



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

September 1, 2023

Memorandum for Heads of Executive Departments and Agencies

From: Kiran A. Ahuja, Director

Subject: Issuance of Regulations on the Fair Chance to Compete for Jobs Act of 2019

The U.S. Office of Personnel Management (OPM) is pleased to announce the issuance of its final regulations to implement the Fair Chance to Compete for Jobs Act of 2019 (Fair Chance Act). The regulations are effective on October 2, 2023, and are accessible at [federalregister.gov/d/2023-18242](https://www.federalregister.gov/d/2023-18242). The regulations assist agencies in carrying out the provisions of the Fair Chance Act found in chapter 92 of title 5, United States Code. The regulations govern when, during the hiring process, a hiring agency can request information typically collected during a background investigation from an applicant for Federal employment. In addition, the regulations provide a complaint process for applicants who believe they have been subjected to a violation of 5 U.S.C. 9202 and hold accountable Federal employees found to have committed such a violation.

To comply with the Fair Chance Act, the regulations, with some exceptions, prohibit Federal agencies and Federal contractors acting on their behalf from requesting that an applicant for Federal employment disclose criminal history record information before the agency makes a conditional offer of employment to that applicant. Moreover, the regulations provide the requirement for governing complaint procedures under which an applicant for a position in the civil service may submit a complaint, or any other information, relating to compliance by an employee in reference to the timing of collection of criminal history information. These regulations also outline adverse action procedures that apply when it is alleged that an agency employee has violated the requirements, establishes minimum penalties and procedures to be followed before a penalty may be assessed, and delineates appeal procedures that will be available from a determination by OPM adverse to the Federal employee. Ultimately, these changes support the Administration's priority to advance comprehensive equity.

Attached are documents that provide informative highlights about the complaint procedures, adverse actions, and appeals for criminal history inquiries prior to a conditional offer. The attached reference documents are not intended to be comprehensive, but rather to call attention to these topics that address related new requirements for agencies. Additional guidance on the restrictions on preemployment criminal inquiries set forth in 5 CFR parts 302, 317, 319, 330, 731, and 920 will be issued separately. You should consult your human resources office or OPM with any questions.

Agency Chief Human Capital Officers and/or Human Resources Directors should contact OPM for additional information using the following contact information: SuitEA@opm.gov or (202) 606-7017, with respect to 5 CFR part 731; employeeaccountability@opm.gov or (202) 606-2930, with respect to 5 CFR part 754; or Michael.Gilmore@opm.gov or (202) 936-3261, for all other parts. Employees should contact their agency human resources offices for assistance.

Attachments:

1. Questions and Answers on 5 CFR Part 754
2. Timeframes and Key Actions for Implementation of 5 CFR Part 754

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, and Human Resources Directors

U.S. Office of Personnel Management
Questions and Answers on 5 CFR Part 754
Complaint Procedures, Adverse Actions, and Appeals for Criminal History
Inquiries Prior to Conditional Offer

1. When may a hiring agency request criminal history information during the hiring process?

Unless otherwise required by law, an employee of an agency may not request, in oral or written form, that an applicant for an appointment to a position in the civil service disclose criminal history record information regarding the applicant before the appointing authority extends a conditional offer to the applicant.

The Fair Chance Act identifies some positions to which the prohibition shall not apply and section 920.201(b) of the regulations identifies additional positions to which the prohibition shall not apply. Exceptions previously granted to agencies by OPM pursuant to 5 CFR part 330 subpart M (i.e., the Ban the Box provisions) continue to be valid.

2. What is the timeframe for an applicant to submit a complaint, or any other information, about an alleged violation of the Fair Chance Act?

