BULLET BACKGROUND PAPER ON
THE NOTIFICATION AND FEDERAL EMPLOYEE
ANTIDISCRIMINATION AND RETALIATION ACT OF 2002
(A point paper on the No Fear Act – dated March 2003)

Information provided by the AMC Office of Legal Counsel and written by MAJ John Flood of AFLSA/JACL.

- The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 ("No FEAR Act") was enacted on 15 May 2002

  -- Effective date is 1 Oct 03 (beginning of FY 04)

  -- Primary purpose of the act is to improve agency accountability for antidiscrimination and whistleblower laws by requiring federal agencies to reimburse the Treasury's Judgment Fund for settlements and judgments paid to employees as the result of such complaints, and by establishing extensive agency reporting requirements

  -- Statute appears to apply to judgments, awards and compromise settlements of discrimination cases entered into after its effective date which may involve conduct that occurred prior to its effective date, although it does not explicitly address that issue

  -- Statute consists of three sections: Title I (General Provisions), Title II (Federal Employee Discrimination and Retaliation), and Title III (EEOC Complaint Data Disclosure)

- Title I sets out the key findings of Congress based on the testimony of individuals, representatives from various interest groups and the results of some significant discrimination cases

  -- Agencies cannot run effectively if they practice or tolerate discrimination or reprisal against whistleblowers; such acts had potentially become a "chronic" problem

  -- Congress viewed the law as necessary to help ensure that agencies comply with the anti-discrimination and whistleblower laws, and held accountable for such acts as appropriate

  -- Statute's key provisions include reimbursement requirements and various notice and reporting requirements by federal agencies

- Congress expressed its "sense" regarding this law in several important ways

  -- Federal agencies should not retaliate against the recipients of court judgments or settlements in discrimination or reprisal cases

  -- An agency's mission and the job security of employees who are "blameless" in a given case should not be compromised

-- Agencies should not use a RIF or furlough as a way to fund the reimbursement requirements of this law; Agencies should also not fire other employees or reduce their benefits as a way to comply with or otherwise further the goals of this law

-- Agencies should not take unfounded disciplinary actions against, or otherwise violate the due process rights of, managers who have been accused of discrimination, and should provide managers with proper training to try and prevent discriminatory acts

- Title II of the act establishes reimbursement requirements, notification requirements, and reporting requirements for federal agencies

-- Agencies must reimburse the General Fund of the Treasury the amount paid from it for judgments, awards, and compromise settlements of discrimination cases

--- The reimbursement funds must come out of the responsible Agency's operating expenses; the law does not specify the source of such funds below the Agency level

--- Covered types of discrimination claims include those based on race, color, religion, national origin (Title VII claims), sex (Title VII and FLSA claims), age (ADEA claims), handicapping condition (Rehabilitation Act claims), and claims based on marital status or political affiliation as prohibited under any law, rule, or regulation, under 5 U.S.C. § 2302 (b)(1)

--- Whistleblower claims under 5 U.S.C. § 2302 (b)(8) & (9) are also covered

--- Agencies must reimburse the General Fund of the Treasury in a reasonable period of time; such payments may need to be extended over several years to avoid RIFs, furloughs, or other adverse affects on employees or the mission

-- Agencies must notify Federal employees, former employees, and applicants for Federal employment, in writing, of their rights and remedies under the relevant anti-discrimination and whistleblower protection laws

--- In accordance with otherwise applicable provisions of law, or if not otherwise required, then in accordance with guidelines that will be issued by the President or his designee

--- Written notification must include posting of the required information on the agency's Internet site, and the agency providing training to its employees regarding the rights and remedies applicable to the employees

-- Agencies must make an annual report to various Congressional leaders and Congressional Committees, to the EEOC, and to the Attorney General, not later than 180 days after the end of each fiscal year. This report must include

--- The number, status and disposition of cases arising under anti-discrimination and whistleblower protection laws

--- The amount of money required to be reimbursed in connection with each case, and a separate, aggregate amount of such reimbursements for attorney's fees

--- The number of employees disciplined for discrimination, retaliation, harassment, or other conduct covered by this law and the specific nature of the disciplinary action taken

--- Year-end statistical data on the number and type of complaints filed, the processing time for complaints, and the number and type of final agency actions involving a finding of discrimination

--- The agency's policy regarding appropriate disciplinary actions against a Federal employee who engages in prohibited discrimination or another prohibited personnel practice covered by this law, and the number of employees disciplined under such policy

--- An analysis of all such information, which must include an examination of trends, a causal analysis, practical knowledge gained through experience, and plans to improve the agency's complaint or civil rights program

