

March 17th, 2025



Federal Practice Group

Navigating A Reduction In Force (RIF): What Every Federal Employee Should Know

Understanding Your Rights and Options During a RIF

Hosted By

Debra D'Agostino – Founding Partner

Joanna Friedman – Deputy Managing Partner

Ricardo Pitts-Wiley – Partner



Guidance on Agency RIF and Reorganization Plans Requested by Implementing The President’s “Department of Government Efficiency” Workforce Optimization Initiative

- **President Trump directed that, no later than March 13, 2025, agencies develop Agency Reorganization Plans.**
- **“Pursuant to the President’s direction, agencies should focus on the maximum elimination of functions that are not statutorily mandated while driving the highest-quality, most efficient delivery of their statutorily-required functions.”**



Voluntary Early Retirement Authority (VERA)

- 5 USC § 8336 and 8414, and regulations at 5 C.F.R. § 831.114 and 842.213 allow agencies to offer voluntary early retirement to certain employees in situations of a RIF.
- VERA lowers the age and years of service requirements for employees to be entitled to receive an immediate annuity (age 50 with 20 years of service or any age with 25 years of service).



Voluntary Separation Incentive Payments (VSIPs)

- In addition to and often used with VERA, agencies may offer VSIPs under 5 U.S.C. § 3521-3524, and 5 C.F.R. § 576.
- The VSIP, also known as a buyout, allows agencies that are undergoing a RIF to offer employees lump-sum payments up to \$25,000 as an incentive to voluntarily separate.
- OPM's guide to VSIPs states that individuals who are re-employed by the federal government within five years after receiving payment generally must repay the VSIP amounts they received in full.



Reduction in Force Regulation

§ 351.201 Use of regulations.

(a) (1) Each agency is responsible for determining the categories within which positions are required, where they are to be located, and when they are to be filled, abolished, or vacated. This includes determining when there is a surplus of employees at a particular location in a particular line of work.

- (2) Each agency shall follow this part when it releases a competing employee from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement, **when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.**



Competitive Area

- Under 5 C.F.R. §351.402, agencies are required to establish competitive areas in which employees compete for retention. Employees compete for retention with other employees only within their competitive areas.
- The competitive area may consist of all or part of an agency. The minimum competitive area is “a subdivision of the agency under separate administration within the local commuting area.”
- OPM directs agencies to define each competitive area solely in terms of organizational unit(s) and geographical location(s).



Competitive Level

- After establishing competitive areas, agencies establish competitive levels.
- Under 5 C.F.R. §351.403(a)(1), a competitive level consists of “all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption.”
- Position descriptions become the basis for competitive levels.



Retention Registers

- After establishing competitive levels, the agency establishes a retention register for each competitive level
- The retention register is the ranking of each employee subject to RIF within a competitive level after the agency applies four retention factors required by law (5 U.S.C. §3502):
 1. Tenure of employment,
 2. Veterans' preference,
 3. Length of service, and
 4. Efficiency or performance ratings.



Tenure of employment

- Under 5 C.F.R. §351.501(b), to determine tenure, employees are categorized into three groups based on their types of appointment:

Group I consists of career employees who are not serving on probation.

Group II consists of career-conditional employees and career employees who are serving probationary periods because of new appointments.

Group III consists of employees serving under term and similar non-status appointments.



Veterans preference

- Under 5 C.F.R. §351.501(c), within each tenure group, the agency further subdivides employees by applying the military preference retention factor:
 - Subgroup AD includes each preference eligible employee who has a compensable service-connected disability of 30% or more.
 - Subgroup A includes each preference-eligible employee not included in Subgroup AD.
 - Subgroup B includes each non-preference-eligible employee



Length of service

- Under 5 C.F.R. §351.503, within each of these veteran's preference subgroups, employees are then ranked based on their length of service.
- The employee with the most federal service is placed at the top of the subgroup, and the employee with the least amount of service is placed at the bottom.
- All creditable service is included when assessing this retention factor.



Performance

- Finally, under 5 C.F.R. §351.504, employees may receive extra retention service credit based on their performance.
- This extra retention service credit is determined by “the employee’s three most recent ratings of record received during the 4-year period prior to the date of issuance of reduction in force notices” (5 C.F.R. §351.504(b)(1)).



Bump and Retreat Rights

Background: Two Rounds of RIF Competition

First Round RIF Competition: agency applies the four retention factors to a competitive level to identify which employee has the lowest retention factor.

- The agency may use RIF procedures to release the lowest-standing employee from the competitive level.