An applicant may submit a complaint, or any other information, to the agency within 30 calendar days of the date of alleged non-compliance with 5 U.S.C. 9202 and 5 CFR part 920 by an employee of the agency. In addition, the agency must conduct outreach to inform an applicant of the procedure for submitting a complaint when it has reasonable cause to believe that the applicant is attempting to file a complaint. The employing agency has the ability to extend the 30-day time limit when an applicant shows that the applicant was not notified of the time limits and was not otherwise aware of them, that the applicant did not know and reasonably should not have known that the noncompliance with section 9202 and part 920 occurred, to consider a reasonable accommodation of a disability, or for other proper and adequate reasons considered by the agency.

Note that OPM will not process any complaint, or any other information, an applicant submits directly to OPM. Instead, OPM will promptly forward the complaint to the appropriate agency.

3. What actions should an agency take if an applicant contacts the agency about a concern related to timing of criminal history inquiries under 5 CFR part 920?

An agency will conduct outreach according to its procedures when an applicant initiates contact related to timing of criminal history inquiries. The agency must inform the applicant of the agency's procedure for submitting a complaint when the agency has reasonable cause to believe that the applicant is attempting to file a complaint.

4. Can an applicant receive assistance during the complaint process?

Yes. An applicant may select a representative of their choice to assist throughout the complaint process. An agency may disallow as an applicant's representative an individual whose activities as a representative would cause a conflict of interest or position, when the applicant designates an agency employee who cannot be released from their official duties because of the priority needs of the Government, or when the applicant designates an agency employee whose release would give rise to unreasonable costs to the Government.

If the agency disallows the applicant's chosen representative, the agency must notify the applicant in writing as soon as practicable.

5. How will an applicant's complaints, or any other information, be investigated?

OPM has delegated to employing agencies the task of investigating complaints, or any other information provided by an applicant. Within the parameters provided in 5 CFR 754.102(b), agencies have discretion to determine the appropriate fact-finding methods that efficiently and thoroughly address the matters at issue. As with other administrative investigations regarding alleged misconduct, it is advisable that agencies gather information about the agency's policies and practices, agency employees involved, and any direction given to the agency employees.

In the event the investigator needs additional information from the applicant, the applicant will be given a reasonable amount of time to respond to any such request for information. Under ordinary circumstances, OPM believes a period of ten calendar days from the date of the request is reasonable and balances the need for timely conclusion of the investigation. However, the agency may extend the applicant's response period for extenuating circumstances. In addition, an agency may extend its

investigation period if the agency provides more than 10 calendar days for the applicant to respond to an agency's request for information.

Agencies should not use a complainant's failure to respond or failure to quickly respond to a request for additional information as the sole reason for abandoning an investigation. Instead, agency investigators should determine whether they can otherwise develop a record that allows a reasonable fact finder to draw conclusions as to whether noncompliance with section 9202 and part 920 occurred.

6. What steps does an agency take after completing its investigation?

The agency provides OPM an administrative report within 30 calendar days of completing its investigation. The agency's administrative report should include all information necessary for OPM to evaluate whether non-compliance with the Fair Chance Act occurred. The report should include the applicant's written complaint or any other information submitted by the applicant, the agency's factual findings, a complete copy of all information gathered during the investigation, and any other information the agency believes OPM should consider.

OPM may request the agency provide additional information as necessary. For example, if OPM decides to initiate adverse action proceedings under 5 CFR part 754, subpart B, OPM may request information about the agency employee that may be relevant to OPM's penalty determination within the ranges specified by the Fair Chance Act. Therefore, the agency's administrative report must also include contact information for an agency human resources point of contact.

Agencies are encouraged to submit their administrative reports electronically to employeeaccountability@opm.gov. Alternatively, agencies may send administrative reports via postal service to the Manager, Employee Accountability, Accountability and Workforce Relations, Employee Services, Office of Personnel Management, 1900 E Street NW, Room 7H28, Washington, DC 20415.