--- And any adjustment the agency will make to comply with any of its reimbursement requirements

---- An agency's first report must include this information for the prior 5 fiscal years

-- Title II provides that the President or his designee will issue rules to carry out the Title II provisions of the law and rules to carry out a comprehensive study regarding best practices relating to appropriate disciplinary actions against Federal employees who violate the law

--- Within 30 days after such guidelines are issued, agencies must notify various Congressional leaders and Congressional Committees, the EEOC, and the Attorney General whether or not the agency has adopted and will fully follow such guidelines, and if not, then the reasons why it has not adopted or will not follow such guidelines

-- Nothing in Title II of the act limits any other remedies available to a Federal employee, former employee or applicant for Federal employment for acts of discrimination or reprisal for whistleblowing activities

-- GAO must also study the effects of eliminating the requirement that Federal employees exhaust administrative remedies before filing complaints with the EEOC, and the effects on agency operations of the reimbursement requirements of this statute

- Title III of the act requires Federal agencies and the EEOC to disclose and post complaint data

-- Agencies must post on its public web site summarized, statistical data regarding the EEO complaints filed by its employees, former employees, or applicants; this data must include, for the present fiscal year and for each of the five prior fiscal years for which the data is available, the following information:

--- Number of complaints filed each year with the agency

--- Number of individuals filing such complaints

--- Number of persons who filed 2 or more of those complaints

--- Number of complaints in which each of the various bases of alleged discrimination is alleged

--- Number of complaints in which each of the various issues of alleged discrimination is alleged

--- Average length of time, for each step of the process, it took the agency to process all such complaints, including those in which an EEOC hearing is and is not requested

--- Total number of final agency actions in the fiscal year involving a finding of discrimination, including the number and percentage that were rendered without an EEOC hearing and those rendered after such a hearing

---- Numbers must also include the number and percentage of cases involving a finding of discrimination based on each of the respective bases of alleged discrimination, and of those, the number and percentage that occurred without an EEOC administrative hearing versus those that were rendered after such a hearing

--- Of the total number of complaints pending in such fiscal year, the number that were first filed before the start of that particular fiscal year, and the total number of cases in which the agency failed to conduct an impartial and appropriate investigation within 180 days of filing

---- Of those cases, the agency must state the number of persons who filed such complaints and the number of those complaints that are at the various steps of the complaint process

-- Title III requires the EEOC to post on the following on its public web site: statistical data relating to hearings requested before an administrative judge of the EEOC, appeals filed with the EEOC from final agency actions on complaints, and statistical data on the information required of federal agencies

-- Title III of the statute requires the EEOC issue rules necessary to carry out Title III of the statute

- As of this date, the President has not issued rules for Title II, the EEOC has not issued rules for Title III, and DoD has not published or provided implementing guidance for the military services

-- President Bush will likely designate OPM to issue the rules to carry out the Title II provisions of the statute, as well as the comprehensive study of best practices

-- EEOC's Office of Legal Counsel is developing the guidance for Title III, which will be in the form of a regulation or a management directive

- Impact of No FEAR on the Air Force will be difficult to assess and will ultimately be dependent on the rules established by the President (or his designee), EEOC and DoD

  -- It is currently unknown whether implementation rules will require the reimbursement to be funded at Air Force level or from wing-level Operations and Maintenance (O&M) funds.

    --- Implementation rules that direct the payment of judgments and settlements out of base level O&M funds might lead to installations settling cases at the administrative level, rather than risk the complainant's filing of his/her complaint in federal court, where the base has no control over the eventual outcome of the case and where the amount of attorney's fees and costs would typically increase with the progression of litigation

  -- Implementation rules that specifically identify and emphasize disciplinary action against one found to have discriminated or engaged in Whistleblower reprisal, whether through a judgment or settlement of the court case, might increase the AF's desire to settle a case at the administrative level, but decrease the AF's desire to settle once the case reaches court

    --- There may be increased incentive to enter an administrative settlement at base level if the base can avoid a finding of discrimination against one of its managers through settlement at base level with a non-admissions clause, or a settlement that is silent regarding the validity of the allegation of discrimination

    --- DOJ's policy of refusing to insert non-admissions clauses in settlement agreements, thereby leaving open the possibility of the AF manager being labeled a discriminator, may result in an AF reluctance to encourage or acquiesce to settlement of a court case

- Based on AF's payout in federal court EEO cases over the past three years, implementation of the law should have limited impact on the overall AF budget, but might have a significant effect on an individual AF base if paid from O&M funds