Federal Employment Law Training Group
Teaching the Law of the Federal Workplace

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Life in the Time of Coronavirus

Unless you've been without Wi-Fi or cable for the last two months, you've heard of the novel coronavirus, or COVID-19. Last week, the World Health Organization categorized the virus as a global pandemic, disrupting normal life in the US, and around the world.

FELTG is staying on top of recommendations from the health experts, and because safety is priority, our in-person classroom training is postponed for the next 30 days. We promise to keep you posted, in the newsletter and on LinkedIn and Twitter.

In the meantime, we are announcing the FELTG Virtual Training Institute's first-ever live training event, ***Emerging Issues in Federal Employment Law***, April 21-23, and you can attend from wherever you are, agency office or home. This three-day event includes sessions from your favorite instructors on current issues that don't go away even during a global pandemic. Join us for one session, or attend them all.

FELTG also has a number of upcoming webinars, which teleworkers can attend from home, and we are also available to provide webinars to specific agencies, on any of our training topics, as an alternative to traditional onsite training.

In this month's newsletter, we tackle generic performance standards, leave myths, improper medical inquiries, investigations, and more.

Deb

Take care, Deborah J. Hopkins, FELTG President

UPCOMING OPEN ENROLLMENT TRAINING CLASSES

Virtual Live Sessions

Emerging Issues in Federal Employment Law, April 21-23

UnCivil Servant: Holding Federal Employees Accountable for Performance and Conduct, April 29-30

Classroom Training

Note: FELTG is planning to hold these sessions with limited enrollment, allowing plenty of space for each student, but will keep close watch on the COVID-19 situation and adjust the schedule if necessary.

EEOC Law Week
Washington, DC
April 27-May 1

Developing and Defending Discipline: Holding Federal Employees Accountable
San Juan, Puerto Rico
May 5-7

Advanced Employee Relations
Washington, DC
May 12-14

Absence, Leave Abuse & Medical Issues Week
Washington, DC
New dates! June 8-12

Employee Relations Week
Denver, CO
June 15-19

Managing the Workplace During the Coronavirus Pandemic
By Dan Gephart

First, it was the guidance from the Office of Personnel Management less than two weeks ago. And then as last week ended, the White House recommended that agencies ensure continuity of operations and keep their employees safe by expanding telework and leave options. We are looking at a new federal workplace reality for, at least, the near future.

Here are some suggestions for managing the workplace, while protecting your employees, in this new reality.

Get over your issues with telework. It's been 10 years since the *Telework Enhancement Act* was signed by President Barack Obama. Your agency should have a plan, even if that plan was scaled back over the last couple of years. One of the reasons telework was touted so strongly once upon another Administration is because it's an agency's best tool to ensure the continuity of its essential functions.

It's hard to imagine a situation that aligns itself more with the use of telework. You have seemingly healthy employees who can work, but because of their contact with a person who may be symptomatic, they are quarantined out of the workplace.

Earlier this month, OPM sent out the following guidance:

"For an employee covered by a telework agreement, ad hoc telework arrangements can be used as a flexibility to promote social distancing and can be an alternative to the use of sick leave for exposure to a quarantinable communicable disease for an employee who is asymptomatic or caring for a family member who is asymptomatic. An employee's request to telework from home while responsible for such a family member may be approved for the length of time the employee is free from care duties and has work to perform to effectively contribute to the agency's mission."

Most agencies would agree that telework is not the right option for employees who are taking care of children at home during the workday. And that was the standard practice – until recently. OPM suggested that agencies loosen up their policies to allow employees to telework even if they're caring for children at home due to school closings.

Once this health crisis is in the rearview mirror, I hope the Administration, OPM and agencies reassess the value of telework and expand programs so they are better prepared for future emergency situations. And it doesn't hurt that telework will also help agencies recruit and retain employees, increase productivity, reduce government spending, and accommodate some employees with disabilities.

Case and Program Consultation

FELTG's team of specialists has decades of experience. They can help you tackle your most challenging workplace issues. If you have a difficult case or situation and think FELTG can help you, email us at info@feltg.com or call 844-283-3584.

Hold employees accountable for performance and conduct. A telework assignment is not an offer to Netflix and Chill. Remember this: Work is not a place, it's a thing you do. And now, more than ever, you need employees who are doing their "thing" as best they can.

