

# Fact Sheet: Administrative Law Judge (ALJ) Positions

## Important Links:

- [Executive Order 13843 - Excepting Administrative Law Judges from the Competitive Service](#)
- [OPM Memorandum Dated July 10, 2018](#)
- [OPM Guidance ALJ Loan Program Dated August 1, 2018](#)
- [OPM Guidance ALJ Promotions and Reassignments Dated August 27, 2018](#)

Note: All actions previously requiring the U.S. Office of Personnel Management (OPM) approval remain subject to OPM approval, regardless of whether the Administrative Law Judge (ALJ) is in the competitive or excepted service, with the exception of new appointments under the Schedule E authority.

## ALJ Classification Authority

OPM continues to retain classification authority for all ALJ positions in the competitive and excepted service pursuant to 5 Code of Federal Regulations (CFR) 930.201(e)(3) and 5 United States Code (U.S.C.) 5372. There is no change to the procedure for OPM's review and approval of ALJ classification requests, including reclassification requests under 5 CFR 930.204(e)(2).

Agencies may change an ALJ position description (PD) to identify that the position is in the excepted service, but must obtain prior OPM approval for substantive PD additions and changes.

Agencies' classification submissions must include the proposed ALJ PD; the previously approved PD; a memo summarizing all changes to the Optional Form (OF) 8, Cover Sheet as well as changes to the position duties, if applicable; and an organizational chart that shows reporting structure alignment.

## Appointments

On July 10, 2018, the President signed Executive Order (E.O.) 13843 titled, "Excepting Administrative Law Judges from the Competitive Service" (83 FR 32755). The E.O. specifies that all appointments of ALJs made on or after July 10, 2018 must be made under Schedule E of the excepted service and acknowledges that such appointments must be made by the head of the hiring agency. (See additional information on Vacancy Announcements below.)

The E.O. also eliminates the need for OPM to conduct ALJ competitive examinations and provides that the appointment of an ALJ is not subject to the requirements of 5 CFR part 302, except that each agency shall follow the principle of veterans' preference as far as administratively feasible (see information below on Veterans' Preference). ALJs appointed to positions in the excepted service will be covered by the agency's excepted service hiring policies.

No new appointments may be made to the competitive service after July 9, 2018. An individual encumbering an ALJ position on July 10, 2018, shall remain in the competitive service while he or she remains in the position of ALJ (and will continue to be subject to the same conditions pertaining to employment in the competitive service). (See additional information on Promotions and Reassignments below.)

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## **Minimum Qualification and Licensure Requirement**

ALJs must meet the minimum qualification and licensure requirement specified in section 3(a)(ii) of the E.O. (5 CFR 6.3(b)). This means the minimum qualification and licensure requirement for an ALJ position is the possession of a professional license to practice law and being authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution at the time of selection and any new appointment (other than an incumbent ALJ). Judicial status is acceptable in lieu of “active” status in States that prohibit sitting judges from maintaining “active” status to practice law, and being in “good standing” also is acceptable in lieu of “active” status in States where the licensing authority considers “good standing” as having a current license to practice law. In addition, the head of an agency may establish any additional requirements he or she deems necessary.

## **Probationary/Trial Period**

ALJs are not subject to probationary periods in the competitive service or trial periods in the excepted service.

## **Nature of Action Code**

Agencies should use ZLM, EO 13843 as the nature of action and legal authority codes for Schedule E appointments of ALJs.

## **Promotions**

As stated in OPM’s August 27, 2018 guidance to chief ALJs and designees, there has been no change in the procedure for OPM to review and approve the advancement of an ALJ’s rate within pay level AL-3 under 5 CFR 930.205(g) regardless of whether the ALJ is in the competitive or excepted service. However, when an agency submits a request to OPM to approve the promotion of an ALJ to a higher level (AL-2 or AL-1) under 5 CFR 930.204(c) in either the competitive or excepted service, the agency’s request should now include documentation that the department head has approved the promotion.

Under the terms of the E.O., “[i]ncumbents of this position who are, on July 10, 2018, in the competitive service shall remain in the competitive service as long as they remain in their current positions.” Under the general civil service regulations, the internal reassignment or promotion of an officer or employee by his or her agency involves only a position change, and does not involve a new appointment under civil service law. 5 CFR 210.102; see also 5 CFR 335.101. Therefore, if the ALJ is in the competitive service, the ALJ remains in the competitive service after promotion.

