

Conducting a Fair Selection Process

(Your guide to conducting a fair and Equal Employment Opportunity (EEO) compliant selection process)

Question:	Answer:
What is a fair selection process?	A fair selection process consists of judging people on the their ability to do the job not on the basis of one’s race, color, sex, age, national origin, religion, genetic information, disability, or EEO activity.
Why is a fair selection process important?	A fair selection process is important because it contributes to a business’ bottom line by adding credibility to the selecting official’s decisions. Selection decisions are among the most cited EEO complaints. Commonly, complainants allege that they were not selected on the basis of their race, color, sex, age, national origin, religion, genetic information, disability, or EEO activity not because they were incapable of doing the job. A fair selection process also improves the NIH’s brand as an equitable employer.
What law(s) are violated by an unfair selection process?	The laws violated by an unfair selection process are: <ul data-bbox="597 1129 1409 1869" style="list-style-type: none">• Title VII of the Civil Rights Act of 1964 (Title VII), prohibits discrimination on the basis of race, color, religion, sex, national origin, or retaliation for participation in EEO activity.• The Pregnancy Discrimination Act, which amended Title VII prohibits discrimination on the basis of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.• The Equal Pay Act of 1963, which makes it illegal to pay different wages to men and women if they perform equal work in the same workplace. The act also protects employees from retaliation for participation in EEO activity.• Sections 501 and 505 of the Rehabilitation Act of 1973, prohibits discrimination on the basis of disability in the Federal Government. The act also protects employees from retaliation for participation

	<p>in EEO activity.</p> <ul style="list-style-type: none"> • The Age Discrimination in Employment Act of 1967(ADEA), prohibits discrimination on the basis of age, 40 years or older. The act also protects employees from retaliation for participation in EEO activity. • The Genetic Information Nondiscrimination Act of 2008 (GINA), prohibits the improper use of genetic information in health insurance and employment; bars employers from using individuals’ genetic information when making a hiring, firing, job placement, or promotion decision.
<p>How does one ensure that a selection process is fair?</p>	<p>One ensures that a selection process is fair by creating a painstakingly structured interview process that reduces the likelihood of bias and increases objectivity. The greater amount of objectivity that is built into the interview process the higher the likelihood that an agency can demonstrate that its selection process was fair. Using objective and consistent evaluation methods promotes impartiality and neutrality.</p>
<p>What happens when an agency is unable to produce interview notes in the course of an EEO complaint?</p>	<p>When an agency is unable to produce interview notes during the course of an EEO complaint a judge can draw an adverse inference and issue sanctions. Interview notes have proven so pivotal to an agency’s case in rebutting a claim of unfair selection that agencies have been forced to settle due to their inability to produce them.</p>
<p>What is a common mistake that can keep an agency’s selection process from being fair?</p>	<p>A common and often fatal violation of a fair selection process is failing to retain selection records. Failing to retain interview notes has proven fatal to an agency’s argument when responding to allegations of discriminatory non-selection. An agency is unable to prove that it did not select the complainant for a discriminatory reason.</p>
<p>What law is violated by failing to retain selection records such as interview notes?</p>	<p>Failure to retain selection records violates 29 C.F.R. §1602.14. The hiring official should maintain all interview notes and documents related to the application and selection process in a secure, centralized location for two years, or until a case has been closed in the event of a challenge to the selection decision, whichever is later.</p>

<p>What documents constitute selection documents and therefore need to be retained for two years?</p>	<p>Selection documents include, but are not limited to:</p> <ul style="list-style-type: none"> • Vacancy Announcement (internal and external recruitment, if applicable) • Position Description; • Application materials submitted by the top-rated candidates; • Rating plan; • Interview questions; • Interview matrix; • Referral list; • Ranking matrix; • Selection memorandum; and • All notes provided by panelists (if a panel was used).
<p>What course of action should a victim of unfair selection take?</p>	<ol style="list-style-type: none"> 1. An employee or applicant who believes that he or she has been made the target of unfair selection should report the behavior as soon as possible to a managing official. 2. An employee or applicant may initiate the administrative inquiry process by contacting a supervisor who will conduct an investigation intended to gather information to determine what action, if any, should be taken. This information is not intended for legal or criminal prosecution. 3. If the employee or applicant feels comfortable contacting the harasser he or she should inform the harasser that the conduct is unwelcome and must stop immediate.

	<p>4. Employees and applicants should also maintain a record of relevant events and communications between all parties involved in the event another incident arises and further action is needed.</p>
<p>Is an employee who brings an unfair selection claim protected from retaliation/ reprisal?</p>	<p>Yes. The NIH is committed to promoting and maintaining a work environment free from discrimination and retaliation. Reprisal for participation in the EEO process is prohibited. If an employee wishes to file an EEO complaint of reprisal he or she may contact the EDI office within 45 calendar days of the alleged occurrence(s) of retaliation discrimination.</p>

Interview Best Practices
<p>Use a diverse interview panel</p> <p>Train interviewers on inclusion, diversity, and bias</p> <p>Take and retain notes</p> <p>Maintain interview notes in a secure, centralized location</p> <p>Base interview questions on job analysis</p> <p>Ask effective, open-ended and behavioral, questions</p> <p>Ask each candidate the same interview questions</p> <p>Use a detailed rating scale</p> <p>Assess candidate responses objectively</p>

How to take notes	
Take notes to recall and establish a record	
Recall	A record
<p>To ensure...</p> <p>The accurate capture of the content of the interview, and to be able to rate a candidate's responses accurately</p>	<p>To ensure...</p> <p>That the employer can defend its employment decision by reconstructing the interview process</p>

To avoid... The errors inherent to human memory which may result in selective recall of a candidate's strengths and or weaknesses	To avoid... Being unable to defend a contested selection decision.
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Case Examples

Addresses:	Case
Adverse inference drawn against the agency for its failure to retain documentation from its selection process in determining the complainant's promotion status.	<u>Carson v. Department of Justice, Federal Bureau of Prisons</u> , 112 LRP 10500, EEOC No. 0120100078 (EEOC 2012).
Agency's failure to retain selection records made it difficult to defend its selection decision when the complainant appears to have qualifications that are on par or better than the selectee.	<u>Nyanzi v. Department of Agriculture</u> , 109 LRP 8194, EEOC No. 0120065317 (EEOC OFO 2009).
Adverse inference drawn against the agency for its failure to retain documentation from its selection process.	<u>Newbold-Reese v. Department of Veterans Affairs</u> , 109 LRP 74337, EEOC No. 0120073324 (EEOC OFO 2009).
Court found in favor of the agency in part because it was able to articulate the selectee's abilities with reasonable specificity in response to the complainant's claim of not being selected due to a protected status. This specificity indicates that the agency took and retained effective notes during its interview process.	<u>Ly v. Department of Veterans Affairs</u> , 109 LRP 30381, EEOC No. 0120090610 (EEOC OFO 2009).

Contacts:

(Who to ask about what)

[Resolutions and Equity](#)

[Employee Relations Contacts](#)

[Identify Your Formal Complaints Specialist](#)

[Guidance Contact](#)

[NIH Ombudsman contact](#)

Resources:

(Where to go for more information)

[Commissioner Miller on the Importance of Equal Employment Opportunity \(Transcript\)](#)

[Summary of Selected Recordkeeping Obligations in 29 CFR Part 1602](#)

[Title VII of the Civil Rights Act of 1964](#)

[The Pregnancy Discrimination Act of 1978](#)

[The Equal Pay Act of 1963](#)

[The Age Discrimination in Employment Act of 1967](#)

[Genetic Information Nondiscrimination Act of 2008](#)