

Farm Service Agency
EEO Informal Complaint Process
Frequently Asked Questions (FAQ)

➤ Informal EEO Complaint Process

What is the purpose of the Informal EEO Complaint Process?

The purpose of the Informal EEO Complaint Process:

- Gives FSA notice of the alleged claim;
- Assists the individual in defining the claim against FSA; and
- Offers an opportunity for informal resolution of the claim.

Who may file an Informal EEO Complaint?

Any employee, former employee, or applicant for employment who believes they have been discriminated against by FSA.

Where do I file an Informal EEO Complaint?

If the claim is against FSA, then you **must** contact a FSA EEO Counselor. If the claim is against another USDA agency, then you **must** contact that USDA agency's EEO Counselor.

How do I file an Informal EEO Complaint?

The mandatory first step by any employee, former employee, or applicant for employment who believes they have been discriminated against by FSA is contacting an EEO Counselor. The initial contact with an FSA EEO Counselor can be made by telephone, email, facsimile, or in person.

When do I file an Informal EEO Complaint?

Any employee, former employee, or applicant for employment who believes they have been discriminated against by FSA **must** contact an **FSA EEO Counselor** within 45 calendar days of the matter alleged to be discriminatory or when the Complainant gained knowledge of its occurrence. In the case of personnel actions, it must be within 45 calendar days of the effective date of the action”.

Why must I file an Informal EEO Complaint?

The Equal Employment Opportunity Commission's (EEOC) EEO Management Directive 110, and 29 CFR 1614.105 states that the first step in the EEO Complaint Process is to contact an EEO Counselor. Informal EEO counseling may not be waived by either the agency or the employee, former employee, or applicant for employment. It is an absolute prerequisite to filing a formal EEO complaint.

There are however, exceptions, to the mandatory contact with an EEO Counselor. They are:

- Age discrimination – You may exercise the option to pursue your claim through the administrative process (Informal and Formal) or you may elect to proceed directly into the United States District Court after giving notice of intent to sue to the EEOC.
- Equal Pay Act discrimination (sex discrimination in the payment of wages) – You may file a civil action in federal district court within two years, or three years if the violation is willful, of the date of the alleged violation, regardless of whether you have pursued the administrative process.

➤ Frequently Asked Questions

○ What is Discrimination?

Discrimination is unfavorable or unfair treatment of a person or class of people in comparison to others who are not members of the same protected class (basis).

○ What is an EEO Complaint?

An EEO complaint is a claim that the Agency acted or failed to act against an employee, former employee or applicant that, adversely affects privileges, benefits, working conditions, or results in disparate treatment or has an adverse impact on employees or applicants, and is based in whole or in part on a person's:

race, color, religion, sex, national origin, age (*40 and over*), disability (*mental/physical*), genetic information, sexual orientation, status as a parent and reprisal, and is not permitted under the law; and/or

political affiliation/beliefs, and marital status, and is not permitted under USDA regulations.

- What are the protected bases of discrimination?

The EEO Complaint Program covers individual and class complaints of discrimination based on race, color, religion, sex, national origin, age (40 years of age or older), physical or mental disability, sexual orientation, genetic information, marital or parental status, political beliefs and reprisal for previous EEO activity or opposition to discriminatory practices.

Only USDA employees but not applicants for USDA employment may initiate a complaint under this manual based on sexual orientation, genetic information, marital or parental status, and/or political beliefs.

Claims of discrimination due to political beliefs are only applicable to competitive service positions, and are not applicable to excepted service or non-career positions.

- Can I contact an EEO Counselor without filing an Informal EEO complaint?

Absolutely, and your contact with the EEO Counselor will be confidential unless you authorize the EEO Counselor to discuss your contact with management.

The EEO Counselor can provide valuable information regarding your concerns and all appropriate avenues of redress. This information will assist you in making an informed decision regarding how you will address your concerns.

- What are the duties of the EEO Counselor?

The EEO counselor has six specific defined duties that must be performed for each completed counseling action where an informal resolution is not achieved. The duties are:

Advise complainant (**orally and in writing**) about the EEO complaint process under 29 C.F.R. Part 1614, the procedures for requesting ADR, and, where applicable, the various options and/or election requirements for mixed cases, negotiated grievances processes, and ADEA procedures;

Assist the complainant in identifying and clarifying the claim(s) and basis(es) of the potential complaint;

Conduct a limited inquiry for the purposes of furnishing information for counseling and resolution efforts, and determining jurisdictional questions if a formal complaint is filed;

In this regard, EEO Counselors must be mindful that informal resolution should be freely arrived at by all parties involved in the dispute and that Counselors should not advocate specific terms or inject their personal views into settlement negotiations;

Document all closures of the counseling contact in writing, send a copy of the closure document to the complainant. The actions should be taken, whether the closure is a resolution by withdrawal or settlement, or a right to file a formal complaint if resolution efforts fail; and

Prepare a report sufficient to determine that required counseling actions have been taken and resolve any jurisdictional questions that may arise if a notice of a right to file a complaint is issued.