Follow these best practices as you manage teleworkers:

- Review your employees' telework agreements.
- Communicate your expectations.

- Model expected behavior, especially if you are also teleworking.
- Support your employees. Be available to them.
- Don't over-monitor.

What about asymptomatic employees who were struggling with performance before telework became an option? If an employee is currently in the middle of demonstration period and is placed on telework, that demonstration period should continue as scheduled, whether there is a week, two weeks, or more left.

However, if an employee isn't eligible for telework while they are quarantined, then it's a different story. If the employee is on sick leave weather and safety leave, their approved time off cannot be used against them. Re-start the demonstration period when their leave ends and they return to the physical workplace.

Authorize weather and safety leave. Wait up, did I just say weather and safety leave? Are we expecting a late winter Snowmaggedon?

Not at all. OPM and the White House suggest that weather and safety leave be used for those asymptomatic employees who are "subject to movement restrictions" and aren't a part of the telework program.

Per OPM: "This determination is based on the significant safety risks for other employees and the general public that would be incurred if such an employee were allowed to travel to and perform work at the employee's normal worksite."

There is this disclaimer in OPM's guidance: "The use of weather and safety leave would not be appropriate in cases of communicable diseases that have not been designated as quarantinable by public health authorities."

Weather and safety leave isn't the only option. Review OPM's guidance for information on the use of sick leave, annual leave, and more. And you'll be sure to get answers when you join us for Absence, Leave Abuse and Medical Issues Week in Washington, DC from June 8-12, 2020.

Don't get hung up on sick notes. OPM wisely allows agencies to be liberal with doctor note requirements for sick leave of three days or more requirement. (Quick reminder for future non-COVID-19 days: Agencies may require medical evidence for which sick leave is grant for fewer than three days if it determines the evidence is necessary.)

The government doesn't want someone who has had contact with the coronavirus to be in the workplace, possibly infecting others. But tests for the virus are hard to come by so far. For that reason, OPM asked agencies to be "mindful about the burden and impact of requiring a medical certificate."

"An agency may consider an employee's self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence." Gephart@FELTG.com

Generic Standards that Fail to Measure Performance Effectively
By Barbara Haga

I've written about conduct issues making it into performance plans when those matters should be dealt with through other means, but there are other problems that we should address. This month, I'll address generic standards.

I am not suggesting that agencies shouldn't use generic standards. I am actually a fan of the concept – if they are written well. Unfortunately, there are a lot of examples of standards that are very difficult to use because they cover too much in one standard.

Here's an example: In this system, the manager sets the elements and then applies these generic standards. So, the manager develops the "what" that's being measured by these words. This is a Fully Successful standard that would apply to all jobs, no matter what the grade.

> The employee demonstrates consistently successful performance that contributes positively to organizational goals. The employee effectively applies technical skills and organizational knowledge to deliver results based on measures of quality, quantity, efficiency, and/or effectiveness within agreed-upon deadlines, keeping the rating official informed of work issues, alterations, and status. The employee successfully carries out regular duties while also handling any special assignments and identifying opportunities to improve organizational operations/results that consider stakeholder perspectives. The employee plans and performs work according to organizational priorities and schedules. The employee communicates clearly and effectively and works effectively with others to accomplish organizational objectives.

Let's review sentence by sentence.

> *The employee demonstrates consistently successful performance that contributes positively to organizational goals.*

The first part just repeats the definition of Fully Successful. I'm not sure the second part is something for which we hold employees accountable. That's on management to set measures that support agency goals.

> *The employee effectively applies technical skills and organizational knowledge to deliver results based on measures of quality, quantity, efficiency, and/or effectiveness within agreed-upon deadlines, keeping the rating official informed of work issues, alterations, and status.*

This is the diamond in this standard. This is what employee measures should have in them, and it should be universally applicable.

> *The employee successfully carries out regular duties while also handling any special assignments and identifying opportunities to improve organizational operations/results that consider stakeholder perspectives.*

I would like to review this one in two parts.

