

July 2004

NO FEAR ACT

Methods the Justice Department Says It Could Use to Account for Its Costs Per Case under the Act



G A O

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Highlights of [GAO-04-863](#), a report to congressional recipients

Why GAO Did This Study

Allegations of violations of employment discrimination and whistleblower protection laws against federal agencies can end up in federal court, at which point Department of Justice (DOJ) attorneys generally take over representation of the agency. Attorneys within Justice's Civil Division and U.S. Attorneys' Offices generally handle this type of litigation.

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR) requires agencies to repay the Department of the Treasury's Judgment Fund for discrimination and whistleblower protection settlements and judgments paid on their behalf. While the No FEAR Act does not require agencies to reimburse DOJ for costs incurred in defending them in cases covered under the act, it does require GAO to review how DOJ could ascertain the cost of representing agencies in each case and what the burden of performing this accounting would be. Based on this requirement, our report provides information on (1) the methods DOJ says it could use to account for the personnel and nonpersonnel costs that it incurs in handling cases covered under No FEAR on a per-case basis and how soon the Department expects it would be able to do so, and (2) how costly DOJ expects it would be to account for each case. We make no recommendations in this report.

www.gao.gov/cgi-bin/getrpt?GAO-04-863.

To view the full product, including the scope and methodology, click on the link above. For more information, contact George H. Stalcup at (202) 512-9490 or stalcupg@gao.gov.

NO FEAR ACT

Methods the Justice Department Says It Could Use to Account for Its Costs Per Case under the Act

What GAO Found

The two DOJ offices that handle cases covered under No FEAR could start to account for these costs on a per-case basis by the beginning of fiscal year 2006 by changing their current systems and procedures. The Executive Office of United States Attorneys (EOUSA) provides accounting for the U.S. Attorneys, who handled the vast majority of employment discrimination cases for DOJ in fiscal year 2002. EOUSA officials said they could account for the per-case costs of cases covered under No FEAR beginning in fiscal year 2006 by using a modification of the way the office currently accounts for health care fraud cases as a group. One change necessary would be for U.S. Attorneys and their paralegals to begin to track their time by case, not by group, as they do now. EOUSA would also need to revise its calculation of nonpersonnel costs to allocate these costs to individual cases, instead of by group. The Civil Division could account for No FEAR cases on a per-case basis by the beginning of fiscal year 2005 in the same way it currently conducts per-case accounting for vaccine injury compensation cases. This would include identifying personnel costs by requiring Civil Division legal professionals to track their time for each No FEAR case on which they work and allocating nonpersonnel costs to each case using a formula for allocating these costs based on the relative amount of time that legal professionals work on No FEAR cases versus all other cases.

The changes needed for DOJ to begin accounting for costs it incurs in cases covered under No FEAR on a per-case basis would require both start-up and recurring costs. EOUSA says that per-case accounting for No FEAR cases would require about \$535,000 in start-up costs—mostly for labor to modify computer systems. Officials from EOUSA did not provide an estimate of their recurring costs, but said they would not be substantial because the cost calculations required for per-case accounting would be carried out electronically. Officials added, however, that many attorneys may not favor tracking their time by case because it could lead to an added emphasis on the number of cases being handled. Because the Civil Division is already performing per-case accounting for certain types of cases, and because this process could also be used for No FEAR cases, officials said accounting for per-case costs for No FEAR cases would not require substantial start-up costs. Officials from the Division said it would incur an annual cost of about 2 work weeks to perform the accounting. DOJ officials said that if appropriate features are included, a DOJ-wide financial management information system planned for EOUSA and the Civil Division by fiscal year 2008 could make it less costly for the department to account for costs of No FEAR cases on a per-case basis than the estimates they gave us. The costs that DOJ said it would incur to conduct per-case accounting for No FEAR cases—there is no plan to do so—are estimates and do not reflect the total cost to DOJ of billing and seeking reimbursement for these cases.

