

the number of test subjects generally used, the distribution of the subjects within the panel cells, the sizing basis, and the representation of male and female test subjects. What pass/fail criteria are you currently using to approve proto-types for further development or production?

(a) As a manufacturer, do you use facepiece-to-face seal criteria to qualify a design for production? Please include details about the criteria in your answer.

(b) As a purchaser, what are the attributes you use to determine which brand(s) or model(s) of respirators to buy (e.g., price point, size, supplier, availability)?

3. Does your company use a panel or portion of a panel to develop respirators for a defined user group (e.g., users with smaller facial features, users with larger facial features)? If so, please define the user group, the panel used, the cells included, and the number of subjects generally needed.

(a) Could the LANL half-facepiece panel be used to test respirators for defined user groups? Please explain why or why not and include related implementation issues.

(b) What issues do you foresee in the implementation of fit testing standards for defined user groups?

4. Does your company use a panel or a portion of a panel to ensure the quality of a manufactured product line? If so, what test method and panel are used? How many subjects are included? Please explain how you maintain your pool of subjects.

5. NIOSH currently uses the LANL half-facepiece panel (lip length, which is actually the lip width, and face length) for categorizing human subjects to evaluate those half-mask respirators evaluated for fit. What are the advantages and/or disadvantages of using the LANL half-facepiece panel for an inward leakage requirement for half-mask air-purifying particulate respirators, approved under subpart K, which are currently not evaluated for fit?

6. What panel size would be sufficient for conducting a facepiece-to-face seal certification test?

(a) Given the recommended number of test subjects, should the pass/fail criteria be specific and include a minimum of one pass per member cell? More than one per cell?

(b) Given the recommended number of test subjects, should the pass/fail criteria be panel based (e.g., 20/25, 28/35) and not specific to panel cells?

(c) Should the pass/fail criteria require an overall high pass rate and allow for a percentage of failures or a

lower fit factor pass criteria and a 100 percent pass rate?

#### *C. Future Utility of the NIOSH Bivariate Panel for All NIOSH-Approved Respirators*

1. Based on your experience with the NIOSH bivariate panel, what implementation issues must NIOSH consider in order to use the NIOSH bivariate panel for certification testing of all classes of respirators?

2. Should NIOSH develop a second NIOSH bivariate panel based on face length and lip length? Please explain why or why not and any implementation concerns or specific recommendations concerning future implementation of a new panel utilizing subject lip length and face length.

#### *D. Inter-Panel Variability*

1. What is an appropriate pass/fail criterion? Assuming the CNC is used, should the subject pass with a fit factor of 20? 50? 75? 100?

2. If a corn oil chamber is used, what inward leakage pass/fail criteria should be used?

3. What other strategies do you suggest to address the inter-panel variability? Please provide specific information that supports your recommendation including experiences, data, analyses, studies, published articles, and standard professional practices.

Dated: August 27, 2013.

**Kathleen Sebelius,**  
*Secretary.*

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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:** Proposed rule.

**SUMMARY:** The Office of Personnel Management (OPM) is proposing to update various nondiscrimination provisions appearing in title 5, Code of Federal Regulations, to provide greater consistency and reflect current law.

**DATES:** Comments must be received on or before November 4, 2013.

**ADDRESSES:** Send or deliver comments to U.S. Office of Personnel Management, Office of Diversity & Inclusion, 1900 E

Street NW., Washington, DC 20415; email to [diversityandinclusion@opm.gov](mailto:diversityandinclusion@opm.gov); or fax to (202) 606-6042. Comments may also be sent through the Federal eRulemaking Portal at <http://www.regulations.gov>. All submissions received through the Portal must include the agency name and docket number or the Regulation Identifier Number (RIN) for this rulemaking. Please specify the section number for each comment.

#### **FOR FURTHER INFORMATION CONTACT:**

Contact Sharon Wong by telephone at (202) 606-7140; by TTY at 1-800-877-8339; by fax at (202) 606-6042; or by email at [diversityandinclusion@opm.gov](mailto:diversityandinclusion@opm.gov).

**SUPPLEMENTARY INFORMATION:** Executive Order 13563 directs agencies to promote “retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.” Pursuant to that direction and OPM’s plan for conducting retrospective review (see <http://www.opm.gov/Open/Resources/RetrospectiveRegReview.pdf>), OPM has been reviewing a number of existing regulations to determine whether they should be changed or eliminated.

Among the regulations OPM has decided to review are those that contain nondiscrimination provisions. OPM 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. That memorandum directed OPM to issue guidance “regarding compliance with, and implementation of, the civil service laws, rules, and regulations, including 5 U.S.C. 2302(b)(10), which make it unlawful to discriminate against Federal employees or applicants for Federal employment on the basis of factors not related to job performance.” See <http://www.whitehouse.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discri>.

Our review revealed that the nondiscrimination provisions are inconsistently worded and most have 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. Accordingly, we are issuing these proposed regulations to update the nondiscrimination provisions 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 are adopting 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, the provisions will reflect the statutory prohibitions on 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 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 will reflect the statutory prohibitions against discrimination on those bases (5 U.S.C. 2302(b)(1)(A)–(D)), as well as prohibitions against 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)); and retaliation for exercising rights under the statutes enumerated above, where retaliation rights are available. (5 U.S.C. 2302(b)(9)(A)–(B)).

Other provisions in our existing regulations are grounded in other specific legal authorities (such as our Federal Equal Opportunity Employment Program regulations at 5 CFR part 720 and our regulations implementing the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 at 5 CFR part 724). We have concluded that the nondiscrimination provisions currently appearing in those regulations appropriately reflect the scope of the laws that they are implementing.

We believe that having uniform nondiscrimination provisions, to the extent permitted by law, will clarify the protections afforded to individuals under law and negate any confusion that might be caused by seemingly

conflicting provisions. Also, where appropriate, we are updating the authority citations for the regulations to reflect a complete list of the statutory provisions pursuant to which the regulations have been issued.

#### **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.

**Elaine Kaplan,**

*Acting Director.*

Accordingly, OPM is proposing to amend 5 CFR chapter I, as follows:

#### **PART 300—EMPLOYMENT (GENERAL)**

- 1. Revise the authority citation for 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, 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.*

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, 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.”

- 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, national origin, or age (as defined by the Age Discrimination in Employment Act of 1967, as amended). The complaint must be filed and processed in accordance with the agency EEO or grievance procedures, as appropriate.

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#### **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, 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 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, 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 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, 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).

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**PART 537—REPAYMENT OF STUDENT LOANS**

■ 11. Revise the authority citation for 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, 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 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, 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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