I view the first part related to special assignments as a problem. First, just being on a special assignment shouldn't be the measure. The quality of the work in that assignment is what should be measured. However, it should be measured based on the same criteria that apply to other assignments - applying technical skills and organizational knowledge and the other criteria in the second sentence. Secondly, special assignments shouldn't outweigh the bulk of an employee's work, which hopefully

would be the normally assigned duties. And, often the employee has no control over what special assignments they are given. What we don't want to create is perpetual volunteers who think that having some special project gets them a higher rating than the coworker who is plugging away doing the work of the unit. Third, not every job has these kinds of opportunities. They may be jobs in remote locations, lower grade jobs, etc.

"Identifying opportunities to improve organizational operations/results that consider stakeholder perspectives" is written at a very high level. Not every employee is going to have these kinds of opportunities either. It might be more reasonable to ask for well-thought out input regarding work procedures. That might be attainable for a lot more grades and types of jobs. You also want to qualify this, so it's not just a lot of ideas, but they are ideas you could actually implement.

The employee plans and performs work according to organizational priorities and schedules.

This one is reasonable for a lot of jobs that have the ability to decide what is performed when. However, lower-graded positions may have little control in this regard, so it may be difficult for the manager to use as a measure.

The employee communicates clearly and effectively and works effectively with others to accomplish organizational objectives.

Before jumping in with this portion of the standard, let's think about designing elements that work effectively. The way I explain it is that you would want to get all of the work that requires the same skills and abilities in one place. You could have someone who is very good technically but whose writing and speaking skills are not very good. You could have someone who is very good technically who is a pain in the butt to work with.

I would suggest that you hold people accountable for these things but to do it in a separate element. There are two reasons:

- A generic standard like this usually is applied to some technical aspect of a job. It's common to see HR Specialists in our business with an element on ER work and an Element on LR work (I am not saying that's good, but it's common). With this element description, the manager would have to assess if the employee communicated effectively on ER matters and then separately address the effectiveness of LR communication, and then make that same assessment on all of the other elements. It makes it very tough for the supervisor.

- The other issue I see with this is that the aspect of communicating effectively should really be critical by itself. Can someone succeed in our line of work if they can't do these things? Isn't that the issue that time and again we hear about from customers that HR doesn't respond, doesn't clearly explain, doesn't provide options, etc. I doubt that HR is necessarily unique in this aspect of performance. I would think that similar issues come up in other lines of work.

Our Employee Relations Week class June 15-19 in Denver, CO, will include much more discussion on writing good standards. Haga@FELTG.com

What's Happening at the FLRA?

Join FELTG Instructor Joseph Schimansky for the 60-minute webinar *Significant Cases and Developments at the FLRA* on June 6 from 1-2 pm ET. Register Now.

Do You Believe These Myths About Leave?
By Deborah Hopkins

If you are part of the FELTG Nation, you probably already know that federal employees have significant rights to various types of leave. In fact, starting this fall, most will receive even more leave entitlements, in the form of paid family leave. That said, leave is not always an entitlement. Today I want to discuss some of the myths surrounding federal employee leave.

Myth: Employees always have the right to dictate their leave status if they have leave on the books.

Here's the scenario: Your employee doesn't come in to work one day when she's scheduled, and doesn't request leave or otherwise notify the supervisor she won't be in. The next day, she comes in and tells the supervisor to put her on annual leave for yesterday. She has 32 hours of annual leave on the books. Must the supervisor grant the annual leave?

No. Annual leave is not an entitlement, and the supervisor may deny the request so long as the denial is reasonable. Is it reasonable to deny a leave request after the fact, when there is no entitlement, and the employee did not follow proper leave procedures? You bet. The employee who doesn't come to work when scheduled is not on approved annual leave, she is AWOL.

In addition, there's also a potential second disciplinary charge for failing to follow leave procedures. If you need good aggravating language, look no further than *Yartzoff v. EPA*, 38 MSPR 403 (1988). This case discusses how an agency is "doubly burdened" by an unscheduled absence; once for the loss of the employee's services, and again for the loss of the opportunity to plan for the absence.

We've said it before, and we'll say it again: Federal employees do not have the legal right to place themselves on leave. There is a three-step procedure that must be followed according to the law regardless of the type of leave requested, and if you're not doing things this way, you are needlessly making your life more difficult.

