Federal Employment Law Training Group
Training By Professionals For Professionals

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Here Comes the Cold

Oh, those dreaded words: *Hiring Freeze.* We often hear them around the time we get a new administration, and we're hearing them this month. Everyone knows that hiring freezes are bad for government. The positions that become vacant during a hiring freeze may be the very most important positions in the agency. You are handed a random vacancy because of the vagaries about people leaving government, and sometimes you are left with poor performing employees who really should be the ones to go, but you're afraid to fire them because bad help is better than no help at all. The bean counters are happy, but that's about it. But let me share a moment with you. Years ago, after I had helped a manager fire a poorly performing toxic employee, I called her to see how things were going. "Oh, just terrific!" she said. "Our office productivity has gone up 50% in six months!" I told her that was fantastic and asked who she had hired to replace the faulty worker. "Oh, I didn't hire anybody to fill the position. Once the toxic employee was out of the office, everybody started working better and harder. You see, she was bringing the whole place down just by coming to work every day." Here at FELTG, we hope you never have to fire anybody. But if you do, keep this thought in mind: Sometimes things get better just by removing the problem employee, even if you don't hire a replacement.

Stay warm out there-

Bill

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April 10-14

WEBINARS ON THE DOCKET

Navigating the World of Mixed Cases: MSPB or EEOC?
January 19

The Hostile Work Environment: It's More than Just Sexual Harassment
February 2

The Changes are Beginning
By William Wiley

We've been predicting it here at FELTG for nearly a year. Congress and the in-coming administration are fed up with what they believe are glitches in our civil service system, which require that bad federal employees be coddled and tolerated rather than held accountable and removed from service. We've been saying you'll need to be prepared for the civil service world to be different starting in 2017.

Well, our prediction was off by about three weeks. The civil service world is starting to change NOW. So buckle up your seat belt and prepare for a bumpy ride.

The first change that is going to make a direct impact on an agency's ability to fire bad employees is the passage of the "Administrative Leave Act of 2016" just last week. The "sense of Congress" behind that piece of legislation is that agencies have been abusing the right to place an employee on administrative leave (regular salary, but no work required) for years. You may have seen some of the articles in the media, the ones about the federal employee sent home by his agency on extended administrative leave pending the outcome of an agency investigation into suspected misconduct. My favorite recently was the SESer who was sent home for two years pending the outcome of an agency investigation. He was interviewed while he was putting in a vegetable garden behind his home in Falls Church, noting that it was his second growing season on full pay (and earning years of credit toward retirement, as well). Just think. If you're some out-of-work coal miner in West Virginia who's trying to get by on a few hundred dollars a month of unemployment insurance and you read about this guy, you just might be tempted to elect someone to run the government who promises to drain the swamp of stuff like this.

Well, the water has begun to recede. Last week, Congress passed legislation that, for the first time in history, places specific limitations on an agency's ability to grant indefinite administrative leave. Effective no sooner than September 2017, and no later than May 2018, every major agency in the Executive Branch will have to have a policy in place that explains in detail when administrative leave will be approved, who can approve it, and acknowledges significant limits in its application. Fortunately, buried deep in the legislation that limits administrative leave, there's a beautiful little nugget of change that provides for something that we here at FELTG have been campaigning for more than a decade.

But first, the major thrust of the legislation:

- In general, an agency can place an employee in an administrative leave status no more than 10 workdays each calendar year. Currently, there is no limit.
- The law creates a new category of excused absence distinct from administrative leave: Investigative Leave.
- Investigative Leave (IL) is limited. Any agency manager (apparently) can be delegated the authority to impose up to 30 days of IL. However, any extensions beyond the initial 30 days can be implemented only by the agency's Human Capital Officer. Extensions can only be in 30-day increments and cannot exceed a total of 90 days of extension.
- Placing an employee on IL for more than 70 days can be challenged to the Office of Special Counsel as based on a prohibited personnel practice (most likely, whistleblowing).
- You're going to love this: If the employee resigns before the investigation is completed, and the investigation results in "adverse findings" about the employee, the agency has to include those findings in the employee's Official Personnel Folder.
    - The agency has to give the former employee notice that this is going to happen.
    - The former employee has the right to respond to the notice in writing

and with documents (thank god, no hearing).
- The former employee has the right to appeal the final decision of the agency to retain the notation to the Merit Systems Protection Board.

