

SECTION 4

FACTFINDING DURING COUNSELING

Factfinding during the precomplaint counseling stage is framed by two considerations:

- The purposes of the factfinding; and
- The limited timeframe for conducting factfinding in the precomplaint process.

The latter consideration needs little explanation. Counseling must be completed within 30 days of the request for counseling unless the complainant agrees to extend the timeframe. 29 CFR 1614.105(d). Absent such an extension, the timeframe for concluding all aspects of counseling, including factfinding, is exceedingly short. Given that the EEO process usually is measured in years, complainants may be reluctant to further extend that timeframe by agreeing to an extension.

Practice Tip

The complexity of a complaint or the Counselor's own work schedule may make it reasonably apparent from the outset that it will be almost impossible to complete precomplaint counseling within 30 days. But, do not ask the complainant to agree to an extension of time at the initial interview. Explain the 30-day timeframe for completing precomplaint counseling and the provision for an extension.

A Counselor is in a far better position to request an extension from the complainant, and receive one, once the precomplaint counseling effort is underway. At that point in time, presumably the complainant will be able to see some noticeable progress in counseling. Moreover, the Counselor will be able to explain what needs to be done to complete Counseling and how long it will take to do those things. The complainant is more likely to agree to an extension if he or she understands why it is necessary and what will be accomplished by extending precomplaint counseling. This can be particularly true if resolution efforts are underway and there is some reasonable prospect that the additional precomplaint counseling time will result in settlement of the complaint.

Also, the Counselor should bear in mind that it is not necessary to request a single 60-day extension. The regulation provides that precomplaint counseling can be extended for 60 days with the agreement of the complainant. But, the regulation does not prohibit the complainant from agreeing to more than one extension and does not restrict the complainant from agreeing to shorter extensions of time. A complainant may be more likely to agree to two 30-day extensions than one 60-day extension.

I. PURPOSES OF FACTFINDING

The EEO Counselor gathers information for two purposes. First, the Counselor assembles so-called “qualifying information” about the complaint and the complainant. The Counselor must gather qualifying information so that the agency can later determine if any formal complaint that is filed meets the basic criteria for an EEO complaint. Second, the EEO Counselor gathers information about the basic facts of the complaint to assist in resolution of the complaint.

Both of these purposes are explained in MD-110 at 2-10:

After the Counselor has determined the basis(es) and claims, s/he should conduct a limited inquiry. The purpose of the limited inquiry is to obtain information to determine jurisdictional questions if a formal complaint is filed and is performed regardless of whether the aggrieved person subsequently chooses ADR. The limited inquiry also is used to obtain information for settlement purposes if the person chooses EEO counseling over ADR or does not have the right to elect between EEO counseling and ADR.

While the scope of the inquiry will vary based on the complexity of the claims, the inquiry is limited and not intended to substitute for the fact finding required in the formal stage. The Counselor must at all times control the inquiry. If the aggrieved person or agency personnel raise objections to the scope or nature of the inquiry, the Counselor shall seek guidance and assistance from the EEO Officer. If the Counselor has problems with the inquiry, s/he should immediately notify the EEO Officer.

Although not expressly a purpose of factfinding at the precomplaint counseling stage, the information and evidence the Counselor gathers may help the complainant decide whether to file a formal complaint.

A. QUALIFYING INFORMATION

Factfinding during precomplaint counseling is not intended to be a means of testing the veracity of the complainant’s allegations. That is the purpose of factfinding during the investigation and hearing stage of the EEO process. Factfinding during counseling is intended to secure sufficient information to determine if the complainant meets the prerequisites for a claim of discrimination in the event a formal complaint is filed.

The qualifying information necessary to determine if the claim will meet the prerequisites for a formal complaint include:

- *Agency and Complainant Information.* A complainant is entitled to anonymity during the precomplaint process. That does not mean the complainant can remain anonymous to the Counselor. The Counselor must secure identifying information from the complainant including:
 - If the complainant is a current employee of the agency, the Counselor must obtain the geographic and organizational component of the agency where the complainant works and the job title series and grade of the position the complainant holds. If the claim involves denial of another position in the agency—i.e., nonpromotion or nonselection for a detail, acting assignment, lateral transfer—the Counselor must also obtain the geographic and organizational component of the agency that contains the desired position, and the job title, series and grade of that position.