Second Round RIF Competition: agency applies the four retention factors to determine whether a released employee has a bump or retreat right to a position in a different competitive level that is held by an employee with even lower retention standing.



Bump and Retreat Rights

Release from the Competitive Level

Regular Order of Release

- The agency releases employees from competitive level in the inverse order of their retention standing.
- The agency releases all employees in group III before releasing any employees in group II, and releases all employees in group II before releasing any employees in group I.
- Within subgroups, the agency releases all employees in subgroup B before releasing employees in subgroup A, and releases all employees in subgroup A before releasing employees in subgroup AD.



Bump and Retreat Rights

Release from the Competitive Level (Continued)

Out-of-Order Release

- Sometimes there are exceptions to the regular order of release (e.g., a temporary or a continuing exception in order to retain an employee with a special skill set)
- The agency must provide an explanation to any employee scheduled for release out of order of the reasons for going out of order.



Bump and Retreat Rights

Definitions of Bump and Retreat

- Per 5 C.F.R. Part 351 Subpart G, competing employees released from the competitive level may have assignment rights known as “bump and retreat.”
- Bumping is “the assignment of an employee to a position in a different competitive level that is held by another employee in a lower retention tenure group, or in a lower subgroup within the same tenure group.”
- Retreating is “the assignment of an employee to a position in a different competitive level that is held by another employee with less service in the same retention subgroup.”



Bump and Retreat Rights

Competitive Service Bump and Retreat Rights

- A competitive service employee who the agency releases from a competitive level may have bump or retreat rights to a continuing position on a different competitive level held by another employee with lower retention standing.
- A released competitive service employee in tenure groups I or II has bump or retreat rights to an **Available Position** in the same competitive area if:
 - the agency would otherwise separate or demote the released employee by RIF, and
 - the released employee has a current performance rating of record equivalent to Minimally Successful (Level II) or higher.



Bump and Retreat Rights

Competitive Service Bump and Retreat Rights (Continued)

An **Available Position** is required to:

- Last at least 3 months and not be a temporary time limited position;
- Be in the competitive service;
- Be a position that the released employee qualifies for;
- Have a pay rate that requires no reduction, or the least possible reduction, in the released employee's present grade;
- Have the same type of work schedule (full time, part time, seasonal, intermittent, on call) as the released employee's present position;
- Be within 3 grades or grade intervals of the employee's present position; and
- Be held by an employee in a lower retention subgroup who is subject to bump rights, or in the same subgroup, but with less service, and who holds a position which the employee formerly occupied on a permanent basis (or an essentially identical position) that is subject to retreat rights.



Bump and Retreat Rights

Competitive Service Bump and Retreat Rights (Continued)

- If there is an **Available Position**, then the agency is required to offer a qualifying-released employee with an **Available Position**, if any exists, at the same grade of the **Available Position**. However, an agency is not required to offer the employee a particular position.
- A RIF offer may have less, more, or the same promotion potential as the released employee's present position.



Bump and Retreat Rights

Excepted Service Bump and Retreat Rights

- Excepted service appointments have no assignment rights under the RIF regulations.
- An agency may elect to provide its excepted employees with RIF assignment rights to other excepted positions only (i.e., no competitive service positions) and under the same appointment authority (e.g., a released Schedule A attorney could bump only another Schedule A attorney on a different competitive level).
- If an agency provides excepted service employees with bump rights, then it must also provide retreat rights and vice versa.



Transfer of Function (5 C.F.R. § 351.301 to § 351.303)

- A transfer of function takes place when a function ceases in one competitive area, and moves to one or more other competitive areas that do not perform the function at the time of transfer.
- A transfer of function also takes place when the entire competitive area moves to a different local commuting area without any additional organizational change.
- A transfer of function may be intra- or interagency. The transfer of function regulations use the same procedures for both types of transfers.



Transfer of employees, § 351.302

- (a) Before a reduction in force is made in connection with the transfer of any or all of the functions ... each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.
- (b) An employee whose position is transferred under this subpart ... is not a competing employee for other positions in the competitive area gaining the function.
- (c) Regardless of an employee's personal preference, an employee has no right to transfer with his or her function, unless the alternative in the competitive area losing the function is separation or demotion.
- (d) Except as permitted in paragraph (e) of this section, the losing competitive area must use the adverse action procedures found in 5 CFR part 752 if it chooses to separate an employee who declines to transfer with his or her function.
- (e) The losing competitive area may, at its discretion, include employees who decline to transfer with their function as part of a concurrent reduction in force.
- (f) An agency may not separate an employee who declines to transfer with the function any sooner than it transfers employees who chose to transfer with the function to the gaining competitive area.
- (g) Agencies may ask employees in a canvass letter whether the employee wishes to transfer with the function when the function transfers to a different local commuting area. The canvass letter must give the employee information concerning entitlements available to the employee if the employee accepts the offer to transfer, and if the employee declines the offer to transfer. An employee may later change and initial acceptance offer without penalty. However, an employee may not later change an initial declination of the offer to transfer.



