

# Issue Spotting & Election of Remedies in Federal Sector Cases

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# INTRODUCTION

- ▶ Federal laws and agencies make up rules for federal employee claims that are different than those for private and other public sector employees.
- ▶ The laws and rules create a complicated mesh of procedural options.







- ▶ However, the number of options is finite.
- ▶ Our objective is to provide familiarity so that the federal sector process is workable.

# ROADMAP

We are reviewing the election of remedies when there is an EEO issue, an MSPB issue, a whistleblower retaliation issue, or a combination thereof.

- 1) Identify the main TYPES OF COMPLAINTS bad acts/wrongdoing that federal employees complain about in the workplace.
- 2) Identify WHERE federal employees may seek legal relief for those issues.
- 3) Evaluate the CHOICES - elections of remedies - that are available for seeking relief for these typical workplace issues.
- 4) Identify some tips, traps, and variances.
- 5) Summarize everything you need to know!

# First, let's look at the typical actions complained-of by federal employees.

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General Categories to keep in mind:

- ▶ **Defensive actions to oppose agency-initiated adverse actions related to their conduct or performance. Agency bears the burden of proof.**
- ▶ Affirmative claims of EEO discrimination.
- ▶ Affirmative claims of whistleblower retaliation.
- ▶ Affirmative claims of prohibited personnel actions.
- ▶ Affirmative claims of unfair labor practices.

# TYPICAL COMPLAINTS: MSPB

Most serious “adverse actions” \ directly MSPB-appealable  
for “employees” under 5 U.S. C. §§ 7512, 7513(d)

- ▶ Employees with MSPB appeal rights may take defensive action to oppose agency-initiated adverse actions related to their conduct or performance. Agency bears the burden of proof. Employees must also raise affirmative defenses, if any, to seek affirmative relief for that same action.
  - Removal
  - Suspension without pay more than 14 days
  - Reduction (demotion) in pay or grade
  - Furlough/RIF
  - Constructive adverse actions, e.g., forced retirement, forced resignation, forced suspension over 14 days
  - Denial of a within grade increase (WIGI)
  - Denial of restoration of employment rights

# TYPICAL COMPLAINTS: everything else

- ▶ Bad acts \ but NOT directly MSPB-appealable.
  - Disciplinary measures
    - Reprimand
    - Counseling (verbal or written)
    - Suspension of 14 days or less
    - Other miscellaneous discipline
  - Performance criticism (including ratings and placement on a performance improvement plan (PIP))
  - Non-selection
  - Non-promotion
  - Reassignment or significant change in duties
  - Prohibited Personnel Practices (PPPs) (factors or conduct which does not adversely affect the performance of the applicant or employee)

# TYPICAL COMPLAINTS: everything else

- ▶ MORE bad acts \ but NOT directly MSPB-appealable.
  - Sexual harassment
  - Hostile work environment (HWE) / dispute about working conditions
  - Being “retaliated against” generally
  - Unhappy about (denied or forced) detail, transfer, reassignment (no grade/pay loss)
  - Change in duties or dispute about duty assignments (or lack thereof)
  - Pay or award disputes (not WIGIs)
  - Denial of (Reasonable) Accommodation
  - Disputes about leave (including FMLA)
  - Disparate treatment (EEO issue v. non-EEO)
  - “Pure” discrimination concerns (bad acts with discriminatory animus)
  - Threat of an adverse action
- ▶ Is it a “personnel action,” part of a HWE, or evidence of motive?



# Four main administrative avenues for raising these issues and obtaining relief.

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- ▶ **UNION GRIEVANCE PROCESS** (election when grievance filed first)
- ▶ **EEOC'S EEO PROCESS** (election when formal EEO complaint filed first)
- ▶ **MSPB APPEAL** (election when MSPB appeal filed first)
- ▶ **OFFICE OF SPECIAL COUNSEL (OSC) COMPLAINT on Whistleblowing Retaliation** (election when OSC complaint filed before MSPB appeal)

# UNION GRIEVANCES

**MAIN RULE:** Only union grievances filed by the employee (not the union) that arise under collective bargaining agreements that are negotiated under the auspices of 5 U.S.C. § 7121(d) are subject to election of remedies provisions.

