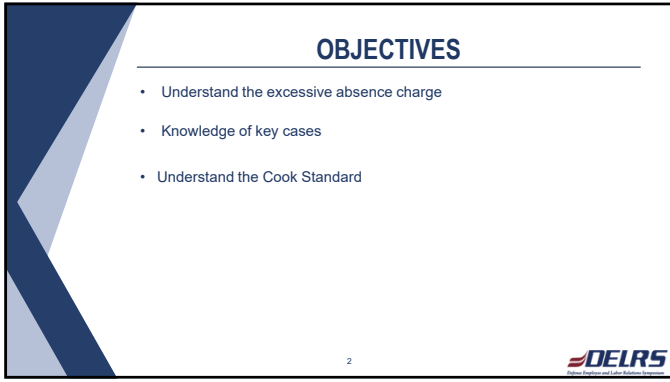
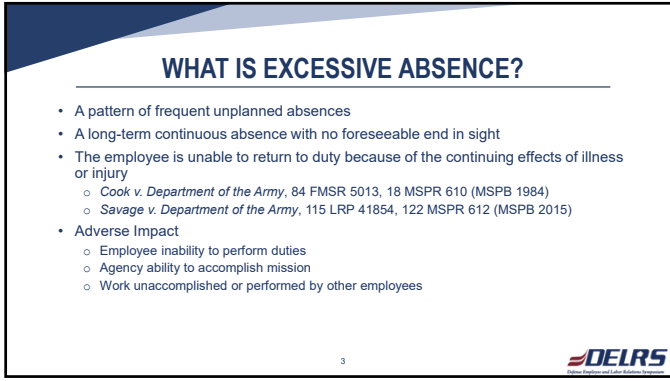




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GENERAL RULE

- An adverse action cannot be based on an employee's use of approved leave
 - When an agency approves leave it releases the employee from the obligation to report
 - Such an absence does not breach the employer-employee relationship


- *Combs v. Social Security Administration*, 91 M.S.P.R. 148 (2002)



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KEY CASES

- *Cook v. Department of the Army*, 84 FMSR 5013, 18 MSPR 610 (MSPB 1984)
- Modified by *McCauley v. Department of the Interior*, 116 MSPR 484 (2011)
- Modified by *Savage v. Department of Army*, 122 MSPR 612 (2015)




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EXCEPTIONS... COOK STANDARD

- Excessive Absence is established when the following criteria is met:
 - The record shows that the employee was absent for compelling reasons beyond his control so that agency approval or disapproval was immaterial because the employee could not be on the job;
 - The absence or absences continued beyond a reasonable time;
 - The employee was warned that adverse action might be initiated unless the employee became available for duty on a regular, full-time, or part-time basis; and
 - The agency showed that the position needed to be filled by an employee available for duty on a regular, full-time, or part-time basis


- *Cook v. Department of the Army*, 18 M.S.P.R. 610, 611-12 (1984)



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EXCEPTIONS... COOK STANDARD (cont.)


- The record shows that the employee was absent for compelling reasons beyond employee's control
 - Agency approval or disapproval was immaterial because the employee could not be on the job
 - Management requirement to track the reason that the employee cannot report to work.
 - Failure to prove in McCauley as agency was still pending medical information



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EXCEPTIONS... COOK STANDARD (cont.)


- The absences continued beyond a reasonable time
 - No standard of reasonable time determined by MSPB
 - Agency must articulate reasonableness and impact to the mission
 - Consistency is important



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EXCEPTIONS... COOK STANDARD (cont.)


- The employee was warned that adverse action might be initiated unless the employee became available for duty on a regular, full-time, or part-time basis
 - Cook Warning letter
 - Must clearly state that the absences are excessive and may result in removal unless the employee becomes available



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EXCEPTIONS... COOK STANDARD (cont.)


- The agency showed that the position needed to be filled by an employee available for duty on a regular, full-time, or part-time basis
 - Impact of absences on mission of organization
 - Necessity for the work to be performed on regular basis

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INCLUDED LEAVE


- Annual and Sick
 - No requirement that annual or sick leave be exhausted
- Leave Without Pay (LWOP)
 - Approved non-pay leave status and absence from duty
 - Granting LWOP is a matter of supervisory discretion and may be limited by internal agency policy
- OWCP
 - After expiration of the statutory one-year period

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EXCLUDED LEAVE


- Family Medical Leave Act
- Absence Without Leave (AWOL)
- Military Leave
- OWCP (first year)

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LWOP & AWOL: GETTING IT RIGHT


- Absence Without Leave
 - The employee was absent during duty hours; and
 - Failed to request/received approved leave or the leave request was denied
 - Sick leave or AWOL?
 - Sick leave should be approved even if the employee fails to properly request leave, as long as the employee provides administratively acceptable evidence of incapacitation.
- Leave Without Pay
 - Approved leave status
 - Requested by employee
 - Sick leave or LWOP?
 - Acceptable to substitute LWOP for sick leave
 - Both considered under Cook Standard