Contents

Letter

Results in Brief	1
Background	3
DOJ Could Adopt Modifications to Its Existing Methods to Account for Costs of Most No FEAR Cases by Case, Beginning in Fiscal Year 2006	4
Accounting for Costs of No FEAR Cases by Case Would Involve Start-Up Costs and Additional Staff Time, but DOJ Officials Said Neither Cost Would Be Substantial	6
Agency Comments	9
	11

Appendixes

Appendix I: Scope of Laws Covered by the No FEAR Act	13
Appendix II: GAO Contact and Staff Acknowledgments	14
GAO Contact	14
Acknowledgments	14

Figures

Figure 1: Calculations Necessary for DOJ to Begin Accounting for Personnel Costs of No FEAR Cases by Case for a Fiscal Year	7
Figure 2: Calculations Necessary for DOJ to Begin Accounting for Nonpersonnel Costs of No FEAR Cases by Case for a Fiscal Year	8

Abbreviations

DOJ	U.S. Department of Justice
EEOC	Equal Employment Opportunity Commission
EOUSA	Executive Office for U.S. Attorneys
FMIS	financial management information system
HCFAC	Health Care Fraud and Abuse Control
HHS	U.S. Department of Health and Human Services
No FEAR	Notification and Federal Employee Antidiscrimination and Retaliation Act
VICP	National Vaccine Injury Compensation Program

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July 22, 2004

Congressional Recipients

Allegations of violations of employment antidiscrimination and whistleblower protection laws against federal agencies can be resolved administratively with agency attorneys representing the agency. When such allegations end up in federal court, Department of Justice (DOJ) attorneys take over representation of the agency, with assistance provided by agency attorneys. DOJ attorneys within the Civil Division and the U.S. Attorneys' Office, which handled the vast majority of the employment discrimination cases in fiscal year 2002, generally handle these federal employment cases.

Generally, DOJ's cost of conducting litigation on behalf of the federal government is paid for out of its appropriations, although its client agencies bear some costs when their attorneys assist DOJ. DOJ has authority in some instances to cover its cost of conducting litigation out of funds other than its appropriations, such as under the National Vaccine Injury Compensation Program—a no-fault alternative to the traditional tort system for resolving vaccine injury claims—and health care fraud and abuse claims.¹

The Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR),² which took effect October 1, 2003, was intended to make federal agencies more accountable for their violations of employment discrimination and whistleblower protection laws. The act attempts to accomplish this by requiring agencies to reimburse the Judgment Fund³ for employment discrimination and whistleblower settlements and judgments paid on their behalf.⁴ No FEAR does not require agencies to reimburse DOJ for costs incurred in defending them in cases

¹For these types of cases, the department generally accounts for costs by group of cases.

²Pub. L. No. 107-174, 116 Stat., 566 (May 15, 2002).

³The Judgment Fund is a permanent, indefinite appropriation administered by the Department of the Treasury.

⁴We previously issued a report on the potential financial impact on the Treasury Department of administering the No FEAR Act: U.S. General Accounting Office, *Judgment Fund: Treasury's Estimates of Claim Payment Processing Costs under the No FEAR Act and Contract Disputes Act*, [GAO-04-481](#) (Washington, D.C.: Apr. 28, 2004).

covered under the act. No FEAR does, however, require GAO to study and report on how DOJ could account for the cost of representing agencies in each case and what the burden of performing this accounting would be.

This report provides information on (1) the methods DOJ officials say they could use to account for the personnel and nonpersonnel costs that DOJ incurs in handling cases covered under No FEAR per case and how soon the department expects to be able to do so and (2) how costly DOJ expects it would be to account for these costs per case. DOJ defines personnel costs as the total compensation—salaries, benefits, and awards—for attorneys and paralegals;⁵ the nonpersonnel cost categories include all other costs, such as service contracts, rent, communications, and utilities.⁶ Throughout this report we refer to attorneys and paralegals as “legal professionals.”

To address our objectives, we reviewed relevant laws and procedures and interviewed officials in the Executive Office for U.S. Attorneys (EOUSA) and the Civil Division. We obtained information from the Civil Division and EOUSA, which serves as a liaison between DOJ in Washington, D.C., and the U.S. Attorneys’ offices across the country. In this capacity, EOUSA provides operational and administrative support—including accounting—to U.S. Attorneys. Neither office currently accounts for the per case cost of defending cases covered under No FEAR. For this reason, each office provided an example of the accounting methods it already uses for other groups of cases and described to us what changes would be necessary to begin accounting for costs of each case covered under No FEAR. EOUSA’s example is its accounting for the costs of health care fraud and abuse control cases by *group of cases*; the Civil Division’s example is its accounting for vaccine injury compensation cases by *case*. Using recent historical costs, EOUSA estimated the cost it would expect to incur in dollars. The Civil Division estimated its cost in staff time and did not convert this cost to dollars. These costs represent only estimates of how the department could account for No FEAR cases by case—there is no plan to do so—and do not reflect the total cost to DOJ of billing and seeking

⁵The Civil Division’s estimate also includes the time that staff would spend compiling data on No FEAR cases.

