Federal Government Workers

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Andrew Ortiz, EJC (Law Clerk)

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Introduction

This chapter provides a very basic overview of the workplace rights of federal government employees and the administrative processes available to them to seek recourse for violations of these rights. In drafting this chapter we relied heavily on *The Federal Employees' Legal Survival Guide: How to Protect and Enforce Your Job Rights*, by Passman & Kaplan, PC (2nd Ed. 2004).

Wage & Hour Issues for Federal Employees

Federal employees **in a union bargaining unit** covered by the provisions of a collective bargaining agreement (CBA) pursue wage and overtime claims as union grievances, unless the CBA specifically excludes the Fair Labor Standards Act (FLSA) or overtime claims. *See* 5 C.F.R. § 551.703.

For those employees not in a bargaining unit or whose CBA excludes such claims, workers can file claims with their agencies or with the Office of Personnel Management (OPM), or file a lawsuit in U.S. District Court or the Court of Federal Claims. *See* 5 C.F.R. §§ 551.703(c); 551.705. Employees may not simultaneously file claims with both their agencies and OPM.

If the worker decides to file a complaint with his or her agency and receives an unfavorable decision from the agency, s/he may then go to the Office of Personnel Management (OPM). If s/he chooses to first file a complaint with OPM and receives an unfavorable decision, however, s/he may not then seek a favorable determination from the agency. *See* 5 C.F.R. § 551.705. OPM encourages workers to use their agencies' grievance procedures, if available, but does not require it. OPM claims must be sent, in writing, to the following address:

Classification and Pay Programs Manager
Center for Merit System Accountability
Office of Personnel Management
1900 E St. NW, Room 6484
Washington, DC 20415

For information regarding the contents of the claim, please visit the OPM website, www.opm.gov. Alternatively, workers may contact OPM at 202-606-7948. Claims may not be filed electronically. If the worker's total claim, including liquidated damages, is for more than $10,000, the case may **only** be filed in the Court of Federal Claims.

If a federal employee alleges a violation of the equal pay requirement (not minimum wage, overtime, or child labor laws), the employee should file a complaint with

the Equal Employment Opportunity Commission. *See* 5 C.F.R. § 551.701(b).[117]

Unemployment Compensation for Federal Employees

Under a 1966 Act of Congress, federal employees whose services have been terminated by the federal government are eligible for payments under state unemployment compensation laws in the state where they last worked for the federal government – the federal employee's last station. To remedy the unfair burden imposed on state funds as a result of the federal government's exemption from state taxation, Congress included in the Act a provision assigning credit for a claimant's federal service and wages to the state of claimant's last official federal work station, and reimbursing that state for the cost of satisfying the claim. *See* 5 U.S.C. § 8504 *et. seq.*

Family and Medical Leave Laws for Federal Employees

Federal employees are covered by provisions nearly identical to the federal FMLA (they also receive 12 weeks of leave in a 12-month period, for example). *See* 5 U.S.C. §§ 6381-6387; 5 C.F.R. §§ 630.1201 – 630.1211. There are, however, some minor differences. For instance:

- Federal employees may not be required to substitute their paid leave for any part of their FMLA leave. *See* 5 C.F.R. § 630.1205(d).
- The avenues of redress are more limited. Workers can file administrative grievances with their agencies or grievances under a collective bargaining agreement. Workers may also raise an FMLA violation as a defense to a disciplinary or adverse action (e.g., separation). Employees, however, probably cannot bring lawsuits against the federal government for FMLA violations, as courts have not found that Congress ever explicitly waived the federal government's immunity from suit with regard to the FMLA. *See Mann v. Haigh*, 120 F.3d 34, 36 (4th Cir. 1997) (noting that while Title I of the FMLA, which covers the private sector and employees of state and local governments, creates a private right of action, Title II, which governs federal employees, "omits a similar provision creating a private right of action"); *Keen v. Brown*, 958 F. Supp. 70 (D. Conn. 1998).

  Note: Federal employees are not covered by the D.C. FMLA.

Discrimination Protections for Federal Government Employees

The process for filing discrimination complaints against the federal government is

[117] *See* Passman & Kaplan, P.C., *Federal Employees' Legal Survival Guide: How to Protect and Enforce Your Rights*, 211-212 (1998).

governed by the Equal Employment Opportunity Commission's (EEOC) regulations found at 29 C.F.R. § 1614. Discrimination based upon race, sex, national origin, religion, handicap, or age is prohibited in employment with the federal government.

EEO Claim Procedure: Federal Employees

The process for an employee of, or applicant for employment with, the federal government to file a complaint of discrimination against his/her agency is substantially different from an employee or applicant alleging discrimination against a private-sector employer.