When I read about this requirement to document the OPF of a former employee, perhaps a now-retired senior citizen, I was reminded that in the Middle Ages, some societies would dig up the bodies of deceased individuals, try them in some sort of medieval court, then punish the body if it was found guilty of the charges. I once worked with a manger who objected to a troubled employee retiring because he wanted to "brand" her with a removal. Come on, kids. When they're gone, they're gone. What a spectacular waste of government time and energy to argue otherwise.

But enough said about the big stuff. If you conduct investigations, you will want to seriously read this new legislation and be as active as possible in the drafting of the implementing regulations. It'll be a new world order for a lot of Inspectors General and Professional Responsibility agency investigators starting next year. And perhaps in some future FELTG newsletter, we'll flesh out the details of what's required under the new legislation if you conduct investigations. We'll certainly be adding some new slides to our famous and fabulous *Workplace Investigations* seminar next scheduled for April 24-28, 2017.

It's the non-investigatory nugget we're after in this new law that will make your life better when it comes to firing bad employees. It has little to do with the "sense of Congress" to control leave abuse, but it's tucked right in there along with all the restrictions on agency authority. The change that may save your life (no kidding), that we have fought for here at FELTG since 2001, is a new form of excused absence called Notice Leave.

If you want to read about that little gift, you'll have to check out a later article in this here newsletter. After you read it, call the grandkids and tell them that the chances that you'll be around until they graduate from high school just went up 1000%. That is IF your agency figures out how to take advantage of this long-overdue flexibility. And of course, we at FELTG are happy to tell agencies how to do just that. Wiley@FELTG.com

FELTG is Coming back to Atlanta!

This time join us for
Advanced Employee Relations
February 14-16, 2016

This three-day open enrollment seminar will cover the relevant things HR practitioners need to with a day on each:

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Plus, hands-on workshops will allow you to leave with the tools you'll need to succeed.

Check out our website www.feltg.com for all the details, and register before space runs out!

EEOC Issues its Own Performance Evaluation for 2016
By Deryn Sumner

The end of the year is a good time for reflection. What went well, what could have gone better, and how can we turn what we learned in 2016 into lessons learned so we can do better in 2017? Since Gary Gilbert started the Firm where I work in 2005, we have dedicated at least a day to this reflection exercise every year. In December, every attorney gets sequestered in our large conference room to talk about our accomplishments, our losses, what inspired us, what depressed us, and what we want to be talking about and doing a year from now.

The EEOC also did some reflecting regarding its accomplishments and published a Performance and Accountability Report for fiscal year 2016 on

November 15, 2016. I've already discussed some of the EEOC's accomplishments this year in the newsletter, most notably the results of the Commission's Select Task Force on the Study of Harassment in the Workplace, which was issued in June 2016. We've also talked about the EEOC's deployment of a pilot program to have administrative judges hold initial status conferences instead of issuing Acknowledgment and Orders. The Report notes that these initial status conferences have "been instrumental in increasing settlement rates, reducing the motions practice, providing customer service by informing the parties about the hearings process, and allowing greater time for more complicated cases."

I love numbers and data, so I was particularly interested in some of the statistics provided by the Report. The Report noted various achievements regarding the federal sector arm of the Commission, many of which I've summarized and highlighted here:

- Employees and applicants received $76.9 million in relief in federal sector cases;
- The EEOC received 8,193 requests for hearing;
- 6,792 complaints were resolved;
- 3,523 appeals from final agency actions were received, which reflects a 3.45% decrease from the number of appeals filed in Fiscal Year 2015;
- The EEOC focused on resolving the oldest appeals pending "or those that vindicate employees' EEO rights and/or preserve their access to the EEO process;"
- The EEOC resolved 3,751 appeals, of which 47.3% were resolved within 180 days of receipt;
- The EEOC reversed procedural dismissals in 436 cases, which reflects 22.5% of appeals filed seeking such reversals;
- The EEOC resolved 1,810, or 54.4%, of appeals that were or would have been 500 or more days old by the end of fiscal year 2016;
- The EEOC issued 111 findings of discrimination, which reflects a 22.7% increase from last year.