1. Employee submits a leave request according to agency procedures

2. Supervisor considers the request

3. Supervisor either grants or denies the request.
   - Sometimes the supervisor must grant the leave; other times it's discretionary.

That's the law.

Myth: If an employee is at work, she can't be charged AWOL.

I think we all know that just because someone is at work, doesn't mean she is actually working. Since the beginning of time – or at least since the beginning of the Civil Service Reform Act – employees who are on the clock but not doing government-related-work can be charged AWOL, or unauthorized absence if that's what your agency calls it. A few cases to get you started:

- An agency may charge an employee with AWOL for conducting personal business while on duty. *Mitchell v. DoD*, 22 MSPR 271 (1984)
- Sleeping on the job; wasting time. *Golden v. USPS*, 60 MSPR 268, 273 (1994)
- If an employee is insubordinate and is told to leave the work site until he agrees to follow directives, he is not on approved leave; he is AWOL. *Lewis v. Bureau of Engraving and Printing*, 29 MSPR 447 (1985).

Myth: An employee may only use sick leave if he, or a close family member, is incapacitated for duty.

Not long ago, I had a federal employee in my class whose sister had recently died. The employee requested sick leave to attend the funeral, and her supervisor denied the leave request. Well, that denial was absolutely wrong.

Under 5 CFR § 630.401(a)(4), an employee is entitled to use up to 104 hours (13 days) of sick leave each leave year for family care and bereavement, which includes making funeral arrangements or attending the funeral of a family member. The definition of family member in these instances covers a wide range including spouse; parents; parents-in-law; children; brothers; sisters; grandparents; grandchildren; step parents; step children; foster parents; foster children; guardianship relationships; same sex and opposite sex domestic partners; and spouses or domestic partners of the aforementioned, as applicable. Check out OPM's full list of Definitions Related to Family Member and Immediate Relative for Leave Purposes.

The supervisor in this case could have legally denied the sick leave request only if the relative did not meet the definition of family member, if the employee had already used 104 hours of sick leave on family-related care that leave year, or if the employee did not have accrued sick leave. Otherwise, the leave was an entitlement and should have been granted.

There are also a few other areas where an employee may not be sick but has an entitlement to sick leave (e.g., routine dentist appointment), so you'll want to be sure to read the regs if you're not familiar with those.

Myth: The agency may dictate the employee's pay status during FMLA.

A lot of supervisors miss this one, but the employee who is on FMLA gets to decide if the time off will be recorded as sick leave, annual leave, LWOP, or any combination of the three. Yes, that means an employee can use LWOP during FMLA and keep all his annual leave and sick leave during FMLA, and save it for a rainy day. The agency has no choice in the matter, so don't even try to force an employee to use accrued leave. The law is on the employee's side.

If you like these leave topics, we have a couple of upcoming webinars on the topic, as part of our Supervisor Training Series. Join us if you can! Hopkins@FELTG.com

Webinar Series: Navigating Challenges in the EEO Process

Equal Employment Opportunity can be a long and often complicated process. And some challenges are more troublesome than others. It's those topics that FELTG instructors Katherine Atkinson, Meghan Droste and Barbara Haga will tackle during this webinar series. If you missed the first webinar earlier this month, no worries.

The series continues with three other webinars over the next several weeks.

April 9: When the ADA and FLMA Collide

May 7: What Do You Do When Contractors File EEO Complaints?

June 4: When Investigations Go Bad: Keeping Integrity in the EEO Process.

Webinars will be held on Thursdays from 1-2 pm ET. Joins us for one of the webinars. Join us for two. Or join us for all of them and learn strategies to ensure that you successfully navigate the often perplexing EEO process.

Monthly Observations, Guidance, Tools, and Tips to Make Your Job Easier

Supervisor Survival Series: Let the Whistle Blow

Over the past few months, we have seen an uptick in media coverage about federal employees who blow the whistle, then accuse the agency of illegal reprisal in the wake of the whistleblowing. While we know that not everything in the media is reported as accurate, there is truth to some of these claims, and as a result are a few of takeaways that supervisors should remember:

- Federal employees are permitted to make public disclosures of waste, fraud, and abuse in the federal government, and the law protects them from illegal reprisal.

