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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 300, 315, 335, 410, 537, and 900

RIN 3206-AM77

Nondiscrimination Provisions

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management (OPM) is issuing a final rule to update various nondiscrimination provisions to provide greater consistency and reflect current law.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: On September 4, 2013, OPM issued proposed regulations in the Federal Register (78 FR 54434) to update certain regulations that contain nondiscrimination provisions. OPM conducted a retrospective review of its regulations, including those with nondiscrimination provisions, as part of the Executive Order 13563 directive that agencies review existing regulations to determine whether they should be changed or eliminated. See <http://www.opm.gov/Open/Resources/RetrospectiveRegReview.pdf>.

OPM also chose these regulations for retrospective review to further respond to a separate instruction issued by President Obama in a June 17, 2009, Memorandum on Federal Benefits and Nondiscrimination, which directed OPM to issue guidance to promote compliance with existing laws that required Federal workplaces to be free of discrimination based on non-merit factors. See 5 U.S.C. 2303(b)(10); <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discrimi>.

Our review revealed that the nondiscrimination provisions in certain regulations were inconsistently worded or had not been updated to reflect recent legal developments, including enactment of the Genetic Information Nondiscrimination Act of 2008 (GINA), Pub. L. 110-233, which prohibits discrimination on the basis of genetic information (including family medical history). Accordingly, OPM is issuing these final regulations to update the nondiscrimination provisions of certain regulations to reflect current law and to make them consistent, to the greatest extent possible.

Some of the nondiscrimination provisions reflect statutory prohibitions on discrimination that arise out of the civil service laws codified at title 5, United States Code, and OPM's authority to enforce the merit system principles. Others were promulgated to reflect the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e, *et seq.*), the Rehabilitation Act of 1973, as amended (29 U.S.C. 701 *et seq.*), and the Age Discrimination in Employment Act of 1967, as amended (ADEA) (29 U.S.C. 621-634). As a result, we adopted two formulations of the nondiscrimination language. For those grounded in Title VII of the Civil Rights Act, the Rehabilitation Act, the ADEA, and the GINA (referred to collectively here as "civil rights laws"), the provisions will reflect the statutory prohibitions of discrimination on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age

(as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history) and retaliation for exercising rights under the statutes enumerated above, where retaliation rights are available. For those grounded in the civil service laws, the provisions reflect the statutory prohibitions of discrimination on those bases (5 U.S.C. 2302(b)(1)(A)-(D)), as well as prohibitions of discrimination on the basis of marital status (5 U.S.C. 2302(b)(1)(E)); political affiliation (*id.*); and sexual orientation, labor organization affiliation or non-affiliation, status as a parent, or any other non-merit-based factor (E.O. 13087; E.O. 13152; 5 U.S.C. 2302(b)(10)). It also incorporates retaliation for exercising rights under the statutes enumerated above, where retaliation rights are available. (5 U.S.C. 2302(b)(9)(A)-(B)).

We further concluded that the nondiscrimination provisions currently appearing in some regulations were grounded in other specific legal authorities and appropriately reflected the scope of the laws that they are implementing. Therefore, we did not propose changes to those provisions. See 5 CFR part 720 and 5 CFR part 724.

We believe that greater consistency across our nondiscrimination provisions will clarify the protections afforded to individuals and lessen the confusion that might result from the use of different language in various provisions. Also, where appropriate, we updated the authority citations for the regulations to reflect a complete list of the statutory provisions pursuant to which the regulations are now being reissued.

As part of the update process, in reviewing the proposed text for section 300.103(c), we also noticed that the heading, “Equal employment opportunity,” was not completely descriptive of the subparagraph because it encompassed forms of discrimination not currently encompassed

by the equal employment opportunity laws. Accordingly, we have changed this heading to read “Equal employment opportunity and prohibited forms of discrimination.”

OPM received six sets of comments in response to the proposed changes to the regulation in 5 CFR parts 300, 315 and 335. Comments on the proposed changes were received from an anonymous commenter, a private citizen (law student), one Federal agency, a disability advocacy group, a religious organization, and a coalition of advocacy groups.