⁶Other nonpersonnel costs include: travel and transportation, mail management, printing and reproduction, operation and maintenance of facilities, medical care, operation and maintenance of equipment, use of financial management system, personnel services, payroll services, financial operations services, office automation, and equipment.

reimbursement for these cases. In commenting on a draft of this report, DOJ officials noted that such a process could also involve negotiating reimbursement agreements for individual cases, and they added that the costs of doing so could be significant. Moreover, DOJ officials stressed that the accounting methods discussed in this report are based on existing circumstances and if a decision is made to perform accounting by case for No FEAR cases, the methods chosen could differ.

We reviewed the supporting documentation that the offices provided to us related to these estimates and interviewed officials of both offices about them. On the basis of our assessment of DOJ's estimates, which are not based on a formal, rigorous methodology, we determined that the data provided by DOJ were sufficiently reliable for purposes of illustrating a method that it could use for accounting by individual case.

We conducted our work from November 2002 through May 2004 in accordance with generally accepted government auditing standards.

Results in Brief

The two DOJ offices that handle cases covered under No FEAR say they could begin accounting for their costs of each of these cases by the beginning of fiscal year 2006 by changing their current systems and procedures. EOUSA could account for the costs of each case covered under No FEAR in fiscal year 2006 by adopting a modification of the method it uses to account for health care fraud cases. Rather than tracking the work they do on No FEAR cases by group in a manner similar to how they track their work on health care fraud cases, legal professionals within the U.S. Attorneys' Office would be required to track their time by individual case. EOUSA would also need to revise its calculation of nonpersonnel costs to allocate these costs to individual cases instead of groups of cases, as EOUSA does now. The Civil Division could account for its costs of No FEAR cases by case by the beginning of fiscal year 2005 in the same way it currently conducts accounting by case for vaccine injury compensation cases. This would include identifying personnel costs by requiring Civil Division legal professionals to track their time for each No FEAR case on which they work and allocating nonpersonnel costs to each case using a formula based on the relative amount of time that legal professionals work on No FEAR cases versus all other cases.

If DOJ were to begin accounting for costs it incurs in cases covered under No FEAR by case, agency officials said such accounting would require both start-up costs and recurring costs. For EOUSA, accounting by case for No

FEAR cases would require about \$535,000 in start-up costs, mostly for labor to modify computer systems. Although EOUSA officials did not provide an estimate of recurring costs, they indicated that these costs would not be substantial because the cost calculations required for accounting by case would be carried out electronically. EOUSA told us that the office might face resistance from many of its attorneys if they were required to begin tracking their time by case. Such resistance would stem from the culture in which the attorneys work. EOUSA explained that many U.S. attorneys believe that tracking their time by case could lead to an added emphasis on the number of cases being handled. Because the Civil Division already tracks costs by case for certain groups of cases and could use this method to account for each No FEAR case, the Civil Division said there would be no significant start-up costs to begin accounting for costs by case for No FEAR cases. Officials estimated an annual recurring cost of about 2 work weeks would be incurred and that the additional staff time spent on this task would compete with other responsibilities, such as responding to requests for financial information. DOJ officials said that if appropriate features are included, a DOJ-wide financial management information system that should be available to the Civil Division and EOUSA by fiscal year 2008 could make it less costly for the department to account for costs of No FEAR cases by case than the estimates they gave us. DOJ officials also said that a system that includes the ability to calculate and integrate personnel and nonpersonnel case costs electronically would enable both EOUSA and the Civil Division to account for the costs of cases covered by No FEAR by case more efficiently.

DOJ provided technical and clarifying comments to a draft of this report, which we incorporated. With these changes, DOJ generally agreed with the facts presented in this report.