- Even if you don't like what the employee discloses, if it is protected under the Whistleblower Protection Act and Whistleblower Protection Enhancement Act, it is illegal for you to treat the employee adversely as a result of the disclosure.

- If your agency chooses to take an action against a whistleblower (for example, discipline, performance, reassignment) then the action cannot be motivated by the whistleblowing or be issued because the person is a whistleblower. The required burden of proof in taking an action against a person who happens to be a whistleblower is *clear and convincing*, which is a much higher burden than typically needed in workplace actions.

The Good News – Investigations are the Fun Part!
By Ann Boehm

Unless you've been hiding under a rock for the last 30 years, chances are that at some point you have watched an episode of *Law and Order.* (And if you haven't seen an episode, I'm pretty sure there's one playing on some channel at this very minute.)

To run for three decades, the show must be onto something, and it is. The format. After the crime is discovered, the first half hour is devoted to an investigation by the detectives. The second half focuses on the criminal trial.

Personally, I generally lose interest once the detectives are done. The investigation part is much more interesting than the trial part. (Perhaps becoming an attorney was a bad idea for me.) The investigation part is also the most important. If the detectives don't do their job right, the lawyers can't do their job and convict the bad guys.

This is true in the world of federal misconduct. A good investigation makes all the difference.

So, if a good investigation makes all the difference, why do I so often get blank stares at training sessions when I ask, "Who is responsible for investigating misconduct?" That concerns me. It may indicate a couple of issues: The people who do the investigating are not properly trained (because no one knew they were supposed to be the ones investigating); or, even worse, the agencies aren't investigating the misconduct properly before disciplining employees.

When I teach our Investigations course, I always emphasize that the point of investigating is to find the facts, not "get" the employee. Employees who allegedly engaged in misconduct should want the matter to be properly investigated. [Editor's

note: Our next open enrollment Workplace Investigations Week will be held August 24-28 in Denver. To book onsite Investigations training, contact Gephart@FELTG.com.]

In my experience, a lack of investigation can result in improper discipline, and a good investigation can clear an innocent person. And of course, a good investigation will support proper disciplinary action so that the agency will prevail in any grievance, arbitration, or EEOC or MSPB litigation.

Here are two anecdotes. I have a friend who was accused of having improper contact with a contractor. She received a letter of reprimand. No one investigated the alleged misconduct – they just issued the letter. She grieved it and demonstrated she did nothing wrong. It put her through tremendous angst and a lot of effort to clear herself *after* the issuance of the reprimand. The agency had to spend time considering a grievance and ultimately rescinding the letter of reprimand. A good investigation beforehand would have saved the agency time and effort and the employee stress.

In another instance, I had a friend accused of pretty serious criminal misconduct. Fortunately, the agency conducted a top-notch investigation and quickly determined there was no misconduct. The people making the misconduct allegations were misinformed. The employee was cleared.

The detectives on *Law and Order* have a harder job than agency misconduct investigators.

First, they have to get enough evidence to meet the criminal burden of proof – beyond a reasonable doubt. The burden of proof for federal administrative cases is preponderance of the evidence or "more likely than not." The federal administrative investigator also is not bound by the many constitutional restrictions and rules of evidence that often doom the *Law and Order* investigations.

But investigations must be done, and they must be done correctly.

A note to agencies: Make sure you have policies that address misconduct investigations. Make sure it's clear who is to conduct those investigations. And make sure the investigators know how to investigate.

Investigations are the fun part. They will either assist the agency with proper discipline or clear a wrongly accused employee. Wouldn't you rather be Detective Lenny Briscoe than District Attorney Jack McCoy? And if you *are* Jack McCoy, don't you want the talents of Lenny to help you get the best information for your case?

Good investigations benefit all! Boehm@FELTG.com

Supervising Federal Employees: Managing Accountability and Defending Your Actions

No other training provides the depth and breadth of guidance federal supervisors need to manage the agency workforce effectively and efficiently. You missed the first couple of webinars? No problem, you can jump into the series at any time. Here are the next few webinars in the series:

April 14: Addressing Special Challenges with Performance

April 28: Providing Performance Feedback That Makes a Difference

May 12: Disciplining Employees for Misconduct, Part I

May 26: Disciplining Employees for Misconduct, Part II

June 9: Tackling Leave Issues I

June 23: Tackling Leave Issues II

June 9: Combatting Against Hostile Work Environment Harassment Claims

The series runs through September.

