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TOP NEWS STORIES

OPM, CHCO COUNCIL MUST STRENGTHEN COORDINATION ON GOVERNMENT-WIDE HUMAN CAPITAL ISSUES, GAO REPORTS

A Government Accountability Office (GAO) convened forum of chief human capital officers (CHCO) identified a number of difficulties faced by agencies in maintaining their capacity to meet their missions in a time of tight agency budgets.

A report borne from that forum "identified three broad recurring human capital challenges and strategies to address them," GAO stated, while acknowledging the challenges were not new or exclusively the result of constrained budgets.

GAO identified the three broad recurring human capital challenges as: (1) lack of coordination in a fragmented human capital community, (2) a lack of an enterprise or "whole of government" approach to address crosscutting challenges, and (3) a lack of agile talent management.

GAO found that "the fiscal environment also created the impetus [amongst CHCOs and agencies] to act and a willingness to consider creative and non-traditional strategies for addressing issues in ways that previously may not have been organizationally or culturally feasible."

GAO recommended that the Office of Personnel Management (OPM) work with the CHCO Council to: (1) strengthen coordination and leadership on government-wide human capital issues, (2) explore expanded use of enterprise solutions to more efficiently and effectively address shared challenges, (3) review the extent to which new capabilities are needed to promote agile talent management, and (4) evaluate the communication strategy for and effectiveness of tools, guidance, or leading practices OPM provides for addressing human capital challenges. OPM and the CHCO Council concurred with GAO's recommendations.

To access the GAO report, GAO-14-168, Human Capital: Strategies to Help Agencies Meet Their Missions in an Era of Highly Constrained Resources, click here.

PRESIDENT TAKES EXECUTIVE ACTION ON STUDENT LOANS, SENATE MAY ALSO

This week the President took executive action to address rising student debt loan loads by sending a Presidential Memorandum to the Secretary of Education.

The Senate may also vote on student loan legislation introduced in May by Sen. Elizabeth Warren (D-MA).

President Obama's memorandum directs the Education Department to propose regulations that would allow students who borrowed Federal Direct Loans to cap their federal student loan payments at ten (10) percent of their income. Currently not all federal student loan payments are capped at that level, and the memorandum will level the field for federal student loan holders.

"This is commencement season, a time for graduates and their families to celebrate one of the greatest achievements of a young person's life. But for many graduates, it also means feeling trapped by a whole lot of student loan debt. And we've got to do more to lift that burden," the president said over the weekend prior to releasing the memorandum.

Senator Warren's bill would allow those paying high student loan rates to refinance those loans at current rates, which are much lower. Additional provisions of the legislation are outlined in a fact sheet.

The Senate may vote on the Warren legislation on Wednesday this week, although that timeline is subject to change.

OSC INVESTIGATING 37 WHISTLEBLOWER REPRISAL CLAIMS AT VA

Last week the U.S. Office of Special Counsel (OSC) announced it is investigating allegations of whistleblower reprisal from 37 Department of Veterans Affairs (VA) employees.

OSC is also reviewing 49 disclosures related to scheduling improprieties and other potential threats to patient safety at VA facilities, for a total of more than 80 pending VA claims, according to the OSC press release.

The OSC blocked several disciplinary actions against VA employees, in order to allow OSC to further investigate reprisal claims, and obtained corrective actions on behalf of more than a dozen VA employees.

"OSC appreciates the VA's cooperation in providing interim relief to these employees," stated Special Counsel Carolyn Lerner. "Receiving candid information about harmful practices from employees will be critical to the VA's efforts to identify problems and find solutions. However, employees will not come forward if they fear retaliation."

FROM THE HILL

SENATOR'S BILL WOULD LET PUBLIC SUE VA EMPLOYEES, REVOKE PENSIONS OF GUILTY

Legislation introduced last week would allow veterans to sue Department of Veterans Affairs (VA) employees who falsified or destroyed health records.

The bill (S. 2419), introduced by Senator Pay Toomey (R-PA) would also empower the Secretary to fire and revoke the pensions of employees found to have violated the bill.

Senator Toomey's legislation, the "VA Accountability Act of 2014," would allow veterans to sue VA employees for medical malpractice. "The true extent of secret VA waitlists could be made public," through the legal discovery process which would entitle the person bringing the suit to emails, memos, voicemails, etc., according to the Senator's press release.