EEO Counseling – 1st stage

The first step of the federal-sector complaint process is EEO counseling. An employee of, or applicant for employment with, the federal government who believes he/she has been discriminated against must contact an EEO counselor in the agency's EEO office within **45** calendar days of the date of the alleged discriminatory event. 29 C.F.R. § 1614.105(a)(1). This time frame can be extended in limited circumstances. *Id.* at § 1614.105(a)(2). Examples of situations where the time frame can be extended are: 1) if a continuing violation occurs, 2) if the worker has severe health problems that make her completely incapacitated and unable to file a complaint, or 3) if the worker is misled by the agency official of the filing deadline. Union grievance proceedings do **not** toll the statute of limitations.

The EEO counselor must advise the complainant that he/she has the choice between traditional EEO counseling or participation in alternative dispute resolution (ADR). *Id.* at § 1614.105(b)(2). Traditional EEO counseling involves the EEO counselor meeting with the complainant and the agency officials involved to gather basic facts regarding the claim and to determine whether the case can be settled. EEO counseling is only supposed to last 30 calendar days from the date of the complainant's first contact with the agency's EEO office. *Id.* at § 1614.105(d). If the complainant chooses ADR, then the pre-complaint processing will terminate after 90 calendar days. *Id.* at § 1614.105(f).

Note: The complaint must include *all* the relief the worker is seeking and must include *all* the claims. If these are not included, the worker may be barred from including them in court or at a later stage of the administrative process.

Filing the formal complaint – 2nd stage

After the EEO counseling stage is completed, the EEO counselor will send a letter to the complainant notifying the complainant of the right to file a formal discrimination complaint. *Id.* at § 1614.105(d). This letter is typically referred to as the "notice of final interview." Significantly, the complainant has only **15 calendar days** from the date he/she receives the notice of final interview to file the formal complaint. *Id*. at § 1614.106(b). If the formal complaint is not filed within those 15 calendar days, then the

complainant will be barred from raising that complaint in the future. The formal complaint must contain the following information: identity of the complainant and the agency; description generally of the action(s) that form the basis of the complaint; address and telephone number of the complainant or the complainant's representative; and signature of the complainant or the complainant's attorney. *Id.* at § 1614.106(c). The complaint also should include a request for compensatory damages and all other relief being sought by the complainant.

The complaint can be amended to include issues or claims "like or related to" those raised in the original complaint at any time prior to the conclusion of the investigation of the original complaint. *Id.* at § 1614.106(d). In general, a complaint may be amended to include additional bases of discrimination at any time prior to an EEOC hearing.

The investigation – 3rd stage

In what seems like an odd conflict-of-interest, the agency that is accused of discrimination is responsible for investigating the complaint. A formal discrimination complaint must be investigated within 180 calendar days of the date the complaint was filed. *Id.* at § 1614.108(e). If the original complaint was amended, the investigation must be completed within either 180 calendar days after the date of the last amendment or 360 calendar days from the date of the filing of the original complaint, whichever is earlier. *Id.* at § 1614.108(f). The agency EEO office can request a 90-day extension to continue and complete its investigation.

Agency decision/EEOC hearing/Filing suit in court – 4th stage

At the completion of the investigation, the agency must notify the complainant of his/her rights for continued processing of the complaint. *Id.* at § 1614.108(f). In short, after the investigation is complete, the complainant may: (1) request that the agency issue a decision regarding the merits of the complaint; (2) request a hearing by an EEOC administrative judge; or (3) file suit in U.S. District Court. *Id.* at § 1614.108(f). Importantly, at any time after 180 calendar days has expired from filing a formal discrimination complaint, the complainant may file suit in an appropriate U.S. District Court or request that an administrative judge of the EEOC conduct a hearing. *Id.* at § 1614.108(g). Once that initial 180 calendar days has expired, the complainant does not have to wait for the agency to complete its investigation to request an EEOC hearing or file suit in court, nor does the complainant need a "right to sue" letter. If the investigation has been completed prior to the 180 calendar days, the agency will provide the complainant with notice of his/her rights. If the complainant wishes to request an EEOC hearing, the complainant must send the hearing request to the appropriate office of the EEOC and a copy of the hearing request must be sent to the agency's (i.e., employing/discriminating agency) EEO office.

The maximum amount of compensatory damages allowed, other than back pay and possibly front pay, is $300,000. *See Fogg v. Ashcroft*, 349 U.S. App. D.C. 26; 254

F.3d 103 (D.C. Cir. 2001) (holding Civil Rights Act limits on damage awards apply to each lawsuit, not each claim within each suit).

Disability Discrimination Claims for Federal Employees

The Rehabilitation Act essentially mirrors the language of the ADA and the ADA-AA; however, it protects employees of the federal government and federal government contractors. Federal employees must file their claims under Section 501 of the Rehabilitation Act, which provides that:

> Each department, agency, and instrumentality ... in the executive branch and the Smithsonian Institution shall ... submit ... an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, instrumentality, or Institution.

See 29 U.S.C. § 791(b).[118] Federal employees must file their claims with an EEO counselor within 45 days and follow the same process as for other types of discrimination claims, discussed in the previous section.