You and What Army?
By Meghan Droste

Way back in January 2018, which feels like a lifetime ago at a time when every day brings at least 20 urgent news alerts and many more times as many things to worry about, I wrote my first article for this newsletter. I discussed the Commission's decisions in a case in which the agency repeatedly refused to comply with orders from OFO. (The decisions are in the *Selene M. v. Tennessee Valley Authority* case, Appeal No. 0720150024, Request No. 0520170121, and Petition No. 0420170027, if you're curious.) The agency repeatedly explained why it was not complying with the Commission's orders, and the Commission repeatedly told the agency to do it anyway.

When I bring this case up during classes, I get questions about the Commission's ability to enforce its decisions. After all, the Commission, like other judicial bodies, can only do so much when it tells a party what to do (or not do). The Commission has no army to compel agencies to comply. Does that mean agencies get a free pass? Not quite, as we can see in the recent decision in *Alma F. v. Department of the Army*, EEOC Pet. No. 2019004337 (Feb. 4, 2020).

The administrative judge found in the complainant's favor and ordered various types of relief. The agency appealed the characterization of backpay as pecuniary damages. The Commission agreed, holding that back pay was equitable relief, and ordered the agency to comply with the order and file documentation outlining its compliance. All of that took place in 2015. By June 2016, six months after the Commission's decision, the agency had failed to file any documentation or respond to the Commission's requests for evidence of compliance. As a result, the Commission opened a petition for enforcement. In January 2017, the Commission again ordered the agency to comply and submit documentation. The agency again failed to respond, resulting in the February decision.

Remarkably, the Commission noted in its decision that the agency failed to provide evidence of compliance in *19 other cases*, all with petitions for enforcement from 2019. The Commission reminded the agency that failure to comply with its orders could result in any of the measures outlined in 29 C.F.R. § 16414.503, including a show cause order to the head of the agency or certification to the Office of Special Counsel. It then ordered the agency to comply with the previous orders and provide a report with an analysis of "Agency-wide EEO reporting on compliance with EEOC orders to identify problem areas," and a "detailed action plan setting forth how the problems identified in its analysis will be corrected, delays ended, and compliance reporting brought in accordance with EEOC regulations."

With the Commission seemingly lacking a method to force compliance, it might be tempting to take a "you and what army?" approach. However, as you can see from the potential repercussions, I definitely would not recommend that. Droste@FELTG.com

More on Probationers: FELTG Answers Your Follow-Up Questions
By Deborah Hopkins

In a recent newsletter, I discussed the differences between initial appointment probationary periods and supervisory probationary periods. As a result of this discussion, FELTG received some follow-up questions, including requests for explanation of more complicated scenarios involving probationary periods. So here goes.

What happens if the agency wants to remove a probationary employee for pre-employment reasons?

If a probationer in the competitive service is removed for reasons occurring after they begin work, such as a performance or

conduct issue, they have no MSPB appeal rights and no right to due process, with limited exceptions. However, if a probationer is being removed for a condition that arose before they started their job at a federal agency (for example, they lied on their job application), then they are entitled to a three-step procedure that mimics due process:

1. Notice for the reasons why the agency is proposing the action;
2. A reasonable amount of time to file a written response; and
3. A written decision at the earliest practicable date, with notice of a right to appeal to MSPB.

See 5 CFR § 315.805.

Note: This three-step process does not follow the same 30-day notice timeline as a proposed removal actions for a fully vested career employee. These procedures are generally abbreviated by agency policy to be a few days at most.

Does a reinstated employee have to serve a new probationary period?

When an agency appoints an individual using reinstatement authority, the individual does not have to serve a probationary period if during any prior service that forms the basis for the reinstatement, the individual successfully completed probation. 5 CFR 315.401, 801(a); *Aviles-Wynkoop v. DoD*, DC-315H-16-0327-I-1 (2016)(NP).

How are temporary appointments related to probationary status?

For many years, individuals employed in a series of temporary appointments accrued MSPB appeal rights even with a few days break in service between appointments. The reason for this was the theory of a Continuous Employment Contract. See *Roden v. TVA*, 25 MSPR 363 (1984).