"The men and women who served in uniform should be first in line for the best quality medical care in the world," said Senator Toomey. "That's why I introduced legislation to allow veterans to hold VA employees accountable if they falsify or destroy information relating to a veteran's health care. My legislation would also authorize the firing of VA employees who engage in such activity."

DOLLARS & SENSE

DISABILITY RETIREMENT | PART 2

Under CSRS or FERS, if you are already eligible for a regular immediate retirement (based on age & service, with no reduction for early age) and you are dealing with a health issue that is preventing you from doing your Federal job, before you commit yourself to applying for a Disability Retirement, it's recommended that you first check in with your agency retirement officer to help you determine whether a regular retirement would be better for you. Depending upon your unique circumstances, it's possible that you might be better off with a regular retirement… especially if you are already eligible to retire will a full (unreduced) pension under FERS.

There are some exceptions to this rule under CSRS… however, regardless of which retirement system you are under, IF you are already eligible to retire based on age & service, ask your agency retirement officer to prepare retirement estimates under both regular & disability retirement to aid you in determining this for yourself… BEFORE you start spending a lot of time filling out application forms.

In most situations (especially under FERS), if you are already eligible to retire based on age & service, a regular retirement could be more money (because Disability Retirement would not include unused sick leave in the computation of the pension), AND there's less paperwork involved with a regular retirement, AND you wouldn't have to wait for a lengthy process at OPM just to determine your eligibility like you do with a Disability Retirement.

Most importantly, if you encounter a health issue that begins to interfere with your Federal job between now and the time you become eligible for a regular retirement, you would want to start looking into the possibility of applying for Disability Retirement sooner than later. The Disability Retirement application process can be lengthy… there's many forms and supporting documents that must be pulled together… not just documentation from you, but also from your supervisor, your physician(s), and your human resources office.

It can take a while to gather some of this documentation, and once your application is forwarded to OPM for review, it can take a while before they make a determination. You don't want to find yourself in a non-pay status while you're waiting on all of this. That's why I recommend that folks begin this application process long before they start burning off all their sick and annual leave.

A positive note regarding non-pay status… if eventually approved for Disability Retirement, OPM would pay the pension retroactive to your last day in a pay status. But you don't want to put yourself through a temporary financial hardship if you can avoid it. Start the process sooner than later… if nothing else, at least start having conversations with your agency retirement officer as soon as you think the health issue might eventually interfere with your job capabilities. Not only can your retirement officer prepare estimates for you, they can also walk you through the entire application process and help you understand which documents/forms need to be submitted to initiate the process.

The more medical documentation that you have to support your claim, the better off you will be in this process. MORE is definitely BETTER, when it comes to supplying medical documentation to support your application for Disability Retirement. And it would be good if you can obtain specific statements from your physician(s) that convey their opinion of your specific health condition in regards to how that affects your ability to perform various functions (both on and off the job). Providing your physician(s) with a detail of your job description would aid them in preparing their statements.
Historical medical documentation is important, but it's also important to have recent documentation to support your application. It would also be helpful if the physician provided an estimate of the expected date of full or partial recovery, OR if no recovery was expected. Although the Disability Retirement application includes an outline for the Physician's Statement, more details in regards to the type of information that would be

helpful to OPM in making their determination can be found in Chapter 60 of the CSRS/FERS Handbook, located online here.

It's also important to note that you don't have to wait until you gather all your supporting medical documentation to file your initial application for Disability Retirement. Submit what you already have when you initially file your application. Meanwhile, your agency retirement officer can send the primary application forms to OPM to initiate the process, but additional supporting documents (from the supervisor, physicians, etc.) can be sent later as they become available.
OPM will not make a final decision until all the appropriate documents are received, but they can at least open your case and start working towards their decision. Meanwhile, you can still go about gathering and submitting additional physician statements and more recent medical documentation until you have provided them with everything you intend to include in your case.

If you are approved for Disability Retirement, be sure to understand the 2 ways that you could lose your Disability Retirement before reaching the age of 60. One of these has to do with recovering from your health condition and the other has to do with work income after retirement. Your retirement officer can cover this with you during your initial meetings to discuss your consideration for this type of retirement.

I've only scratched the surface on the topic of Disability Retirement. Until I write another article on this topic, you can find more details using the web link that I shared earlier in this article.

