

October 2024

Use of Contractors and Agency Agreements for Drafting Merit Final Agency Decisions



U.S. Equal Employment Opportunity Commission

Research, Evaluation, & Applied Data Division | Office of Federal Operations

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Executive Summary

The equal employment opportunity (EEO) complaint process provides Federal employees and job applicants an avenue to address unlawful discrimination and retaliation. A merit final agency decision (FAD) is one means by which the claims raised in an EEO complaint are adjudicated. A merit FAD contains findings of fact and conclusions of law on each claim raised by the complainant, provides the rationale for dismissal of any claims (as applicable), and determines appropriate remedies and relief when discrimination is found.

This program evaluation from the U.S. Equal Employment Opportunity Commission (EEOC) supplements a previous evaluation that examined the timeliness of agency merit FADs and culminated in a report titled [*Timeliness of Merit Final Agency Decisions in the Federal Sector*](#). In the previous report, the EEOC noted that agencies reported using contractors, memoranda of understanding, and agency agreements to timely draft their FADs. However, agencies, also expressed concerns about the quality of some of these FADs. This supplemental program evaluation and report examines challenges and promising practices when using contractors or agency agreements for FAD drafting.

Main Findings

To better understand the role of contractors and agency agreements in the FAD drafting process, the EEOC sent supplemental requests for information to agencies that had received questionnaires during the previous program evaluation. The EEOC also interviewed an agency that drafts a significant number of FADs for other Federal agencies and reviewed data from the Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (Form 462).

The EEOC identified the following promising practices:

- Start the contracting process early, or request FAD drafting services and provide necessary documentation as soon as possible.
- Provide specific instructions for FAD drafting and include any available templates, boilerplate, or sample language.
- Request a copy of the revisions made by the client agency to facilitate improvement by the drafting agency for future FAD drafts.
- Maintain regular communication about timeframes and drafting issues to ensure the timeliness and quality of FADs.

The EEOC also identified certain major impediments to issuing timely and quality merit FADs written by contractors and other agencies:

- Insufficient staff to review FAD drafts for legal sufficiency and correct issues.

- Difficulty holding contractors and other agencies accountable for poor performance.
- Time intensive to send FADs back to contractors and other agencies for revisions and additions.

Main Recommendations

To improve the quality and timeliness of FADs written by contractors and other agencies, the EEOC recommends that agencies:

- Provide sufficient staffing and resources to review and revise FADs.
- Begin the FAD process early.
- Regularly communicate with the drafting agency or contractor about timelines, draft requirements, templates, revisions, and quality issues.
- Hold contractors or other agencies accountable for late or poor performance, ending the relationship if issues persist.

Introduction

The equal employment opportunity (EEO) complaint process provides Federal employees and job applicants an avenue to address unlawful discrimination and retaliation. Through Management Directive 110 (MD-110), the U.S. Equal Employment Opportunity Commission (EEOC) provides Federal agencies with policies, procedures, and guidance related to the processing of employment discrimination complaints.¹

EEOC regulation 29 CFR § 1614.110(b) provides that an agency must issue a final decision on a complaint upon the complainant's request or when no reply is received to an election notice provided to the complainant under § 1614.108(f). Further, 29 CFR § 1614.110(b) provides, in relevant part, that a final decision must address the merits of each issue raised in the complaint, provide the rationale for dismissal of any claims (as applicable), and address appropriate remedies and relief when discrimination is found.

As noted in the EEOC's previous report titled [*Timeliness of Merit Final Agency Decisions in the Federal Sector*](#), some agencies reported using contractors and other agencies to draft merit FADs on their behalf. In the previous merit FAD program evaluation, the EEOC conducted a survey and found that 34.0 percent of agencies used contractors or agency agreements for drafting at least some of the agency's FADs. Furthermore, responses from a questionnaire and interviews revealed that 13 of 14 agencies sometimes or always used FAD writing contractors or agency agreements. However, respondents also expressed concerns about the quality of FADs drafted by contractors or other agencies, which sometimes required substantial revisions. This supplemental program evaluation and report examines challenges and promising practices when using contractors or agency agreements to draft FADs.

Methodology

The EEOC used multiple methods to gain insight into challenges and promising practices when using contractors and agency agreements for merit FAD drafting. First, the EEOC reviewed data from the Fiscal Year (FY) 2021-22 Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (Form 462). The EEOC also reviewed data from the FY 2022 FAD program evaluation, including a survey sent to Federal Sector EEO Directors, a questionnaire sent to a subset of survey respondents, and interviews from three agencies with high merit FAD timeliness rates. The EEOC sent a supplemental request for information to previous questionnaire respondents and interviewees. Lastly, the

¹ The EEO complaint process is described in 29 C.F.R. Part 1614 and MD-110.