- ▶ Union grievances vary greatly; not all grievances trigger an election.
- ▶ USPS employees are excluded from 5 U.S.C. § 7121(d).
- ▶ Very few 7121(d) negotiated grievance procedures allow for the grievance of EEO claims that fall within EEOC's purview under 29 CFR Part 1614.
- ▶ If unclear, employee should ask their local / union steward if action is covered, and ask HR.
- ▶ Lawyer should get a copy of the CBA and OPF to double-check.
- ▶ Election is made by an employee (not union) filing a grievance.
- ▶ HR or "administrative" grievances are superfluous and do not count as an election of anything.
- ▶ Election of remedies means collateral estoppel / res judicata principles apply. You normally cannot split your cause of action or file same action in more than one place.
- ▶ BEWARE: CBA's may not provide for their covered employees to invoke arbitration on their EEO issue(s).

# UNION GRIEVANCE

- ▶ IF GRIEVANCE USED BY MISTAKE: If it is determined that the union grievance is not an election because the CBA does not cover the EEO claim: Just file with MSPB or EEO process if time allows. If filing time has expired, the Agency should issue appeal rights to file with the MSPB, if available, or the EEOC's Office of Federal Operation (29 CFR 1614.401(d)). TIP: Start EEO counseling and file a formal EEO complaint ASAP in order to short circuit the OFO remand. Argue that all time mistakenly spent in the union process should be tolled, especially if due to Agency misinformation.
- ▶ IF EEO CLAIMS EXCLUDED but SAME ISSUE GRIEVED: If EEO claim(s) are *excluded* from the 7121(d) procedures (or it is not a 7121(d) CBA), the EEO claim must be exhausted in the EEO process or as an affirmative defense at MSPB (if otherwise appealable to MSPB). Raising the same agency action as a grievance issue will not constitute an election. However, the Agency may hold the EEO complaint in abeyance while the union grievance on the same matter proceeds. 29 CFR 1614.301(c).

# EEOC COMPLAINT PROCESS

- ▶ Governed by EEOC's regulations, 29 CFR Part 1614
- ▶ Covers claims arising under:
  - ❑ Title VII (race, color, religion, sex, national origin, pregnancy) (42 U.S.C. § 2000e-16)
  - ❑ Equal Pay Act (EPA) (sex-based wage and compensation discrimination) (29 U.S.C. § 206(d)),
  - ❑ the Age Discrimination in Employment Act (ADEA) (age over 40) (29 U.S.C. § 621 *et seq.*),
  - ❑ the Rehabilitation Act of 1973, as amended (disability, essentially the ADAAA) (29 U.S.C. § 791 *et seq.*),
  - ❑ the Genetic Information Nondiscrimination Act (GINA) (42 U.S.C. § 2000ff *et seq.*),
  - ❑ the Pregnant Workers Fairness Act (PWFA) (pregnancy, childbirth, related medical conditions) (42 U.S.C. § 2000gg *et seq.*).
- ▶ Employees are protected from retaliation and for participating in any stage of administrative or judicial proceedings under those statutes. Complaints of retaliation will be processed as complaints of discrimination under the applicable statute.



# EEO PROCESS – covers...

Check the regulation 29 CFR 1614.103(b) - (d) to confirm coverage and exclusions!

► Covered:

- (1) Military departments as defined in 5 U.S.C. § 102;
  - (2) Executive agencies as defined in 5 U.S.C. § 105;
  - (3) The United States Postal Service, Postal Rate Commission and Tennessee Valley Authority;
  - (4) All units of the judicial branch of the Federal government having positions in the **competitive service**, except for complaints under the Rehabilitation Act (other judicial employees need to use their court's Employment Dispute Resolution (EDR) Plan);
  - (5) The National Oceanic and Atmospheric Administration Commissioned Corps;
  - (6) The Government Printing Office except for complaints under the Rehabilitation Act; and
  - (7) The Smithsonian Institution.
- Within the above covered departments, agencies and units, this part applies to all employees and applicants for employment, and to all employment policies or practices affecting employees or applicants for employment including employees and applicants who are paid from nonappropriated funds, unless otherwise excluded.

# EEO PROCESS - excludes...

Check the regulation 29 CFR § 1614.103(b) - (d) to confirm coverage and exclusions!

► Excluded:

- (1) Uniformed members of the military departments referred to in paragraph (b) (1) of this section;
- (2) Employees of the General Accounting Office;
- (3) Employees of the Library of Congress (Congressional employees use the Congressional Accountability Act process);
- (4) Aliens employed in positions, or who apply for positions, located outside the limits of the United States; or
- (5) Equal Pay Act complaints of employees whose services are performed within a foreign country or certain United States territories as provided in 29 U.S.C. § 213(f).