Workers' Compensation for Federal Employees

Federal Workers' Compensation Procedures

Injured workers should file Form CA-1, Notice and Claim, within 30 days of the injury in order to receive continuation of pay. To make a claim for occupational illness or disease, workers should file Form CA-2, Notice and Claim.

Notice of injury should generally be given within 30 days, and the claim must be filed within three years from the time the worker realized the injury, disease, or illness was caused or aggravated by employment. *See* 5 U.S.C. §§ 8119-8121. The burden is on the claimant to prove that the injury is work-related. If the claim is denied by the district office, workers can ask for a short oral hearing or written review conducted by a hearing officer. The hearing office will issue a recommendation. *Id*. at §§ 8124-8128. The worker can request reconsideration by the OWCP within one year of the initial decision, and submit additional evidence. Adverse decisions can be appealed within 90 days to the Employee Compensation Appeals Board, U.S. Department of Labor. For good cause, this time limit can be extended to one year. Review is limited to evidence on the record. The decision of the ECAB is not subject to judicial review. *See* 5 U.S.C. § 8128.

[118] Employees who are covered by the Aviation and Transportation Security Act (ATSA) cannot sue their employer under the Rehabilitation Act because the ATSA pre-empts the Rehabilitation Act. *See Joren v. Napolitano*, 633 F.3d 1144 (7th Cir. 2011) (holding that an airport security screener could not sue the TSA under the Rehabilitation Act).

Attorneys for Federal Workers' Compensation Claims

Very few attorneys handle federal workers' compensation cases. Attorneys' fees are available by statute; however, before awarded, the fees must be approved by OWCP. Attorneys have to wait a long period before collecting fees, and this limits the number of attorneys who engage in this work. The National Association of Federal Injured Workers maintains a list of federal workers' compensation attorneys. *See* 5 U.S.C. § 8127; 5 U.S.C. § 8130.

Coverage Issues Specific to the Federal Government System

Emotional distress

To make a claim for emotional distress, the disability must result from a worker's "emotional reaction to his regular or specially-assigned work duties or to a requirement imposed by the employment." *Lillian Cutler*, 28 EACB 125.

Restoration Rights

If the worker recovers from disability within one year, he/she should be returned to his/her former or an equivalent position. If the disability lasts for more than one year, workers receive priority placement for two years, including "all reasonable efforts" from the agency. *See* 5 U.S.C. § 8151; 5 C.F.R. § 353

Miscellaneous Issues Specific to the Federal Government System

Problems with Health Insurance Companies

Health insurance companies are supposed to pay for work-related injuries and be reimbursed later if the claim is approved. If they fail to do so, the worker can file a complaint with the U.S. Office of Personnel Management, the federal agency charged with managing federal employee health insurance programs.

Disability Retirement vs. Workers' Compensation

In most cases, the coverage under workers' compensation will be better, because under workers' compensation, the benefits are more generous than disability retirement, workers' compensation benefits are not taxable, and employees are entitled to reemployment rights.

Exceptions to Employment At Will for Federal Employees

Most federal employees are not at-will employees. *See* 5 U.S.C. § 1201-1222. As public employees, federal workers have constitutional rights that may prevent their

termination, including procedural due process rights to notice and a hearing before the deprivation of the employee's property interest in employment, and the protection of free speech rights.

Removal for Misconduct or Poor Performance

Federal employees may be removed for misconduct[119] or poor performance.[120] The major difference between a removal for poor performance and a removal for misconduct is the necessity of creating a performance improvement plan for the effected worker. An employee whose performance is unacceptable may be removed, demoted, or reassigned.

Performance Improvement Plans

A performance improvement plan (PIP) is designed to spell out in writing what a worker must do in order to effectively perform his or her job, and it must be approved by the Office of Personnel Management. *See* 5 U.S.C. § 4303; 5 C.F.R. § 432.104. The discharge must then be related to the criteria outlined in the plan, and at least one of the plan components must be "crucial" to the worker's position.

Prior to issuing a PIP, the agency/employer must determine that the employee's performance is unacceptable. Once the PIP is issued, the employee has at least 30 calendar days to improve his or her performance to an acceptable level, but employees are generally given 90 days. If the employee does not demonstrate acceptable performance during the PIP, the agency will either demote or remove the employee.

Prior to demoting or removing the employee, the agency must follow the same procedures as it would to remove an employee for misconduct.

Notice of Proposed Removal

Prior to terminating a federal employee for misconduct or poor performance, (or taking an adverse action against a federal employee), the agency/employer must first send the employee a "notice of proposed removal/demotion/suspension" containing specific reasons for the action, and provide the worker a chance to review the material relied on by the agency for the removal. The worker will have at least seven (7) days after the receipt of the notice to respond in writing and/or orally.

An adverse action is defined as a termination, demotion, or suspension of more than 15 days.

After the employee presents his/her reply to the notice of proposed adverse action, the agency must issue a written decision explaining whether or not it is going to

[119] These are sometimes referred to as Chapter 75 removals.

