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| DEPARTMENT OF COMMERCE United States of America | DEPARTMENT ADMINISTRATIVE ORDER <u>202-955</u> | |
| DEPARTMENT ADMINISTRATIVE ORDER SERIES | DATE OF ISSUANCE 01/11/2024 | EFFECTIVE DATE 01/11/2024 |
| SUBJECT ALLEGATIONS OF HARASSMENT PROHIBITED BY FEDERAL LAW | | |
| <p><u>SECTION 1. PURPOSE.</u></p> <p>.01 The Department of Commerce is committed to ensuring a harassment-free workplace. When allegations of unlawful harassment are substantiated, immediate and appropriate action shall be taken.</p> <p>.02 The purpose of this Order is to provide a quick and effective process for management to review, and to take appropriate and swift action when they become aware of an allegation of harassment prohibited by Federal law, that is, harassment based on race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability, or genetic information, or retaliation/reprisal.</p> <p>.03 The Order provides effective procedures to: (1) encourage employees to report allegations of harassment; (2) prevent and address harassing behavior at the earliest stage; and (3) provide guidance to managers and supervisors on the process to follow when they receive, witness, or become aware of an allegation of unlawful harassment from an employee, and the appropriate corrective action to take when allegations of unlawful harassment are substantiated.</p> <p>.04 The procedures established in this Order are outside the EEO complaint processing programs of the Department, which adjudicates complaints of discrimination and is focused on providing remedial relief to employees affected by prohibited harassment.</p> <p>.05 This revision makes minor editorial changes.</p> <p><u>SECTION 2. DEFINITIONS.</u></p> <p>.01 Anonymity. The quality or state of being unknown or obscure.</p> <p>.02 Confidentiality. The state of keeping or being kept secret or private.</p> <p>.03 Employee. For the purpose of this Order, an employee is an employee of the Department.</p> <p>.04 Protected activities. Reporting harassing conduct; participating in a harassment inquiry under the Order's provisions in such a report; providing evidence in any harassment inquiry under the provisions of this Order.</p> | | |

.05 Protected status. An employee's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, older age (40 or older), disability, genetic information, or retaliation/reprisal.

.06 Servicing Human Resources Office (SHRO). The organization that provides employee relations functions for its serviced employees.

.07 Unlawful harassment. Unlawful harassment is unwelcome conduct that is based on race, color, religion, sex (including sexual orientation, gender identity, or pregnancy), national origin, older age (beginning at age 40), disability, or genetic information (including family medical history), or retaliation/reprisal. Harassment becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

SECTION 3. POLICY.

.01 The Department strictly prohibits unlawful harassment.

.02 The Department will not tolerate unlawful harassment or any form(s) of retaliation against any employee making a report of harassing conduct, participating in a harassment inquiry into such a report, or providing evidence in any harassment inquiry under the provisions of this Order.

.03 Supervisors are responsible for maintaining a workplace free of harassment, for taking immediate and appropriate action when they become aware of an allegation of harassment or unwelcome behavior, and for addressing and correcting the misconduct when the allegation of harassment is substantiated.

.04 Once supervisors become aware of potential harassing behavior, they have a duty and obligation to act by taking immediate and appropriate action, in accordance with the procedures in this Order.

.05 During the period of a pending harassment inquiry, employees alleged to have engaged in harassment are not disciplined until it has been established that unlawful harassment has occurred. Immediate action(s), in accordance with Section 10.02 of this Order, taken to mitigate the opportunity for additional actual or perceived harassment to occur, is not considered disciplinary in nature.

SECTION 4. SCOPE.

.01 The policy of this Order applies to all employees.

.02 The procedures in this Order apply to incidents or allegations of - harassment prohibited by Federal law, whether ongoing or completed that normally would require the Department to initiate disciplinary action against the offending party. The conduct covered by this DAO involves:

- a. The targeting of an employee for harassment because of their sex (this includes harassment that is not necessarily sexual in nature) or other protected status.

- b. A pattern of pervasive harassment in the work unit including unwelcome behavior towards an individual or individuals that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment; or
- c. A single incident of prohibited harassment of such a serious nature that the continued effective functioning of the unit will be impacted.