Background

The types of cases covered by No FEAR include employment discrimination cases brought under various federal antidiscrimination statutes and certain prohibited personnel practice cases, including whistleblower protection. (See app. I for further information on the scope of laws covered by No FEAR.) No FEAR was intended to (1) make agencies more accountable for their violations of certain employee protection laws, (2) increase agencies' compliance with these laws, and (3) improve congressional oversight. In addition to requiring agencies to repay the Judgment Fund, No FEAR attempts to accomplish these goals by requiring each agency to (1) provide employees written notification of, and training on, their rights under the laws covered by the act; (2) submit

annual reports on its No FEAR cases to congressional entities, the Equal Employment Opportunity Commission (EEOC), and the Attorney General; and (3) post on Treasury's public Web site summary statistical data on employment discrimination complaints filed involving the agency.

The Civil Division has responsibility for a broad range of civil litigation, including defending the United States, its agencies, or officers in suits challenging the constitutionality, lawfulness, or propriety of presidential initiatives, federal statutes, and government programs and actions. The Civil Division delegates to the U.S. Attorneys in the states and U.S. territories the responsibility for handling a great many of these cases, including most No FEAR cases. For example, U.S. Attorneys handled the vast majority of employment discrimination cases in fiscal year 2002. No FEAR cases that are not handled by U.S. Attorneys are generally assigned to the appropriate part of the Civil Division.

DOJ has authority in certain instances to cover its costs of providing litigation services out of funds other than its appropriations. For example, the Health Care Fraud and Abuse Control (HCFAC) program established by the Health Insurance Portability and Accountability Act of 1996⁷ includes the authority for DOJ to cover its costs incurred in engaging in HCFAC-related activities out of an account in the Federal Hospital Insurance Trust Fund. HCFAC is jointly administered by the Department of Health and Human Services (HHS), through its inspector general, and DOJ. Officials from these agencies work with federal, state, and local law enforcement to control fraud and abuse in health care, in both public and private health plans. The federal government won or negotiated more than \$1.8 billion in judgments, settlements, and administrative awards in health care fraud cases and proceedings in fiscal year 2002, the latest year for which such figures are available. The U.S. Attorneys prosecute civil and criminal HCFAC cases in U.S. district courts and handle appeals in higher courts. The Civil Division is also involved in health care fraud cases.

DOJ also has authority to cover its costs incurred out of funds other than its appropriations in cases under the National Vaccine Injury Compensation Program (VICP), which was established by the National Childhood Vaccine Injury Act of 1986⁸ and took effect October 1, 1988. HHS administers the

⁷Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996).

⁸Pub. L. No. 99-660, Title III, 100 Stat. 3755-3784 (Nov. 14, 1986).

program. Under the program, an individual claiming a vaccine-related injury or death can file a petition for compensation against the Secretary of HHS with the U.S. Court of Federal Claims, which determines if the individual is entitled to an award and, if so, the amount. DOJ defends HHS in these proceedings. The Vaccine Injury Compensation Trust Fund pays the awards and the federal government's costs of administering the program, including the Civil Division's costs in representing HHS.⁹

DOJ Could Adopt Modifications to Its Existing Methods to Account for Costs of Most No FEAR Cases by Case, Beginning in Fiscal Year 2006

The two DOJ offices that handle No FEAR cases said they could account for costs by case by using a modification of the methods they now use to account for HCFAC and vaccine injury compensation cases. EOUSA stated that it could modify the electronic accounting it uses for the HCFAC group of cases to account for each case covered by No FEAR by case, beginning in fiscal year 2006. The Civil Division said that it could account for costs per case of No FEAR cases by the beginning of fiscal year 2005 in the same way it performs individual case accounting for VICP cases. The calculation of personnel and nonpersonnel costs for both offices under the modified scenario would be similar.

EOUSA Could Account for Each No FEAR Case by Adopting Modifications to Its Current Accounting for Health Care Fraud Cases

Officials from EOUSA told us that they could account for the costs of each case covered under No FEAR by using a modification of its current accounting procedures for the HCFAC group of cases beginning in fiscal year 2006. To calculate its cost for handling HCFAC cases as a group in a fiscal year, EOUSA calculates personnel and nonpersonnel costs separately and then adds them together. EOUSA officials told us that they determine the personnel costs of the HCFAC group of cases in a particular fiscal year in three steps: calculating the hourly compensation rates for each legal professional for all cases, calculating each of these individual's total compensation for work performed on HCFAC cases, and adding these compensation amounts together.