EEOC interviewed a Federal agency that drafts a significant number of FADs on behalf of other agencies.

The EEOC grouped the data by the following agency sizes:

- Large – 15,000 or more employees
- Medium – 1,000 to 14,999 employees
- Small – fewer than 1,000 employees

Furthermore, the EEOC considered whether an agency was a cabinet-level agency, a subcomponent of a cabinet agency, or a Department of Defense (DOD) subcomponent. Cabinet agencies are the 15 Federal executive agencies with agency heads that comprise the President's Cabinet. Subcomponents are agencies under a cabinet or parent DOD agency.

Additionally, agencies were classified by their FAD timeliness rates between FY 2018 and FY 2021:

- Low Timeliness – 0 to 49 percent
- Medium Timeliness – 50 to 74 percent
- High Timeliness – 75 to 100 percent

The prior FAD program evaluation from FY 2022 relied on a survey, questionnaire, and interviews. The EEOC sent a voluntary survey to all Federal agencies seeking feedback on the processing of FADs. The survey consisted of 25 questions in total. The EEOC received responses from 61 agencies—with 27 EEO Directors, four Deputy EEO Directors, four EEO Complaints Managers, nine Complaints Adjudication Officers, and five Civil Rights Program Managers among the respondents. The EEOC sent a questionnaire to a subset of survey respondents, including 11 cabinet-level agencies (nine large agencies and two medium agencies), five DOD subcomponents (three large agencies and two medium agencies), two large agencies, seven medium agencies, and five small agencies. The EEOC received a total of 19 responses from seven cabinet-level agencies (five large agencies and two medium agencies), four DOD subcomponents (two large agencies and two medium agencies), one large agency, three medium agencies, and four small agencies. The EEOC also interviewed two large cabinet-level agencies and a medium agency that had, on average, timely issued over 90 percent of their merit FADs from FY 2018 to FY 2021.

For this program evaluation, in December 2022, the EEOC sent supplemental requests for information to prior questionnaire recipients and interviewees. The EEOC received a total of 24 responses, including 10 cabinet-level agencies (nine large and one medium), three DOD subcomponents (two large and one medium), two large agencies, five medium agencies, and four small agencies. Lastly, the

EEOC interviewed an agency with multiple agency agreements for FAD drafting to better understand challenges and promising practices when working with other agencies and contractors.

Relevant Results from the Previous Merit FAD Program Evaluation

This section summarizes the relevant results from the EEOC's previous FY 2022 program evaluation on merit FAD timeliness.

Survey Results

The EEOC asked survey respondents to identify who drafted agency merit FADs. Of the 53 agencies that responded to this question:

- 26 agencies (49.1 percent) indicated that agency employees drafted the FADs.
- Nine agencies (17.0 percent) indicated that contract FAD writers draft FADs with approval from agency employees.
- Nine agencies (17.0 percent) indicated contracting with FAD writers on an as needed basis.

Nine other agencies (17.0 percent) responded "other" because they either did not have any FADs during the fiscal year or did not believe the choices reflected FAD processing at the agency.²

Interview Results

All three agencies the EEOC interviewed had a contract in place for FAD writing. However, two of the agencies seldom or never used contractors or other agencies during the last fiscal year. Agencies emphasized the importance of ensuring sufficient oversight of contractors and other agencies. They also highlighted the need to provide clear guidance, ensure close coordination, share template FADs, and hold other agencies accountable for deficiencies in work product. One agency also emphasized consistent interaction with the drafting agency.

Questionnaire Results

Of the seven cabinet-level agency respondents, one respondent stated that the agency never used FAD contractors or other agencies. The remainder of cabinet-level agencies used contractors and other agencies to draft FADs—ranging from only in certain situations (such as conflict cases) to the majority of FADs. The four DOD subcomponents and eight other agencies also varied in their use of FAD contractors, from drafting all merit FADs in-house to relying solely on contractors or another agency.

² Percentages do not add up to 100 percent due to rounding.

Agencies described challenges with using contractors and other agencies. One agency described the quality of FADs it received from another agency as “unacceptable.” Another agency said it lacked the proper staff to review the FAD drafts it received for legal sufficiency and revise problematic drafts. A different agency stated that it was “time-consuming” to hold contractors and other agencies accountable for poor performance and send back FADs for revisions and additions.

