



**FEDERAL MEDIATION AND CONCILIATION SERVICE**  
**OFFICE OF THE DIRECTOR**  
250 E Street, SW  
Washington, D.C. 20427

**DIRECTIVE 5809: ANTI-HARASSMENT**

1. Purpose: This Directive sets forth the updated FMCS policy on anti-harassment and provides guidance and implementing procedures for maintaining a workplace free from unlawful harassment, in accordance with Federal laws. The purpose of this directive is to:
  - a. Prevent harassment in FMCS employment, facilities and services;
  - b. Correct harassing conduct that does occur before it becomes severe or pervasive;
  - c. Ensure all FMCS employees, contractors, volunteers, interns, visitors, and customers are aware that FMCS does not tolerate discrimination or harassment;
  - d. Identify what to do in the event of an incident of harassment at FMCS; and
  - e. Ensure that any employee who engages in such improper conduct will be subject to appropriate disciplinary action. Supervisory or management officials who either condone or fail to act promptly to correct alleged harassing conduct that is brought to their attention will also be subject to appropriate disciplinary action.
2. Authority:
  - a. Title VII of the Civil Rights Act of 1964 (Title VII), as amended;
  - b. Equal Pay Act of 1963, as amended;
  - c. The Age Discrimination in Employment Act of 1967 (ADEA);
  - d. The Rehabilitation Act of 1973, Sections 501 and 505, as amended;
  - e. Americans with Disabilities Act (ADA) of 1990, as amended;
  - f. Federal Sector Equal Employment Opportunity Regulations, 29 CFR Part 1614;
  - g. Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002;
  - h. Genetic Information Nondiscrimination Act of 2008;
  - i. Executive Order 13087, which amended Executive Order 11478, prohibiting discrimination in federal employment based on sexual orientation;
  - j. Executive Order 13152, which amended Executive Order 11478, prohibiting discrimination in federal employment based on status as a parent;
  - k. Equal Employment Opportunity Commission (EEOC) Model EEO Programs Must

Have an Effective Anti-Harassment Program (2005);

- l. EEOC's Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999);
  - m. Equal Employment Opportunity Commission Management Directive 715 (2003); and
  - n. Directive 9101, FMCS Equal Employment Opportunity Complaints Program;
  - o. Executive Order 14035 and Government-wide Strategic Plan to advance DEIA in the Federal Government (2021).
3. Scope: This directive covers conduct that falls within the EEO's definition of unlawful harassment, as well as other broader conduct. The EEO definition of unlawful harassment is unwelcome verbal or physical conduct based on a protected class (race, color, religion, sex (including sexual orientation, gender identity, and pregnancy), national origin, age (40 or older), disability or genetic information) that has the purpose or effect of unreasonably interfering with an employee's work performance and/or creating an intimidating, hostile, or offensive work environment. To rise to the level of unlawful harassment, conduct must be severe or pervasive. This policy also covers any type of harassment that interferes with, or alters, the condition of an employee's employment.

Employees should be aware that the anti-harassment process within this directive is **NOT** the same as the EEO complaints process and does not impact, pause or extend any statutory timelines associated with that process.

4. Applicability: This directive covers all federal employees, non-federal workers, and contractors, as defined below, regardless of position. As such, each federal employee, non-federal worker, and contractor is required to comply with this policy. The principles in this policy also apply to all individuals on owned or leased property, including extended visitors and customers. This policy also applies to conduct in virtual settings and conduct while using agency-owned devices or accounts or agency-sponsored third-party sites for communication (ex. Microsoft Teams, Zoom).
- a. Federal employee: An individual of the FMCS who is employed pursuant to an appointing authority that grants them federal status by law. This includes: Title 5 employees (GS), all Executives (SES and SL), and Political Appointees.
    - i. NOTE: FMCS Management is responsible for taking appropriate action against any federal employee who violates this policy. Appropriate action for federal employees may include, but is not limited to, reprimand, suspension, demotion, or removal from one's position and/or separation from the Federal Service. Such actions may also be considered when making administrative decisions related to funding, staffing, and other resources.
  - b. Non-federal worker: Those individuals who perform work for FMCS but have not been employed under an appointing authority that grants them federal status by law and benefits. This includes: all Trainees, Interns, or Volunteers.
    - i. NOTE: FMCS Management is responsible for taking appropriate action against

any non-federal worker who violates this policy.

