

Comments & Response to FTA's Proposed EEO Plan Circular
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FTA proposed that EEO Programs be updated and submitted to FTA on a triennial basis or as major changes occur in the workforce or employment conditions.

COMMENT(S)

One commenter suggested FTA add the language, "whichever comes first" at the end of the sentence to clarify that FTA requires the EEO Program to be updated at a minimum every three years, or sooner if conditions warrant.

FTA RESPONSE

FTA made that change.

FTA proposed removing the following sentence, which appears in the 1988 Circular: "At the discretion of FTA Office of Civil Rights, less information may be requested where the recipient's previously submitted EEO Program has not changed significantly."

COMMENT(S)

Several commenters disagreed with this proposal, asserting a requirement for a full update of an EEO Program when there are no significant changes places an unnecessary burden on small agencies that are in compliance and have limited staff, and is not necessary for agencies with strong EEO Programs or EEO Programs that have not changed significantly.

FTA RESPONSE

In response to commenters, FTA have restored that language.

FTA proposed that agencies would be required to update their EEO policy annually or after the naming of a new CEO/GM or EEO Officer.

COMMENT(S)

One commenter suggested that if there are no changes to the EEO policy, there would be no need to update it.

FTA RESPONSE

FTA revised the language to require a review and update at least every four years, when the EEO Program is submitted to FTA, or after the naming of a new CEO/GM or EEO Officer.

FTA proposed that top management officials would need to meet quarterly to discuss the EEO Program and its implementation.

COMMENT(S)

Several commenters objected to this frequency, asserting it would be overly burdensome for the agency, and recommending semiannual or annual meetings would be sufficient.

FTA RESPONSE

We agreed with those comments and revised the Circular to reflect that the meetings take place at least semiannually.

FTA proposed that agencies be required to conduct EEO training for all new supervisors or managers within 30 days of their appointment.

COMMENTS(S)

Two commenters suggested this timeframe should be extended; one suggested the training take place within six months, and one recommended it take place within 90 days.

FTA RESPONSE

FTA revised the Circular to require that training for supervisors and managers be conducted within 90 days of their appointment.

FTA proposed that agencies be required to meet with employees of protected classes and affinity groups to seek input on EEO Program implementation.

COMMENTS(S)

Two commenters suggested that all employees should be invited to provide input on the program implementation, not just members of protected classes or affinity groups.

FTA RESPONSE

FTA revised the Circular to require meetings with all employees and affinity groups to seek input on EEO Program implementation.

In order to ensure impartiality and independence of the EEO Officer, FTA proposed that the EEO Officer would need to be separated from human resources officials.

COMMENTS(S)

Several commenters objected to this proposal. The general consensus was that in agencies where the administrative staffs are small, separation of duties is impossible. One agency asserted that to create an EEO position separate from human resources would dilute the department's effectiveness to ensure EEO and legal compliance. Others suggested such a separation would cast concerns on the ability of the human resources department to protect equal employment opportunity. One commenter suggested FTA should not attempt to dictate how individual agencies avoid such conflicts of interest and that there would be substantial costs involved. Another commenter asserted the proposed separation ignored the normal function and role of a human resources department—to be knowledgeable about and enforce labor and employment laws, regulations and workplace rules—and that attempting to carve out functions in a way that is illogical would only serve to confuse all employees in the organization.

FTA RESPONSE

In response, we have revised this section to state that in order to maintain the independence and integrity of the EEO Officer, it *may* be necessary to separate the function from human resources. Agencies are not required to separate EEO and HR. However, in the event the EEO Officer is part of HR, we have added language that requires the agency to include in its EEO Program a detailed method for eliminating conflicts of interest in complaint investigations, including a narrative describing how independence.

FTA proposed that in order to maintain distance between the investigation of EEO complaints and defense of the agency, that the functional unit that reviews EEO matters be separate and apart from the functional unit that represents the agency in EEO complaints.

COMMENT(S)

Several commenters objected to this proposal. One commenter expressed concern about the phrasing of the language, specifically that attorneys rather than EEO Officers would represent an agency at administrative hearings. Another commenter expressed concern that the separation could inhibit a lawyer's ability to provide legal guidance on EEO requirements or could require the creation of two EEO offices, for internal and external complaints. Another commenter stated that the EEO Officer is better suited to report to a legal office because of the need for advice regarding perplexing or difficult EEO matters and the level of expertise needed to navigate the numerous EEO laws, regulations, and court rulings.