- **What are my responsibilities in the EEO Complaint Process?**

An individual who files a complaint must fully cooperate in the processing of the complaint, which includes providing specific responses to offers of resolution and providing requested information in a timely manner, if available.

In addition, all individuals must provide his/her current addresses and telephone numbers and pertinent information relating to his/her representative. This includes communicating with the EEO counselor, the investigator, and any agency representative or caseworker. You shall not delegate these responsibilities to a representative.

- **Can I have a representative in the EEO Complaint Process?**

Yes, you are entitled to be accompanied, represented, and/or advised at any stage of the process by another individual. You are expected to personally answer all questions from counselors and investigators and are responsible for compliance with this requirement whether or not represented.

If you have a representative, all correspondence will be addressed to both you and your designated representative, and documents given to the you will also be given to your representative. Where you have listed multiple representatives (i.e., a union representative, and a non attorney representative) you must designate a lead representative to receive the official documents. If your representative is an attorney, all correspondence will be addressed to your attorney.

Oral discussions with you, if represented, may be undertaken without first contacting your representative, but you must be given the opportunity to contact your representative and/or make your representative a party to the discussion before it proceeds.

FSA may prohibit a particular employee from acting as your representative on a particular complaint if:

- (1) there is a conflict of interest; or
- (2) the priority requirements of FSA would be harmed.

○ Can I use “Official Time” to work on my complaint?

Yes. You, your representative, witnesses, or Responsible Management Official in active duty status, shall be granted reasonable official time to prepare and present a complaint or a response to inquiries involved in processing the complaint. The term “reasonable amount of official time” depends on the individual circumstances of each complaint.

NOTE: You must obtain supervisory approval prior to meeting with EEO officials, counselors, investigators, etc. Failure to obtain supervisory approval may result in you being charged leave or placed on AWOL.

Reasonable is defined as whatever is appropriate, under the factual circumstances presented in the complaint, in order to allow a complete presentation of the relevant information associated with the complaint and to respond to an agency’s request for information. The actual number of hours to which you and your representative are entitled will vary, depending on the nature and complexity of the

complaint and considering the mission of the agency, as well as the agency's need to have its employees available to perform their normal duties on a regular basis. You and FSA management should arrive at a mutual understanding as to the amount of official time to be used, prior to your use of such time. Ultimate authority for determining official time rests with FSA. Disputes regarding the use of official time should be referred to FSA's Civil Rights Director.

You and your representative, if employed by FSA and otherwise in a pay status, shall be on official time, regardless of the tour of duty, when their presence is authorized or required by the agency or the EEOC during the investigation, informal adjustment, or hearing on the complaint. Whatever time is spent in the (official EEO) meetings or hearings are automatically deemed reasonable. If you or your representative have already worked a full week and must attend a hearing or meeting on an off duty day, you and/or your representative are entitled to official time, which may require that the agency pays overtime. In the alternative, the supervisor can, in advance and in accordance with Agency leave policy and practices, adjust the tour of duty when appropriate or necessary.

Preparation does not include conducting independent inquiries or gathering data or testimony, but does include activities reasonably related to and anticipated in regard to responding to official requests for information during any complaint processing stage. Since USDA conducts the required investigation, official time is not necessary or reasonable for the purpose of independently obtaining evidence or statements on the complaint issue. Responsible Management Officials, witnesses and their representatives are subject to the same rules on official time. The term "reasonable amount of official time" depends on the individual circumstances of each complaint.

- What are my rights in the Informal EEO process?

Rights and Responsibilities of the Complainant

On November 9, 1999, EEOC's regulations governing the processing of complaints of employment discrimination by federal applicants and employees were revised. Your rights and responsibilities under the revised regulations include the following:

Prior to filing a formal complaint, the right to anonymity.

The right to representation throughout the complaint process including the Informal complaint process. The EEO Counselor is not an advocate for either the aggrieved person or the agency.

The right to choose between FSA's Alternative Dispute Resolution Program (ADR) or traditional EEO counseling, where the agency agrees to offer ADR.

