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The Sequester, Furloughs and Federal Employees

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9.0—Miscellaneous

Beginning in the 1980s, I have represented employees on reduction-in-force (RIF) and related furlough cases. With the budget sequester, I now am getting furlough questions from federal employees. Accordingly, here is a quick legal overview.

A “furlough” is placement of an employee in a temporary status without duties and pay for non-disciplinary reasons. A furlough is for a year or less. 5 C.F.R. § 351.604^[2]; *Kinglee v. United States Postal Service*, 114 M.S.P.R. 473, footnote 5 (2010).^[3] Standard operating procedures (SOP) exist for such a contingency, i.e., the SOP found in Office of Personnel Management (OPM) regulations. This legal overview looks at parts of the SOP as they may apply to you.

AM I COVERED BY THE SOP, i.e. RIF PROCEDURES? I counted more than 100 MSPB decisions and court cases on this question, so I answer it first.

Competitive service and excepted service employees are covered by OPM regulations. Seasonal, part-time, and other categories of employee may not, with some exceptions, be covered by these RIF procedures. If the regulations apply to you, you should receive notice of your rights.

If you are covered, then furloughs of less than 30 days are appealable as adverse actions. 5 U.S.C. §§ 7512, 7513(c)^[4]; 5 C.F.R. § 1201.3. Furloughs for more than 30 consecutive days or 23 non-consecutive work-days are appealable as a RIF. 5 C.F.R. part 351; *Kinglee v. United States Postal Service*, 114 M.S.P.R. 473, footnote 5 (2010); *Lowmack v. Department of the Navy*, 80 M.S.P.R. 491 (1999).

RIF rights attend releases from competitive levels for lack of work and other reasons listed in regulation including furlough. However, only those employees released from their competitive level are entitled to RIF appeal rights. *Krizman v. Merit Systems Protection Bd.*, 77 F.3d 434 (Fed.Cir.1996), and *Mueller v. Merit Systems Protection Bd.*, 76 F.3d 1198 (Fed. Cir. 1996).^[5]

Many cases in which employees were denied RIF appeal rights – and I am combining together here both furlough and other cases – concerned employees who were not released from their competitive levels, were released for less than 30-days, or otherwise failed to meet the criteria to receive notice of appeal rights due to RIF or adverse action.

THE GOVERNMENT IS CUTTING FEDERAL EMPLOYEE PAY. WHAT NOW?

Like employees (e.g., same grade level and classification series, the duties of which are generally interchangeable) likely will be grouped together in a competitive level with an order of preference for retention, such as veterans' preference.

For a short furlough of a covered employee (adverse action procedures do not apply to all employees), you will receive at least 30 calendar days advance written notice stating the specific reasons for the action, such as a lack of work or funds. 5 U.S.C. § 7513. If the agency is furloughing some, but not all, employees in a competitive level, the notice of proposed furlough should state the basis for selecting you for furlough, and not others. At least seven calendar days is provided to answer that notice, and other rights include an appeal to the MSPB. The furlough likely will be intermittent days for 22 days or less, if you receive the short furlough notice.

If the furlough likely will be intermittent days for 23 days or more, you (if a covered employee) should receive the RIF furlough notice. If additional furlough days are necessary, you will be issued another notice. If the furlough days may exceed 90-days, then a full RIF may need to be run. Annual, sick, court, or military leave which was approved for a designated furlough day will be cancelled (unless you reschedule the furlough day). You will be given a chance to review of retention registers, RIF regulations, and related records. You will be told your retention standing meaning: Service [i.e., competitive or excepted]; Position title, series, and grade; Competitive level; Tenure and subgroup; Service computation date (SCD); Three most recent performance rating with years credited; and Adjusted SCD (SCD-RIF).