The anonymous commenter requested to have “gender, particularly trans-gender” listed as a protected category and age discrimination claims expanded to include all ages. With regard to gender, as noted above, the category “gender identity” is already included within the category of “sex (including pregnancy and gender identity).” Accordingly, OPM does not believe any further action on this comment is necessary or appropriate. Similarly, with regard to the commenter’s position on the scope of age discrimination claims, OPM lacks the authority to revise the statutory elements for the ADEA through this rulemaking process, and thus declines to adopt that comment.

The individual commenter focused on issues related to the addition of “sexual orientation” as a protected category in certain provisions. The commenter stated that he believed the regulations will result in greater inconsistency because the references to sexual orientation were limited to the administrative arena and do not include the right to file a civil action in a Federal court. He also asserted that the absence of a right to Federal court meant the regulations were not “current.”

In support of his position, the commenter cited a 2002 district court ruling, which held that sexual orientation claims are not actionable under Title VII. OPM has considered this comment but does not agree that the revised regulations will result in “greater inconsistency” or

that the changes have not made the regulations “current.” These regulations seek to reflect the existing state of the law. Specifically, under the Civil Service Reform Act (CSRA), OPM has broad authority to issue regulations, including defining what is meant by “non-merit-based factors.” Under this authority, OPM has long held that, when tied to an actionable Part 300 claim, a claim of sexual orientation discrimination could reach the Merit System Protection Board and possibly, the Federal Circuit. Therefore, the regulations correctly note that claims of sexual orientation discrimination may be brought under the CSRA. On the other hand, these regulations seek to reflect, and do not purport to alter, the existing state of the law in Federal courts. Consequently, the regulations do not, and did not intend to, opine on what kinds of claims may be viable sex discrimination claims in Federal courts under Title VII.

The commenter suggested in the alternative that OPM add language explaining what he described as “the discrepancy between a [F]ederal employee's right to administratively pursue a sexual orientation discrimination claim and the narrow judicial review sections of the CSRA,” either in the regulation or in the OPM handbook titled “Addressing Sexual Orientation Discrimination.” *See* Comment at page 5. OPM has considered this comment but declined to adopt either alternative. These regulations are not a strategic guide for litigation; rather, they only restate the law as it exists today. Accordingly, OPM declines to add specific information regarding litigation options for sexual orientation claims. With respect to OPM’s handbook, OPM notes this document has been rendered out of date as a result of significant developments that have occurred since its original publication in 2008, including most significantly the Supreme Court’s decision invalidating Section 3 of the Defense of Marriage Act (DOMA). As a result, this handbook has been taken down from OPM’s website for an assessment of whether the document can merely be updated or whether a new publication is appropriate.

The commenter also requested that OPM either define the term "sexual orientation" or add a parenthetical to make the meaning clearer, similar to parentheticals added to other bases under Title VII. The commenter believed such definitions were needed in order for the provisions to truly reflect what he defines as "current law." The religious organization also raised a concern that "sexual orientation" was not defined. OPM considered these comments but declines to adopt them. The parentheticals for the Title VII categories were included only for clarification and for consistency across the regulations with nondiscrimination provisions. Although both commenters suggest that the "meaning" of sexual orientation is not unified, the existing case law demonstrates that the term "sexual orientation" is generally understood in the context of nondiscrimination jurisprudence, and thus not in need of further definition or clarification in these regulations.