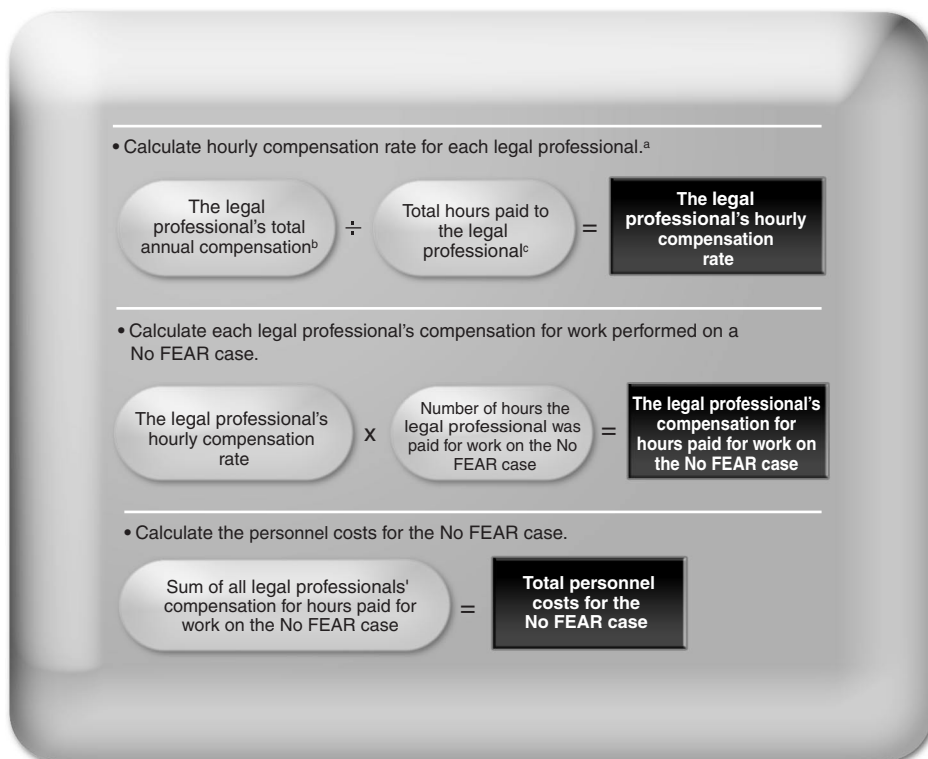
EOUSA officials told us that they determine nonpersonnel costs for HCFAC cases by allocating costs as a group based on the relative amount of time that its legal professionals worked on HCFAC cases versus all other cases. This calculation for a fiscal year is determined in three steps: determining the percentage of case hours its legal professionals were paid for work on

⁹26 U.S.C. 9510(c)(1)(B).

HCFAC cases versus all other cases, applying this percentage to the cost for each nonpersonnel category for the HCFAC group of cases, and adding up the costs for each nonpersonnel cost category for HCFAC cases.

For EOUSA to begin accounting for personnel costs for each case covered under No FEAR, legal professionals within the U.S. Attorneys' Office would have to change how they track their time. Instead of tracking their time by group of cases, as they do now, they would have to track their time by individual case, so that officials could determine the personnel time spent on each case. (See fig. 1.)

Figure 1: Calculations Necessary for DOJ to Begin Accounting for Personnel Costs of No FEAR Cases by Case for a Fiscal Year



Source: GAO.