The possible election requirement between a negotiated grievance procedure and the EEO complaint procedure. Consult your EEO Counselor for clarification.

The election requirement in the event that the claim at issue is appealable to the Merit Systems Protection Board (MSPB). Consult your EEO Counselor for clarification.

The requirement that the aggrieved person file a written complaint within 15 calendar days of receipt of the Counselor's Notice of Right to File a Formal Complaint in the event the aggrieved person wishes to file a formal complaint at the conclusion of counseling or ADR.

The right to file a notice of intent to sue when age is alleged as a basis for discrimination and of the right to file a lawsuit under the ADEA instead of an administrative complaint of age discrimination, pursuant to 29 CFR §1614.201(a).

The right to go directly to a court of competent jurisdiction on claims of sex-based discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.

The right to request a hearing before an EEOC Administrative Judge except in a mixed case after 180 calendar days from the filing of a formal complaint or after completion of the investigation, whichever comes first.

The right to an immediate final decision after an investigation by the agency in accordance with 29 CFR §1614.108(f).

The right to go to U.S. District Court 180 calendar days after filing a formal complaint or 180 days after filing an appeal.

The duty to mitigate damages, e.g., that interim earnings or amounts that could be earned by the individual with reasonable diligence generally must be deducted from an award of back pay.

The duty to keep the agency and EEOC informed of your current mailing address and to serve copies of appeal papers on the agency.

Where traditional counseling is selected, the right to receive in writing within 30 calendar days of the first counseling contact (unless the aggrieved person agrees in writing to an extension) a notice terminating counseling and informing the aggrieved of:

- (1) the right to file a formal individual or class complaint within 15 calendar days of receipt of the notice,
- (2) the appropriate official with whom to file a formal complaint, and
- (3) the complainant's duty to immediately inform the agency if the complainant retains counsel or a representative.

Where the aggrieved person agrees to participate in ADR, the written notice terminating the counseling period will be issued upon completion of the ADR or within ninety (90) calendar days of the first contact with the EEO Counselor, whichever is earlier.

That only claims raised at the counseling stage or claims that are like or related to those that were raised may be the subject of a formal complaint or an amendment to a complaint after it has been filed.

That rejection of an agency's offer of resolution made pursuant to 29 CFR §1614.109(c) may result in the limitations of the agency's payment of attorney's fees or costs you can recover.

If you have filed two or more complaints, the agency must consolidate them after appropriate notice to you. 29 CFR §1614.606– When a complaint has been consolidated with one or more earlier complaints, the agency shall complete its investigation within the earlier of 180 days after the filing of the last complaint or 360 days of the filing of the first complaint and that you may request a hearing before an EEOC Administrative Judge at any time after 180 days of the filing of the first complaint.

Class complaint procedures and responsibilities of a class agent will be provided upon request.

- How will my complaint be processed in the Informal EEO process?

The EEO Counselor will explain the agency's traditional EEO counseling process, the ADR process, and your election option. You must elect between having the dispute(s) about which you contacted the EEO Counselor handled through the agency's traditional EEO counseling process or handled through the agency's ADR process. Your election must be made in writing on a form developed by the agency. Your election to proceed through counseling or ADR is final.

- What can I expect in the “traditional counseling” process?

At the initial session or as soon as possible thereafter, the EEO Counselor must provide you with written notice of your rights and responsibilities. Additionally, depending upon the facts and circumstances of your particular case, the EEO Counselor will discuss other avenues of redress that may be available to you.

The EEO Counselor must determine what action(s) the agency has taken or is taking that causes you to believe you are the victim of discrimination. Before the EEO Counselor begins the inquiry, they must be certain that the claim(s) are clearly defined and you agree on the claim(s) that are to be the subject of the inquiry and subsequent attempts at resolution, whether through counseling or ADR.

You must advise the EEO Counselor of the basis(es) of discrimination. The EEO Counselor can explain the basis(es) of discrimination to you; however, it is your responsibility to tell the EEO Counselor how you were discriminated against.

After the basis(es) and claims have been defined, the EEO Counselor will conduct a limited inquiry. The purpose of the limited inquiry is to obtain information to determine jurisdictional questions if a formal complaint is filed and is performed regardless of whether you subsequently choose ADR. The limited inquiry also is used to obtain information for settlement purposes if you choose traditional EEO counseling over ADR. While the scope of the inquiry will vary based on the complexity of the claims, the inquiry is limited and not intended to substitute for the fact finding required in the formal stage. The EEO Counselor controls the inquiry at all times control the inquiry. If you or agency personnel raise objections to the scope or nature of the inquiry, the EEO Counselor will seek guidance and assistance from the CMB Branch Chief. If the EEO Counselor has problems with the inquiry,

they will immediately notify the CMB Branch Chief.