- c. Contractors: Employees of a firm that has a mutually binding legal relationship, in the form of a contract, with FMCS to provide supplies and services. The contract firm is responsible for ensuring that their employees comply with this policy.
  - i. NOTE: Contractors' failure to comply with this policy may have action taken against them by the contracting officer ranging from a negative contractor performance review (CPARS) to a breach of contract, depending upon the impact of the failure to comply.
- d. Extended visitors and customers: Visitors to any FMCS owned or leased space (including agency-controlled virtual settings) are responsible for abiding by federal law, regulations, and applicable policy for FMCS controlled spaces. Any visitors or customers that commit acts of discrimination or harassment within FMCS facilities should be reported to FMCS management or physical security and may be removed and/or barred from the space.

## 5. Policy:

- a. FMCS does not, and will not, tolerate discrimination or harassment within FMCS facilities, agency-controlled virtual settings, or services. FMCS does not condone acts of harassment committed by employees, volunteers, interns, contractors, visitors, or customers using FMCS facilities or services, and it does not condone harassment of employees, volunteers, interns, contractors, visitors, or customers using FMCS facilities or services. FMCS is committed to maintaining a work environment that is courteous, respectful, and free from harassment for its employees, contractors, volunteers, interns, visitors, and customers.
- b. Even if harassing conduct does not rise to the level actionable under Title VII of the Civil Rights Act of 1964, as amended, it is still misconduct. FMCS' anti-harassment policy therefore is to take swift and appropriate corrective action, including the use of disciplinary action, to eliminate harassing conduct even if the conduct does not violate the law. Harassing actions may also result in corrective actions such as revoking privileges to use FMCS facilities or services.
- c. Retaliation towards any federal employee, non-federal worker, or contractor for reporting allegations of inappropriate conduct or harassment, participating as a witness in an administrative inquiry or investigation, or for participating in the EEO complaint process, is prohibited.
- d. If you are subjected to harassment of the type covered by this policy while using FMCS facilities or services, you may use the procedures in this policy to report the incident, and your report will be handled swiftly and with consideration.
- e. Employees, volunteers, contractors, and interns will be informed of this policy through their on-boarding process.
- f. All managers, supervisors, and employees are required to take mandatory anti-harassment training at least biennially through FMCS' Learning Management System

(LMS) or other approved format. Anti-harassment training requirements may also be met by taking NO FEAR Act training conducted by the EEO Office.

- g. Filing a complaint under these procedures is not equivalent to filing an EEO complaint of discrimination, under 29 CFR 1614, or a grievance, under an administrative or negotiated procedure.

6. Definition of Harassment in the Workplace:

- a. Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information (including family medical history). Harassment is a form of employment discrimination prohibited by Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), the Rehabilitation Act of 1973 (as amended), and ADA Amendments Act of 2008 ADAAA, 42 U.S.C. ch. 126 § 12101 et seq. Harassment becomes unlawful when: enduring the offensive conduct becomes a condition of continued employment, or the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.
- b. Unwelcome conduct is conduct that a person did not invite or solicit and that they regard as undesirable or offensive (outside of work assignments or instructions) and the complainant is not an active participant in the behavior. The standard for determining whether verbal or physical conduct is sufficiently severe or pervasive to create a hostile work environment is whether a reasonable person in the same or similar circumstance would find the conduct intimidating, hostile, or abusive. Whether an instance or a pattern of harassing conduct is severe or pervasive is determined on a case-by-case basis, with consideration paid to the following factors:
  - i. The frequency of the unwelcome discriminatory conduct;
  - ii. The severity of the conduct;
  - iii. Whether the conduct was physically threatening or humiliating, or a mere offensive utterance;
  - iv. Whether the conduct unreasonably interfered with work performance;
  - v. The effect on the employee's psychological well-being; and
  - vi. Whether the harasser was a superior within the organization.
- c. Liability for harassment attaches to the Agency if management (i) knew or should have known of harassment and (ii) failed to take immediate and appropriate action to investigate the behavior. This includes harassing behavior from outside clients or entities engaged in FMCS services. Knowledge is assumed if:
  - i. The victim complains about harassment to an appropriate official;
  - ii. The conduct occurred in the presence of a manager or supervisor, and they were aware of it;
  - iii. The conduct is widespread; or
  - iv. The complainant put the alleged violator on notice.