SECTION 5. EXCLUSIONS.

- .01 Alleged harassing behavior not connected to protected status or protected activities. Such allegations are covered under Department Administrative Order (DAO) 202-751, "Discipline" and/or applicable collective bargaining agreements.
- .02 The Department prohibits all unwelcome conduct, including unwelcome conduct that is not severe or pervasive or has not risen to the level of unlawful conduct. However, conduct that is not based on an employee's protected characteristic is not addressed in, or covered by, this DAO.

SECTION 6. LABOR RELATIONS' OBLIGATIONS.

- .01 Organizations whose employees are represented by labor unions must ensure that all labor relations' obligations are satisfied when carrying out the provisions of this Order.

SECTION 7. RESPONSIBILITIES FOR REPORTING ALLEGATIONS OF HARASSMENT.

- .01 Employee Responsibility. Employees are strongly encouraged to report any incident perceived to be harassment, including those personally experienced and those witnessed.
 - a. A report should be made to the employee's immediate supervisor, a higher-level supervisor, or to the appropriate SHRO as soon as the incident occurs, or when the employee becomes aware of the incident.
 - b. To the extent possible, the confidentiality of employees who report harassment will be protected. An allegation of harassment shall be shared with only those who have an official need to know. However, complete confidentiality is not guaranteed, as an effective harassment inquiry may be adversely impacted by not revealing certain information to the alleged harasser and/or potential witness(es). Any employee making a report of harassing conduct, participating in a harassment inquiry into such a report, or providing evidence in any harassment inquiry under the provisions of this Order is protected from retaliation.
- .02 Manager/Supervisor Responsibility.
 - a. A supervisor who receives, or is made aware of, an allegation of prohibited harassment by an employee must immediately report the allegation, in writing, to the appropriate SHRO, even when the harassed employee requests that the incident not be reported (see .02 c). Failure by the supervisor to report the allegation could result in disciplinary or adverse action against the supervisor.
 - b. In all cases, the supervisor to whom the incident is reported to, or witnessed by, must inform the

employee of their right to initiate a complaint with the servicing EEO Office or from the Department's Office of Civil Rights (OCR). The employee must be informed that the reporting to the EEO Office or the OCR must occur within 45 calendar days from the date of the alleged harassing incident or the date that the employee became aware of the alleged harassing incident.

c. Requests for Non-Report, Confidentiality, and/or Anonymity

1. Employees may ask that a supervisor keep the allegations of harassment confidential and not report the incident. However, the supervisor is required to inform the employee of their obligation to report the incident and that confidentiality will be maintained within the confines of the harassment inquiry and disposition of the harassment inquiry in accordance with the provisions of this Order. The supervisor should ascertain if the employee is requesting confidentiality.

2. The supervisor must inform their SHRO of the harassment allegation(s) and if applicable, the employee's request for confidentiality.

3. When the employee requests confidentiality, the responsible supervisor must provide a written statement on the alleged harassment indicating that any harassment inquiry and/or action may be limited due to confidentiality being requested. This statement must be coordinated with the SHRO, and a copy of the statement provided to the employee and to the SHRO.

d. Reporting to the Office of Inspector General (OIG). Supervisors and/or other Department officials are not required to report instances of harassment to the OIG. However, if there is evidence of a pattern of harassment in a bureau/operating unit (OU), that evidence should be reported to the OIG in accordance with DAO 207-10, "Inspector General Investigations and Related Activity." Reporting evidence of a pattern of harassment to the OIG does not relieve the bureau/OU of the obligation to identify and correct the situation. In appropriate cases, the OIG will advise the bureau/OU if its proposed actions could interfere with OIG proceedings.

SECTION 8. EQUAL EMPLOYMENT OPPORTUNITY.

.01 Every employee, at any time, has access to an EEO Counselor, and may file a formal complaint of discrimination, without informing their supervisor of the alleged incident of harassment, based on race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age (40 or older), disability, or genetic information, or retaliation/reprisal.

.02 EEO Counselors who become aware of an allegation of unlawful harassment are responsible for: (1) informing the employee alleging harassment of this Order; (2) notifying the employee of the EEO Counselor's responsibility to report the allegation to the SHRO; (3) referring the matter to the SHRO. The EEO Counselor can assist the affected parties in resolving allegations. However, a settlement agreement resolving a complaint of discrimination or retaliation may not necessarily end the inquiry required under this Order.