- If the complainant is an applicant for employment, the Counselor must obtain the geographic and organizational component of the agency where the complainant sought employment and the job title series and grade of the position the complainant sought.
- If the complainant is a former employee, the Counselor must obtain the geographic and organizational component of the agency where the complainant previously worked and the job title series and grade of the position the complainant held.

This information should be obtained at the initial interview and is important to determining whether the complainant meets the requirement of 29 CFR 1614.106(a) that the complaint of discrimination be filed with the agency that allegedly discriminated against the complainant.

- *Chronology of Significant Events.* The Counselor must identify the date of the initial request for counseling, the date of the alleged discriminatory action or event, and the 45th day after that action or event. In counting the 45 days, the day of the action or event is not counted. It is the day after the action or event that begins the 45-day period. 29 CFR 1614.604(d).
 - If it appears that more than 45 days have passed between the action or event the complainant alleges is discriminatory and the initial request for counseling, the Counselor should gather information on the reason or reasons for the delay. This information must be gathered so that the agency can make a determination on whether counseling was timely initiated and, if not, whether it is appropriate for the agency to waive the 45-day limitation. The information collected should be specifically directed at the criteria for waiver under 29 CFR 1614.105(a)(2):
- *Was the complainant notified of the time limits for initiating counseling or otherwise aware of those time limits?* The agency is required to post EEO filing requirements. So the Counselor should inquire:
 - Was there such a posting in the location where the complainant works or worked?
 - If a notice was posted, where was it posted? Was it in a place where employees were likely to see it?
 - Does the complainant contend that he or she was unaware of the 45-day time period? If so, what reason or reasons does the complainant give for being unaware of the time period?
 - Has the complainant previously initiated Counselor contact in a timely fashion? If so, what prevented the complainant from doing so this time?
 - If the complainant was an applicant for employment, did the agency employ any other means of notifying the complainant for the time period for initiating Counseling?
- *Did the complainant believe that the contested action or event was discriminatory at the time it occurred?* There are two components to this inquiry: 1) Whether the complainant knew of the action or event at the time it occurred? 2) Whether the complainant had reason to

believe the action or event was based on discrimination at the time it occurred? So the Counselor should inquire:

- When and how did the complainant learn of the action or event that is the subject of the complaint?
- Is there any information that contradicts or calls into question the complainant's version of when and how he or she learned about the action or event?
- If the complainant says that he or she knew of the action or event at the time it occurred but only later came to believe it was discriminatory, specifically what happened, or what did the complainant learn and when, that triggered that belief?
- Is there any information that contradicts or calls into question the complainant's version of when and how he or she came to believe the action or event was discriminatory?

This information should be obtained during the initial interview and in subsequent factfinding, if necessary. For example, it may be necessary to interview the complainant's supervisors or coworkers. The Counselor should bear in mind it is the agency that will need to determine whether the complainant is being truthful about when he or she learned of the action or event or came to believe it was discriminatory if a formal complaint is filed. The Counselor does not make that determination. The agency also will need to determine if a reasonable person in the same circumstances would have learned of the action or event or come to believe it was discriminatory at an earlier point in time. Again, the Counselor does not make that determination, but the factfinding he or she does in precomplaint counseling will assist the agency in making that determination.

- *Was the complainant prevented from initiating contact with the 45-day period by circumstances beyond his or her control?* The agency is required to waive the time limit for Counselor contact if the complainant simply could not timely contact a Counselor. So the Counselor should inquire:
 - What event or events prevented the complainant from contacting a Counselor earlier?
 - When did the event or events occur?
 - Is there evidence that corroborates or contradicts the assertion the event or events occurred or when?
 - Did the complainant make any unsuccessful efforts to initiate counseling?
 - When did the effect of the event or events abate to the point where the complainant was able to initiate counseling?
 - How long after the effect sufficiently abated did the complainant wait to initiate counseling?

Much of this information can be obtained at the initial interview. In some instances, interviews with supervisors and coworkers may be necessary to complete the factfinding. Also, the Counselor may ask the complainant to provide documentation of the event or events that allegedly prevented him or her from initiating Counselor contact at an earlier date. For example, if the complainant says he