Agencies are reminded that for competitive service incumbents, 5 CFR part 335 applies to promotions to a higher level. With certain exceptions, under 5 CFR 335.103(c)(1), a promotion to a higher level (including a time-limited promotion of more than 120 days, or a detail of more than 120 days) is subject to the competitive procedures of the agency’s merit promotion plan.

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## **Reassignments**

As stated in OPM's August 27, 2018 guidance to chief ALJs and designees, there has been no change in the procedure for OPM's review and approval of a routine geographic reassignment of an ALJ under 5 CFR 930.204(f) regardless of whether the ALJ is in the competitive or excepted service. However, when an agency submits a request for OPM to approve a reassignment to a different bureau within the same department, or a reassignment to perform a significantly different kind of work within the department, the agency's request to OPM should now include documentation that the department head has approved the reassignment.

Upon reassignment, an incumbent ALJ in the competitive service remains in the competitive service, because reassignment is a position change that does not result in a new appointment as a matter of civil service law.

## **Employment of a Former ALJ**

OPM explained in its July 10, 2018 memorandum to agencies that appointment of an ALJ by reinstatement (5 CFR 930.204(g)) is no longer available, because reinstatement is a competitive service appointment method, and new appointments of ALJs must be in the excepted service.

An agency head may appoint a former ALJ under excepted service Schedule E authority who meets the minimum qualification and professional license requirement specified in section 3(a)(ii) of the E.O. (5 CFR 6.3(b)) and in the above paragraph, Minimum Qualification and Licensure Requirement.

## **Movement between Agencies (Interagency Transfers)**

OPM explained in its July 10, 2018 memorandum to agencies that appointment of an ALJ by interagency transfer (5 CFR 930.204(h)) is no longer available, since transfer is a competitive service appointment method, and new appointments of ALJs must be in the excepted service. Therefore, an ALJ serving in the competitive service who moves to another agency must do so through a Schedule E appointment. Upon such a move, the ALJ moves out of the competitive service and into the excepted service regardless of whether the move is at or above the ALJ's current pay level. As indicated in the above paragraph, Minimum Qualification and Licensure Requirement, incumbent ALJs moving to another ALJ position are not subject to the minimum qualification and licensure requirement.

## **Pay**

OPM explained in its July 10, 2018 memorandum to agencies that the E.O. does not affect the ALJ pay system. The provisions of 5 U.S.C. 5372 and 5 CFR 930.205 apply to ALJs in the competitive and excepted service.

Additionally, as stated in OPM's August 27, 2018 guidance to chief ALJs and designees, there has been no change in the procedure for OPM to review and approve the advancement of an ALJ's rate within pay level AL-3 under 5 CFR 930.205(g).

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## **Performance**

5 CFR 930.206(a) continues to apply. As OPM noted in its July 10, 2018 memorandum, agencies may not rate the job performance of an ALJ appointed in the competitive or the excepted service.

## **Awards and Incentives**

5 CFR 930.206(b) continues to apply. As OPM noted in its July 10, 2018 memorandum, agencies may not grant any monetary or honorary award or incentive under 5 U.S.C. 3502, 4503, 4504, or under any other authority, to an ALJ appointed in the competitive or the excepted service. This includes recruitment, relocation, and retention incentives under 5 U.S.C. 5753 and 5754 and the student loan repayment program under 5 U.S.C. 5379(d)(2) and 5 CFR 537.108(a)(2). An ALJ cannot meet the requirements for these incentives and payments because an agency may not rate the job performance of an ALJ.

## **Details**

OPM noted in its July 10, 2018 memorandum to agencies that the OPM regulations in 5 CFR 930.207 continue to govern intra-agency details.

Agencies may detail ALJs for up to 120 days without OPM approval. All details that will last more than 120 days, and details exceeding more than a total of 120 days in a 12-month period, require OPM approval regardless of whether the ALJs are in the competitive or excepted service.

## **ALJ Loan Program**

OPM explained in its July 10, 2018 memorandum to agencies that the OPM regulations in 5 CFR 930.208 continue to govern the ALJ Loan Program. OPM issued additional Loan Program guidance to chief ALJs and designees on August 1, 2018.

In summary, the department or agency that employs the ALJ to be loaned, whether in the competitive or excepted service, must furnish OPM with documentation that the ALJ's appointment was originally made or later ratified by the department head; and the department or agency that has accepted the services of the loaned ALJ must, as soon as practicable, furnish OPM with documentation that its department head has approved the loan. It is still the case that an ALJ loan is a reimbursable interagency detail, and that the ALJ remains an incumbent of the position from which he or she was detailed.