Agencies described practices to expedite the FAD drafting process when using contractors and other agencies. One agency emphasized regular communication to ensure timeframes are met. Another agency said it returned deficient FADs and conducted quarterly meetings regarding deficiencies and corrections. An additional agency stated that it amended its memorandum of understanding with an agency to include agreed-upon timeframes, thus contributing to greater timeliness, and developed standard operating procedures for processing conflict cases. One small agency did not have a contract in place because it issued few FADs. This agency emphasized starting the contracting process early upon learning that a FAD is needed, assigning the case as soon as possible, constantly monitoring and checking in with the contractor, and providing expectations and due dates.

Supplemental Request for Information Results

The EEOC sent to 32 agencies a Supplemental Request for Information titled “Merit Final Agency Decision Contractors and Inter-Agency Agreements.” This questionnaire focused on the number of merit FADs written by contractors in FY 2022 and quality concerns with FADs written by contractors.

Out of the 32 agencies, 23 responded: 10 cabinet-level (including nine large and one medium), four large, six medium, and three small agencies.³ The cabinet-level agencies reported a total of 11 to 162 merit FADs, with zero to all of these FADs written by contractors. The large agencies reported a total of 11 to 258 merit FADs, with up to 232 of these FADs written by contractors. The medium agencies reported a total of 3 to 11 merit FADs, with up to 10 of these FADs written by contractors. The small agencies reported no merit FADs in FY 2022.

One cabinet-level agency asserted that FADs should be drafted by in-house attorneys only, given the significance and sensitivity of EEO complaints, the time and resources needed to train attorneys, and the fact that FAD writers are determining potential liability for the agency.

For agencies that reported using contractors or other agencies to draft FADs, quality satisfaction varied. Some agencies reported not having to return any FADs for corrections, while others reported having to return almost all FADs for corrections. The most satisfied client agencies provided the contractor or other

³ Among these respondents, two were large DOD subcomponents and one was a medium DOD subcomponent.

agency with either a template or a model FAD written in-house. The most satisfied client agencies also frequently met with the contractor or other agency to discuss quality.

Agencies reported the following reasons for high satisfaction with FAD drafts by contractors and other agencies:

- The FADs were well-written and needed only minimal editing.
- Using contractors or other agencies to write the FADs helped ensure timeliness.
- The drafts were thorough in their legal and factual analysis.
- The contractor or other agency was quick to fix errors.

Agencies reported the following reasons for dissatisfaction with FAD drafts by contractors and other agencies:

- Time restrictions required that the agency usually make substantial revisions as opposed to returning the FAD for changes.
- All the drafts required substantial time to review and edit.
- The drafts had poor legal and factual analysis.
- The drafts had poor grammar and formatting.

The EEOC asked respondents about the most common and effective ways to address quality concerns. Responses included:

- The agency continued to send the draft back for corrections until the agency approved.
- The agency used in-house staff to edit and rewrite drafts.
- The agency provided a guidance manual that illustrated the quality expected.
- The agency frequently met with the contractor or other agency to provide feedback and address any continuous substantive errors.
- Statement of Work (SOW) contained penalties for late and poor performance.
- For serious or continuous quality issues, the agency stopped using the contractor.

Agency suggestions on improving the quality of FADs written by contractors and other agencies followed three main themes—communication, timeliness, and expectations.

Communication

Agencies found that maintaining frequent communication with a point of contact at the contractor or other agency during the drafting process helped with quality

control. It also reduced the time the agency needed to expend overall in reviewing and editing FAD drafts received from the contractor or other agency. Thus, agencies highly recommended regular, recurring meetings with a point of contact at the contractor or other agency to discuss quality issues and provide regular review and feedback.

Timeliness

Agencies stated that the contractor or drafting agency should submit initial drafts to the client agency within a reasonable period of time to allow the client agency to review and request any necessary changes. Agencies also advised that client agencies perform at least two rounds of review before signing off.

Expectations

Agencies suggested setting the expectation that the contractor or drafting agency will have experienced writers drafting the FADs. The writers should have a good understanding of the law, regulations and policies related to the allegations in the complaint. Where possible, contractors and drafting agencies should use administrative judges and attorneys that specialize or have experience in employment discrimination law. Agencies also recommended keeping track of low-quality FAD writers and notifying the contractor or drafting agency of such issues.

Agencies provided quality assurance suggestions. For example, to illustrate the quality of work that is expected, the client agency should provide the contractor or drafting agency with a model FAD that was drafted and reviewed for legal sufficiency in-house. This should minimize quality concerns and streamline the drafting, reviewing, and signing of FADs. The client agency should also provide a checklist, including items such as legal analysis, elements of proof, grammar, spelling, and anything else the client agency deems vital to a well-written FAD.