# EEO PROCESS

- ▶ Consulting with an EEO Counselor, filing an informal complaint, attending mediation, or merely filling out EEO processing forms (short of a formal complaint) does not constitute an election of the EEO process. 29 CFR § 1614.301(a).
- ▶ BEWARE: An employee must initiate contact with an EEO counselor or EEO Official logically connected with the EEO process with an intent to file a discrimination complaint within 45 calendar days of the effective date of the personnel action at issue or within 45 calendar days of when the employee knew or should have known of the discrimination. 29 CFR § 1614.105(a)(2). Equitable tolling may apply.
- ▶ Filing the written formal EEO complaint constitutes an irrevocable election of the EEO process for claims that are covered by (and require administrative exhaustion by resort to) the procedures in 29 CFR Part 1614.

# MERIT SYSTEM PROTECTION BOARD (MSPB)

- ▶ Governed by MSPB regulations at 5 CFR Part 1201.
  - ❑ If the agency is an executive agency subject to the MSPB (5 U.S.C. § 7511(b)),
  - ❑ if an employee is an “employee” (5 U.S.C. § 7511(a)(1)), and
  - ❑ if an MSPB appealable action is at issue (see 5 CFR § 1201.3(a)),
  - ❑ then a claim generally must be filed, if at all, with the Merit Systems Protection Board (MSPB) **within thirty (30) calendar days** of the effective date of the adverse action. 5 CFR § 1201.22(b).
  - ❑ Equitable tolling may apply, but high standard. 5 CFR § 1201.22(c).
  - ❑ Only **ten (10) business days** to file an appeal for certain Title 38 VA employees for removal, demotion, suspensions over 14 days. 38 U.S.C. § 714(c)(4)(B).
- ▶ *Only* for MSPB-appealable issues (*not* the other many common complaints):
  - Removal
  - Suspension without pay more than 14 days
  - Reduction (demotion) in pay or grade
  - Furlough/RIF
  - Constructive adverse actions, e.g., forced retirement, forced resignation, forced suspension over 14 days
  - Denial of a within grade increase (WIGI)
  - Denial of restoration of employment rights



# MERIT SYSTEM PROTECTION BOARD (MSPB)

## ► Jurisdictional memos

- ❑ The Administrative Judge (AJ) may order an appellant to explain why the Board has jurisdiction
  - ❑ The order may be buried in the Acknowledgment Order (“Ack Order”)
  - ❑ AJs do this because there is NO summary judgment at the MSPB
  - ❑ A jurisdictional order may be the last opportunity for an AJ to avoid a hearing
- ❑ A response is typically required within 10 days
  - ❑ The time can be extended with a timely motion
- ❑ The response only needs to set out the **allegations** supporting jurisdiction
  - ❑ The order may say evidence is required, but the courts say jurisdiction arises from allegations, not the evidence.
  - ❑ Exhaustion is treated as jurisdictional, even though the Supreme Court says it is not

## ► Discovery

- Must serve a first request within 30 days of the Ack Order
- A notice of deposition must specify the date, time and place
- Follow-up discovery requests are due within 10 days of each response
- Motions to compel are due within 10 days of each response

# MERIT SYSTEM PROTECTION BOARD (MSPB)

- ▶ Pre-hearing submission
  - Last chance to raise issues to be decided. 5 CFR 1201.24(b)
  - Must include a list of witnesses and a summary of unique testimony the witness can provide
  - Includes both favorable and unfavorable witnesses
  - Witness list often includes “any witnesses listed by the Agency”
  - Must include exhibits
- ▶ Withdraw the hearing request?
  - ❑ Avoids giving the AJ an opportunity to make credibility determinations
  - ❑ Credibility determinations are virtually unreviewable

# MIXED CASES = MSPB issue + EEO motive

- ▶ WARNING: Special election of remedies exist where the employee claims that an unlawful EEO (including EEO retaliation) basis motivated the decision-making in an **MSPB issue**.
- ▶ CHOICE to begin the claim:
  - ❑ in the EEO process (within 45 days then filing a timely formal EEO complaint) (explained above) as a mixed case (losing all other affirmative defenses other than EEO!). You still get an EEO investigation, but then move to MSPB for hearing and decision phase.
- ▶ OR
  - ❑ By filing a timely appeal with the MSPB (within 30 days typically) (explained above) as a mixed case appeal, where you appeal the agency's adverse action as lacking sufficient evidence and also claim that it was unlawfully motivated by a prohibited EEO basis (explained above) (and add all other appropriate affirmative defenses!).
  - ❑ Hearing will only take place at the MSPB unless "unmixed" and sent to EEOC.
  - ❑ Special appeal routes.