7. What is an adverse action under the Fair Chance Act?

The Fair Chance Act defines adverse actions for violations of the Act as written warnings, suspensions without pay, and civil penalties of various amounts depending on the violation. Notably the range of penalties includes some forms of penalty that are not enumerated under the "adverse actions" provisions found in chapter 75 of title 5, United States Code (written warnings, civil penalties). Adverse actions for Fair Chance

Act violations are similar, but not identical, to the adverse actions found at 5 CFR part 752. There are some very unique differences. For example, a written warning issued under this section is an adverse action and is subject to the same procedures and retention period as any other records of adverse actions to include placement of the Standard Form 50 in the employee's Official Personnel Folder. Additionally, the Act and the regulations provide for civil penalties of various amounts depending on the violation. The term "civil penalty" is a form of monetary penalty on a covered agency employee which is separate and distinct from a suspension without pay.

8. My agency follows progressive discipline when addressing misconduct. Can an agency change OPM's penalty for a violation of the Fair Chance Act if the agency employee has a history of prior discipline for misconduct?

No. The Fair Chance Act prescribes the range of penalties OPM may direct an agency to process when an agency employee has been found to have violated section 9202 of the Fair Chance Act and 5 CFR part 920. OPM is the proposing and deciding authority for penalties imposed for section 9202 violations. Accordingly, OPM, not the employing agency, is responsible for evaluating the facts and circumstances in each case. Also, the penalty scheme developed by Congress in the Fair Chance Act is unique to violations of section 9202 of the Act. OPM will not apply other statutes or current case law to Fair Chance Act violations.

9. Are penalties ordered by OPM under the Fair Chance Act regulations appealable?

Some penalties ordered by OPM under the Fair Chance Act are appealable. An agency employee subjected to a suspension of more than 14 days or civil penalty of any amount under 5 CFR part 754, subpart B, may appeal the action to the Merit Systems Protection Board (MSPB). MSPB appeal rights are not conferred for written warnings or suspensions of 14 days or less. In addition, because the adverse action is ordered by OPM and only processed by the employing agency, there is no right to file an administrative grievance or a contractual negotiated grievance for the adverse action under a negotiated grievance procedure covered by a collective bargaining agreement between an agency and an exclusive bargaining representative for that agency.

10. Are agencies required to collect a civil penalty imposed by OPM for a Fair Chance violation?

Yes. OPM may direct an agency to collect a civil penalty after OPM has determined that a violation of section 9202 of the Act has occurred. The employing agency will collect and remit the civil penalty to the Treasury, for deposit in the Treasury. If OPM orders a civil penalty, the penalty cannot be collected and remitted until the conclusion of any appeal to the MSPB. This is consistent with 5 U.S.C. 1215(a)(3)(A), under which the Office of Special Counsel can pursue a civil penalty as a disciplinary action, but the penalty cannot be collected until the Board's proceedings have concluded.

11. What happens if the agency employee alleged to have violated the Fair Chance Act is an administrative law judge?

Investigative authority is not delegated to agencies when the alleged violator is an administrative law judge (ALJ) for whom an adverse action is governed by the procedures in 5 U.S.C. 7521. Instead, OPM will conduct the investigation.

If, based on its investigation, OPM believes that an ALJ has violated 5 U.S.C. 9202 and 5 CFR part 920, OPM will file a complaint with the MSPB proposing an action set forth in 5 U.S.C. 9204 and describing with particularity the facts that support the proposed action. MSPB will determine whether the action is for good cause under its regulations in 5 CFR part 1201, subpart D.

12. Will applicants be notified of the outcome of a complaint?

No. Neither the Fair Chance Act nor OPM regulations require that an applicant be notified of the outcome of a complaint. As an interested party, an applicant may submit a Freedom of Information Act request to obtain any releasable information about the investigation and outcome. Note that an agency may only share information from the records concerning an individual's Fair Chance Act complaint pursuant to the Privacy Act and the applicable system of records notice. For example, an agency may share information only with those who have a need to know, such as human resources staff involved in advising management and any management official responsible for approving the action, or others to whom disclosure is permitted pursuant to a routine use.

13. Will OPM establish new legal authority codes and remark codes for adverse actions taken under 5 U.S.C. 9202 and 5 CFR 754, subpart B?