I will admit that I have criticized the Commission for the lengthy delays in receiving decisions, but it is heartening to see a focus on resolving older cases and obtaining relief for victims of discrimination. The complete Report is available here: https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf. Sumner@FELTG.com

Civil Service Reform and Probation
By Barbara Haga

I am taking advantage of this FELTG vehicle to share some thoughts that the new administration might take into account in making decisions about what sort of reform might improve the civil service system. Lots of people are doing this – there seems to be a real possibility that we might see it in the next administration. It's time. It's been 38 years since the last major overhaul of the civil service system.

In this article, I am taking exception with the recommendations that have been made by one group. A report entitled "Governing for Results: A Transition and Management Agenda to Lead Policy Change in a New Administration" was issued on October 17 by a group of 12 organizations, including the Partnership for Public Service, the Federal Times, Government Executive, Young Government Leaders, and the Senior Executives Association. The report says that it was prepared to make suggestions on improving management of the Federal government, and was the culmination of 18 months of research "…involving a bipartisan collection of political and career officials in a variety of Administrations."

When I read the report, I was surprised by some of the recommendations, and I will address other parts of the report next month. In this column, I am going to deal with recommendations regarding the probationary period, including the suggested fix as well as the information it is based on. There are some well-known organizations and the association that represents the interests of the Senior

Executives whose names are on this report. It is regrettable that they are confused about the basics of due process and that they are advising the new administration based on misinformation.

A Three to Five Year Probationary Period

Page 27 of the report contains the following:

> *Currently federal employees receive merely a one-year probationary period and on day 366 they are automatically (without action from the supervisor) afforded permanent status. This current policy (which is not enshrined in law and can be administratively changed) encourages a passive approval of employees who later present performance problems.*
>
> *The Administration should extend the probationary period to 3-5 years and require a pro-active certification by a manager that a probationary employee should be granted permanent status. If an employee is not certified by the 3-5 year period, the employee would be automatically terminated.*

Part of the incorrect information here is that the employee becomes "permanent." Permanent is a term we use in the staffing business when a job doesn't have a time limitation, like a temporary or a term appointment would have. Probationary employees don't become permanent, what they acquire is appeal rights. So, to take action on day 366 involves the full complement of due process rights, including notice, right to representation, right to review the material relied upon, and a chance to appeal to the MSPB.

Those of us with significant experience in the business know that it isn't always a one-year probationary period. For example, non-preference eligibles in the excepted service have a two-year trial period before they acquire rights, not a one year period. An employee converted in place may have a probationary period that is shorter than one year, because temporary service is credited toward completion of the probationary period (remember *Van Wersch* and *McCormick* from a few years ago?). If you are not familiar with those two decisions, the MSPB prepared a report on navigating the probationary period which you can easily pop into Google. As recommended in the report, OPM revised the regulations regarding crediting service toward completion of the probationary period. Final regulations were issued on February 7, 2008 (73 FR 7187-7188).

The transition report is correct that OPM implements regulations to control the length and operation of probationary periods. But their regulations don't confer appeal rights – that's 5 USC 75. So, OPM can require probationary periods of twenty years, but the employees are still going to have appeal rights on day 366.

OPM can't resolve this – if they could have I think they would have done it a long time ago. The report should suggest that Congress change 5 USC 7511(a)(1)(A)(ii) to eliminate the phrase "who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less," so that prior service doesn't count.

Do We Need that Long to Decide?

I, for one, don't think we need a longer probationary period. I think we need to better manage what we have. I have never seen a case, in my decades of working in this business, when the manager didn't know pretty quickly that the person didn't have what the job required. It just took him or her ten or eleven months to come to HR to do something about it.

Have we in the HR business contributed to not properly utilizing the probationary period? I think we have. In the olden days when I started doing ER work, most agencies sent notices to managers about 90 days before the probationary period was set to end requiring a certification that the

employee should be retained. With automation and downsizing in some agencies' HR staffs, these certification reports were dropped and HR offices said that managers could now see the probationary period ending date in the system and that they should stay on top of that and let us know when something was going wrong.