# OFFICE OF SPECIAL COUNSEL (OSC) WHISTLEBLOWER RETALIATION COMPLAINTS

- ▶ Complaints and disclosures must use Form 14 (including the on-line version at [osc.gov](https://osc.gov)) 5 C.F.R. 1800(c)(1). See lines 287-319 of the outline.
- ▶ Be sure to get a copy of the complaint when you file it. OSC cannot give you a copy during the investigation. After the investigation, it is available only through FOIA.
- ▶ If OSC determines that there is merit to a complaint, it may seek corrective action from the agency. If the Agency refuses, the OSC has prosecutorial authority (and discretion) to take allegations of unlawful activity to the MSPB for corrective action. It may also go to the MSPB and seek discipline of federal agency bad actors.
- ▶ Except for whistleblower and veteran retaliation complaints, if the OSC declines to seek corrective action, that is the end of the road.



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# Whistleblower Protection Act (WPA)

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“It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.”

S. REP. 112-155, \* 5, 2012 WL 1377618, 2012  
U.S. Code Cong. & Admin. News 589, 593

The WPA protects:

- Disclosures
- Participation
- Refusals to violate law, rules or regulations

# Protected disclosures

At 5 U.S.C. § 2302(b)(8), the WPA protects:

- Lawful disclosures to anyone of
  - Violations of law, rule or regulation
  - Gross mismanagement, gross waste, abuse of authority
  - Substantial and specific danger to public health or safety
- Disclosures are lawful if they do not violate a law passed by Congress or an Executive Order “in the interest of national defense”. See outline, lines 211-236.
  - Violation of a regulation does not make a disclosure unlawful. *Dep’t of Homeland Sec. v. MacLean*, 135 S.Ct. 913 (2015)

# Substantial and specific danger to public health or safety

Federal Circuit analyzes several factors, including:

- (1) the likelihood of harm resulting from the danger;
- (2) when the alleged harm may occur; and
- (3) the nature of the harm, i.e., the potential consequences.

*Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).

...the disclosure of a danger only potentially arising in the future is not a protected disclosure. *Herman v. Dep't of Justice*, 193 F.3d 1375, 1379 (Fed.Cir.1999). Rather, the danger must be substantial and specific.

# Violation of law, rule or regulation

## *What is a “rule?”*

- *Rusin v. Dep’t of the Treasury*, 92 M.S.P.R. 298, 305-07 (2002)
  - “the determination of whether or not something is a ‘rule’ for purposes of the Whistleblower Protection Act (WPA) cannot be based merely on its title” and a “more substantive examination” is required.
  - “[A]n established and authoritative standard

or principle; a general norm mandating or guiding conduct or action in a given type of

conduct, regulation or principle.” *Id.*, at 305-



# Reasonable belief

## *What is a “reasonable belief?”*

- *Ward v. Dep’t of the Army*, 67 M.S.P.R. 482, 485-486 (1995); *Russell v. Dep’t of Justice*, 68 M.S.P.R. 337, 342 (1995).
  - “The [whistleblower] need not prove that the condition reported established any of the situations detailed under 5 U.S.C. § 2302(b)(8)(A)(i) or (ii), but he [or she] must come forth with such proof, either in the form of testimony or documentary evidence, as will establish that the matter reported was one that a reasonable person in the employee’s position would believe to evidence one of the situations specified at 5 U.S.C. § 2302(b)(8).”
- Private sector applications
  - Subjective and objective components. *Sylvester v. Parexel Int’l LLC*, ARB 07-123, 2011 WL 2517148 (ARB May 25, 2011)

# Other Protected Activities “(b)(9)”

## 5 U.S.C. 2302(b)(9) protects:

- (A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—
  - (i) with regard to remedying a violation of paragraph (8); or
  - (ii) other than with regard to remedying a violation of paragraph (8);
- (B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);
- (C) cooperating with or disclosing information to the Inspector General (or any other component responsible for

internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law or

individual to violate a law, rule, or regulation

■ No “impossible belief” required for “participation claims”