[120] These are sometimes referred to as Chapter 43 removals (aka performance-based removals). They are less common than those under Chapter 75.

terminate, suspend, or demote the employee. The agency has the burden to establish by a preponderance of the evidence that the adverse action "promotes the efficiency of the federal service," and it can choose to mitigate the penalty to a lesser one.

In any event, no official agency action can be taken for 30 days. *See* 5 U.S.C. § 7512; 5 C.F.R. § 752.404. If, after 30 days, the agency decides to move forward with its decision to terminate (or demote or suspend for 15 or more calendar days), **the worker then has 30 days from the effective date of the removal to appeal in writing to the Merit Systems Protection Board or 45 days to file a discrimination complaint with the agency's EEO office**.

If the worker is a **union member**, however, s/he must check her union contract because it will specify the **maximum number of days within which to file an appeal**. THIS TIME PERIOD COULD BE AS SHORT AS FIVE DAYS!

Practice Tip: Some unions are inactive and workers are unaware they are members. Read the Notice of Proposed Removal carefully to see whether it references a union. If it does, immediately request a copy of the collective bargaining agreement from the union AND the agency, and ask the union for assistance with preparing the appeal.

Appeals to the MSPB[121]

Federal employees who are (1) not on probation (e.g., competitive service federal workers who have been employed for more than a year), or (2) excepted service workers who have been employed in the same or similar position for two years have due process rights that allow them to appeal a termination or other "adverse action" to the Merit Systems Protection Board (MSPB).[122]

Other "adverse actions" include suspensions of *more than* 15 calendar days, a demotion, a loss in pay, or a reduction-in-force (RIF). A suspension for less than 15 days is not appealable to the MSPB unless the worker claims retaliation and has raised that claim with the Office of Special Counsel.[123]

Workers have **thirty (30) calendar days** (or the next business day after the thirtieth day) from the effective date of the adverse action to appeal the action to the

[121] Although many federal employees have the right to file an appeal to the MSPB from an adverse action, some do not, due to the nature of their appointment or the agency for which s/he works. For example, employees of the FBI generally do not have MSPB appeal rights.

[122] Federal workers are hired and employed under one of two categories of service: "competitive service," which requires a preliminary civil service examination and a probationary employment period, are the presumptive category, while "excepted service," which requires no examination and has at least a two-year probationary period, must be approved by the Office of Personnel Management. There are further sub-categories, such as temporary, term, career-conditional, and career.

[123] Much of this section is culled from James M. Eisenmann, Esq., *Overview of Rights of Federal Government and District of Columbia Employees* (September 23, 1999) (unpublished paper included in D.C. Bar PSAC Pro Bono Program – Employment Law Training).

MSPB.

The MSPB provides an optional form (a letter is also fine) for filing an appeal, available online at www.mspb.gov. The worker should provide two copies of the appeal, filed with the regional office. If the worker was terminated prior to filing an appeal, s/he will no longer be on payroll. However, if the MSPB orders him or her reinstated, s/he will receive back pay and interest for the time of the appeal, so long as s/he was "ready, willing and able to work." If the worker was suspended, s/he will remain on payroll pending the appeal; however, s/he will not receive income for the time she was suspended, unless the MSPB orders otherwise.

Federal employees who are covered by union contracts must choose to use either the union grievance procedures as negotiated in the collective bargaining agreement OR the above outlined procedure.

The MSPB, in the *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981), established a number of factors it uses to determine whether a removal was proper. The factors include the following:

(13) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(14) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and the prominence of the position;
(15) The employee's past disciplinary record;
(16) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(17) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
(18) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(19) Consistency of the penalty with any applicable agency table of penalties;
(20) The notoriety of the offense or its impact upon the reputation of the agency;
(21) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(22) Potential for the employee's rehabilitation;
(23) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter; and
(24) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

One can use these factors to argue that the adverse action was not proper. To

review post 1994 MSPB case law, go to www.mspb.gov.

Federal workers who work in D.C. file MSPB cases with the Washington Regional Office, 1800 Diagonal Road, Suite 205, Alexandria, VA 22314. The telephone number is 703-756-6250.

At the MSPB, the case is assigned to an administrative law judge. It is common practice for the administrative judges to actively try to get the parties to settle the case.

Whistleblower and Anti-Retaliation Protections for Federal Employees

The Civil Service Reform Act, 5 U.S.C. § 2302, protects many categories of federal government employees (and applicants for employment) from retaliation for whistleblowing. Under the law, it is unlawful to retaliate against such employees or applicants who have (1) complained that a law, rule, or regulation has been violated; (2) complained of gross mismanagement, gross waste of funds, abuse of authority, or a "substantial and specific danger to public health or safety;" or (3) disclosed to the Special Counsel or Inspector General that there has been such a legal violation, gross mismanagement, gross waste, abuse of authority, or substantial danger to health or safety. § 2302(b)(8).