The individual commenter, the agency, and the disability advocacy organization questioned why certain bases were missing from the list of protected bases in certain provisions within Part 300, Employment Practices. In particular, each commenter noted the difference between 5 CFR 300.104 (Appeals, Grievances and Complaints; complaints and grievance to an agency) as compared to 5 CFR 300.103 (Basic requirements; equal employment opportunity). The commenter recognized these two provisions were grounded in different authorities but suggested that sexual orientation should be added to section 300.104(c)(1)¹ to allow for a complaint alleging sexual orientation discrimination within an agency. OPM has considered but declines to accept this suggestion. Section 300.103(c), one of the three foundations for raising an

¹ The commenter actually cited "section 300.103(c)(1)," but OPM believes this is a typographic error because this same sentence referenced the right to file a complaint, which is consistent with language in "section 300.104(c)(1)." Moreover, the term "sexual orientation" is already included in section 300.103(c).

employment practice claim, identifies the statutory categories of discrimination under the civil rights laws and prohibited personnel practices under the merit system principles for which one can seek redress. Section 300.104(c), however, is an internal agency administrative complaints process that was created by regulation in order to give another, although more limited, avenue for redress to employees. Given the more limited authority for an action under section 300.104(c), OPM initially decided that it was more appropriate to simply update the language within the provision, including changing an obsolete procedural citation, but not add any additional bases for a claim. Upon further review, however, OPM believes it is appropriate to further update the language in this provision to include the same formulation for title VII claims found in 300.103(c) for consistency. Therefore, the parenthetical (including pregnancy and gender identity) has been added to the category “sex,” and “disability,” “genetic information (including family medical history),” and retaliation have been added as separate categories.

The agency specifically questioned why "disability," "genetic information," and "retaliation" were not included in the list of protected bases in section 300.104(c)(1) as well as why “genetic information” and "retaliation" were not included in section 315.806(d) (Appeal rights to the Merit System Protection Board [MSPB]). As noted above, upon further review, OPM has decided to further update section 300.104(c)(1) to reflect the same formulation for claims under the civil rights laws already found in section 300.103(c). So “disability,” “genetic information (including family medical history),” and retaliation have now been added as separate categories.

Further, while considering the agency comments, OPM identified an error in the final sentence of section 300.104(c)(1). Specifically, the sentence refers to "EEO and grievance procedures." The grievance procedures, however, are already referenced in section

300.104(c)(2). Therefore, OPM removed the duplicative reference to “grievance” from the last sentence in section 300.104(c)(1).

In section 315.806(d) of Part 315, OPM addresses probationary employees. Longstanding Civil Service Commission and OPM regulations, now at 5 CFR 315.806(d), limit probationers' access to the MSPB to appeals based on discrimination claims based on marital status or partisan political reasons. The regulations permitted appellants to append allegations of other types of discrimination that were then enshrined in statute when an employee raised a marital status or partisan political reason allegation.

Consistent with the purpose of these regulations – to “update various nondiscrimination provisions” in Title 5 of the Code of Federal Regulations – OPM proposed to retain the current content of the regulation, but change “handicapping condition” to “disability.” In keeping with our objective of conforming the regulation to accurately reflect the current state of the law, we also added the parenthetical “(including pregnancy and gender identity)” to the word “sex.” The separate grounds of “genetic information (including family medical history)” and “retaliation” have not been added, however, because those categories would create new rights, which is outside the scope of this rulemaking process.

The disability advocacy organization supported OPM’s proposal to add disability and genetic information to the non-discrimination provisions in sections 300.102, 300.103, and 335.103. Similar to the agency, however, the organization also thought “disability” and “genetic information” should be added to the list of claims actionable under the agency administrative process in section 300.104(c). For the reasons discussed above, OPM agrees with this view and has added “disability” and “genetic information (including family medical history).”

The disability advocacy organization also asked that OPM “clarify in the final regulations that the Uniform Guidelines on Employee Selection Procedures (UGESP) does not apply to complaints of discrimination based on disability” in light of statements from the EEOC related to UGESP. OPM considered this comment and agrees that clarification is needed. On its face, UGESP states that it applies to employment selection procedures with an adverse impact on members of a race, color, religion, sex, or national origin group. Therefore, section 300.103(c) is further revised to make it clear that while the categories of claims in this regulation have been updated to reflect current law, to the extent possible, OPM did not intend to expand the scope of the UGESP.