FTA RESPONSE

In response, FTA clarified that the attorney who provides legal expertise to the EEO Officer in the investigation of a case cannot represent the agency in the same EEO case.

FTA proposed that in order to ensure complaints are investigated effectively, those individuals charged with investigating complaints must have EEO investigative training.

COMMENT(S)

Two commenters requested clarification on what would constitute sufficient EEO investigative training for EEO Officers.

FTA RESPONSE

FTA have revised the Circular to include the specific information that should be covered in this training.

FTA proposed removing the requirement that EEO Officers concur on hires and promotions. Several commenters objected to this change. They asserted this requirement ensured the EEO Officer was involved in the process. They also suggested the removal of this function would undermine their ability to be part of the process.

COMMENT(S)

Two commenters supported the removal of the statement, stating the requirement was overly burdensome.

FTA RESPONSE

FTA reinstated the statement and provided a sample concurrence checklist in an Attachment that clarifies what “concurrence” entails.

The utilization analysis is a comparative analysis in which the female and minority availability for each EEO subgroup is compared with the current workforce representation of females and minorities. The following proposals, comments and responses are all related to the utilization analysis in the EEO Circular.

There was a concern that “two or more races (not Hispanic or Latino)” is a subcategory that is currently not collected on the EEO-4 forms. OMB approved the change of the EEO-4 categories to be consistent with the EEO-1, including two or more races.

COMMENT(S)

One commenter was concerned that extending to agencies with fewer than 100 transit employees the requirement to complete the FTA's electronic database for analysis and utilization of hires, promotions, and personnel's applications, without additional financial resources, would be extremely burdensome for smaller agencies to complete and track. The commenter urged FTA to consider limiting the FTA analysis and utilization database submittal only to agencies that meet the threshold for the submittal of an EEO Program.

FTA RESPONSE

FTA revised the Circular to provide that agencies with 50-99 employees will not be required to submit a full plan to FTA every four years, and will not be required to conduct a utilization analysis

COMMENT(S)

Two commenters sought clarification on how to track individuals with disabilities and veteran status with no baseline for availability.

FTA RESPONSE

FTA has included language in section 2.2.6 that states we are not asking agencies to set a goal for veterans or persons with disabilities based on availability numbers. There is no whole person rule or four-fifths analysis. The agency can set its own specific aspirational goals, but the Circular asks agencies to track raw numbers; for example, the number applied, number hired, number applied for promotion, and number promoted.

COMMENT(S)

One commenter requested clarification on setting department/unit/functional area goals. The Circular states, “Although FTA requires utilization data summarized for each job category, agencies are encouraged to compile workforce statistics for each department, job category, grade/rank of employee (*e.g.*, Road Supervisor I or II, Mechanic A or B, etc.), and job title to include salary ranges and principal duties for the jobs in each subcategory.”

FTA RESPONSE

We did not revise the Circular based on this comment, as the Circular states setting goals based on workforce statistics for each department, job category, grade/rank of employee is an encouraged good practice. It is not a requirement.

Goals and Timetables - The following proposals, comments and responses are all related to the EEO Plan goals and timetables section of the EEO Circular.

COMMENT(S)

One commenter asserted that setting long-term and short-term goals and timetables for each individual minority group, broken down by specific racial/ethnic subcategories for men and women, could only be achieved by conducting targeted recruitments, which could be perceived as discriminatory in California under the Fair Employment and Housing Act (FEHA).

FTA RESPONSE

FTA did not revise the proposal, as the short-term and long-term goals are aspirational goals based on identified underutilization and the results of the employment practices analysis.

Assessment of Employment Practices - The following proposals, comments and responses are all related to the Assessment of Employment Practices section of the EEO Circular.

FTA proposed that agencies be required to describe their efforts to locate, qualify, and train employees in protected classes.

COMMENT(S)

One commenter asserted all employees, not just employees of a protected class, should be able to receive training and that any action to locate, qualify, and train employees in protected classes could be perceived as discriminatory under FEHA. Certainly all employees should be able to avail themselves of training; the only documentation FTA requires in the EEO Program is those efforts to locate, qualify, and train employees in protected classes.