Yes. When an agency employee is found to have violated the Fair Chance Act, OPM will direct an agency to process a personnel action. OPM’s [Guide to Processing Personnel Actions](#) (GPPA) has been updated with a new Nature of Action code for a written warning issued for a first violation of the Fair Chance Act. The GPPA also reflects new legal authority codes and remark codes to identify that the adverse actions are taken under 5 U.S.C. 9202.

14. What are the respective roles for employing agencies and OPM under 5 CFR part 754?

Both OPM and agencies have important roles in implementing the Fair Chance Act regulations. For example, employing agencies are responsible for educating their workforce about the Fair Chance Act requirements, including what constitutes a prohibited inquiry and potential consequences of a prohibited inquiry. A summary of the respective roles for OPM and agencies with regard to 5 CFR part 754 can be found in the table below.

Role	Responsible Party
Applicant outreach	Agency
Complaint intake	Agency
Complaint investigation	Agency
Complaint adjudication	OPM
Penalty determination	OPM
Penalty processing	Agency
Appeal respondent	OPM
Record-keeping	Agency and OPM
Agency employee training	Agency

U.S. Office of Personnel Management

Timeframes and Key Actions for Implementation of 5 CFR Part 754

When	Who	What	Reference
Within 90 days of the effective date of 5 CFR 754	Agency	Establish and publicize an accessible program for the agency to receive a complaint, or any other information, from an applicant, and any applicable supporting material, relating to the agency's compliance with section 9202 of title 5, United States Code and 5 CFR part 920.	5 CFR 754.102(a)(1)-(a)(4)
Within 30 calendar days of the date of alleged non-compliance	Applicant	Submit a complaint, or any other information, to the employing agency, unless the agency extends the time limit for the reasons provided in 5 CFR 754.102(a)(3).	5 CFR 754.102(a)(2); 5 CFR 754.102(a)(3)
Within 10 calendar days from the date of a request for additional information	Applicant or applicant's representative	Respond to an investigator's request for documentary and testimonial evidence, unless the agency extends the time limit for extenuating circumstances.	5 CFR 754.102(b)(4)
Within 60 calendar days of the date of the filing of the complaint	Agency	Complete the investigation, unless the agency extends the investigative period to provide the applicant more than 10 calendar days to respond to a request for additional information.	5 CFR 754.102(b)(5)
Within 30 calendar days of completing investigation	Agency	Provide an administrative report to the Office of Personnel Management (OPM).	5 CFR 754.102(b)(6)
At least 30 days	OPM	Provide advance written notice to an agency employee against whom an action is proposed.	5 CFR 754.203(a)
Not less than 7 days	OPM	Provide an agency employee an opportunity to answer orally and in writing in response to a proposed adverse action.	5 CFR 754.203(b)
As soon as practicable	Agency	Carry out an OPM order to file a written warning if OPM determines an agency employee has violated the Fair Chance Act for the first time. A Standard Form 50 will be filed in the employee's Official Personnel Folder. OPM's Guide to Processing Personnel Actions has been updated with a new Nature of Action code for a written warning issued for a first violation of the Fair Chance Act.	5 CFR 754.202(a)
As soon as practicable	Agency	Carry out an OPM order to process a suspension if OPM determines the agency employee has violated the Fair Chance Act for a second or subsequent offense.	5 CFR 754.202 (d)(1)
Not later than 30 days after the effective date of the action	Agency employee	May appeal to the Merit Systems Protection Board (MSPB), but only to the extent the action concerns suspensions for more than 14 days or combines a suspension and a civil penalty.	5 CFR 754.204(A); 5 U.S.C. 9205; 5 CFR PART 1201
As soon as practicable	Agency	Carry out an OPM order to collect and remit a civil penalty, unless the employee timely appeals the action, in which case the agency shall collect and remit the civil penalty as soon as practicable after the MSPB issues a final decision sustaining the action.	5 CFR 754.202 (d)(2)