The disability advocacy group’s final comment asked OPM to revise 5 CFR 300.103(b) (Relevance), a different provision of the employment practice claims regulations. This provision was not part of this update process; therefore, this comment is outside of the scope of this rulemaking and will not receive any further consideration, beyond acknowledging receipt.

The religious organization questioned the inclusion of “gender identity” and “sexual orientation” to categories to prevent Federal workplace discrimination. First, the organization stated the inclusion of "gender identity" was not authorized by statute and the term is ambiguous and not defined in the regulations. OPM has considered these comments but disagrees that the category of "gender identity" is not authorized or that the term is not sufficiently defined. OPM notes that since 2012, the Equal Employment Opportunity Commission (EEOC) has recognized, in case law, that a gender identity claim is a form of discrimination on the basis of sex under Title VII. *See Macy v. Holder*, No. 0120120821, 2012 WL 1435995 *2 (EEOC, Apr. 20, 2012). Operative law is defined not only by the literal terms of statute and regulation but also by case law developed by the agency upon which authority to resolve claims is conferred and any

Federal courts with jurisdiction to consider such claims. Although the organization cited several cases that, in its view, supported its position regarding the viability of gender identity claims under Title VII, the position outlined by the EEOC in its 2012 *Macy* decision is the operative precedent with respect to how such claims will be handled through the Federal sector EEO process, which was our focus in drafting this language. In addition, as a substantive matter, two recent Federal court decisions, including one involving the Federal sector, have recognized the viability of such claims, see *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard Co.*, ___ F. Supp. 2d ___, 2014 WL 1396386, at *8 (D. Md. Apr. 10, 2014). Moreover, several Federal courts have allowed gender identity discrimination claims to proceed as allegations of sex stereotyping under Title VII or section 1983, see, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005). The existing case law demonstrates that the term “gender identity” is generally understood in the context of nondiscrimination jurisprudence, and thus not in need of further definition or clarification in these regulations.

The organization also stated that if the "gender identity" claim remained in the regulations, then there was no need for a bill such as "Employment Non-Discrimination Act" (ENDA) and that such inclusion "would have an adverse impact on the rights of other employees." See Comment at page 4. It made a similar comment about the negative impact of the "sexual orientation" category on the rights of other employees. OPM has considered but disagrees with these comments. Pending legislative actions, such as ENDA, are outside of the scope of this rulemaking, but OPM notes that the possibility of future legislation is not a basis for declining to act. See *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Subsequent legislative history is a hazardous basis for inferring the intent of an earlier

Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.”) (internal quotations and citations omitted). Moreover, even if passed, ENDA would not be limited to the Federal workforce, so would not be redundant to these regulations.

With regard to the rights of other employees, OPM notes it is already unlawful to discriminate against Federal employees or applicants for Federal employment on the basis of factors not related to job performance. 5 U.S.C. 2302(b)(10). The inclusion in these regulations of "gender identity" and "sexual orientation" did not change that longstanding prohibition. On the other hand, the suggestion that OPM simply incorporate the existing statutory language for 5 U.S.C. 2302(b)(10) is inconsistent with the purpose of this rulemaking process, which is to reduce the likelihood of confusion and inconsistent application. So OPM declines to adopt that suggestion,

Lastly the organization asserts that inclusion of "gender identity" and "sexual orientation" as part of a list of protected classes, along with other classes such as race, unfairly equates religious or moral opposition to claims of gender identity or sexual orientation with racial bigotry. OPM does not make such a moral equivalence assertion and does not believe the regulations, as written, inherently lead to such comparisons. Therefore, OPM does not believe this concern is a basis for removing the category of "gender identity" or "sexual orientation" from the nondiscrimination regulations.

The coalition of advocacy groups agreed with the changes in the regulations that added the parenthetical to “sex” so that it now reads “sex (including pregnancy and gender identity)” under the formulation for categories under Title VII. The coalition also asked that OPM further revise the Title VII categories to include sexual orientation. As OPM noted previously, the

purpose of this rulemaking is to note that claims of discrimination based upon factors not related to job performance, such as sexual orientation, may be brought under CSRA, the regulations do not, and did not intend at this time, to specifically address Title VII.