.03 When an employee files a formal EEO complaint of unlawful harassment, a copy of any harassment inquiry conducted by the Department, pursuant to this DAO, must be forwarded to the Department's OCR for inclusion in the "EEO Report of Harassment inquiry," upon request by the OCR.

.04 EEO complaints are filed against the employing bureau. Accordingly, the matter to be decided in the EEO process when complaints of unlawful harassment are adjudicated is whether the bureau subjected the employee to unlawful discrimination.

.05 If an EEO Counselor informs a supervisor of an allegation of harassment, that supervisor must immediately inform their SHRO about the allegation.

SECTION 9. PROCEDURES.

.01 Initial Review of an Allegation of Harassment. The SHRO, or designee, or other appropriate organization will promptly conduct an initial review of the allegation upon its notification and determine if the allegation is covered within the scope of this Order. If it is determined that the allegation is covered under the Order, the incident shall be investigated in accordance with this Order and the investigation shall begin within 10 days when the agency receives notice of allegations of harassment. If it is determined that the allegation involves behavior that would not constitute unlawful harassment, a harassment inquiry under this Order will not be conducted but **may be conducted under a different authority.**

.02 Immediate Action(s). When necessary, immediate action(s) to mitigate the opportunity for additional harassment to occur shall be taken before completing the initial review of the allegation(s). For examples of immediate actions, please see .04(2)b(1) below.

.03 Allegations That Do Not Rise to the Level of Unlawful Harassment. If during the initial review, it is determined that the allegation(s) are not covered under the scope of this Order, as described in Section 4, a determination as to whether the allegation(s) are types of conduct or behavior covered under DAO 202-751, "Discipline" must be made.

Upon conclusion of the initial review, the SHRO shall:

- a. Initiate an inquiry; or
- b. Inform the employee raising the allegation(s) that although the matter(s) does not rise to the level of unlawful harassment under this Order, management is considering appropriate action.

.04 Allegations That May Rise to the Level of Unlawful Harassment

- a. The facts are known and not in dispute.

1. Employees may allege, or supervisors may become aware of, incidents of unlawful harassment where the facts are not in dispute (e.g., where all parties admit the allegations are true). In such situations, corrective action, including stopping any ongoing harassment and initiating disciplinary or adverse action, if appropriate, should be taken immediately in consultation with the SHRO. In all cases, the SHROs are responsible for coordinating with the Office of the General Counsel (OGC) to ensure that enough facts are known to proceed with corrective action.

- 2. If disciplinary or adverse action is taken, it must proceed in accordance with DAO 202-751,

“Discipline”, any applicable collective bargaining agreement provision, 5 United States Code (U.S.C.) Chapter 75, and 5 Code of Federal Regulations Part 752. Appropriate corrective actions include, but are not limited to, a written reprimand, reassignment, suspension, demotion, or removal, as appropriate.

b. The facts are in dispute.

1. If a determination of the validity of the harassment allegation cannot be readily made, or not enough facts are known to proceed with corrective action, the SHRO, where appropriate, will identify a person to investigate, and the harassment inquiry shall begin within 10 days from when the agency receives notice of allegations of harassment. The SHRO will provide advice and assistance to the investigator. When the allegations concern the employee’s first-line supervisor or a coworker in the unit, consideration should be given to taking immediate measures before completing the harassment inquiry to mitigate the opportunity for additional harassment. Examples of such measures are:

a. For the employees alleged to have engaged in harassment, making scheduling changes to avoid contact between the parties; temporary telework, temporary change in work location such as a different room/floor/corridor of building; and any other available flexibility to separate the parties, placing the supervisor or coworker on non-disciplinary leave with pay, pending the conclusion of the harassment inquiry; or

b. If the employee (recipient of alleged harassment) agrees, have them report to an alternative supervisor while the harassment inquiry is being conducted. Such an offer to the employee should only be made after consultation with the SHRO and the OGC.