Another commenter asked for clarification on whether or not test validation documentation is required for all candidate selections. As clarification, test validation is completed per test, not per candidate. The commenter also asked FTA to clarify or remove the requirement that agencies provide a narrative of current seniority policies and procedures for union and non-union workers. We have revised the Circular to provide that agencies must provide a narrative for union and non-union workers if the seniority policies are different. In order to conduct a qualitative assessment of seniority practices to determine any potential disparate impact, a narrative must be provided.

One commenter noted that revising union agreements is a complex process that cannot be done unilaterally by an agency. In response, we revised the Circular to state, "When agencies are negotiating or amending union agreements, FTA requires agencies to review and revise the agreements wherever current provisions are identified as barriers to equal employment." The commenter further asserted, with regard to disciplinary procedures and termination practices, that it would be unreasonable to require agencies to use the "same" standard for determining when a person will be demoted, disciplined, or laid off in light of collectively bargained-for procedures and practices, and in light of state civil service law provisions governing the appointment, promotion and continuance of employment of certain agency employees (including layoffs).

FTA RESPONSE

We have not revised the Circular in response to this comment, as the Circular provides for placing employees in similarly situated groupings (e.g., subject to the same schedule of disciplinary charges) and requires separate analyses for employees subject to different disciplinary processes.

Monitoring and Reporting - The following proposals, comments and responses are all related to the Monitoring and Reporting updates that were in the EEO Circular.

FTA proposed that agencies would be required to evaluate their EEO Programs at least quarterly.

COMMENT(S)

Several commenters objected to meeting with management quarterly to discuss the EEO Program and its implementation. They asserted it would be overly burdensome for the agency.

FTA RESPONSE

FTA revised the Circular to reflect the evaluation should take place, at a minimum, semiannually.

COMMENT(S)

Some commenters suggested that unit managers should not have access to EEO information and that tracking this information is entirely a human resources function. There was also concern that reviewing this information with all levels of management could breach confidentiality for smaller agencies.

FTA RESPONSE

The Circular has been revised to say all “program” EEO-related meetings should be discussed. The meetings that are conducted with managers are to discuss the agency's progress in terms of meeting their EEO Program goals and requirements, not to discuss individual EEO complaints.

COMMENT(S)

One commenter questioned whether FTA is requiring the agency to track the agenda and outcome of every single meeting that the EEO Officer has with the CEO/GM, with any management official, and with human resources, with a concern on resource management.

FTA RESPONSE

FTA revised the Circular to provide documentation of meetings where EEO is officially discussed; for example, official EEO training and official meetings with management to report on EEO Program progress and plans of actions. There is no need to document every conversation.

FTA proposed that one element of a successful EEO Program is to, “Produce documentation that supports actions to implement the plan for minority and female job applicants or employees and informs management of the program's effectiveness.”

COMMENT(S)

One commenter suggested replacing “for minority and female” with “to improve diversity of.”

FTA RESPONSE

FTA did not adopt this suggestion. We believe it is important to specifically state “minority and female” as opposed to the more general “improve diversity,” in order to ensure agencies are documenting their efforts appropriately.

FTA proposed that one of the EEO Program attachments would be an Start Printed Page 67051organization chart showing the reporting relationships of all positions.

COMMENT(S)

One commenter suggested the organizational chart section should be revised so that it did not include the names of all employees.

FTA RESPONSE

We have revised the Circular to clarify that only directors, department heads, and executive leadership are to be named on the organization chart.

FTA sought comment on how long it would take to develop an EEO Program with the requirements set out in chapter 2 of the Circular. FTA also sought suggestions from recipients regarding how to use information technology to decrease the amount of time it takes to develop an EEO Program.

COMMENT(S)

One commenter suggested that the Circular has new data collection requirements that will require coordination with departmental units such as human resources and information technology. The commenter sought a 12-month grace period before new statistical data is required.

FTA RESPONSE

As stated above, FTA will be drafting a new schedule for quadrennial submission of EEO Programs to FTA. FTA will work with agencies that find themselves on the “earlier” side of the schedule and that may need to update their internal practices in order to develop an effective EEO Program.

EEO Compliance Oversight, Complaints, and Enforcement - The following proposals, comments and responses are all related to the EEO Compliance Oversight, Complaints, and Enforcement Monitoring and Reporting section in the EEO Circular.

COMMENT(S)

One commenter requested additional clarity and definition of factors and concerns that may trigger a discretionary review.

FTA RESPONSE

FTA revised the Circular to clarify the six factors that contribute to the selection for a civil rights specialized review.