I agree with the report's suggestion that affirmative certification should be required. I would propose that the notice go to the supervisor at six months and ask for one of three things: 1) an affirmative response at the six-month point the employee's performance and on-the-job conduct support a positive decision on retention, 2) a response that the supervisor is undecided at this point regarding retention (which will trigger contact by the assigned HR/ER Specialist), and 3) a response that the supervisor recommends ending the employee's employment (which will trigger contact by the assigned HR/ER Specialist.) Then, of course, someone in HR needs to follow up on these reports to make sure that they are returned and, if not, that triggers contact by the assigned HR/ER Specialist.

A couple of other things are needed. I would suggest repeating the notices at 9 months. Top management needs to convey the message that the selection process isn't the end – that until a final decision has been made to terminate or retain, the manager is still responsible for the decision about this use of precious resources. Also, the HR staff needs to look at this use of their time as a good investment – not a burden. If there is a bad match, we have one limited period to identify that and separate the employee. If we wait till later, it's a lot more work with more risk. Who wouldn't say that it is a reasonable use of one's time to take action the easy way?

As always, comments are welcome!
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Whoa, Doggies; This is a Bad One
By William Wiley

I love the law. I adore justice. But sometimes I think that judges who interpret the law and thereby dispense justice need to spend a bit more time in the real world before they issue decisions that affect the real world.

Issue in point: the bad dark road that the Federal Circuit Court of Appeals is taking us down relative to due process in the appeal of removals from the civil service. For many years, the Board and the court have duked it out on the issue of due process. In the late '80s and into the '90s, when I was chief counsel to the Board chairman, MSPB issued decisions that attempted to reflect the real world of a federal workplace. Yes, yes, yes, an employee is entitled to know the reasons that his removal is proposed. However, the Board was comparatively good about forgiving agencies who did not notify the employee of every possible nit and jog that conceivably could have been some small part of a decision to fire somebody. When "extra" information would show up in the mind of the Deciding Official (DO), MSPB would evaluate whether it really made a difference to the employee and, more often than not, would find this "new" evidence to be duplicative or reinforcing, or otherwise not a violation of due process. Without saying it in a decision, the Board members were acknowledging their own personal experiences in a federal workplace, and recognizing that in the real world, a lot gets talked about around a removal, on many levels. As long as an employee was informed of the big stuff relevant to making a removal decision, MSPB tended to ignore the little stuff that might have been part of the decision but was so minor as not to have had an adverse effect on the employee.

Unfortunately, those guys wearing the black robes over at the Federal Circuit did not have the same workplace experiences, and tended to think in terms of a perfect due process world, a world in which agencies had to inform the employee in the proposal letter of darned near EVERYTHING in the DO's mind when he made the decision to remove. The big deal case in which the Federal Circuit emphasized its reality-lacking tell-all philosophy was *Stone v. FDIC*, 179 F.3d (Fed. Cir. 1999), a decision in which it spanked the Board from not reversing a removal based on due process grounds when the agency DO considered facts not in the proposal. From that point forward, smart agencies

acted to make certain that DOs were careful to restrict their thoughts and their decision letters to only those facts noted in the proposal notices. The result is that these days, it is much more likely than it was previously, the DO will have to notify the employee of extra information that has come up during the proposal period and allow additional response time. In fact, you regular readers might remember reading in our FELTG newsletter previously that we are almost at the point of suggesting that DOs issue draft decision letters to employees for response prior to a final decision being made. That's how afraid we are that a DO will inadvertently rely upon something in a decision that was not included in the proposal.

Well, now we have a new decision from the Federal Circuit that pushes us even farther down that dark and elusive road of perfect due process, *Federal Education Association v. DoD Schools*, Fed. Cir. No. 2015-3173 (Nov 18, 2016). In that case, the third-level supervisor emailed the employee's first- and second-level supervisors and said that if the employee had done what was alleged, "we need to try and terminate her." During the subsequent proposal and removal procedure, the employee was not informed of the pre-proposal email. Although the DO testified at hearing that he was not influenced in his decision to remove by the email, a 2 to 1 Federal Circuit set aside the removal based on a due process violation. It reasoned that even though the email was pre-proposal and lacked actual influence, it was an *ex parte* communication "of the type likely to result in undue pressure upon the Deciding Official."