Notice of Separation by RIF(5 C.F.R. § 351.801)

(a)(1) Each competing employee selected for release from a competitive level under this part is entitled to a specific written notice at least 60 full days before the effective date of release.

(b) When a reduction in force is caused by circumstances not reasonably foreseeable, the Director of OPM, at the request of an agency head or designee, may approve a notice period of less than 60 days. The shortened notice period must cover at least 30 full days before the effective date of release. An agency request to OPM shall specify:

- (1) The reduction in force to which the request pertains;
- (2) The number of days by which the agency requests that the period be shortened;
- (3) The reasons for the request; and
- (4) Any other additional information that OPM may specify.



Severance Pay

- If you are about to be separated from a permanent position involuntarily and through no fault of your own, you will likely be eligible for severance pay.
- To be eligible, you must not have refused an offer of a position that is (1) in the same commuting area, (2) in the same agency, and (3) no more than two grades below your current grade level. In addition, you must have been employed for at least 12 continuous months, and cannot be eligible for an immediate annuity as a civilian or from the uniformed services. Also, you must not be receiving workers' compensation benefits for wage loss due to an on-the-job injury.



Calculation of severance pay

- You will be entitled to 1 week's basic pay for each year of civilian service up through 10 years, plus 2 weeks' basic pay for each year of creditable service beyond 10 years.
- In addition, an age adjustment allowance of 2.5 percent is added for each full quarter of a year you are over 40 years of age. The maximum amount of severance pay is one year's salary (52 weeks).
- Severance payments will be equal to your weekly pay at the time of separation and will be paid out at regular pay period intervals. The only deductions made from severance pay are taxes, social security (if applicable), and Medicare.



Entitlement to severance pay

Qualifying appointments

- A career or career-conditional appointment in the competitive service or the equivalent in the excepted service; career appointment in the Senior Executive Service; an excepted appointment without time limitation, except under Schedule C or an equivalent appointment made for similar purposes; an overseas limited appointment without time limitation;
- A time-limited appointment in the Foreign Service, when the employee was assigned under a statutory authority that carried entitlement to reemployment in the same agency, but this right of reemployment has expired; and
- A time-limited appointment (or series of time-limited appointments by the same agency without any breaks in service) for full-time employment that takes effect within 3 calendar days after the end of a qualifying appointment.

Nonqualifying Appointments

The following types of appointments are nonqualifying appointments and do not convey eligibility for severance pay:

- An appointment at a noncovered agency (see the definition of *agency* in 5 CFR 550.703); appointment in which the employee has an intermittent work schedule;
- A Presidential appointment or an excepted appointment under Schedule C or an equivalent appointment made for similar purposes
- An emergency appointment;
- A noncareer appointment in the Senior Executive Service or an equivalent appointment made for similar purposes; and
- A time-limited appointment (except for a time-limited appointment that is qualifying because it is made effective within 3 calendar days after separation from a qualifying appointment), including-
 - A term appointment; overseas limited appointment with a time limitation; limited term or limited emergency appointment in the Senior Executive Service, as defined in 5 U.S.C. 3132(a), or an equivalent appointment made for similar purposes; Veterans Readjustment Appointment; and Presidential Management Fellows appointment.



MSPB Appeal Options

- An individual may appeal the following RIF actions to the MSPB: furlough for more than 30 days, separation, or demotion.
- For purposes of the RIF regulations, individuals serving a probationary period have appeal rights to the Board. See 5 C.F.R. §§ 351.202(a), 351.203, 351.501(a), (b)(2).
- For career or career candidate appointees in the Foreign Service, RIF appeal rights to the Board are pursuant to 22 U.S.C. § 4010a.



Covered Employees Must Use Grievance Process

- If an employee is covered by a Collective Bargaining Agreement, matters that customarily would be within the appellate jurisdiction of the Board are deemed to be covered by the negotiated grievance procedure, and thus beyond the Board's jurisdiction, unless a matter is excluded from the application of the grievance procedure. See 5 C.F.R. § 1201.3(c)(1)(ii).