.05 Conducting a harassment inquiry under this Order.

a. The harassment inquiry must result in a record sufficient to support any corrective and/or disciplinary action taken, or to indicate there is not sufficient evidence to support corrective and/or disciplinary action. The cost of the harassment inquiry, if any, shall be the responsibility of the bureau to which the alleged harasser is assigned.

b. The investigator selected to perform the harassment inquiry must be appropriately authorized to conduct harassment inquiries of this nature and shall take a signed, sworn statement from the employee alleging harassment, the employee against whom the allegations are made, and from all witnesses.

c. The investigator shall coordinate with the appropriate SHRO to ensure that all labor relations’ obligations are met for employees in a bargaining unit when conducting harassment inquiries.

d. The following process should be followed during the harassment inquiry:

1. Confirm the name, position, and supervisory chain of the employee alleging harassment.

2. Identify the alleged harassment and the name(s) of the employee(s) allegedly responsible for it.

3. Obtain, from the employee alleging harassment, a detailed account of the alleged harassment, including a description of the alleged actions/comments, the dates, times, and locations of the alleged

actions/comments as well as the names of any witnesses to, or persons with knowledge of, the alleged actions/comments, as well as any other documentation (i.e., emails, photos, etc.).

4. Regarding allegations of sexual harassment, determine specifically whether the employee is claiming that someone has made, and/or carried out, any threats or promises regarding their terms and conditions of employment.

5. Obtain from the alleged harasser, a detailed response to each of the allegations, as well as the names of witnesses who can corroborate the accused's account of the alleged harassment.

6. Obtain a statement from all witnesses listed by the employee as to what they witnessed regarding the alleged harassment.

7. Inform all interviewees about the prohibition forbidding retaliation against the employee reporting the alleged harassment, and of those participating in a harassment inquiry under this Order.

8. To the extent possible, and absent extenuating circumstances, the harassment inquiry described in this Order shall be completed within 90 calendar days from the SHRO being notified of the allegation of harassment.

9. When the harassment inquiry is completed, the information shall be provided to the Director SHRO, or designee, who will determine whether the alleged harassment occurred. Subsequently, the Director SHRO, or designee, shall provide the findings to the appropriate management official(s) in the bureau/OU to which the alleged harasser and the employee of the alleged harassment are assigned. The SHRO shall also provide the findings to the OGC, to receive guidance on an appropriate resolution to the matter.

10. In all instances, when the harassment inquiry is completed, the SHRO will communicate the findings of the harassment inquiry to the employee who was the subject of the alleged harassment. If the harassment inquiry establishes that immediate and appropriate corrective action, including discipline, is warranted, those for whom disciplinary or adverse action has been proposed will be provided a copy of the pertinent parts of the harassment inquiry as part of the disciplinary process.

.06 When a Harassment Inquiry Results in a Determination of Unlawful Harassment.

a. When a harassment inquiry results in a determination that an employee engaged in unlawful harassment, the employee who committed the harassment shall be subject to appropriate corrective action. Disciplinary or adverse action, if appropriate, should be immediately taken in consultation with the SHRO and the OGC.

b. The SHRO shall maintain a record of all reviews and/or harassment inquiries conducted in accordance with this Order that result in disciplinary or adverse action, in accordance with the General Records Schedule. This requirement does not affect any other record keeping requirement that may apply to harassment inquiries conducted in accordance with this Order.

SECTION 10. DEPARTMENTAL COORDINATION.

.01 As necessary, because of their potentially overlapping roles, the SHRO, Office of Human Resources Management, OGC, OCR, Office of Security, and the OIG should communicate with each other in a timely manner when they receive an allegation of harassment to (1) ensure that employees are aware of the various avenues of redress and that any regulatory time requirements for their respective processes and jurisdictions are met; and (2) to increase the Department's ability to detect and address any systemic harassment issues.

SECTION 11. EFFECT ON OTHER ORDERS.

.01 This Order supersedes Department Administrative Order 202-955, dated January 23, 2023.

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Director for Human Resources Management and
Chief Human Capital Officer

Approved:

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Deputy Assistant Secretary for Administration
Performing the non-exclusive functions and
duties of the Chief Financial Officer and
Assistant Secretary for Administration

Office of Primary Interest
Office of Human Resources Management