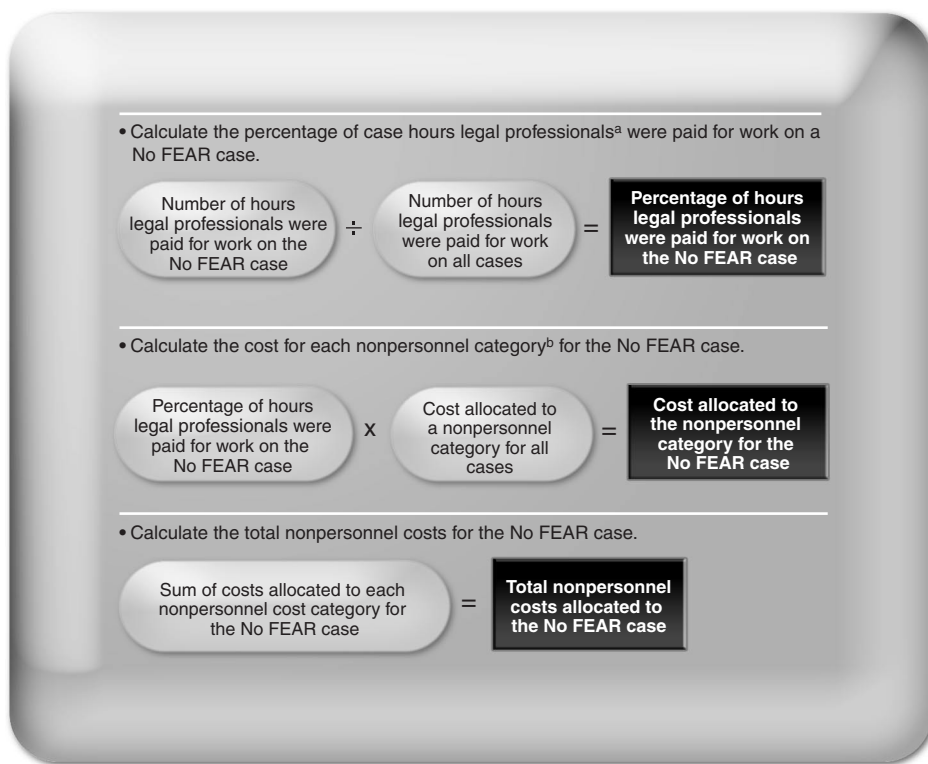
^aLegal professionals include attorneys and paralegals working on a case.

^bTotal compensation includes salaries, benefits, and awards.

^cAttorneys are paid for a maximum of 40 hours per week.

EOUSA officials said that to begin accounting for the nonpersonnel costs of each case covered under No FEAR would require a departure from its current accounting. EOUSA would need to calculate the nonpersonnel cost for each No FEAR case based on the relative amount of personnel time spent on that case versus all cases (see fig. 2). Cases requiring more personnel time would be allocated proportionately more nonpersonnel costs than cases requiring less personnel time.

Figure 2: Calculations Necessary for DOJ to Begin Accounting for Nonpersonnel Costs of No FEAR Cases by Case for a Fiscal Year



Source: GAO.

^aLegal professionals include attorneys and paralegals working on a case.

^bExamples of nonpersonnel cost categories are GSA rent, service contracts, and printing.

EOUSA officials said that to perform these calculations, they would need to modify EOUSA's electronic systems for tracking personnel time and the

legal activities to which that time is devoted. EOUSA estimates it could do this by the beginning of fiscal year 2006.

The Civil Division Could Use Current Methods to Account for No FEAR Cases by Case

Civil Division officials told us that they could account for costs of cases covered by No FEAR by case by the beginning of fiscal year 2005 in the same way they already account for the individual costs of VICP cases. For each No FEAR case, personnel costs could be calculated by linking data from the case management system, which tracks the time legal professionals worked by case and group of cases, with payroll data. Other than travel costs, which can be tracked by case, nonpersonnel costs for an individual case are not tracked by the Civil Division; these costs could be allocated using a formula based on the relative amount of time that legal professionals work on No FEAR cases versus all other cases.

Accounting for Costs of No FEAR Cases by Case Would Involve Start-Up Costs and Additional Staff Time, but DOJ Officials Said Neither Cost Would Be Substantial

If DOJ were to begin accounting for cases covered under No FEAR by case, EOUSA would incur start-up costs, but no substantial recurring costs, while the Civil Division would incur a recurring cost, but no substantial start-up costs. DOJ officials also said that an electronic financial management information system (FMIS) that the department is planning for use throughout DOJ beginning by fiscal year 2008 could make it easier for both offices to account for costs of these cases by case because it would track nonpersonnel costs.

Neither EOUSA nor the Civil Division Anticipates Substantial Costs

EOUSA estimates that accounting for the individual costs of cases covered under No FEAR would require about \$535,000 in start-up costs—about \$500,000 to modify its electronic case management system, which provides information to manage cases and track personnel costs, and about \$35,000 for administrative oversight. The \$500,000 estimate consists of labor costs of 85 work weeks for workers with differing skill levels and is based on EOUSA's knowledge of system architectures and estimates of the cost of comparable modifications. Once these changes were made, EOUSA officials told us that individual case accounting would be carried out electronically and would not involve substantial recurring costs, although the officials did not provide an estimate of these costs.