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## **Senior ALJ Program**

OPM explained in its July 10, 2018 memorandum to agencies that the OPM regulations in 5 CFR 930.209 continue to govern the Senior ALJ Program. The Senior ALJ Program established under 5 U.S.C. 3323(b)(2) is the exclusive means to reappoint a retired ALJ to an ALJ position under 5 U.S.C. 3105.

Senior ALJs appointed prior to July 10, 2018, remain in the competitive service for the duration of their appointment, including any extension periods authorized by OPM. All new appointments of Senior ALJs on or after July 10, 2018 are made to the excepted service under Schedule E.

As was the case before E.O. 13483, an agency may reemploy a retired ALJ in some other capacity, such as under an expert or consultant appointment, or to a General Schedule, Senior Executive Service, or Senior Level position, without utilizing the Senior ALJ Program or seeking OPM approval under that program.

## **Adverse Action**

OPM explained in its July 10, 2018 memorandum to agencies that ALJs in the excepted service will be subject to the same adverse action procedures as those governing ALJs in the competitive service with respect to actions to remove, suspend, reduce in level, reduce in pay, or furlough for 30 days or less (5 U.S.C. 7521 and 5 CFR part 1201).

## **Vacancy Announcements**

The excepted service has no requirement to post a USAJOBS announcement, or to follow the job posting requirements for competitive service positions set forth in 5 CFR 330.104. However, agencies should be mindful that the merit system principles (5 U.S.C. 2301) apply to excepted service recruiting as well as to competitive service recruiting. Agencies should uphold these principles by telling potential applicants about the vacancy and by recruiting in a manner to attract a sufficient pool of qualified applicants. Additionally, an agency may prescribe qualification requirements in addition to the minimum qualification and licensure requirement set forth in section 3(a)(ii) of the E.O. (5 C.F.R. 6.3(b)). But any agency-specific requirements must be provided to potential applicants, as OPM noted in its July 10, 2018 guidance.

In situations where the potential pool of qualified applicants includes employees in both the competitive and excepted service, the agency must recruit in such a way that allows all qualified and eligible employees to apply regardless of whether they are in competitive or excepted service. Specifically, when recruiting for promotion opportunities from among current ALJ employees, you should consider employees in both the competitive and excepted services.

OPM remains available to review ALJ vacancy announcements for the competitive and excepted service as a courtesy.

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## **Veterans' Preference**

Agencies filling positions in the excepted service, including using the new Schedule E authority to appoint ALJs, should have policies in place that govern the hiring and employment of excepted service employees. OPM has not provided interpretive guidance on implementing the principle of veterans' preference as far as administratively feasible. OPM recommends that agencies contact their respective Offices of General Counsel regarding the application and interpretation of veterans' preference in ALJ hiring. We note that there is Federal Circuit case law on the meaning of this language in other contexts that counsel may wish to consider.

## **Security, Suitability and Identity Credentialing**

Civil Service Rule VI, as amended by E.O. 13483, provides that appointments in the excepted service, including to the position of ALJ, are "subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations." OPM reminded agencies in its July 10, 2018 memorandum that ALJ appointments are generally subject to investigation, a determination of fitness, a determination of eligibility for logical and physical access to agency systems and facilities, and, where applicable, a determination of national security eligibility. Incumbents who remain in the competitive service and whose positions have been designated as public trust positions will continue to be subject to periodic public trust reinvestigations.

## **Rulemaking Related to ALJ Positions**

Through his statutory rulemaking authority and E.O. 13483, the President amended Civil Service Rule VI, 5 CFR part 6, to place the position of ALJ in Schedule E of the excepted service; to provide that appointment of an ALJ is not subject to the requirements of 5 CFR part 302, except that each agency shall follow the principle of veterans' preference as far as administratively feasible; to make appointments subject to certain minimum licensure requirements, while permitting additional agency requirements for appointment as appropriate; and to provide that incumbent ALJs as of July 10, 2018 shall remain in the competitive service as long as they remain in their current positions.

The President also directed OPM to adopt such regulations as the Director determines may be necessary to implement this order, including, as appropriate, amendments to or rescissions of regulations that are inconsistent with, or that would impede the implementation of, this order. OPM is preparing new proposed regulations, as stated in its July 10, 2018 memorandum. Because this Fact Sheet describes requirements of the current regulations, OPM expects to issue new guidance, as appropriate, after the final rule is issued.