Agencies also suggested that the SOW should explicitly state the internal review process that it requires from the contractor or drafting agency, as well as any applicable penalties regarding untimeliness or quality issues. Final review and approval should remain solely in the authority of the client agency.

Interview With Agency Drafting FADs for Multiple Client Agencies

The EEOC interviewed an agency that provides FAD drafting services for multiple client agencies. The EEOC sought to identify challenges and promising practices in working within such agreements that could also be applied to private merit FAD contractors.

The agency said it provided merit FAD drafting services for 15 client agencies in FY 2021 and 14 client agencies in FY 2022. Some of these client agencies had agency agreements in place and utilized this agency for all FAD drafting, while other client

agencies had agency agreements in place but utilized this agency only in case of a backlog.

In FY 2021, this agency drafted 1,025 merit FADs for its own issuance and 608 for client agencies. By comparison, in FY 2022, the agency drafted 937 merit FADs for its own issuance and 660 for client agencies. The EEOC examined Form 462 data and found that, governmentwide, agencies issued 5,604 merit FADS in FY 2021 and 5,054 merit FADs in FY 2022. Assuming the FADs drafted for client agencies were issued during the same fiscal year, this one interviewee agency would have drafted 28.5 percent and 31.6 percent of all merit FADs issued governmentwide in FY 2021 and FY 2022, respectively.

Table 1. Merit FADs Issued by Interviewee Agency and Drafted for Client Agencies, FY 2020-21

Fiscal Year (FY)	Self-Drafted Merit FADs Issued by Interviewee Agency	Merit FADs Drafted for Client Agencies	Merit FADs Issued Governmentwide
2021	1,025	608	5,604
2022	937	660	5,054

Notes: Merit final agency decisions (FADs) address the merits of each claim raised by the complainant, provide the rationale for dismissal of any claims (as applicable), and determine appropriate remedies and relief when discrimination is found.

Source: U.S. Equal Employment Opportunity Commission (EEOC), FY 2021-22 Annual Federal Equal Employment Opportunity Statistical Report of Discrimination Complaints (Form 462) and EEOC interview with agency.

The agency drafted one finding of discrimination on behalf of another agency in FY 2021. It otherwise did not draft or issue any findings of discrimination in FY 2021-22.

At the time of the interview, the agency used government employees and contractors to draft FADs for both its internal EEO program and its client agencies. The agency employed two GS-15 Managers and four GS-13 EEO Analysts. Further, the agency used 29 contract FAD writers, 18 of whom were attorneys. The remaining contractors were individuals with an EEO background.

The agency described its process for merit FAD drafting on behalf of other agencies:

- The drafting agency receives a list of FADs and relevant documents from client agencies through a SharePoint site. The drafting agency must complete its FAD draft within 25 days of receipt of the request.
- The FAD is assigned to a contractor or employee for drafting. Although the drafting agency has its own standard legal analysis, boilerplate language, and templates, specific information from the client agency would supersede such information and would be provided to the drafter.

- The drafter sends the draft to an EEO Analyst at the drafting agency for review and approval.
- The completed draft is then shared with the client agency, which has three days to notify the drafting agency if the draft is acceptable.
- If an issue arises, the client agency may send the draft back with requested revisions. The drafter may request further explanation. The drafting agency aims to return all revisions within three to five days.

The drafting agency said that, although client agencies may revise the FADs in-house, it prefers that the FADs are returned to the drafting agency for corrections to improve their knowledge base for future FADs. This also helps the FAD writer and EEO Analyst improve.

The drafting agency emphasized the importance of timely requests as well as open communication and feedback with the client agencies it services. When a client agency submitted a request and documents late, drafting and revising the FAD on time became difficult. The drafting agency often met with client agencies either every quarter or every six months. Consistent discussions, information about necessary revisions, and notification of preferences enabled the drafting agency to provide the most useful work product to client agencies.

Main Findings in This Report

Impediments to Merit FAD Quality and Timeliness

Through its evaluation of agencies and their practices in using contractors and other agencies for merit FAD drafting, the EEOC found several impediments to client satisfaction as well as the quality and timeliness of FAD issuance. Agencies reported that contractors and other agencies often provided drafts with poor analysis, grammar, and formatting. Some agencies said they lacked sufficient staffing to review drafts and maintain accountability. They also said it was time-consuming to return problematic FAD drafts for revisions and additions. Thus, these agencies made substantial edits in-house as opposed to returning drafts for changes. In the worst cases, agencies stopped using a contractor or other agency to draft FADs.

Promising Practices for Merit FAD Quality and Timeliness

The EEOC's evaluation also identified promising practices that agencies employ for a successful relationship with a contractor or other agency. These practices may improve the quality and timeliness of FADs. Primarily, agencies focused on maintaining communication, prioritizing timeliness, and ensuring clear expectations and accountability.