7. Forms of Harassment: The following are examples of inappropriate conduct that may meet the definition of harassment if an incident is severe or pervasive. A hostile environment can result from the unwelcome conduct and interactions on the job, when the unwelcome conduct renders the workplace atmosphere intimidating, hostile, or offensive.
- a. Sexual Harassment/Harassment based on sex (including pregnancy, gender identity, and sexual orientation). Examples include, but are not limited to:
    - i. Unwelcome sexual advances;
    - ii. Requests for sexual favors;
    - iii. Making repeated attempts to establish an unwanted relationship;
    - iv. Making offensive comments or asking questions about someone's sexual history, orientation, or gender identity;
    - v. Intentionally misusing a person's name or pronouns;
    - vi. Sharing sexually inappropriate images or videos, such as pornography, with others in the workplace;
    - vii. Sending suggestive letters, notes, texts, or emails or displaying inappropriate sexual images in the workplace;
    - viii. Telling lewd jokes or sharing sexual anecdotes;
    - ix. Making inappropriate sexual gestures;
    - x. Staring in a sexually suggestive or offensive manner or inappropriate whistling;
    - xi. Making sexual comments about appearance, clothing, or body parts; or
    - xii. Inappropriate touching, including pinching, patting, rubbing, or purposefully brushing up against another person.
  - b. Harassment based on race, ethnicity, color, and/or national origin. Examples include, but are not limited to:
    - i. Making derogatory epithets, slurs, remarks, stereotypes, labels, jokes, or innuendos related to a person's race, ethnicity, culture, or national origin;
    - ii. Making comments, jokes, teasing someone about a person's dress, personal appearance, hairstyle, speech, or other practices that are related to their race, ethnicity, culture, and/or national origin;
    - iii. Displaying racist or discriminatory symbols or imagery; or
    - iv. Engaging in a pattern of unwelcome or inappropriate verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or otherwise negative prejudicial slights and

insults toward an individual or group, including but not limited to individuals from historically excluded groups. These may also be referred to as microaggressions, such as touching someone's hair or skin, commenting on ability to speak English, stating and/or perpetuating stereotypes, etc.

- c. Harassment based on physical, cognitive, mental disability or "regarded as" having a disability. Examples include, but are not limited to:
  - i. Making derogatory remarks, stereotypes, labels, jokes, or innuendos related to people with disabilities;
  - ii. Sending inappropriate letters, notes, texts, or emails and/or displaying inappropriate images in the workplace of people with disabilities;
  - iii. Telling inappropriate jokes or sharing inappropriate disability related anecdotes;
  - iv. Making inappropriate or mocking disability related gestures;
  - v. Staring in an inappropriate or offensive manner;
  - vi. Making inappropriate comments about appearance, assistive equipment, or body parts;
  - vii. Inappropriate touching, including pinching, patting, rubbing, or purposefully providing unwanted assistance including with service animals; or
  - viii. Making offensive comments or asking questions about someone's medical condition, history of a medical condition, and/or whether they are a person with a disability.
- d. Harassment based on religion or creed. Examples include, but are not limited to:
  - i. Sharing inappropriate images or videos with others in the workplace of a person's religion, creed, or a person's choice to abstain from religiosity;
  - ii. Sending inappropriate letters, notes, texts, or emails or displaying inappropriate images in the workplace of a person's religion, creed, or a person's choice to abstain from religiosity;
  - iii. Telling inappropriate jokes or sharing inappropriate religion related anecdotes;
  - iv. Making inappropriate or mocking religion related gestures; or
  - v. Making offensive comments or asking questions about someone's religion, creed, or a person's choice to abstain from religiosity.
- e. Harassment based on age (40 or older). Examples include, but are not limited to:
  - i. Sending inappropriate letters, notes, texts, or e-mails or displaying inappropriate age-related images in the workplace;