The Act also makes it unlawful to do the following:

- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because of "the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation." 5 U.S.C. § 2302(b)(9)(A).
- Discriminate against a federal government employee or applicant on the basis of the employee's testifying or assisting another individual in the exercise of any right referred to in subsection (b)(9)(A). § 2302(b)(9)(B).
- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because the employee is "cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law." § 2302(b)(9)(C).
- Discriminate (or threaten to discriminate) against federal government employees (or applicants for employment) because of their refusal to obey an order that "would require the individual to violate a law." § 2302(b)(9)(D).

The Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (WPEA), strengthened protections under 5 U.S.C. § 2302. Disclosures can no longer be excluded from protections because (1) the disclosure was made to a supervisor or to a person participating in the legal violation, gross mismanagement, gross waste, abuse of authority, or substantial danger to health or safety; (2) the disclosure revealed information that had been previously disclosed; (3) of the employee's motive for making the disclosure; (3) the disclosure was not made in writing; (4) the disclosure was made while the employee was off duty; or (5) of the amount of time which has passed

since the occurrence of the events described in the disclosure. § 2302(f)(1). The WPEA expressly protects employees who make disclosures in the normal course of their duties and up the chain of command. *See* § 2302(f). TSA security officers are no longer excluded from whistleblower protections. *See* § 2304(a).

Additionally, the Inspector General for each agency must now designate a Whistleblower Protection Ombudsman tasked with explaining to employees the process for submitting retaliation claims with the Office of Special Counsel as well as the process for filing whistleblower disclosures. *See* 5 U.S.C.A. App. 3 § 3(d).

The WPEA expands the remedies available in whistleblower claims. Employees may now pursue compensatory damages in addition to reversal of adverse personnel actions. 5 U.S.C. § 1204(g)(1)(A)(ii), (g)(2).

Note: Under the WPEA, whistleblower protections supersede agency non-disclosure agreements, and all such agreements signed after the WPEA went into effect must advise employees of this exception. *See* 5 U.S.C. § 2302(a)(2)(xi), (b)(13)

False Claims Act Claims

Please see the Wage & Hour Chapter of this manual for a detailed discussion about bringing and enforcing whistleblower claims under the False Claims Act.

Substance Abuse Testing for Federal Employees

Drug testing is required by law for many federal and state government employees. For example, about half of all federal government employees are tested at some point, ranging from once during the application/hiring process to random ongoing testing for certain positions.

When is Testing Required

Executive Order 12,564, signed by Ronald Reagan in 1986, mandates drug testing for federal government employees in "sensitive positions." *See* 51 FR 32,889, § 3(a) (1986). This includes the handling of classified information; positions charged with law enforcement, national security, and protecting life, property, and public health and safety; and jobs requiring a high degree of trust and confidence. *Id.* at § 7(d). In total, about half of all federal government employees are covered by this law.

The tests are permitted under five circumstances: 1) initial job application; 2) reasonable suspicion of illegal drug use; 3) in conjunction with the investigation of an accident; 4) as part of an Employee Assistance Program (EAP); and 5) pursuant to a drug testing program established by the agency head in accordance with section 3(a) of the Executive Order. *See id*. at § 3.

Manner of Testing

The Department of Health and Human Services (HHS) has promulgated regulations for the manner of testing of federal employees. *See* 53 FR 11970-01 (1988).

Urine testing is generally the method used. Thus, the guidelines exclusively and extensively cover urine collection techniques (as opposed to hair, which is sometimes tested by private employers). *See id.* at subpart B, § 2.2. The guidelines require testing for marijuana and cocaine, allow testing for amphetamines, opiates and PCP, and allow testing for other Schedule I and II controlled substances during reasonable suspicion or accident-related testing, but do not allow testing for alcohol and other legal drugs. *See id.* at subpart B, § 2.1(a).

Some worker protections include:

(1) Employees must sign a statement that it is their specimen. *Id.* at subpart B, §2.2(f)(22).
(2) Specimen collectors must ensure workers' privacy unless there is reason to believe the worker may adulterate the sample. *Id.* at subpart B, § 2.2(e).
(3) Any tested employee must, upon written request, have access to documents relating to his or her test and to the certification of the lab performing the test. *Id.* at subpart B, § 2.9.

What to Do About a Positive Test

The Executive Order mandates a confirmatory test or the employee's admission that s/he used illegal drugs before action may be taken on any positive test. 51 FR 32,889, § 5(e) (1986). Both the first and confirmatory tests are generally done before the employee is informed of a positive result. *See* 53 FR 11970-01, subpart C, § 3.5 (1988).

Once the worker is informed of a positive test result, s/he should make a written request for documents pertaining to the test. Prior to verifying a positive test result, a Medical Review Officer must give the employee a chance to explain the result. *Id.* at subpart B, § 2.7(c).

Section 5 of the Executive Order specifies disciplinary action once an employee's drug use is established. *See* 51 FR 32,889, § 5 (1986). Generally, the employee will be referred to an Employee Assistance Program (EAP) for rehabilitation, and refusal to take part will result in dismissal, as will any recurrence of drug use. *Id.* at § 5(a-d). Employees in sensitive positions will be temporarily removed pending successful completion of the EAP. *Id.* at § 5(c).

