

Federal Sector Alternative Dispute Resolution Fact Sheet

The use of alternative dispute resolution (ADR) techniques by federal agencies has increased dramatically in the equal employment opportunity (EEO) process. In 1998, the Equal Employment Opportunity Commission's ADR Study of Federal Sector EEO ADR Programs reported that more than half of the federal agencies surveyed had active ADR programs. As of January 1, 2000, all federal agencies were required to establish or make available an ADR program during the pre-complaint and formal complaint stages of the EEO process. See 29 C.F.R. 1614.102(b)(2). In order to build on the success of ADR programs in the federal sector, it is vital for complainants and management officials to understand and participate in the ADR process.

What is ADR?

ADR generally refers to a continuum of processes and approaches that are designed to resolve disputes in a manner which avoids the cost, delay, and unpredictability of more traditional adversarial and adjudicatory processes, such as, litigation, hearings, and appeals. Numerous types of ADR techniques exist, including mediation, facilitation, fact finding, early neutral evaluation, the use of an Ombudsman, settlement conferences, materials, and peer review. Chapter 3 of the EEO Management Directive (MD)-110 provides a detailed description of each of these techniques.

Every agency has the discretion to create its own unique ADR program that is best suited for their particular office environment. Mediation has been the most popular form of ADR offered by federal agencies in the EEO process. Over 87 percent of the agencies who responded to EEOC's 1998 ADR survey stated that mediation is their primary ADR technique. The EEOC has encouraged federal agencies to experiment with other forms of ADR, including a combination of ADR techniques. Many agencies have established pilot programs to decrease the processing time of EEO complaints and improve the overall satisfaction of the participants.

Why is ADR beneficial?

Agencies and complainants have realized that utilizing ADR during the EEO process has many advantages. ADR offers the parties the opportunity for an early, informal resolution of disputes in a mutually-satisfactory fashion. Rather than receiving a decision from an unknown third party, such as an administrative judge, the parties have the opportunity to write their own agreement in a manner which satisfies both of their needs. Not only does ADR provide a Win-Win resolution for the parties, but it also usually costs less and uses fewer resources than traditional administrative or adjudicative processes. For example, complainants could avoid costly attorney's fees and the agency could minimize the use of investigators, legal staff, official time, and court reporter fees. Moreover, since the parties are using ADR during the earliest stages of the EEO process, a resolution will avoid numerous years of litigation in administrative and court proceedings. As a result, the complainant's working relationship can improve rather than deteriorate due to ongoing legal battles, and the overall employee morale can be enhanced when the agency is viewed as open-minded and cooperative in seeking to resolve EEO disputes.

How does the ADR process work?

The revised regulations do not require federal agencies to conduct ADR in every EEO case; rather, agencies have the discretion as to which EEO cases are offered ADR. Complainants may not file a new complaint based on the agency's refusal to offer ADR in their particular case.

If the agency offers ADR during the pre-complaint, or the informal, stage of the EEO process, the complainant may choose between participating in the ADR program or the traditional EEO counseling activities. Once the complainant elects to participate in the ADR program, all EEO

counseling activities will end. It is also important to note that electing ADR increases the EEO pre-complaint processing period from 30 to 90 days. In the event that the matter concludes without resolution after 90 days, the agency will conduct a final interview, and issue a notice of right to file a formal complaint to the complainant.

If the complainant files a complaint, the agency may also choose to offer ADR during the formal complaint stage. The 180-day processing period for the formal complaint stage may be increased by an additional 90 days in order to conduct ADR, if the parties agree to do so in writing.

The revised regulations have established certain core principles which must be incorporated into every federal sector ADR program. The overriding requirement is that the ADR program is fair. Fairness requires voluntariness, neutrality, confidentiality, and enforceability.

1. Voluntariness means that the parties (in this context, the complainant and the agency) knowingly and willingly enter into an ADR proceeding and that they have the opportunity to end the proceeding at any time. In this regard, once the ADR proceeding ends, complainants may re-enter the traditional EEO complaint process in order to pursue their claim. Moreover, any agreements between the parties must have been reached without coercion or duress.

2. Neutrality means that the ADR proceeding is impartial and independent of control by either party. A neutral third party who assists the parties in reaching an agreement must not have any stake in the outcome of the proceeding.

3. Confidentiality of the ADR proceedings must be maintained by the parties and the neutral third party. This means that information concerning the underlying facts of an ADR proceeding and records generated as part of that proceeding may not be made part of the EEO complaint record. The Alternative Dispute Resolution Act of 1996, 5 U.S.C. § 574, provides that neutrals in ADR proceedings may not voluntarily disclose or be required to disclose dispute resolution communications, with certain statutory exceptions. For additional information regarding confidentiality, please consult with the guidance developed by the Department of Justice Interagency Alternative Dispute Resolution Working Group at <http://www.usdoj.gov/adr/>.

4. In order to have an enforceable settlement agreement, the agreement must be in writing and signed by both parties. The revised regulations at 29 C.F.R. . 1614.504 set forth specific procedures by which the EEOC enforces all settlement agreements.

Nothing said or done during attempts to resolve the matter through ADR proceedings may be made the subject of an EEO complaint. All concerns with the operation of the agency's ADR program should be resolved by contacting the administrator of the ADR program. If the agency's ADR program appears to conflict with the EEOC's complaint processing regulations and the MD-110, individuals may write to:

Director of Special Services Staff
Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036.