Maintain Communication

Agencies emphasized continued communication to ensure a successful relationship. Satisfied agencies identified a point of contact from the contractor or other agency. They collaborated during the FAD drafting process to address any potential issues prior to the completion of a FAD draft. This contributed to a higher quality draft that needed less time for revisions. Satisfied agencies also provided feedback after receiving a FAD draft. Even if the agency did not return the draft and made revisions in-house, they communicated these changes to the contractor or other agency for the future.

Furthermore, satisfied agencies maintained regular communication to discuss overall issues. This communication included quarterly meetings where the agency provided feedback about draft quality, deficiencies, and corrections.

Prioritize Timeliness

Agencies that were satisfied with using FAD contractors or other agencies for FAD drafting began the relevant processes early. These included initiating the contracting process when a contract is not in place, assigning the case, and providing relevant documents as soon as practicable. Satisfied agencies communicated relevant deadlines to ensure the draft and revisions were submitted on time. These agencies were also responsive to requests for additional documentation or information during the FAD drafting process.

Ensure Clear Expectations and Accountability

Satisfied agencies expressed expectations and held contractors and other agencies accountable throughout the FAD drafting process. Satisfied agencies provided clear guidance prior to assigning the FAD. For example, they shared templates, model FADs that showed quality expectations, or a checklist of vital elements. Upon receipt of FAD drafts, agencies held contractors and other agencies accountable by returning deficient FADs for corrections or providing a copy of FADs revised in-house. These practices allowed the contractor or other agency to build greater knowledge and improve in the future.

Throughout the relationship, satisfied agencies maintained a culture of accountability. Some agencies met regularly to discuss overall deficiencies and corrections. They also kept track of low-quality FAD writers. Other agencies ensured accountability through the SOW by including agreed-upon timeframes and penalties for late and poor performance. Finally, if an agency continued to observe serious quality issues with draft FADs, the agency stopped using the contractor or other agency.

Conclusion and Next Steps

This report assessed factors that contribute to timely and quality merit FADs drafted by contractors and other agencies. The EEOC surveyed multiple agencies, interviewed agencies with high merit FAD timeliness rates, reviewed questionnaires and supplemental requests for information from a subset of survey respondents, and conducted an interview with an agency that drafts merit FADs for multiple agencies.

The results indicate that agencies should dedicate the time and resources to coordinate and hold agencies and contractors accountable for timely and quality merit FADs. They should maintain communication with the contractor or other agencies, prioritize timeliness, and provide clear expectations. Agencies that implement these practices can improve their experience with FAD contracts and agency agreements, as well as ensure timelier and higher quality work products.

Appendix A: Supplemental Request for Information on Merit FAD Contractors and Inter-Agency Agreements

The U.S. Equal Employment Opportunity Commission (EEOC) is studying the usage of contractors and inter-agency agreements (IAAs) in drafting merit final agency decisions (FADs). This is a follow-up to the FY 2022 program evaluation regarding merit FAD timeliness. You are receiving this supplemental request for information (RFI) because you participated in the previous program evaluation.

The RFI should take approximately 15 to 20 minutes to complete.

<p>1. Contact and General Information</p> <ul style="list-style-type: none"> • Name • Agency and Subcomponent • Job Title • Grade • Years in Your Position • Email
<p>2. What is your role in the FAD drafting process?</p>
<p>3. How many merit FADs did your agency issue in FY 2022?</p>
<p>4. How many merit FADs were drafted in whole or in part by a contractor or through an IAA with another agency in FY 2022?</p>
<p>5. If your agency did not use any contractors or IAAs for FADs in FY 2022, please explain why.</p>
<p>6. What influences your decision to assign a particular merit FAD to a contractor or another agency as opposed to drafting the FAD in-house?</p>
<p>7. Please identify each contractor and/or other agency and the number of merit FADs drafted by each. Use as many lines as necessary.</p> <ul style="list-style-type: none"> • Agency/Contractor • Complete Merit FADs Drafted • Partial Merit FADs Drafted
<p>8. Are you satisfied with the quality of draft merit FADs you receive from contractors/other agencies? Please explain.</p>
<p>9. When your agency receives a merit FAD that you identify as having a quality issue, how do you ensure your agency ultimately issues a quality merit FAD?</p>
<p>10. How many merit FADs did your agency return to a contractor/agency due to a quality issue? Please explain.</p>

11. What advice do you have for the EEO community to improve the quality of merit FADs drafted by contractors and through IAAs?