An employee who uses drugs can only avoid discipline if s/he admits to drug use or volunteers for testing before being identified by other means**.** *Id.* at § 5(b)(1). S/he must also: 1) seek EAP rehabilitation; and 2) refrain from future drug use. *Id.* § 5(b)(2-3).

Federal Government Contract Workers

The *Drug Free Workplaces Act of 1988* requires federal **government contractors** and grant recipients to certify that they provide drug-free workplaces, but this act does not require testing. *See* 41 U.S.C.A. §§ 8101 to 8106.

Employees of Congress

In the past, many labor and employment laws did not apply to employees of the U.S. House or Senate. The Congressional Accountability Act of 1995 (PL 104-1) extended labor protections to most employees on Capitol Hill, including workers at the House of Representatives and the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment. This includes those currently working, job applicants, and former employees who may file claims in certain cases. The statute can be found at 2 U.S.C. § 1301 *et seq*.

The following laws are now enforceable under the Congressional Accountability Act:

- **Title VII of the Civil Rights Act of 1964**, as amended by the Civil Rights Act of 1991, prohibits discrimination in employment because of race, color, religion, sex, or national origin.
- **Age Discrimination in Employment Act of 1967** prohibits employment discrimination against individuals 40 years of age and older.
- **Title I of the Americans with Disabilities Act of 1990** and the Rehabilitation Act of 1973 prohibit employment discrimination against qualified individuals with disabilities.
- **Fair Labor Standards Act of 1938** governs overtime pay, minimum wage, and child labor protection, and prohibits pay discrimination on the basis of sex.
- **Family and Medical Leave Act of 1993** entitles eligible employees to take leave for certain family and medical reasons.
- **Employee Polygraph Protection Act** restricts use of lie detector tests by employers.
- **Worker Adjustment and Retraining Notification Act** assures employees of notice before shut-downs and mass lay-offs.
- **Section 2 of the Uniformed Services Employment and Reemployment Rights Act** of 1994 protects job rights of individuals who serve in the military and other uniformed services.
- **Federal Service Labor-Management Relations Act** establishes the rights of individuals to form, join, or assist a labor organization, or to refrain from such activity; and to collectively bargain over conditions of employment through their representatives. It does not establish the right to strike.
- **Occupational Safety and Health Act** protects the safety and health of employees

from physical, chemical, and other hazards in their places of employment.

- **Titles II and III of the Americans with Disabilities Act of 1990** prohibit discrimination against qualified individuals with disabilities with respect to public services and public accommodations.

Complaint Procedure

A worker who believes his or her rights have been violated pursuant to any of the above-mentioned statutes must lodge a complaint with the Office of Compliance (OOC), or the worker will lose his/her right to pursue a claim. For a copy of the Rules & Procedure, go to www.compliance.gov. This complaint *must* be made within 180 days. *See Office of Compliance Rules of Procedure*, R. 2.03(c)(1). The complaint can be made in person, in writing or by phone. *Id.* at R. 2.03(c)(2). The OOC has a two-step process: counseling and mediation. These two stages are completely confidential, and the employer will not be notified during the first stage. *Id.* at R. 1.06. The counseling period lasts 30 days, unless the worker requests a different period and the OOC agrees. *Id.* at R. 2.03(j). After the counseling period is completed, the OOC sends a letter notifying the worker that if s/he wants to continue his/her case s/he must file for mediation within 15 days. *Id*. at R. 2.03(l). After mediation, the worker can either file a complaint with the OOC administrative hearing process or may file a civil action in Federal District Court. *Id.* at R. 2.05(a).[124] The complaint must be filed within 90 days of receiving notification of the end of mediation, but no sooner than 30 days. *Id.*

Note: Employees of the Capitol Police or the Office of the Architect of the Capital may be required to go through the internal grievance procedures of their respective employers. *Id.* at R. 2.03(m)(1)(i).

If the worker opts for the OOC administrative hearing process, a copy of the complaint will be served on the employer. *Id.* at R. 5.01(e). The employer must respond within 15 days. *Id.* at R. 5.01(f). The hearing is held by an appointed Hearing Officer and will occur within 60 days of the filing of the complaint. *Id.* at R. 7.05. The Hearing Officer will issue a decision no later than 90 days after the end of the hearing. *Id.* at R. 7.16. The worker may appeal to the board for review no later than 30 days after the order of the Hearing Officer. *Id.* at R. 8.01(a). Upon the decision of the board, the worker may appeal to the U.S. Court of Appeals for the federal circuit that has jurisdiction. *Id.* at §8.04(a).

The Office of Compliance provides information about the applicability of these laws. The Office of Compliance is located at Room LA 200, John Adams Building, 110 Second St. S.E., Washington, D.C. 20540-1999, Telephone: 202-724-9250 Fax: 202-426-1913 TTY: 202-426-1912. Go to www.compliance.gov for further details.