- ii. Telling inappropriate jokes or sharing inappropriate age-related anecdotes;
  - iii. Making inappropriate or mocking age-related gestures;
  - iv. Determining and assigning tasks or duties based on a person's age;
  - v. Staring in an inappropriate or offensive manner;
  - vi. Inappropriate touching, including pinching, patting, rubbing, or purposefully providing unwanted assistance; or
  - vii. Making offensive age-related comments or inappropriately asking questions about someone's age.
- f. Harassment based on genetic information. Examples include, but are not limited to:
- i. Unlawfully obtaining or sharing genetic information, as well as any information related to it with others in the workplace;
  - ii. Sending inappropriate letters, notes, texts, or e-mails related to genetic information or displaying inappropriate images in the workplace related to genetic information; or
  - iii. Making offensive comments or asking questions about someone's genetic information or related medical condition, history of a medical condition, and/or whether they are a person with a disability.
- g. Inappropriate conduct: Inappropriate conduct is also covered and is a separate, broader category of misconduct that may not meet the definition of harassment listed above. This type of conduct, though inappropriate and covered under this policy, may not constitute harassment under the law. Inappropriate conduct includes any comments or conduct that disparages or demonstrates hostility or aversion towards any person that could reasonably be perceived as disruptive, disrespectful, offensive, or inappropriate in the workplace. These may also be referred to as microaggressions. Examples include, but are not limited to:
- i. Actions or behaviors that adversely impact Agency operations, productivity, and/or work environment;
  - ii. Rude comments, ridicule, disrespectful jokes, or insults;
  - iii. Inappropriate yelling or emotional outbursts, using expletives, throwing objects, or banging/slamming doors;
  - iv. Inappropriate touching or any form of physical intimidation or aggression (e.g., holding, restraining, impeding, or blocking movement, following, inappropriate contact or advances, bullying, or any other forms of inappropriate touching);
  - v. Engaging in a personal relationship with someone in an inherently unequal position where there is a real or perceived authority or influence over the other's conditions of employment and/or has the ability to directly impact the other's

career progression and not disclosing the relationship and taking steps to mitigate the risk to all parties. This may include formal and informal supervisory relationships;

- vi. Inappropriate or rude gestures, expressions, pictures, or graffiti;
- vii. Threats against others or engaging in other threatening behavior;
- viii. Psychological bullying or intimidation, such as making statements that are false, malicious, disparaging, or derogatory with the intent to hurt another's reputation; or
- ix. Engaging in behaviors that may have a dampening effect on reporting workplace concerns, such as those that can be perceived as intimidating or retaliatory against individuals who report concerns or participate in an administrative inquiry or other protected activity.

## 8. Rights and Responsibilities:

### a. Director, FMCS

- 1. Exercises personal leadership in establishing, maintaining, and carrying out a continuing program designed to deter harassment;
- 2. Ensures resources are allocated to promote a safe and civil organizational culture and to create an environment where all individuals are treated with respect and dignity; and
- 3. Holds FMCS leadership, managers, and supervisors accountable under this policy.

### b. Office of Human Resources (OHR)

- 1. Assists management officials in conducting prompt and impartial inquiries into non-EEO allegations of harassment, obtains third party investigation services;
- 2. Assists management officials in reviewing reports of inquiry to determine what, if any, administrative action is required and advising on appropriate disciplinary action;
- 3. If it appears that the allegations might rise to the level of fraud, waste, abuse, or mismanagement, makes referrals to an OIG<sup>1</sup> or OSC; and
- 4. Works with managers and supervisors to process any disciplinary action managers decide to implement.