If during the course of the EEO Counselor's limited inquiry, the agency and you agree to an informal resolution of the dispute, the terms of the resolution should be reduced to writing and signed by both parties to help ensure that the agency and you have the same understanding of the terms of the resolution. The EEO Counselor will provide a copy of the signed and dated resolution agreement to the CMB Branch Chief. The CMB Branch Chief will monitor the implementation of the resolution agreement terms and conditions.

If you are not satisfied with the agency's proposed resolution of the dispute, or the agency officials do not agree to your requested remedy, the EEO Counselor must hold a final interview with you within 30 days of the initial contact with the EEO Counselor, unless you granted the EEO Counselor an extension. If the dispute is not resolved at the end of the extended time period, the EEO Counselor must advise you in writing of your right to file a complaint.

During the final interview, the EEO Counselor should discuss what occurred during the EEO counseling process in terms of attempts at resolution. The Counselor will not indicate whether they believe the discrimination complaint has merit. Since EEO counseling inquiries are conducted informally and do not involve sworn testimony or extensive documentation, the EEO Counselor 1) cannot make findings on the claim of discrimination, and 2) should not imply to you that their interpretation of the claims of the case constitutes an official finding of the agency on the claim of discrimination.

If you file a formal EEO complaint, the EEO Counselor will prepare an EEO Counselor's Report. The report will contain:

- ✓ precise description of the claim(s) and the basis(es) identified by the complainant;
- ✓ Pertinent documents gathered during the inquiry, if any;
- ✓ Specific information bearing on timeliness of the counseling contact;
- ✓ If timeliness appears to be a factor, an explanation for the delay; and
- ✓ An indication as to whether an attempt to resolve the complaint was made.

- What can I expect in the “ADR” process?

When you elect ADR, the informal EEO process shall be ninety (90) days. Once you elect ADR, the EEO Counselor will complete the intake functions of counseling (that is, obtaining the information needed to determine the basis(es), claim(s), and timeliness) before referring your ADR request to the CMB Branch Chief.

The CMB Branch Chief will assign another FSA EEO Counselor to serve as the neutral in your case. Once you submit your ADR election in writing, all communications should be made directly with the neutral assigned to conduct your ADR session. The neutral will contact you and the appropriate agency officials to schedule the ADR session. All inquiries and questions relating to ADR should be communicated to the neutral.

After the CMB Branch Chief designates a neutral, a request for an Agency Resolving Official (ARO) will be submitted to the appropriate Deputy Administrator. Upon receipt of the ARO designation, the CMB Branch Chief will issue the ARO delegation letter.

If the dispute is resolved during the ADR process, the neutral will prepare the resolution agreement for signature by you and the ARO. The EEO Counselor will be informed of the resolution and will close the case.

If the dispute is not resolved during the ADR process, the CMB Branch Chief will notify the EEO Counselor and the Counselor will contact you to conduct the final interview.

If you file a formal complaint, the EEO Counselor will submit an EEO Counselor's Report. The report will contain relevant information about you, jurisdiction, claims, bases, requested remedy, and will indicate that you elected ADR and that the dispute was not resolved.

- What should I do if I am dissatisfied with the way my complaint is being handled in the Informal EEO complaint process?

If you are dissatisfied with the processing of your complaint in the Informal EEO complaint process, whether or not you allege prohibited discrimination as a basis for dissatisfaction, you should contact the CMB Branch Chief. The CMB Branch Chief will earnestly attempt to resolve your dissatisfaction with the complaint process as early and expeditiously as possible.

- If I file an informal EEO complaint, will it affect my rights regarding other avenues of redress that are available to me regarding my claim of discrimination?

No.

- Where can I find additional information about the EEO Complaint Process?

EEOC

<http://www.eeoc.gov/>

<http://www.eeoc.gov/federal/md110.html>

http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=e96725758cc0a83a4988aff0251ec5c6&c=ecfr&tpl=/ecfrbrowse/Title29/29cfrv4_02.tpl#1400

USDA

<http://www.ascr.usda.gov/>

<http://www.ocio.usda.gov/directives/doc/DM4300-001.pdf>

<http://www.ocio.usda.gov/directives/doc/DR4300-007.pdf>

<http://www.ocio.usda.gov/directives/doc/DR4300-010.pdf>

<http://www.ocio.usda.gov/directives/doc/DR4710-001.pdf>