James Marshall is a federal retirement benefits specialist and the owner of Federal Retirement Planning LLC. For more information, please visit the Federal Retirement Planning LLC website.

CASE LAW UPDATE

CALIFORNIA STATE SUPERIOR COURT HOLDS STATE TEACHER TENURE AND DISMISSAL STATUTES UNCONSTITUTIONAL

On May 14, 2012, nine California public school students challenged five statutes of the California Education Code which concern teacher tenure and teacher dismissal, claiming that the statutes violated the equal protection clause of the California Constitution, resulted in "ineffective teachers obtaining and retaining permanent employment," and that schools which serve predominantly low-income and minority students employed a disproportionate amount of these ineffective teachers. The plaintiffs asked the state court to consider whether the challenged state statutes cause the potential or unreasonable exposure of "grossly" ineffective teachers to all California students or to minority and low income students in particular in violation of the equal protection clause of the California Constitution. On May 2, 2013, the state superior court allowed the California Teachers Association and the California Federation of Teachers to become parties to the litigation, recognizing the "legitimate and immediate interests" that the aforementioned unions had in the outcome of the case. On June 10, 2014, the Los Angeles Superior Court ruled in favor of the plaintiffs, finding the challenged statutes of the California Education Code to be unconstitutional with regard to the California Constitution.

The court, at the opening of its analysis, cited to three pertinent provisions of the California Constitution. Article 1, section 7(a) of the California Constitution provides that a person "may not be deprived of life, liberty, or property without due process of law or denied protection of the laws." Article 9, section 1 reads "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific …

improvement." Finally, Article 9, section 5 states: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district."

Citing three California Supreme Court cases (*Serrano v. Priest* (1971) 5 Cal.3d 584, *Serrano v. Priest* (1976) 18 Cal.3d 728, and *Butt v. State of California* (1992) 4 Cal.4th 668) which held education to be a "fundamental interest" in California and that a right to "basic equality of educational opportunity" exists, the court looked to evidence regarding the specific effect of grossly ineffective teachers on students. The court found compelling evidence which indicated that "a single year in the classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom," and that students who are taught by a teacher "in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers." Based on the number of "grossly ineffective teachers" as defined by placement in the bottom 5% of competence, the court found that those teachers have a direct, negative impact on a "significant" amount of California students.

The court also found that the challenged statutes imposed a "real and appreciable" impact on California students' "fundamental right to equality of education," and that burden on poor and minority students was disproportionately greater. Because of this finding, the court analyzed the five challenged statutes under the "strict scrutiny" test. In other words, the court found that the burden was on the state to prove that the State has a "compelling interest" which justifies the challenged statutes, and that the distinctions drawn by the challenged statutes are necessary to further the purpose of that compelling interest.

The first statute analyzed was the "Permanent Employment Statute," a statute which grants tenure to teachers after a two-year period pending the results of an election. The court took issue with the simultaneity of the "induction" program, which recommends teachers for credentialing and lasts a full two years compared to the Permanent Employment Statute, which requires elections to be submitted well before the end of the second year. The plaintiffs argued, and the court agreed, that there was a possibility that a non-credentialed teacher could receive tenure. In reaching its finding that the statute was unconstitutional, the court found that the State (one of only five in the country with a two-year or less tenure program) had no compelling interest in the brevity of the two-year tenure program provided for in the "Permanent Employment Statute," while the statute "unfairly" disadvantaged both students and teachers.

The plaintiffs argued that "it is too time consuming and too expensive to go through the dismissal process as required by the Dismissal Statutes to rid school districts" of ineffective teachers. While the court noted testimony that dismissals are "extremely rare" due to school administrations believing it is "impossible" to dismiss a tenured teacher, it also considered the defendants' "entirely legitimate" due process argument. The court, however, characterized the Dismissal Statutes as "*über* due process."

The court found that under *Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194, vested due process stemming from a property right in a school district employee's position grants procedural rights before discipline becomes effective, and offers the employee the right to a multi-stage appellate review process. This procedure, the court found, granted less due process than that being afforded to teachers (rather than school district employees) under the Dismissal Statutes. The court held that the defendants could not prove that the State had a compelling interest in greater protections for teachers than the "reasonable" rights afforded to school district employees, and that the Dismissal Statutes were unconstitutional because removal under the statutes was "so complex, time consuming and expensive as to make an effective, efficient, yet fair dismissal of a grossly ineffective teacher illusory."

