Removal As A Result Of An On-The-Job Injury

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Introductions

• Name
• Agency & Location
• Position – FECA and/or Employee Relations
• Any experience with removal as a result of an on-the-job injury?
Objectives

• Explain restoration rights.
• Explain the steps for removing an employee from federal service as a result of their on-the-job injury.
• Learn how to identify cases that may be eligible for removal.
• Describe the information that the Injury Compensation Specialist should and shouldn’t provide to Labor & Employee Relations (LER).
• Explain LER’s process for removing an employee.
Objectives (cont’d)

• Explain the Douglas Factors to be considered for a removal (or any disciplinary) action.
• Discuss related case law.
• Review important things that an agency should consider before removing an employee as a result of an on-the-job injury.
• True or False Exercise
Restoration Rights

- The Office of Personnel Management (OPM), not the OWCP, has jurisdiction over retention and restoration rights and is responsible for enforcing this provision. The OPM regulations at 5 CFR §353.301 provide an overview of restoration rights for fully recovered and partially recovered employees.
5 CFR §353.301, Restoration Rights

- (a) Fully recovered within 1 year. An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee's basic entitlement is to the former position or equivalent in the local commuting area the employee left. If a suitable vacancy does not exist, the employee is entitled to displace an employee occupying a continuing position under temporary appointment or tenure group III. If there is no such position in the local commuting area, the agency must offer the employee a position (as described above) in another location. This paragraph also applies when an injured employee accepts a lower-grade position in lieu of separation and subsequently fully recovers. A fully recovered employee is expected to return to work immediately upon the cessation of compensation.
(b) Fully recovered after 1 year. An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the excepted service. If the individual cannot be placed in the former commuting area, he or she is entitled to priority consideration for an equivalent position elsewhere in the agency. (See parts 302 and 330 of this chapter for more information on how this may be accomplished for the excepted and competitive services, respectively.) This subpart also applies when an injured employee accepts a lower-graded position in lieu of separation and subsequently fully recovers.
Step 1: Review Chargeback to Identify Eligible Cases

- Injured worker (IW) has been out of work for at least 1 year
  - CA-810, Section 8-2 Retention Rights: Under 5 U.S.C. 8151, an employee who recovers within one year of starting compensation has mandatory rights to his or her old position or its equivalent, regardless of whether he or she is still on the agency rolls.
- No end in sight – medical does not provide any assurance that the claimant will return to work in any capacity in the near future.
  - Medical documentation should be recent (within one year for Periodic Roll cases). If there is no recent medical documentation in the file, the Injury Compensation Specialist should obtain updated medical prior to considering the case for a removal.
Step 2: Discuss With Labor & Employee Relations (LER)

• Provide LER with the dates that the Injured Worker (IW) has been out of work and a general overview of the IW’s work status

• IMPORTANT: Do not provide LER with medical documentation or specifics! It is a violation of the Privacy Act for documents or information from the FECA case file to be used in administrative actions (e.g., EEO complaints, disciplinary or separation actions) without the employee’s consent.
Step 3: LER Sends an Availability for Duty letter to the IW

- The letter will request medical documentation containing the following information based on 5 CFR §339:
  - History of the medical conditions, including references to findings from previous examinations, treatment, and responses to treatment;
  - Clinical findings from the most recent medical evaluation, including any of the following which have been obtained: findings of physician examination; results of lab tests; x-rays; EKGs and other special evaluations or diagnostic procedures; and in the case of psychiatric evaluation of psychological assessment, findings of a mental status examination and the results of psychological tests, if appropriate;
  - Diagnosis, including current clinical status;
  - Prognosis, including plans for future treatment and an estimate of the expected date of full or partial recovery;
Availability for Duty Letter (cont’d)

• The letter will request medical documentation containing the following information based on 5 CFR §339:
  • Explanation of the impact of the medical condition on overall health and activities, including the basis for any conclusion that restrictions or accommodations are or are not warranted, and where they are warranted, an explanation of their therapeutic or risk avoiding value;
  • Explanation of the medical basis for any conclusion which indicates the likelihood that the individual is or is not expected to suffer sudden or subtle incapacitation by carrying out, with or without accommodation, the tasks or duties of a specific position; and
  • Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well stabilized and the likelihood that the individual may experience sudden or subtle incapacitation as a result of the medical condition.
Step 4: Propose Removal

- If the medical documentation indicates there is “no end in sight” to total disability, the agency can consider removing the employee. LER will work with the “proposing official” (usually the IW’s immediate supervisor, but depends on local processes and Collective Bargaining Agreements) to issue a Notice of Proposed Removal to the IW.