This last information is material because in a RIF employees are “released” with the lowest retention category going first. If released, part of your notice may include that you could not be reassigned without undue interruption. What this means is that an agency may make a temporary or continuing exception to release and assignment rights to continue a job function or activity without undue interruption. See 5 C.F.R. 351.608(a); 5 C.F.R. 351.607. A released employee may have rights to assignment to a lower grade position, with saved pay, and even to “bump” another employee if the released employee is able to perform the position of the lower-standing employee within 90-days of the RIF. *E.g., see*, 5 C.F.R. §351.403 (Competitive level), 5 C.F.R. §§ 351.501, 351.502 (Order of retention), § 351.503 (Length of service), § 351.504 (Credit for performance), 5 CFR § 351.604 (Use of furlough).

These RIF procedures, when applied fairly, preclude most claims of favoritism. However, if an employee is being treated differently than colleagues, it may be worthwhile to look at (1) whether the colleague received preferences because of correct application of the RIF regulations, (2) possible motives for favoritism (e.g., a desire to discipline one employee), and (3) those parts of the process leading to furlough or RIF failures to apply the procedures correctly, or equally. A few examples of the latter may be reassignment of persons before a furlough, misapplication of the undue interruption rule, and reassignments to avoid placement in certain competitive levels.

Examples of reasons to release some, but not all, employees from a competitive level include that employees not released (1) are currently in a non-pay status, (2) in an Intergovernmental Personnel Act mobility assignment, (3) are on an assignment not otherwise causing an expenditure of funds to the agency, or (4) are in a position whose duties have been determined to be of crucial importance to this agency’s mission and responsibilities, and cannot be curtailed.

The foregoing are analytic tools or examples of past cases, not suggestions for claims. Each case is different and facts are facts.

SHOULD I ACCEPT REASSIGNMENT? RETIRE?

An OPM website provides that if you refuse reassignment, you will be furloughed. True as stated, but also know what rights you give up and where you may end up if you refuse the reassignment. In one case, an employee directed to relocate geographically was fired when she refused. *Toyama v. Leavitt*, 408 Fed. Appx. 351 (Fed. Cir. 2010). You need a position if you plan to continue to work. In *Johnson v. Army*, 83 M.S.P.R. 141, 145-46 (1999), however, the employee had no valid RIF appeal after voluntarily accepting a lower-grade position before the effective date of a RIF. In contrast, and in another case, an employee who accepted a vacant position during a RIF maintained rights of appeal. *Knight v. Department of Defense*, 332 F.3d 1362 (Fed. Cir. 2003). Similarly, employees who retired after being separated by RIF or after getting a final RIF notice were held to retain MSPB appeal rights. *Farooq v. Corporation for Nat. and Community Service*, 109 M.S.P.R. 73 (2008). *Riccio v. Department of the Navy*, 98 M.S.P.R. 345 (2005); *Murray v. Department of Defense*, 92 M.S.P.R. 361 (2002).

A more nuanced application of these same principles is seen in the case of a physician who voluntarily accepted a position with fewer hours, and thus less pay, per pay period, without any break in service. It was held that he had no rights of appeal. *Wolf v. Department of Veterans Affairs*, 317 F.3d 1395, 1396-397 (Fed. Cir. 2003).

A common distinction among these cases is that one set of employees were subject to RIF and others who avoided the RIF and forewent RIF and appeal rights in doing so.

SUMMARY.

The OPM web site is worth your review for frequently asked questions, but neither OPM nor I can cover all RIF or furlough questions. The lesson intended by the above examples is you should know your rights and consider options before leaving your job or making other decisions.

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[2] This citation refers to section 351.604 of title 5 of the Code of Federal Regulations.

[3] *Kinglee* is a published decision of the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency.

[4] This citation refers to sections 7512 and 7513(c) of title 5 of the United States Code.

[5] This citation refers to a published decision of the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in our nation's capital and has nationwide jurisdiction over certain kinds of cases, including appeals from final MSPB decisions. The *Mueller* case can be found in Volume 76 of *Federal Reporter Third Series*, starting on page 1198.