EOUSA officials noted that the office might face resistance from many of its attorneys if they were required to begin tracking their time by case. This resistance would stem from the culture within which the attorneys work. EOUSA officials explained that U.S. Attorneys believe that tracking their time by case could lead to an added emphasis on the number of cases being handled.

The Civil Division estimated that it would incur 2 work weeks of recurring costs to produce cost reports required for accounting by case of No FEAR cases. The division would not have significant start-up costs because it is already accounting for certain groups of cases by case. Attorneys in the division's litigating branches would have to begin flagging No FEAR cases with a special code that would then be entered into the division's case management system. The system could then track the number of hours that attorneys and paralegals reported working on each No FEAR case. The Civil Division's accounting staff would retrieve these data. The division did express concern that this work might compete with other staff responsibilities, such as responding to requests for financial information. Civil Division officials also noted that additional work would be involved if it were to start such accounting after the beginning of a fiscal year. In this scenario, the division would have to identify the No FEAR cases, identify personnel costs for each case, use a formula for estimating the nonpersonnel costs for each case based on the relative amount of time that legal professionals work on No FEAR cases versus all other cases, and use electronic spreadsheets to apply this formula.

A New Financial Management Information System Could Make It Easier for DOJ to Account for Costs of No FEAR Cases by Case

DOJ has recently started planning an electronic FMIS that is expected to be available departmentwide beginning in fiscal year 2008, although certain agencies within the department may be able to use the system before then. DOJ officials said that a system that includes features such as the ability to calculate and integrate personnel and nonpersonnel case costs electronically could make it less costly to account for the costs of individual cases covered by No FEAR than the estimates they gave us. DOJ officials based their statement on the expectation that FMIS's ability to track nonpersonnel costs will make it possible to integrate data from its case management and financial management systems to track all costs directly.

Agency Comments

On June 17, 2004, we provided a draft of this report to DOJ for review and comment. DOJ e-mailed clarifying and technical comments, which we incorporated. With these changes, DOJ officials indicated general agreement with the report.

We will send copies of this report to interested congressional committees; the Attorney General; Assistant Attorney General, Civil Division; and the EOUSA Director. We will also make copies available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>. If you or your staff have questions about this report, please call me at (202) 512-9490 or Belva Martin, Assistant Director, on (202) 512-4285. Key contributors to this report are listed in appendix II.



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Director, Strategic Issues

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Scope of Laws Covered by the No FEAR Act

No FEAR cases include cases brought in federal district court by job applicants and current or former federal employees under any of the provisions of the following laws:¹ (1) section 717 of the Civil Rights Act of 1964, as amended,² which prohibits discrimination on the basis of race, color, religion, sex, or national origin; (2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967,³ which prohibits discrimination on the basis of age; (3) the Equal Pay Act of 1963,⁴ which prohibits sex-based wage discrimination, and (4) section 501 of the Rehabilitation Act of 1973,⁵ which prohibits discrimination on the basis of disability. Prior to filing in federal court, individuals alleging violations of these discrimination laws typically are required to exhaust administrative remedies.

No FEAR cases also include cases appealed from the Merit Systems Protection Board (MSPB)⁶ to federal court, such as the U.S. Federal Circuit Court of Appeals, alleging violation of certain prohibited personnel practices—most notably retaliation for whistleblowing.⁷

Agency attorneys are responsible for representing their agency while a matter is at the administrative stage, either before EEOC or MSPB. However, once a matter is filed in district court or appealed to the U.S. Federal Circuit Court of Appeals, DOJ attorneys generally take over representation of the agency, with assistance provided by counsel from the client agency.

¹No FEAR cases are identified under section 201 of the act. Section 201(a)(2) permits the identification of additional cases through implementing regulations.

²42 U.S.C. § 2000e-16.

³29 U.S.C. § 631, 633a.

⁴29 U.S.C. § 206(d).

⁵29 U.S.C. § 791.

⁶MSPB is an independent, quasijudicial agency in the executive branch.

⁷Section 201(c)(1).

GAO Contact and Staff Acknowledgments

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