[124] The worker must choose a forum. Once the worker has filed a civil complaint, s/he is barred from filing a complaint with the OOC.

Retirement for Federal Employment

The information for this section was taken from Federal Employees' Legal Survival Guide, by the Attorneys of Passman & Kaplan, P.C., published by the National Employee Rights Institute. Please see this guide for additional treatment of these systems.

CSRS & FERS

The Civil Service Retirement System (CSRS) covers all appointed and elected officers and employees in or under the executive, judicial, and legislative branches of the federal government and certain employees of the District of Columbia, except those excluded by law or OPM regulations. For federal employees hired after Jan. 1, 1984, who are covered by Social Security, a new retirement system was developed, the Federal Employees Retirement System (FERS).

There are some notable differences between CSRS and FERS. CSRS is a straight retirement plan with the benefits dependent on years of service and "high-three" salary years. High-three average pay is the highest average pay produced by an employee's basic pay during any three consecutive years of service, including within-grade increases, but not overtime or other allowances, with several exceptions.

FERS is a three-tiered retirement system containing three benefits: (1) Social Security, (2) a basic annuity plan that is less generous than CSRS, and (3) an option thrift savings plan.

FERS employees may contribute up to 10 percent of their pay to the thrift plan with full matching by the agency on the first three percent and half matching on the next two percent. These contributions are credited to the employee's own account. If an employee is in the thrift savings plan, there are a number of investment vehicles to which he or she can direct funds.

Eligibility for Retirement

Optional voluntary retirement under the CSRS is available when employees reach: (1) age 55 with at least 30 years of service, (2) age 60 with at least 20 years of service, or (3) age 62 with at least five years of service. An employee must have been employed under CSRS for at least five years, including one year out of the two last years immediately preceding his or her separation. In addition, the employee must have been employed in a position covered by CSRS where retirement deposits were or should have been made, except for disability retirement benefits.

Under FERS, an employee may retire at age: (1) 60 with at least 20 years' service with reduced benefits, or (2) 55 with a minimum of 10 years' service with greatly reduced benefits. Early retirement will cause benefits to be reduced by five percent for each year the employee is younger than 62 when he or she retires. There is also a gradual extension of the minimum age of 55 for retirement under FERS for employees born in 1948 and thereafter.

Other Retirement Options

"Discontinued service retirement" is available if an employee is involuntarily separated without cause, or on account of poor performance, before becoming eligible for optional retirement. There is also early optional retirement due to major reorganizations, major RIFs, or major transfers of function as determined by OPM.

If the employee is younger than 55 at the date of retirement, under CSRS, an annuity is reduced by: (1) one-sixth of 1% for each full month, and (2) 2% per year. There is no similar penalty or reduction under FERS based on age. If an employee is separated for cause or resigns from federal employment with a minimum of five years of service and does not obtain a refund of his or her retirement contributions, the employee may wait until age 62 for deferred retirement.

Federal Law Enforcement Officials and Firefighters

Federal law enforcement officials and firefighters already contribute 7.5% of their salaries to their retirement systems. They are entitled to greater benefits while retiring at an earlier age. Retirement is optional at age 50 and is mandatory at age 55 with at least 20 years of law enforcement or service, although it may be extended to age 60 by the agency head.[125] Military service as a firefighter or law enforcement officer may not be credited toward the minimum 20-year civilian service requirement.[126]

Federal Disability Retirement

If a federal worker is unable to render **useful and efficient service**, s/he may apply for disability retirement, through which s/he can collect a portion of his or her salary from the contributions made to her or his retirement fund. If a worker cannot perform **any single critical element** of his or her current job on account of illness or injury, then s/he is unable to render useful and efficient service, and is deemed disabled. *See* 5 U.S.C. § 8451 *et seq*. (FERS); 5 C.F.R. § 844.103 *et seq*. (FERS); 5 U.S.C. § 8337 (CSRS); 5 C.F.R. §§ 831.101, .1201 *et seq.* (CSRS).

A worker need not be totally disabled in order to collect federal disability retirement benefits. If the disabling **medical condition is likely to last more than one year**, then a worker is eligible to collect disability retirement benefits. The disability need not be because of an on-the-job injury, and can be the result of the exacerbation or flare-up of a pre-existing condition.

Enrollment Requirement

As discussed above, there are two federal employment systems: Federal Employee Retirement System (FERS) and Civil Service Retirement System (CSRS).

[125] *See* 5 CFR 831.901-911.
[126] *See* 5 USC 8336(c)(1).

Make sure you know which system an employee is in before you advise them about disability retirement.

FERS employees must be enrolled in their retirement system for 18 months in order to be eligible for disability retirement. CSRS employees must be enrolled for a minimum of five years in order to be eligible.

Note: A federal employee injured on the job cannot collect both workers' compensation and disability retirement. Although an employee can apply for both, the employee must elect one or the other.