Timing of Appeal

- An appeal must be filed no later than 30 days after the effective date of the RIF action, or 30 days after the date of the appellant's receipt of the agency's RIF related decision, whichever is later. See 5 C.F.R. § 1201.22(b)



Losure v. I.C.C., 2 M.S.P.R. 195, 199 (1980)

The permissible reasons justifying a reduction in force are set out at 5 C.F.R. § 351.201(a) as “lack of work, shortage of funds, reorganization, reclassification due to change in duties, or the exercise of reemployment rights or restoration rights.” ... The term “reorganization,” ... is not a magic word whose incantation can justify use of RIF actions to circumvent an employee's procedural rights.

The agency may establish a prima facie case on this element of its decision by coming forward with evidence showing a RIF undertaken for any of the reasons specified in 5 C.F.R. § 351.201(a). If the employee presents no rebuttal evidence to challenge the bona fides of the agency's alleged reason for the RIF, the agency's initial evidence would normally suffice to meet also the agency's burden of persuasion on this element of its decision. Once the agency makes out a prima facie case, the burden of going forward with rebuttal evidence shifts to the employee but the burden of persuasion (more precisely the risk of non-persuasion) never shifts from the agency.

- “The Board will not allow the circumvention of adverse action procedures where the ‘reorganization’ has no substance and is in reality a pretext for summary removal.” Losure, 2 M.S.P.R. at 200.



Markland v. OPM, 140 F.3d 1031, 1033 (Fed. Cir. 1998)

- OPM bears the burden of proving by a preponderance of the evidence that the RIF procedures were properly invoked.
- We accord an agency “wide discretion in conducting a reduction in force; absent a clear abuse of that discretion, a substantial departure from applicable procedures, a misconstruction of governing statutes, or the like, we do not upset a final agency decision.”



Decker v. Dep't of Health & Hum. Servs., 40 M.S.P.R. 119 (March 1989)

- Once an agency establishes a prima facie case by demonstrating that the RIF regulations were properly invoked, the burden shifts to the appellants to come forward with evidence to rebut the agency's claim of a legitimate management reason for the RIF actions.
- Even though an agency establishes a prima facie case that a RIF was conducted for a valid management reason under 5 C.F.R. § 351.201(a), its improper motivations will taint the RIF. See *Drake v. Department of Commerce*, 18 M.S.P.R. 475, 478 (1983) (although agency's purported reason for RIF, lack of work due to a shortage of funds, was a legitimate management reason, preponderant evidence showed that its primary reason was to retain an employee with a lower retention standing than the appellant, thereby circumventing the RIF regulations).



McKenna v. Dep't of Navy, 2007 WL 1120318 (M.S.P.B. Apr. 6, 2007)

It is well established that, in a RIF, an employee has a substantive right to be placed in a properly drawn competitive level. See *Jicha v. Dep't of the Navy*, 65 M.S.P.R. 73, 76 (1994). Thus, the agency bears the burden to prove by preponderant evidence that the appellant's competitive level was properly drawn. *Disney v. Dep't of the Navy*, 67 M.S.P.R. 563, 567 (1995).

To meet its burden, the agency must establish distinguishing features between positions in separate competitive levels that are sufficient as a matter of law to find that the positions are not “similar enough in duties, qualifications requirements, pay schedules, and working conditions, so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption.” 5 C.F.R. § 351.403(a). “Without undue interruption” means without any loss to productivity beyond that normally expected in the orientation of any new, but fully qualified employee. See *Disney*, 67 M.S.P.R. at 567.

In determining whether the agency afforded the appellant his proper assignment rights, the Board must conduct a de novo review to determine whether the agency has shown that the appellant did not have “the capacity, adaptability, and special skills needed to satisfactorily perform the duties of the position without undue interruption.” 5 C.F.R. § 351.702(a)(4); see *Chambers v. U.S. Postal Service*, 77 M.S.P.R. 337, 342 (1998) (the determination of an employee's qualification for assignment under section 351.702(a) is within the agency's discretion, subject to review by the Board under the preponderance-of-the-evidence standard).



Peters v. Dep't of Energy, 29 M.S.P.R. 253, 255 (1985)

- The Board concluded that the agency engaged in an impermissible circumvention of the RIF regulations by promoting the appellant's coworker to avoid his being bumped by the appellant in the course of a reorganization.
- Therefore, even though the agency articulated legitimate management reasons for the RIF, the agency has failed to sustain its burden of showing by preponderant evidence that its application of the RIF regulations with respect to the appellant was proper.



Consultation Request

- ClientIntake@fedpractice.com or (202) 862-4360