Oh, my goodness. These types of managerial communications occur all the time in a federal workplace. Agencies do not fire career employees lightly. There is always a lot of pre-proposal discussion – among managers, Human Resources professionals, and legal offices – about what to do in a particular situation. Before *FEA v. DoD*, those discussions did not become part of a case unless they were relied upon by the DO in making her decision. Now, I don't know where the line is, the "type likely to result in undue pressure." Here the pressure came from up the chain of command. But what if it came from the director of Human Resources? Or, in an unprivileged manner from an agency attorney? Is the safest solution to provide the employee an attachment to the proposal letter that lists in detail ALL of the pre-proposal communications held regarding the employee's misconduct?

I hope I am over-reacting, that the court saw something unusual in this case that made this email a unique critical communication that we will not see again. Alternatively, I'm hoping that the Federal Circuit will grant *en banc* review and set aside this misplaced unpractical holding. Because if I am right and this thing gets upheld, I'm not sure just what agency officials are supposed to do. Wiley@FELTG.com.

EEOC Understands the Problems Agencies Can Have Implementing Decisions

By Deryn Sumner

I know firsthand the frustration agency representatives can experience when they are being asked about when a payment under a settlement agreement or administrative judge's order will be made, and they can't give a clear answer, because their agency isn't the one that actually makes the payment. Many agencies rely on other entities such as DFAS or Department of Treasury to effectuate payments, and it can be very hard to get information about when the payments will be made when it's not in your agency's control. Or, you are being asked to change personnel records or leave records from many years ago, and those records have been archived or kept in a system that is no longer used by the agency.

The EEOC understands. In *Kristy E. v. Department of Air Force*, EEOC Petition No. 0420160005 (November 18, 2016), the petitioner requested enforcement of the EEOC's prior decision and an award of $75,000 in sanctions for the continued delay in obtaining the ordered relief. This case has a convoluted and lengthy procedural history. As I talk about elsewhere in this month's newsletter, the EEOC made it a priority in fiscal year 2016 to resolve older cases on the docket. Here, the complainant filed a formal complaint in 2004,

received default judgment in her favor in 2008, and is still dealing with this case over a decade after it began. The Agency rejected the Administrative Judge's (AJ's) order granting sanctions and ordering relief and filed an appeal in 2008. The Office of Federal Operations took until 2015 to issue a decision on the appeal and ordered the Agency to implement the AJ's decision. The Agency requested several extensions of time to implement the ordered relief, noting that restoring the ordered 675.75 hours of leave posed a challenge as the employee's leave records had since been archived. The employee eventually filed a petition for enforcement and requested monetary sanctions for the delay.

The Commission, although it granted the petition for enforcement and ordered the Agency to comply with its prior Order, did give the Agency a break, and stated:

> As we noted in our November 19, 2015, letter, in situations like this, where records have been archived, it can add weeks or even months to an agency's compliance efforts. As we further noted, the Agency provided good cause, given that it lacked access to Petitioner's salary records. We note that the Agency, throughout the compliance process, stayed in contact with both the Commission and Petitioner concerning its efforts to obtain compliance with Part 6. Therefore, we decline to sanction the Agency. Also, with respect to Petitioner's request that the Agency be sanctioned with an additional damages award of $75,000, we note that such a sanction would amount to punitive damages, which are unavailable against the government or a government agency. See Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(A)(b)(1); *Jones v. Dep't of Health and Human Serv.*, EEOC Request No. 05940377 (January 23, 1995) (citing *Graham v. U.S. Postal Serv.*, EEOC Request No. 05940132 (May 19, 1994)).

The takeaway for agencies from this decision: keep in communication with the employee and the assigned compliance officer regarding attempts to comply with the Commission's orders and if there's a specific reason for the delay, such as problems obtaining archived records or effectuation of payments being outside of the agency's control, communicate that. The Commission understands the challenges that can come along with implementing these orders.

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Featured Webinar Series

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Legal writing in federal sector employment law is a specialized craft. Focus on the skills needed to produce effective, defensible, legally-sound documents in the federal sector.

Sessions will be held on Wednesdays from 1:00 – 2:00 p.m. eastern.

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February 8: **Framing Charges and Drafting Proposed Discipline**

February 15: **The *Douglas* Factor Analysis and Writing the Decision Letter**

February 22: **Writing Performance Improvement Plans that Work**

March 1: **Working with Performance Standards: From Creating to Editing**

March 8: **Writing Effective Motions for Summary Judgment**

Registration is open now, and a series discount is available through January 25.

