expertise, as appropriate in order to provide legal services in support of [agency] programs and activities that are consistent with the strategic goals of [agency] and the priorities of the [agency head].

Mastery of the principles and techniques of written and oral communication to speak and write with clarity and tact to provide guidance on complex legal issues, secure acceptance of recommendations, prepare complex legal opinions, and effectively represent the [agency] in a variety of external interactions.

SPECIALIZED EXPERIENCE

Applicants should have demonstrated specialized experience in legal research, excellent writing and communication skills, and a strong



academic record. This experience should be clearly documented in the cover letter and resume.

GS-12: One year of specialized experience, equivalent to the (GS-11) level in the Federal service or equivalent responsibility in the private sector/pay systems that has equipped you with the particular competencies to successfully perform as an Attorney Advisor. Examples of such experience include: Providing legal advice, research, analysis and interpretation of federal, state, and local laws; Writing opinions, memoranda, pleadings, briefs, and legal support of agency/organization programs and litigation; Performing other legal services as assigned; Rendering of legal advice, oral or written, to administrative officials in connection with the day-to-day operations of programs; preparing various kinds of legal documents, both for specific case use and for general use; Ability to conduct substantial research to handle cases involving the Department's programs; Ability to apply creative legal analysis and sound legal judgment to find appropriate precedent or distinguish applicable law or facts to support or justify legal positions.

If you are relying on your education to meet qualification requirements: You MUST submit a copy of your transcript if you want to substitute your education for experience. If you claim qualifications based on education, and do not submit a transcript, your education will not be used in making a qualification determination and you may be found "not qualified".

Education must be accredited by an accrediting institution recognized by the U.S. Department of Education in order for it to be credited towards qualifications. Therefore, provide only the attendance and/or degrees from schools accredited by accrediting institutions recognized by the U.S. Department of Education.

You will be evaluated based on your qualifications for this position as evidenced by the education, experience, and training you described in your application package, as well as the responses to the Occupational



Questionnaire to determine the degree to which you possess the knowledge, skills, abilities and competencies listed below:

Legal, Government, and Jurisprudence Written Communication Oral Communication Problem Solving

Your application, including the online Assessment Questionnaire, will be reviewed to determine if you meet (a) minimum qualification requirements and (b) the resume supports the answers provided to the job-specific questions. Your resume must clearly support your responses to all the questions addressing experience and education relevant to this position. Those determined to be in the best qualified category will be referred to the selecting official for consideration

VACANCY 2

OTHER

Before hiring, an agency will ask you to complete a Declaration for Federal Employment to determine your suitability for Federal employment and to authorize a background investigation. The agency will also ask you to sign and certify the accuracy of all the information in your application. If you make a false statement in any part of your application, you may not be hired; you may be fired after you begin work; or you may be fined or jailed.



Page 5 of the preamble reads, in part, "[t]his Recommendation's appendix offers [an example] of . . . an announcement that is written clearly and in a welcoming manner." Below is such an announcement.

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 agencyspecific 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 inhouse 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.

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