The coalition also requested that OPM take additional actions to work with other agencies to update their EEO policies and update existing guidance related to transgender employees. These requests are outside of the scope of this rulemaking process but OPM notes that it plans to assess all of the OPM published materials in this area to determine whether new or updated publications are appropriate.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

I certify that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to Federal agencies and employees.

List of Subjects in 5 CFR Parts 300, 315, 335, 410, 537, and 900

Administrative practice and procedure, Equal employment opportunity, Government employees, Individuals with disabilities, Intergovernmental relations.

U.S. Office of Personnel Management.

Accordingly, OPM amends title 5, Code of Federal Regulations, as follows:

PART 300 – EMPLOYMENT (GENERAL)

1. Revise the authority citation for 5 CFR part 300 to read as follows:

Authority: 5 U.S.C. 552, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR 1954-1958 Comp., page 218, unless otherwise noted. Secs. 300.101 through 300.104 also issued under 5 U.S.C. 7201, 7204, and 7701; E.O. 11478, 3 CFR 1966–1970 Comp., page 803, E.O. 13087; and E.O. 13152. Secs. 300.401 through 300.408 also issued under 5 U.S.C. 1302(c). Secs. 300.501 through 300.507 also issued under 5 U.S.C. 1103(a)(5). Sec. 300.603 also issued under 5 U.S.C. 1104.

2. Revise §300.102(c) to read as follows:

§ 300.102 Policy.

* * * * *

(c) Be developed and used without discrimination on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor organization affiliation or nonaffiliation, status as a parent, or any other non-merit-based factor,

or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available.

* * * * *

3. Revise § 300.103(c) to read as follows:

§ 300.103 Basic requirements.

* * * * *

(c) *Equal employment opportunity and prohibited forms of discrimination.* An employment practice must not discriminate on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor organization affiliation or nonaffiliation, status as a parent, or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available. Employee selection procedures shall meet the standards established by the “Uniform Guidelines on Employee Selection Procedures,” where applicable.

4. Revise § 300.104(c)(1) to read as follows:

§ 300.104 Appeals, grievances and complaints.

* * * * *

(c) *Complaints and grievances to an agency.* (1) A candidate may file a complaint with an agency when he or she believes that an employment practice that was applied to him or her and that is administered by the agency discriminates against him or her on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by

the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available. The complaint must be filed and processed in accordance with the agency EEO procedures, as appropriate.

* * * * *

PART 315 – CAREER AND CAREER-CONDITIONAL EMPLOYMENT

5. Revise the authority citation for part 315 to read as follows:

Authority: 5 U.S.C. 1302, 2301, 2302, 3301, and 3302; E.O. 10577, 3 CFR, 1954–1958 Comp. p. 218, unless otherwise noted; and E.O. 13162. Secs. 315.601 and 315.609 also issued under 22 U.S.C. 3651 and 3652. Secs. 315.602 and 315.604 also issued under 5 U.S.C. 1104. Sec. 315.603 also issued under 5 U.S.C. 8151. Sec. 315.605 also issued under E.O. 12034, 3 CFR, 1978 Comp. p.111. Sec. 315.606 also issued under E.O. 11219, 3 CFR, 1964–1965 Comp. p. 303. Sec. 315.607 also issued under 22 U.S.C. 2506. Sec. 315.608 also issued under E.O. 12721, 3 CFR, 1990 Comp. p. 293. Sec. 315.610 also issued under 5 U.S.C. 3304(c). Sec. 315.611 also issued under 5 U.S.C. 3304(f). Sec. 315.612 also issued under E.O. 13473. Sec. 315.708 also issued under E.O.13318, 3 CFR, 2004 Comp. p. 265. Sec. 315.710 also issued under E.O. 12596, 3 CFR, 1987 Comp. p. 229. Subpart I also issued under 5 U.S. C. 3321, E.O. 12107, 3 CFR, 1978 Comp. p. 264.