EEO Complaint-ing a PIP? No Dice.
By Deborah Hopkins

A couple of weeks ago, Bill and I held a brand-new training class in Atlanta: Developing and Defending Discipline (next coming to San Diego February 28 – March 2). One of the questions that came up was a question we get frequently enough that I figured it was worth a newsletter article.

Here's the question: Can an employee file an EEO complaint about being put on a Performance Improvement Plan (PIP)?

Here's the short answer: an employee can file an EEO complaint for just about anything.

But, here's the more fulsome answer: a PIP is a preliminary step to taking a personnel action and, in most instances, does not constitute an adverse action sufficient to render an employee aggrieved. See *Lopez v. Agriculture*, EEOC No. 01A04897 (2000); *Jackson v. CIA*, EEOC No. 059311779 (1994) (holding that performance improvement plans which are not placed in the employee's official personnel folder do not constitute adverse actions).

That means that if an employee files an EEO complaint and the basis of the complaint is something like, "I was placed on a PIP because of my race [and/or sex, age, religion, national origin, disability, etc.]," then the agency should not accept this as a valid EEO complaint because this is not a personnel action that forms the proper basis for a complaint. Placing an employee on a PIP is what we in the business refer to as a preliminary step (see *Lopez*, above).

That's right, EEOC seems to side with management on this one. In the Analysis that accompanied the 1992 issuance of EEOC regulations at 29 CFR Part 1614, EEOC explained: "We intend to require dismissal of complaints that allege discrimination in any preliminary steps that do not, without further action, affect the person; for example, progress reviews or improvement periods that are not a part of any official file on the employee."

In other words, EEOC itself says the PIP does not "affect the person" because it is not a personnel action; is simply a chance for the employee to show she can do her job. If she's focused on filing an EEO complaint instead of meeting her performance standards during the PIP period, I think we'd all agree that the chances she'll be able to successfully survive the PIP are pretty low.

If a federal employee comes to us (or to any of our instructors who are attorneys) and asks us to represent him in an EEO complaint, and we find out he is filing a complaint for discrimination because he was put on a PIP, our reply is always, "Get back to work; you have a job to do." PIP time is not the time to file an EEO complaint; you know it's true when the EEOC has made an affirmative statement on the topic.

As an aside, someone could initiate a claim that being placed on a PIP was an act of reprisal for engaging in protected EEO activity. The reprisal standard makes it illegal "to discriminate" against someone for engaging in the EEO process or for speaking out against discriminatory policies, and putting someone on a PIP because of such activity is discrimination. While a supervisor needs only to articulate a reason to initiate a PIP, that supervisor will need solid evidence to combat a reprisal claim.

Also worth noting, a complainant could use her placement on a PIP as evidence toward a hostile work environment claim, though as stated above the PIP alone isn't sufficient to initiate the EEO complaint.

And finally, on another related matter, if an employee alleges the PIP was initiated in retaliation for protected union activity or whistleblower activity, the supervisor will also have to defend those claims under the elements of retaliation.

Remember, a PIP is not an adverse action, so documentation of the employee's unacceptable performance as a reason for initiating the PIP should meet that evidentiary standard necessary to defend against the retaliation claims. Keep your notebook close, supervisors, and with these things in mind, PIP away!
Hopkins@FELTG.com

EEOC Issues Updated Enforcement Guidance Regarding National Origin Discrimination
By Deryn Sumner

The EEOC issues guidance on various topics related to discrimination, including harassment, use of arrest and conviction records in employment, and disability discrimination. As Supreme Court cases and new laws change the landscape of discrimination law, the guidance needs to be updated to reflect these changes. This is a large undertaking as the guidance is considered official EEOC policy, and the Commission seeks public comment and must obtain approval from the majority of the Commissioners before issuing the guidance. In the last three years, the EEOC has updated and issued three enforcement guidance areas: pregnancy discrimination and related issues, retaliation and related issues, and now, in November 2016, national origin discrimination and related issues. Although the enforcement guidance relating to disability discrimination now contain a note stating that the ADA Amendments Act of 2009 made significant changes, the EEOC has not yet issued revised guidance regarding disability discrimination.

The EEOC updated the national origin discrimination guidance for the first time since 2002. Along with the guidance, it issued a question and answer series and a small business fact sheet. I find the question and answer series to be very helpful in providing advice to managers and employees, as the questions address likely hypotheticals and are written in plain language. The EEOC sought public comment in July 2016 before issuing the final revised guidance.