---

<sup>1</sup> The Agency may form an agreement with an external agency to provide services commonly performed by an Office of Inspector General.

c. Office of Equal Employment Opportunity (EEO)

1. Provides agency-wide leadership and guidance on issues of equal employment opportunity, diversity, and inclusion;
2. Oversight of all discrimination complaints filed under 29 CFR Part 1614;
3. Providing training and guidance to the FMCS community on their rights and responsibilities regarding EEO laws and policies;
4. Providing guidance to managers as appropriate, and when requested, on how to address allegations of unlawful harassment because of a legally protected basis;
5. Processes EEO complaints regarding harassment;
6. Provides technical assistance to FMCS staff and training regarding harassment; and
7. Refers harassment allegations to the OHR if not brought as part of an EEO complaint.

d. Office of General Counsel (OGC)

Provides legal advice, represents FMCS in matters relating to harassment, reviews documents for legal sufficiency.

e. Office of Inspector General (OIG)/Office of Special Counsel (OSC)

May investigate allegations of harassment in connection with fraud, waste, abuse, or mismanagement.

f. All FMCS supervisors and managers shall be responsible for:

1. Acting promptly and appropriately to prevent harassment in the workplace and to prevent retaliation against those who complain of harassment;
2. Reporting, pursuant to procedures set forth in this Directive, any incident of harassing conduct brought to their attention or personally witnessed;
3. Receiving and handling allegations of harassing conduct promptly and appropriately, utilizing the procedures set forth in this Directive; Managers and Supervisors should encourage reporting on FMCS Form 5809-1 or should ensure collection of the information contained within that form through other acceptable format (email or signed statement);
4. In consultation with OHR, providing appropriate interim relief to alleged victims of harassment pending the outcome of the investigation to ensure that further misconduct does not occur; and
5. In consultation with OHR, taking prompt and appropriate corrective and disciplinary action, up to and including removal, against personnel who have

engaged in harassing conduct.

g. All FMCS employees shall be responsible for:

1. Acting professionally and refraining from harassing conduct;
2. Becoming familiar with the provision of this Directive, complying with all requirements of the Directive, and cooperating with any inquiry under this Directive;
3. Timely reporting incidents of workplace harassment, including those incidents as a bystander, to any appropriate FMCS manager or supervisor or the resources identified in this directive. Complaints may be filed directly with the OHR at [antiharassment@fmcs.gov](mailto:antiharassment@fmcs.gov);
4. Cooperating fully with investigation of the complaint;
5. Reporting any acts of retaliation related to making a good faith report of harassment, or for assisting with an investigation;
6. Being aware that management cannot guarantee confidentiality when investigating a workplace harassment complaint; and
7. Taking advantage of the Employee Assistance Program (EAP) counseling services, or other personal counseling services, when necessary, to address personal problems relating to the workplace harassment.

9. Procedure for Reporting Harassment:

- a. Any federal employee, non-federal worker, or contractor who believes they have experienced harassment or inappropriate conduct may report such behavior to:
  - 1) [antiharassment@fmcs.gov](mailto:antiharassment@fmcs.gov) using the intake form FMCS 5809-1; or
  - 2) To any manager or supervisor within FMCS. Managers and Supervisors then have an obligation to timely report, within seven (7) calendar days, any allegations to the Office of Human Resources for prompt investigation using the intake form and forwarding to [antiharassment@fmcs.gov](mailto:antiharassment@fmcs.gov); or
  - 3) To the Office of Equal Employment Opportunity at [eeo@fmcs.gov](mailto:eeo@fmcs.gov), if they believe the harassment is prohibited under Directive 9101. Claims of harassment not falling within the EEO process will be forwarded to [antiharassment@fmcs.gov](mailto:antiharassment@fmcs.gov); or
  - 4) If a contractor, report such behavior to their employing organization and/or the Contracting Officer's Representative (COR) and are encouraged to follow any reporting requirements set forth by their organization; or
  - 5) To the Director, OHR who will utilize the intake form and forward a copy to [antiharassment@fmcs.gov](mailto:antiharassment@fmcs.gov) within seven (7) calendar days; or