# OSC Complaints must be filed with Form 14

## *5 CFR § 1800.1(c)(1) requires:*

- The Form OSC-14 must be used to file all such complaints (except those limited to an allegation or allegations of a Hatch Act violation - see paragraph (d) of this section for information on filing Hatch Act complaints).
- Can be filed on-line: [osc.gov/File a Complaint](https://osc.gov/File%20a%20Complaint)
  - <https://osc.gov/Pages/File-Complaint.aspx>
- Amendments and supplements can be made by email or other means.
  - *Edwards v. Dep't of Air Force*, 120 M.S.P.R. 307, 317 (2013); *Lewis v. Dep't of Def.*, 123 M.S.P.R. 255, 260 (2016) (“The appellant also may submit his own letters to OSC to demonstrate the scope of the complaints he has exhausted with that agency.”);
  - *McCarthy v. MSPB*, 809 F.3d 1365, 1374 (Fed. Cir. 2016) (considering

# Individual right of action (IRA appeals)

## *5 U.S.C. 1221(a) permits whistleblowers:*

- as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.
- Expanded beyond 2302(b)(8) by 2012 WVPEA
- MSPB appeals can be filed on-line from [mspb.gov](https://www.mspb.gov) under “appeals” or “Electronic Filing” and “New Appeal.”

# Employer knowledge and “revelment”

## *A common defense is to deny knowledge of the protected activity*

- *It is harder to deny if the whistleblower has made a written disclosure to the manager.*
- *“Revelment letters” arose in union organizing*
- *A request for official time can serve the same purpose:*
  - *I request \_\_\_\_\_ hours of official time to meet and confer with an attorney about making disclosures to the Inspector General and the Office of Special Counsel. I make this request pursuant to 5 C.F.R. Section 5.4. Please let me know if you will approve this request for official time. Thank you.*
- *For federal sector EEO cases, cite 29 CFR Section 1614.605(b)*

# Occupational Safety and Health Act (OSH Act)

## Applies to federal agencies

- 29 U.S.C. § 668 (excluding USPS which is treated as a private sector employer)
- General duty clause (29 U.S.C. § 654) does NOT apply but specific safety standards do.

§ 668(a) The head of each agency shall (after consultation with representatives of the employees thereof)— (1) “provide safe and healthful places and conditions of employment, consistent with the standards set under section 655 of this title;”)

## Federal sector general duty:

- The head of each agency shall develop and support organized safety promotion to reduce accidents and injuries among employees of his [or her] agency, encourage safe practices, and eliminate work hazards and health risks. 5 U.S.C. § 7902(d)



# Federal Sector OSHA regulations

*OSHA requires that:*

- The head of each federal agency “must assure safe and healthful working conditions for his/her employees.” 29 C.F.R. § 1960.1 (g)
- *“The head of each [federal] agency shall furnish to each employee employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical*

# Intelligence Community protections against retaliation

## ■ Intelligence Authorization Act of 2014

50 U.S.C. § 3234

PPD-19; ICD-120; DOD, Directive-Type  
Memorandum 13-008

Same definition of protected disclosures. 50  
U.S.C. § 3234(b)

Covers employees of contractors. 50 U.S.C. §  
3234(c)

Agency-specific procedures

Final decision-making by DNI and agency  
heads

Security clearance retaliation is covered by 50  
U.S.C. § 3341(j) (90 days to file a complaint)

# Federal Labor Relations Act (FLRA)

- Protection from unfair labor practices. 5 U.S.C. § 7116.
- Collective bargaining agreements (CBA) may provide for grievances and arbitration.
- If an employee
  - (1) is in a bargaining unit, subject to a CBA, and
  - (2) suffers an adverse action that is directly appealable to the MSPB (termination, suspension over 14 days, demotion, etc.)