6. Revise §315.806(d) to read as follows:

§ 315.806 Appeal rights to the Merit Systems Protection Board.

* * * * *

(d) An employee may appeal to the Board under this section a termination that the employee alleges was based on discrimination because of race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), or disability. An appeal alleging a discriminatory termination may be filed under this subsection only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.

PART 335 – PROMOTION AND INTERNAL PLACEMENT

7. Revise the authority citation for 5 CFR part 335 to read as follows:

Authority: 5 U.S.C. 2301, 2302, 3301, 3302, 3330; E.O. 10577, E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152, 3 CFR 1954-58 Comp., p. 218; 5 U.S.C. 3304(f), and Pub. L. 106-117.

8. Revise § 335.103(b)(1) to read as follows:

§ 335.103 Agency promotion programs.

* * * * *

(b) *Merit promotion requirements--(1) Requirement 1.* Each agency must establish procedures for promoting employees that are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation, as specified in paragraph (c) of this section. Actions under a promotion plan – whether identification, qualification, evaluation, or selection of candidates – must be made without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor organization affiliation or nonaffiliation, status as a parent, or any other non-merit-based factor, unless specifically designated by statute as a factor that must be taken into consideration when awarding such benefits, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available, and must be based solely on job-related criteria.

* * * * *

PART 410 – TRAINING

9. Revise the authority citation for 5 CFR part 410 to read as follows:

Authority: 5 U.S.C. 1103(c), 2301, 2302, 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275, E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152.

10. Revise § 410.302(a)(1) to read as follows:

§ 410.302 Responsibility of the head of an agency.

(a) *Specific responsibilities.* (1) The head of each agency must prescribe procedures as are necessary to ensure that the selection of employees for training is made without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor organization affiliation or nonaffiliation, status as parent, or any other non-merit-based factor, unless specifically designated by statute as a factor that must be taken into consideration when awarding such benefits, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available, and with proper regard for their privacy and constitutional rights as provided by merit system principles set forth in 5 U.S.C. 2301(b)(2).

* * * * *

PART 537 – REPAYMENT OF STUDENT LOANS

11. Revise the authority citation for 5 CFR part 537 to read as follows:

Authority: 5 U.S.C. 2301, 2302, and 5379(g); E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152.

12. Revise § 537.105(d) to read as follows:

§ 537.105 Criteria for payment.

* * * * *

(d) *Selection.* When selecting employees (or job candidates) to receive student loan repayment benefits, agencies must ensure that benefits are awarded without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, labor affiliation or nonaffiliation, status as a parent, or any other non-merit-based factor, unless specifically designated by statute as a factor that must be taken into consideration when awarding such benefits, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available.

PART 900 – INTERGOVERNMENTAL PERSONNEL ACT PROGRAMS

Subpart F – Standards for a Merit System of Personnel Administration

13. Revise the authority citation for 5 CFR part 900, subpart F, to read as follows:

Authority: 42 U.S.C. 4728, 4763; E.O. 11589, 3 CFR part 557 (1971-75 Compilation); 5 U.S.C. 2301, 2302, E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152.

14. Revise § 900.603(e) to read as follows:

§ 900.603 Standards for a merit system of personnel administration.

* * * * *

(e) Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to race, color, religion, sex (including pregnancy and gender identity), national origin, age (as defined by the Age Discrimination in Employment Act of 1967, as amended), disability, genetic information (including family medical history), marital status, political affiliation, sexual orientation, status as parent, labor organization affiliation or

nonaffiliation in accordance with chapter 71 of title V, or any other non-merit-based factor, or retaliation for exercising rights with respect to the categories enumerated above, where retaliation rights are available, and with proper regard for their privacy and constitutional rights as citizens. This “fair treatment” principle includes compliance with the Federal equal employment opportunity and nondiscrimination laws.

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