- A common charge that an agency may base a proposed removal on is Medical Inability to Perform.
Douglas Factors

• The Merit Systems Protection Board in its landmark decision, *Douglas vs. Veterans Administration*, 5 M.S.P.R. 280 (1981), established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct.
Douglas Factors

Factors that must be considered in a removal action (or any disciplinary action) include:

(1) 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;

(2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

(3) the employee’s past disciplinary record;

(4) the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
Douglas Factors (cont’d)

Factors that must be considered in a removal action (or any disciplinary action) include:

(5) 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 work ability to perform assigned duties;

(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

(7) consistency of the penalty with any applicable agency table of penalties;

(8) the notoriety of the offense or its impact upon the reputation of the agency;
Factors that must be considered in a removal action (or any disciplinary action) include:

(9) 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;
(10) the potential for the employee’s rehabilitation;
(11) 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
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.
Step 5: Removal Decision

- Following a reply period (e.g., 7 days from the date of the proposed removal), the Deciding Official will issue a Decision on Notice of Proposed Removal with a removal effective date (no sooner than 30 days from the date of the Notice of Proposed Removal).

- The IW may appeal the decision via a variety of channels (e.g., Merit Systems Protection Board (MSPB), EEO, negotiated grievance procedure).
An agency may remove an employee if he is unable, because of a medical condition, to perform the duties of his position.

An agency is not required to prove as part of its charge that it considered accommodation where there is no disability discrimination issue in the case.

A removal for physical disability cannot be sustained when the employee diligently obtains and presents new medical evidence showing that he has recovered from the condition that previously prevented him from performing the duties of his position.
Removal for physical inability to perform the duties of a position promotes the efficiency of the service.

When an agency has shown that an employee cannot perform the duties of her position for medical reasons, and the agency is unable to offer an accommodation, the MSPB will uphold the removal.
Related Case Law (cont’d)

Edwards v. Department of Transportation, 109 FMSR 112
August 6, 2008

• Evidence of the recovery of an employee removed for physical disability—even when the evidence was obtained and submitted only on appeal, after the employee’s removal had been effected—is relevant and material to the “efficiency of the service” requirement.

• When an individual is unavailable for duty by reason of incapacitation, removal is justified if there is no foreseeable end to the unavailability.
Kimble v. USPS
September 19, 1991

• Being technically “fully recovered” under 5 CFR §339 does not demonstrate that an employee is able to perform, since OWCP may terminate compensation benefits for reasons other than medical recovery.
Related Case Law (cont’d)

Bennett v. Department of Transportation, 116 LRP 37836
July 29, 2016

• Removal for Medical Inability to Perform is an adverse action, but not a disciplinary action. While acknowledging that the claimant’s medical condition is beyond his or her control, the position needs to be filled by an employee available for duty on a regular, full-time basis.
Things To Consider

• If you are dual-hatted as ICPA and LER, you will need to separate duties. Another LER Specialist will need to handle the removal action for a FECA case.

• Although you are removing the IW from your agency rolls and opening up the billet to hire someone else, the IW will remain on your chargeback until/if they are able to return to work. It can also be more difficult to bring the IW back to work after they’ve been removed from your rolls.
Scenario #1

As the Injury Compensation Specialist, you have scheduled a meeting with Janine Smith, a Labor & Employee Relations Specialist, to discuss an injured worker, Alex Hill, that has been on the Periodic Roll for two years. The latest medical documentation indicates that Alex has reached Maximum Medical Improvement and cannot return to work in any capacity.
Scenario #1: PART ONE

What information should you share with Janine? What information are you not allowed to share with Janine in accordance with the Privacy Act?
Scenario #1: PART TWO

Now that Janine is aware of the situation, what are her next steps?
Bob Beverage is the Administrative Officer for the Department of the Army. He was injured on the job 18 months ago and has been off work since his date of injury. The OWCP placed him on the Periodic Roll. The agency would like to remove Bob and fill his position. What steps should the agency take?
ANY questions?
References

• 5 CFR §353.301, Restoration Rights
• CA-810, Injury Compensation for Federal Employees
• 5 U.S.C. 8151, Civil Service Retention Rights
• 5 CFR §339, Medical Qualification Determinations
• 5 CFR §752, Adverse Actions
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