Then beware of elections of remedies. Under 5 U.S.C. § 7121(d) and 5 C.F.R. § 1201.3. Employee is limited to remedies and procedures first filed among:

1. Grievance under CBA
2. MSPB appeal, or
3. OSC complaint.

# HIPAA PERMITS CERTAIN WHISTLEBLOWER DISCLOSURES

- (j) Standard: Disclosures by whistleblowers and workforce member crime victims - ...
- (i) The workforce member or business associate believes in good faith that the covered entity has engaged in conduct that is unlawful or otherwise violates professional or clinical standards, or that the care, services, or conditions provided by the covered entity potentially endangers one or more patients, workers, or the public; and
- (ii) The disclosure is to: (A) A health oversight agency or public health authority authorized by law to investigate or otherwise oversee ... or to an appropriate health care accreditation organization ...; or
- (B) An attorney retained by or on behalf of the workforce member ... for the purpose of determining the legal options of the workforce member ... with regard to the conduct described in paragraph (j)(1)(i) of this section.
- 45 C.F.R. § 164.502(j)(1)

# OSC - IRA APPEALS at MSPB

- ▶ If the OSC declines to seek corrective action on a federal employee's complaint of retaliation for making protected whistleblower disclosures under 5 U.S.C. § 2302(b)(8) or retaliation for engaging in certain protected activities under 5 U.S.C. § 2302(b)(9), the federal employee may seek corrective action at the MSPB. There are two ways to get your whistleblower retaliation claim before the MSPB. See procedures for filing an IRA appeal set forth in MSPB regulations at 5 C.F.R. Part 1209.
- ▶ (1) If the federal employee already has a right to file an MSPB appeal (i.e., suffered a directly appealable **MSPB issue**), timely file your MSPB appeal yourself and raise the whistleblower retaliation claim as an affirmative defense in that MSPB appeal, OR
- ▶ (2) File an "individual right of action" (or IRA) appeal after exhausting (filing) their whistleblower retaliation complaint at the OSC.
  - To exhaust (whether by choice or required by law), (a) file the IRA appeal within 60 calendar days after receiving notice from OSC that it is closing its investigation and declining to seek corrective action on the alleged retaliation, OR (b) file the IRA appeal after 120 days have passed after filing the retaliation complaint with OSC.

# Third, let's sort out and summarize the options for a federal employee's election of remedies and evaluate them.

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We are reviewing election of remedies when there is an EEO issue, an MSPB issue, a whistleblower retaliation issue, or a combination thereof:

- *EEO Issues*: GRIEVANCE v. EEO Complaint
- *MSPB Issues*: GRIEVANCE v. MSPB Appeal
- *Mixed EEO + MSPB Issues*: GRIEVANCE v. EEOC v. MSPB
- *Whistleblowing Retaliation Claims (no MSPB Issue)*: OSC THEN MSPB IRA Appeal
- *Whistleblowing Claims with MSPB Issue*: OSC v. MSPB Appeal v. Grievance



# NOTE: OTHER ISSUES/OPTIONS

- ▶ Outside of the election of remedies involving combinations of EEO, MSPB, and whistleblower retaliation issues, there are many other issues for which relief can be found in formal complaint processes (beyond scope of this panel presentation), such as:
  - ❑ FLRA complaint process for labor issues (ULPs) (but you cannot file both a grievance and ULP on the same issue - elect one complaint route)
  - ❑ General whistleblowing (wrongdoing that you reasonably believe to be gross waste, fraud, abuse, harm to health/public safety) - blow the whistle to IG, OSC, Congress, chain of command/manager, press (do not violate HIPAA while doing so, but see HIPAA's limited whistleblower exception at 45 C.F.R. § 164.502(j)(1))
  - ❑ Department of Labor (wage and hour claims; USERRA; certain whistleblower laws)
  - ❑ OPM (retirement claims, may lead to OPM or MSPB appeal, other internal complaint options)
  - ❑ USERRA (retaliation for veteran status) (first DOL then OSC then MSPB)
  - ❑ Retaliation for environmental / safety complaints (think OSHA, SDWA)
  - ❑ OSC for Hatch Act

EEO Issues, no MSPB Issues

## GRIEVANCE v. EEO Complaint

### GRIEVANCE

- Somewhat rare to accept EEO claims.
- Only employee (not union) filing constitutes an election.
- Hard to get access to documents.
- No depositions.
- Watch out for grieving non-EEO issue (e.g., transfer in violation of CBA) then being unable to take discriminatory transfer claim to EEO later.
- Union steward often represents you; check if union counsel for EEOC hearing.
- Avoid if union will not guarantee to invoke arbitration on your behalf unless small issue.
- Quicker than EEOC - months?
- No ability to move to federal court afterward

# EEO Issues, no MSPB Issues

## GRIEVANCE v. EEO Complaint

### EEO COMPLAINT & EEOC Hearing

- Agency obtains affidavits and documents (ROI); Low success rate at developing good Report of Investigation; better with strong counsel
- Agencies always represented and horrible in discovery
- Very low success rate at EEOC hearing without counsel
- Full discovery (depositions) at your cost.
- Tortuously long process - years.
- Can get great relief, decent compensatory damages, if you win before EEOC AJ
- Summary judgment / MTD threat
- Not great ADR options; EEOC settlement AJs often better.
- May proceed to federal court afterward.