A few years ago, though, MSPB changed its stance and said in order to gain MSPB appeal rights, temporary employees must have more than a year of continuous, uninterrupted employment with no break in service – not even a day or two. *Winns v. USPS*, 2017 MSPB 1. See also *Bough v. DoI*, Fed. Cir. 2018-1477, 1478 (April 5, 2019). This "current, continuous standard" for temporary employees allows them to count their work toward completion of probation when the prior service:

– Is in the same agency,
– Is in the same line of work (determined by the employee's actual duties and responsibilities); and is
– Continuous (without a service break).

5 CFR 315.802(b)

In the excepted service, prior intervals of permanent service that are separated at the time of removal by a period of temporary service do not count toward the two-year requirement, even if there is no break in service when one considers both temporary and permanent positions. *Roy v. MSPB and DoJ*, 672 F.3d 1378 (Fed. Cir. 2012) (employee who had 8 years permanent employment and 1.5 years permanent employment separated by an 18-month temporary appointment did not have MSPB appeal rights).

What if an employee voluntarily accepts a job with a probationary period?

There are some positions in the federal government that may require a probationary or trial period regardless of the employee's employment history with the government. Employees have appeal rights, *regardless of whether they are serving a probationary/trial period*, if they have:

– Current continuous employment (as defined above) of:
  • One year in the competitive service (excluding service in temporary positions with a duration of two years or less), or
  • Two years in the excepted service, and

- For veterans: one year in either service.

Van Wersch v. HHS, 197 F.3d 1144 (Fed. Cir. 1999), *Claiborne v. VA*, 2012 MSPB 101 (August 30, 2012).

This means that an employee in the competitive service who has completed a year of current, continuous service (not a temporary appointment) has full procedural and appeal rights even if that individual is serving a probationary period. 5 USC 7511(a)(1)(A). If the individual is in the excepted service then the full appeal rights vest after two years even if that individual is serving a probationary period. 5 USC 7511(a)(1)(C). A person eligible for veterans preference will receive full procedural and appeal rights after one year of "current continuous service in the same or similar positions" whether the veteran is in the competitive or excepted service. 5 USC 7511(a)(1)(B).

In summary, employees have two separate and distinct avenues to appeal rights:

- Employees who have completed a probationary period have appeal rights.
- Employees who have a year of current service prior to the termination have appeal rights.

A special note for DOD, the probationary period is two years instead of just one, so some of your timelines may have to be modified accordingly. Hopkins@FELTG.com

Tips from the Other Side: March 2020
By Meghan Droste

I imagine many of you are spending fair amount of time right now refreshing your online news source of choice for updates on COVID-19. There's no doubt that this is a stressful and possibly scary time, with a lot of unknowns about how and for how long this pandemic will impact our day-to-day lives. If you are concerned, I completely understand.

In this stressful time, I want to take a moment to remind you about improper medical inquires. In short: Don't make them! Slightly longer advice: Be mindful of when you can ask employees for medical information or documentation. A global pandemic does not suspend the application of the Rehabilitation Act or the Americans with Disabilities Act, so it is important to remember that agencies may only request medical information in very specific circumstances.

Employers may only ask current employees for medical information or documentation if it is job-related and consistent with business necessity. This means that in many (but not all) circumstances, an agency may request medical documentation to support a request for reasonable accommodations. It also means that an agency cannot request medical documentation because it is curious and wants to know if an employee has a medical condition. If one of your employees shows up with the sniffles in the next few weeks, you should not automatically demand a letter from their doctor establishing that it is seasonal allergies and not something worse.

Agencies may also request medical information when there is a concern an employee will pose a direct threat while performing the essential functions of their position due to a medical condition. Be careful with these inquiries as well. An agency may not request all medical records, just those related to the specific condition at issue, and the request must be based on an individualized assessment and on reasonable medical judgment that relies on the most current medical knowledge and/or best objective evidence. That Facebook post you just saw about the symptoms of COVID-19? It's not objective evidence. The musings of a health expert on TV? Also not objective evidence.

Tread carefully out there and when in doubt, check with knowledgeable folks at your agency before asking an employee to reveal information about their health. (Also, wash your hands!) Droste@FELTG.com