- 6) Employees may also contact OSC, or an external OIG made available to FMCS employees, directly, or may also choose one of FMCS' formal complaints or grievance processes, if applicable. Employees will need to follow the rules and timelines for those processes, which differ from the ones in this policy.
- b. Once an allegation is raised, the OHR will work with the appropriate managers or supervisors to timely investigate the alleged harassment; documenting the investigative findings; taking appropriate action, including disciplinary action, to remedy the situation; and, making a good faith effort to prevent future incidents from occurring. When appropriate, OHR will obtain a third party to conduct a prompt, impartial and thorough investigation of all the circumstances surrounding the alleged incident.
  - 1) During this process, a reporting party may initially remain anonymous, but the information will be shared with those entities with a need to know. Reports can be made anonymously, which means you do not have to identify yourself. However, fact finders (either internal or third party) must follow up on all allegations of harassment and cannot guarantee that your identity will not be disclosed during the process. Please note that if you desire to remain anonymous, key details about the allegation or concern would need to be omitted. This would limit FMCS' ability to conduct an inquiry and take corrective action as warranted.
  - 2) Confidentiality indicates that you desire what you say to be private or secret and no further action will be taken. **This process is not a confidential resource.** OHR and management officials cannot guarantee confidentiality when it comes to allegations of harassment. If you report an allegation that meets the definition of harassment, including sexual harassment, your supervisor or manager **must** contact OHR. There are other offices that operate under principles of confidentiality. You can reach out to them to discuss any concerns and they are not required to take action, including the Employee Assistance Program (EAP) or the FMCS Ombuds, both of which operate under principles of confidentiality. Bargaining Unit employees may also reach out to their Union Representative.
- c. If an employee makes an allegation of harassment against someone outside the Agency (such as a customer, vendor, contractor, or consultant), the OHR will complete any necessary internal investigation and provide appropriate interim relief, as well as refer the allegations to the FMCS Office of General Counsel to handle interactions with or consequences to the third party. The Agency may be liable for harassment by third parties that it knows about or should have known about (see Section 6c).
- d. Any FMCS employee who attempts to retaliate against a person who files a harassment complaint or who assisted in the investigation of a discrimination complaint will be subject to appropriate disciplinary action in accordance with agency disciplinary regulations, the Collective Bargaining Agreement, and Directive 5805 (Disciplinary and Adverse Actions).

## 10. Resolution

- a. Corrective Administrative Action

- i. When it is determined that this policy has been violated, the OHR Employee and Labor Relations Specialist will coordinate with appropriate management officials to develop corrective administrative actions. The corrective administrative actions can include a variety of interventions as well as appropriate disciplinary actions such as reprimand, proposed suspension, or proposed removal and shall always include a reminder that retaliatory treatment towards any federal employee, non-federal worker, or contractor for reporting allegations of inappropriate conduct or harassment, or for participating as a witness in an administrative inquiry or EEO complaint process, is prohibited. Other interventions may include training, coaching, facilitated discussions for the team, and/or collaborative work with the Employee Assistance Program or the FMCS Ombuds. If the respondent is a Government contractor, corrective and/or disciplinary action will be the responsibility of the contracting company and negative performance may be recorded in the Contractor Performance Assessment Reporting System (CPARS), if warranted.
  - ii. Should any employee or manager not cooperate throughout this process, or not implement the corrective administrative action in whole or in part, OHR will report this information to the FMCS Director and external entities, as appropriate.
- b. Communicating Outcomes to Reporting Parties
  - i. OHR will notify the reporting party of the status of the administrative inquiry and when it has been referred to the appropriate management officials. However, because of privacy rights and procedures, no further information will be provided.
- c. EEO Process Not Affected by Anti-Harassment Process
  - i. This Directive is not intended to replace an employee's EEO rights. An employee may pursue claims of harassing conduct through this Directive or the EEO process simultaneously. If an employee wishes to file a formal claim, report harassment, seek guidance or counseling, or file a claim of discrimination through EEO procedures, they must contact the FMCS EEO Office within 45 days of the incident or becoming aware of the harassment. Pursuing the anti-harassment process through this Directive will not extend or toll any timeframes for the EEO process; therefore, employees should be cognizant of timeframes.

11. CONTACT: Office of Human Resources, [antiharassment@fmcs.gov](mailto:antiharassment@fmcs.gov)

12. EFFECTIVE DATE: This Directive is effective immediately and shall continue until superseded or replaced.

---

Gregory Goldstein, Acting Director