# EEO Complaint Process Election

must elect EEOC AJ hearing process or Final Agency Decision (FAD)

## EEOC AJ Hearing Process

- Usually get full discovery, including depositions (at your cost) to follow up on ROI
- Continues the “investigatory process” and AJ can issue sanctions for lack of ROI
- Opportunity to call and cross-examine witnesses at hearing
- Judge can make credibility assessments
- Transcripts may be useful on appeal or if pursued in federal court
- Client gets a “day in court”
- Can always withdraw hearing request and seek FAD without prejudice/penalty

## Agency FAD

- If Agency’s EEO program is good, there is a chance of winning on the record, e.g. DOJ’s Central Adjudication Office (CAO)
- Must have a very strong ROI to win on the record
- If you first elected an AJ and developed the record, then withdrew that AJ request and requested a FAD, submit additional evidence to Agency EEO office and ask them to consider it when drafting FAD (somewhat unclear whether it adds to the official record).
- If there was no AJ hearing, then OFO review is de novo
- If Agency FAD is very late, OFO may impose sanctions

## Only MSPB Issues MSPB Appeal

- Election made when MSPB appeal filed (often 30 days). Make sure you have MSPB rights before bypassing grievance.
- Agency files “Agency file,” not an ROI. Just management’s side of the story but it may contain useful admissions or omissions.
- Jurisdictional memo may be needed for WPA and affirmative defenses.
- Agencies are always represented and often horrible in discovery
- Discovery must be commenced on time, deadlines for motions and follow-up
- Subpoena power
- Tortuously long process - years.
- Can get great relief for EEO or WPA, including compensatory damages
- No summary judgment!
- “MAP” program and settlement judges for mediations
- May proceed to federal court in mixed cases.

# Mixed EEO + MSPB Issue

## GRIEVANCE v. EEOC v. MSPB

### GRIEVANCE

- Election made when employee files grievance
- Avoid if union will not guarantee to invoke arbitration
- Quicker than EEOC and MSPB
- See points above!!

### EEOC

- Election made when formal EEO complaint is filed that includes **MSPB issues**.
- Great option if you miss the earlier MSPB appeal-filing deadline.
- Great to get a Report of Investigation plus, later, MSPB Agency File.
- If “unmixed” and back at EEOC for hearing, very low success rate without counsel. All constructive adverse actions are very challenging issues.
- See points above for EEOC!!

### MSPB

- Need strong counsel
- Agencies always represented, sometimes by HR reps
- Agency File is very helpful and cuts down on discovery fights
- No summary judgment!
- Takes a long time, but “rocket docket” compared to EEOC
- Subpoena power
- Historically very low success rate on affirmative claims and very low compensatory damages from MSPB Ajs
- See points above for MSPB!!

## Whistleblowing Retaliation Claims (no MSPB Issue)

### OSC (IRA) v. MSPB Appeal

- ❑ Must file and exhaust issues at OSC!!
  - Exhaustion of each adverse action and each protected activity needs to be documented. Email is sufficient.
- ❑ If OSC declines to seek corrective action, only option is to proceed with IRA appeal at MSPB after exhausted.
- ❑ Only the whistleblower issues will be considered.



# Whistleblowing Retaliation Claims (MSPB Issue)

## OSC (IRA) v. MSPB Appeal

### OSC COMPLAINT FIRST

#### THEN IRA APPEAL AT MSPB

- Filing at OSC is optional!
- It will lock you into a much harder proof scheme at MSPB: Agency will no longer bear its burden on **MSPB Issue**.
- You must prevail on the prima facie claim of your affirmative whistleblowing retaliation claim, including a showing that protected activity was a “contributing factor, in order to reverse the action. 5 U.S.C. § 1221(e)(1).
- Don’t do it unless you have a really good reason!! MSPB appeals are subject to equitable tolling.