The guidance includes an overview, a section on what national origin discrimination is and how it can intersect with other bases of discrimination, and issues relating to language, accent, and citizenship issues. Although not an issue normally faced in federal sector employment discrimination cases, the EEOC does make clear that Title VII prohibits discrimination against individuals regardless of their citizenship or work authorization, and that immigration status is not relevant to the underlying merits of a charge of discrimination. Further, threats to report an employee's immigration status can constitute retaliation if the employee has engaged in protected EEO activity.

I found the section on intersectional discrimination to be the most interesting, because often when consulting with clients or potential clients, it can be difficult to parse through the exact basis that is leading to the disparate treatment or harassment. For example, a female employee who is a practicing Muslim from an Arab country who objected to workplace comments regarding her religion or country of origin may face discrimination for any one of, or perhaps multiple protected bases. The Updated Enforcement Guidance regarding national origin discrimination can be found here: https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm.
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Your Life Just Got Better (and Maybe Longer)
By William Wiley

Earlier in this newsletter, we explained how the recently enacted "Administrative Leave Act of 2016" limits the length of time that an agency can keep an employee on paid leave while an investigation is being conducted. We also noted that an employee who has left the agency during the course of an investigation must have his OPF annotated after departure if the results of the investigation include "adverse findings." Clearly, these are important aspects of the legislation for those legislators who proposed the bill initially. However, tucked in this legislation is a much more important change to our business of federal accountability, a change that affects every supervisor and every workplace in

government much more than do the restrictions on time limits for investigations and annotations in retired OPFs stored in some vault in a mountain in Virginia:

Notice Leave

The situation has been this for nearly 40 years:

1. The law requires that a bad employee be kept on the payroll for at least 30 days after he is given notice that he is probably about to be fired.
2. OPM, in a snit of ridiculous, short-sighted, rule-making, has in force a regulation that says that normally an employee who has been given notice of an impending removal is to be kept in her regular position.
3. Therefore, agencies who don't think things through keep bad employees in the federal workplace where they have access to government computer systems, coworkers, and members of the public during the most stressful of moments one can imagine, with nothing to lose and unbounded harm that can be caused. All you need for a mass killing in a federal workplace is a depressed individual with an automatic rifle carrying a valid government ID badge and a proposed removal notice.

According to the Bureau of Labor and Statistics, two people are killed by a coworker every workday in America. You would think that the policy writers at OPM would have more concern for the lives of their fellow civil servants.

Add to this foolishness the decisions of some senior managers that bad employees should not be placed on administrative leave during the 30-day notice period that follows a proposed removal. This combination of poorly-thought-through policy mandates creates a burning fuse of potential workplace death that could easily be avoided if those who made the policy worked on the front lines where their lives would be in danger.

But finally, we have relief from this awful policy combination. The new law creates a form of excused absence to be known henceforth as Notice Leave (NL). It provides authority for an agency to place the bad employee into a paid excusal status for anyone whose removal has been proposed. The length of NL, unlike the restrictions placed on IL, is "the duration of the notice period."

We've been fighting for this sort of protection for the federal workplace so long that they should have named it "FELTG Leave." But we'll take comfort in knowing that maybe somebody who is reading this newsletter today will be around for another edition because of the agency's authority to get people out of the workplace once their removal is proposed, no matter what they call it.

Be careful, though. The law lays out several criteria that have to be met before NL (aka FELTG-L) can be enforced. If your agency's leadership fails to see the importance of getting bad employees out of the workplace once their proposal is removed, your policy makers may make the mistake of making it difficult to authorize NL. So stay tuned. Here at FELTG we have your back and will soon be giving specific recommendations to you and your policy makers as to how to handle this new flexibility for the greatest benefit, in spite of what some might see as road blocks to fully exploiting its benefits.

Hey, Congress. Thanks for the early Christmas present. Whether you realize it, or not. Happy Holidays right back at you.

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A FELTG Farewell to Sue McCluskey!

FELTG would like to thank Sue McCluskey for providing our students with her stellar instruction and unparalleled experience during ***FLRA Law Week*** the last several years, and we wish her the best in retirement.

We miss you already, Sue!