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RELATED CHARGES


- Failure to follow leave procedures
 - Employee was aware of the procedures for requesting leave and did not follow them
 - Separate from AWOL charge
- Inability to perform duties based on physical or mental condition
 - Performance or conduct issues identified
 - Concerns that condition may result in injury to employee or others
 - Request for medical
 - Employee unable to perform duties based on medical condition
- AWOL

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BEST PRACTICES

- Management track all approved and unapproved absences
- Verify with supervisor that absences were related to illness/injury
- Accurate time coding and leave usage
- Express absences in hour and % of time
- Provide employee with a warning letter
 - Include information on CEAP, FMLA, RA and Disability Retirement
 - Inform that adverse action may occur without improvement
- Allow improvement period and if unsuccessful...
- Draft Proposed Removal
 - Include time & attendance report
 - Ensure Cook Standard is met

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SAMPLE COOK WARNING LETTER

Date: [DATE OF WARNING]
 To: [EMPLOYEE'S NAME]
 From: [SUPERVISOR'S OR HR ADVISOR'S NAME]

Re: Warning Regarding Excessive Absence

This letter is to advise you that your continued excessive absences are having an increasingly onerous burden on this organization and the staff. Over the past [PERIOD OF TIME DURING WHICH THE EXCESSIVE ABSENCES HAVE OCCURRED], you have demonstrated unreliable attendance and excess use of leave (a total of hours during 20XX [ADD ADDITIONAL YEARS IF APPLICABLE]). Your leave record indicates that during 20XX, you used hours of sick leave, hours of annual leave, and hours of leave without pay (exceeding hours of Family and Medical Leave Act leave granted between [DATE] and [DATE]). The medical documentation you have presented in support of your use of leave has indicated that you have been incapacitated for duty for all of these leave periods.


[PROVIDE SUMMARY OF EMPLOYEE'S LEAVE FORMS, INCLUDING DATE AND PERIOD OF INCAPACITATION COVERED]

This continuing pattern of excessive absences is having an adverse impact on the agency's ability to accomplish its mission.

[PROVIDE DETAILED HISTORY OF THE EMPLOYEE'S EXCESSIVE ABSENCES]

While fully sympathetic to your condition and what I perceive as your inability to either work a full work schedule [or confidently predict in advance when your condition would preclude your coming to work on a particular day], I am responsible for carrying out the mission of the [unit, branch, agency, etc.]. You are an important member of the organization and the work assigned to you is a key component of the overall work output.

When you are unable to work, I must often assign your work to other employees to assure timely completion. In addition, I am unable to schedule your attendance at important meetings and training classes, since I am unable to confidently predict that you will be available when required. On numerous occasions workflow planning and progress was impacted because you were not available.

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SAMPLE COOK WARNING LETTER (cont.)

Employee programs. On [DATE], [I OR SUPERVISOR'S NAME], notified you of the programs that are available to help you through a period of serious illness or to help you to perform the essential duties of your position and maintain your employment. These programs include:

- o If FMLA IS EXHAUSTED: FMLA. You invoked your FMLA entitlement for the 12-month period from [DATE] to [DATE]. Your leave record indicates that you have used _____ hours of FMLA leave and that your FMLA leave entitlement for this year is exhausted.
- o Reasonable accommodation. On [DATE], you were notified of your right to request a reasonable accommodation. A reasonable accommodation is a change in your work environment or in the way things are customarily done that would allow you to perform the essential duties of your position.


[PROVIDE HISTORY OF WHETHER REASONABLE ACCOMMODATION WAS REQUESTED, APPROVED, AND/OR DENIED]

You have been provided considerable time to resolve your medical conditions. Unfortunately, your absences continue to be excessive. [For intermittent absences: The difficulty of this situation is compounded by the fact that these absences have been unscheduled with no foreseeable end, making it virtually impossible for "me" or "your supervisor" to assign tasks to you or to have any confidence that you will be able to perform tasks in a timely fashion.] At a minimum, I need you to be able to confidently predict almost all of your absences sufficiently in advance to allow for the scheduling of time-sensitive [work projects, meetings, and training classes]. (An occasional unplanned absence is acceptable, as it would be for any employee.)

Your position, [EMPLOYEE'S POSITION OF RECORD], must be filled by an employee who is available for duty on a regular "full-time" or "part-time" basis. During your absences, I have been forced to fulfill the duties of your position by [utilizing _____ hours of overtime to cover work that would have been performed by your position, utilizing the services of a contract employee to fulfill certain of your duties, bringing in a temporary employee to cover your duties, etc.]

You are hereby notified that adverse action (up to and including removal) may be taken unless you are able to provide a date in the near future when you will be available for duty on a regular ["full-time" or "part-time"] basis and you carry through with that commitment to return to regular attendance.

If you have any questions regarding this notice, please contact [NAME] at [TELEPHONE NUMBER] or [EMAIL ADDRESS].

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ANY QUESTIONS



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Seven horizontal lines for handwritten notes.