### MSPB APPEAL FIRST

- Timely file MSPB appeal and include the whistleblowing retaliation claim as an affirmative defense.
- Agency has the burden to prove the adverse action (misconduct by prep/evidence, performance by substantial evidence), or the action is reversed! You only have the burden to prove your affirmative defenses.
- Whistleblower claim is subject to the WPA’s bifurcated causation standard. You must show protected activity, an adverse action, and that the protected activity was a “contributing factor.” 5 U.S.C. § 1221(e)(1). Then, burden shifts to the agency to show that it would have taken the same adverse action without the protected activity by “clear and convincing evidence.” 5 U.S.C. § 1221(e)(2); *Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1367 (Fed. Cir. 2012) (“‘Clear and convincing evidence’ is a high burden of proof for the Government to bear.”).

# AGE CLAIMS may bypass EEO process

- ▶ Age complaints fall within 29 CFR Part 1614 and can be administratively processed like other EEO claims. Once filed, it takes 180 days to exhaust the EEO process and move to federal court.
- ▶ The statute of limitations does not toll while in the administrative process. If federal court action is envisioned, calculate whether you have time for the EEO administrative process.
- ▶ Everything discussed above applies to them.
- ▶ Additionally, federal employees may file age claims *directly* in federal district court, bypassing (and no returning to) the administrative EEO process.
- ▶ If you elect to bypass the administrative EEO process, you must give a thirty (30) day notice to the EEOC at the address specified in the EEOC regulations. 29 CFR § 1614.201.



# EQUAL PAY ACT CLAIMS may bypass EEO process

- ▶ Like age claims under the ADEA, the EEO process covers claims arising under the Equal Pay Act, and claimants may file their EPA claims directly in federal court if they wish, bypassing (and not returning to) the EEO process. 29 CFR § 1614.408.
- ▶ An EPA claimant may jump from the EEOC's EEO administrative process into federal court (but not the other direction) at any time "regardless of whether he or she pursued any administrative complaint processing." 29 CFR § 1614.408.
- ▶ BEWARE: Title VII claims for sex-based wage and compensation claims, even if based on same facts, must be exhausted through the EEO process.
- ▶ BEWARE: EPA statute of limitations does not toll while in EEO process.
- ▶ The EEOC's EEO process is not an election of remedies for an EPA claim, but it is for MSPB jurisdiction and 7121(d) negotiated grievance procedures.
- ▶ If you begin the EEO process and jump to federal court, you need not provide any prior notice to the EEOC.



# SETTLEMENT BREACH ELECTION

## similar EEO and MSPB options

- - ▶ An EEO complainant may elect whether to seek enforcement (specific performance) or to reinstate the complaint where processing ended. 29 CFR § 1614.504(a).
  - ▶
  - ▶ An MSPB appellant may elect to enforce the MSPB-entered settlement agreement or rescind it and reinstate the underlying appeal. *See Poett v. Dept. of Agriculture*, 98 MSPR 628, ¶ 20 (2005).

# SUMMARY

- ▶ General First-In-Time Rule & Irrevocable.  
The first action taken will constitute an election.
  - ▶ EEO Formal Complaint
  - ▶ MSPB Appeal
  - ▶ OSC whistleblower retaliation complaint (instead of with MSPB)
  - ▶ 7121(d) union grievance filed by the employee, if CBA allows it
- ▶ EEO Counseling does not count as an election. EEO Counseling contact must be made within 45 days, and formal EEO complaint, if to be filed, within 15 days thereafter.
- ▶ Even if employee is not sure of which option to pursue for an EEO claim, initiating EEO counseling may be done without prejudicing MSPB or union options for EEO claims. It could get some management feedback before making election.



# SUMMARY

- ▶ Union grievances often need filed within 10 days.
- ▶ MSPB appeals need filed within 30 days (or less for some VA actions).
- ▶ If employees miss MSPB and union grievance deadlines, EEO option may still be available for an EEO claim.
- ▶ If you have a directly appealable **MSPB Issue**, don't go to OSC first with a whistleblower retaliation claim! Just put it in your MSPB appeal.





# ELECTION OF REMEDIES

UNLESS AGENCY NOTICE OF RIGHTS AT FAULT OR MISLEADING...

- ▶ No do-overs, no take-backs, even if there is time left to file somewhere else.
- ▶ Find your best pathway. Check twice, file once!
- ▶ QUESTIONS??