The final statute to be scrutinized was the California Education Code's "Last-In-First-Out" ("LIFO") statute, which states that the "last-hired teacher is the statutorily-mandated first-fired one" when a school is forced to lay off teachers (California is one of 10 states in which seniority is the sole factor). The court observed that the statute provided for no exceptions or waiver of imposition of the mandate for particularly effective teachers, and found that the statute was unconstitutional because the State had no compelling interest in the "*de facto* separation" of students from competent teachers, and no compelling interest in the "*de facto* retention" of incompetent teachers.

Finally, the court addressed whether the challenged statutes disproportionately affect poor and/or minority students in violation of the equal protection clause of the California Constitution. Citing an exhibit titled "Evaluating Progress Toward Equitable Distribution of Effective Educators," the court found that students at high-poverty, low-performing schools were most vulnerable to incompetent teachers, and that "minority children disproportionately attend such schools."

For the above stated reasons, all five of the challenged statutes were found unconstitutional.

You can read the full case, *Vergara v. California*, here.

This case law update was written by Conor D. Dirks, associate attorney, Shaw Bransford & Roth, PC.

For thirty years, Shaw Bransford & Roth P.C. has provided superior representation on a wide range of federal employment law issues, from representing federal employees nationwide in administrative investigations, disciplinary and performance actions, and Bivens lawsuits, to handling security clearance adjudications and employment discrimination cases.

GEICO'S GOOD STUFF

OSHA'S NATIONAL SAFETY STAND-DOWN REACHES NEARLY 1 MILLION WORKERS

GEICO's Good Stuff is a column series highlighting great stuff happening in the federal community.

Last week hundreds of thousands of workers across America participated in a National Safety Stand-Down, a campaign to prevent falls, injuries, and deaths in construction.

The initiative was organized by the Occupational Safety and Health Administration (OSHA), part of the Department of Labor (DOL), and carried out in partnership with more than 25,000 businesses, unions, and construction associations holding hundreds of public and private events around the country.

During the weeklong stand-down, employers and workers were asked to voluntarily stop work for a short period of time to discuss safe working conditions and ways to save workers' lives by preventing fatal falls.

In 2012, nearly 300 workers lost their lives in falls from heights and nearly 9,000 were seriously injured in falls. Lack of fall protection is the most frequently cited OSHA violation, and the agency has been working on a Fall Prevention Campaign since 2012, which has included developing materials and resources to assist employers in having "toolbox talks" around safety issues with their employees.

Non-fatal falls in construction can result in serious injury, with substantial cost to workers and employers. According to the National Council on Compensation Insurance, workers compensation cost to employers for construction falls averages around $100,000 per case.

"All of our materials reinforce our message that *Safety Pays and Falls Cost*," said Assistant Secretary of Labor for Occupational Safety and Health Dr. David Michaels. "OSHA doesn't want to see any worker or any company suffer because they didn't have the information they needed to prevent fatal falls and serious injuries. OSHA wants businesses to protect their bottom line, and employers to keep workers safe."

"This is an unprecedented effort and we want the outcome - in the form of fewer fatal accidents -- to be unprecedented as well. Never before have we been able to reach such a large number of people with a single worker safety initiative, and it couldn't come at a more vital time," said Labor Secretary Thomas Perez. "With the economy recovering and housing starts on the rise, this is the moment to ensure that no one has to lose their life in order to make a living. The summer construction season is underway as we speak. Now is the moment to make sure those who build *our homes* are able to return safe and sound to their *own homes* every night."

If your agency engaged in a significant public-facing activity such as OSHA's, or will it be doing so soon, send FEDmanager an email at publisher@fedmanager.com and tell us your agency's story.

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HEARD INSIDE THE BELTWAY

I am also certain that you need help. This government, this Congress, our presidents have not been as engaged as they should be in reforming some of the structures of administration, in supporting efforts to recruit and train your successors, and in providing incentives to implement the best management practices… The simple fact is that a sense of urgency about administrative reform seems to be lacking. Strong political support is absent.

Paul Volcker, former Federal Reserve chairman, at a reception honoring the 2013 Presidential Rank Award finalists

WEEKLY LEADERSHIP REFLECTION

The true test of a good government is its aptitude and tendency to produce a good administration.

Alexander Hamilton, The Federalist No. 68