Accommodation and Reassignment

Because disability retirement is supposed to be a last resort, federal agencies are required to make reasonable attempts to reassign and accommodate disabled workers. Accommodations must allow the worker to perform all the critical aspects of his or her job in order to be valid. Reassignments must be to another position in the agency with the same grade, pay, and tenure, and within the same commuting area. Only after attempts to accommodate and reassign have been exhausted can a federal employee apply for disability retirement.

Federal workers **must** cooperate with these attempts at reassignment and accommodation; if they fail to do so, or turn down reasonable accommodations or reassignments, they can be denied disability retirement.

Checklist

Make sure your client meets all these qualifications in order to successfully apply for disability retirement:

_____ Enrolled in FERS for at least 18 months, or enrolled in CSRS for at least five years
_____ Suffers from a disease or injury
_____ This disease or injury became disabling only **after** the employee entered federal service
_____ Unable to perform any **one** of the critical elements of the job in a satisfactory manner
_____ Likely to be unable to perform that critical element for at least one year
_____ Currently in government service, or have been separated from service for less than one year
_____ Agency cannot accommodate the disability or find a suitable reassignment to a comparable position

Application Procedure

Employees may submit an application for disability retirement **within one year**

after the date of their separation. If the application is submitted before separation or within 31 days of separation, it may be sent to the personnel department of the worker's agency, but it is generally better to send it directly to OPM. After 31 days, the application should be sent directly to FERS at Office of Personnel Management, Federal Employees' Retirement System, Employee Records and Service Center, P.O. Box 200, Boyers, PA 16020. For information, request Standard Forms 3105 (A through E) and 3107 from the agency or OPM.

Note: Termination from a job does not preclude a federal employee from applying for disability retirement. In fact, termination because a person cannot perform the functions of a job due to a medical condition may help bolster a claim for disability retirement.

If a worker is denied disability retirement by OPM, the worker can usually request reconsideration and file a letter brief in support, as a part of which new evidence (e.g., new medical records) can be submitted. The right to request reconsideration is stated in the CSRS regulations at 5 C.F.R. § 831.109. The FERS regulations do not contain this provision.

If the reconsideration is denied, the worker can appeal to the Merit Systems Protection Board (MSPB) and request a hearing before an administrative law judge (ALJ). Appeals from the ALJ are taken to the MSPB (an actual board that is like an appellate court). Appeals from the MSPB are taken to the Federal Circuit court.

Benefits Received

If a worker successfully applies for disability retirement under FERS, s/he will receive 60% of his or her average pay during the first year of disability and 40% of the average pay during all other years. Average pay is the average amount earned during each year of the three highest consecutive paid years of federal civil service. **FERS employees on disability are also required to apply for Social Security**, even if they believe they are not eligible to receive it. If a person is eligible for Social Security, during the first year, for every dollar the worker receives from Social Security, the same amount will be deducted from his or her disability payment. This will most likely reduce the worker's entitlement to his or her disability payment to nothing, or almost nothing. During subsequent years, for each dollar a person receives from Social Security, FERS will deduct 60 cents from the disability payment.

CSRS employees do not have to apply for Social Security, and if they do apply and receive it, their disability payment will not be reduced. Like FERS, CSRS disability is also predicated on the same average pay definition as FERS, but the formula for computing benefits is a bit more complex:

- If a worker has 22 or more years of "creditable service,"[127] but less than 22 years

[127] To compute creditable service, add the number of years until a worker reaches 60 to the number of years he or she worked in the federal civil service.

of actual service, s/he will collect 40% of average pay.

- If a worker has 22 or more years of actual service, the annuity will be computed under the general formula for regular retirement and will be higher than 40% of average pay.
- If a worker has less than 22 years of creditable service, s/he will receive less than 40% of average pay, ranging from 7.5% for 5 years of service to 38.25% for 21 years of service. (The percentage increases by 1.75% through year 10, and then increases by 2% each year.)

The benefits are taxable income, but recipients are eligible for the Earned Income Tax Credit. *See The Earned Income Credit 2012 Outreach Kit*, Center on Budget and Policy Priorities. The kit can be found on the Center's EITC website at http://eitcoutreach.org.

Disability retirement benefits continue until the worker (1) dies; (2) returns to work for the federal government; (3) voluntarily gives up the benefits; (4) recovers from the disability; or (5) is "restored to earning capacity."[128] For more detail, *see* 5 C.F.R. § 831.1209. Workers who successfully received disability are eligible to maintain government health insurance, but they must pay the same monthly premiums as they did when they were employed.

A person can work in another non-government job while on disability retirement. However, if in doing so, s/he is "restored to earning capacity," disability retirement benefits will cease, including group health insurance coverage.

Federal Employees' Right to Personnel Files

Under the Privacy Act, federal government employees have a right to view their own personnel file. *See* 5 U.S.C. § 552a. The act also contains a process for correcting errors found in the file.

[128] A person is restored to earning capacity when income from wages or self-employment or both equals at least 80% of the current rate of pay of the position occupied immediately before retirement. *See* 5 U.S.C. § 8337(d).