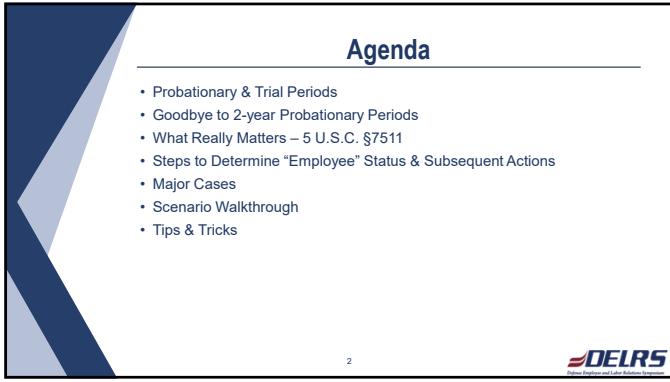
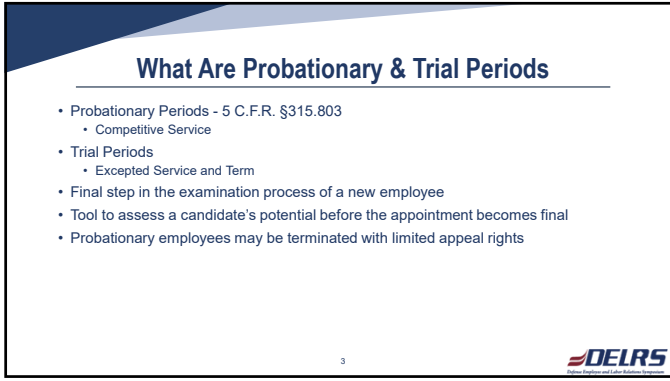




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2



3

Limited Due Process & Appeal Rights


- 5 C.F.R. §315.804 – Notification in Writing
 - Reason for Separation – “Conclusions as to Inadequacies”
 - Effective Date
- Merit System Protections Board – Non-Frivolous Claims of:
 - Partisan Political Reasons
 - Marital Status
 - Discrimination Claims raised in conjunction with either above



4

Supervisory & Managerial Probationary Periods


- Requirement to serve upon initial appointment to supervisory and/or managerial position(s)
- 1 year in length – Competitive Service
 - Excepted Service and Alternate Personnel Systems – Check implementing regulations and operating instructions (Army STRL – 2 years; DCIPS – Not required)



5

Goodbye to 2 Year Probationary Periods


- FY2016 NDAA, Sec. 1105 instituted a 2-year probationary period for DoD employees, effective Nov. 25, 2015
 - Codified at 10 U.S.C. §1599e
 - Also included a provision that Secretaries of Defense and the Military Departments had ability to extend a covered employee’s probationary period
- FY2022 NDAA, Sec. 1106 rescinded 10 U.S.C., §1599e, effective Dec. 31, 2022
- Impact
 - Returned to 1-year probationary period for individuals appointed on or after Dec. 31, 2022
 - New permanent positions in the competitive service and career appointments in the SES, subject to any creditable service
- Individuals appointed to positions before Dec. 31, 2022 will continue to serve a 2-year probationary period



6

Probationary Period in Name Only

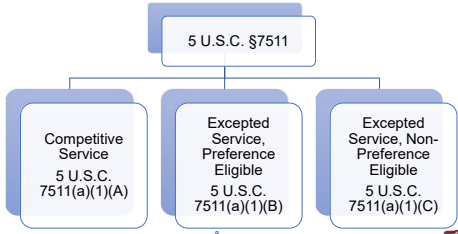
- Serving a probationary period is only part of the equation
- An individual can be both serving a probationary period **AND** meet the definition of an "employee" under 5 U.S.C. §7511
- If the individual meets the 5 U.S.C. §7511 definition of "employee," they are entitled to
 - Due process (notice and opportunity to respond)
 - Full appeal rights to the Merit Systems Protection Board (MSPB)
 - MSPB reviews merits of the underlying charge




7

5 U.S.C. §7511

- Provides 3 different scenarios for "employee" definition






8

5 U.S.C. §7511(a)(1)(A)


- An individual in the competitive service:
 - Who is not serving a probationary or trial period under an initial appointment; **OR**
 - Who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less.
- Note: Previously was a 2-year current continuous service requirement for DoD



9

5 U.S.C. §7511(a)(1)(B)


- A preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions:
 - In an executive agency; or
 - In the Postal Service or Postal Regulatory Commission
- Examples: VRA, Schedule A, etc.



10

5 U.S.C. §7511(a)(1)(C)


- An individual in the excepted service (other than a preference eligible):
 - Who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; **OR**
 - Who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less
- Examples: Schedule A



11

McCormick & Van Wersch


- Decisions by the Court of Appeals for the Federal Circuit
 - McCormick v. Air Force, 307 F.3d 1339 (2002)
 - Van Wersch v. Dep't of Health and Human Services, 197 F.3d 1144 (1999)
- MSPB's prior application of 5 U.S.C. §7511(a)(1)(A) and (C)
 - "or" equated to "and"
 - Individuals had to meet BOTH elements of completing a probationary/trial period **AND** current continuous service
- Federal Circuit found MSPB's application of §7511 conflicted with plain language
 - "or" means either one element **or** the other needs to be met for an individual to be an employee, not both
 - McCormick applies to 5 U.S.C. §7511(a)(1)(A) [competitive service]
 - Van Wersch applies to 5 U.S.C. §7511(a)(1)(C) [excepted service]



12

Current Continuous Service


- Defined in 5 C.F.R. §752.402
 - "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday"
- Different than "tacking on" for probationary period credit in 5 C.F.R. §315.802
 - No same Agency requirement
 - No same line of work requirement
 - No break length
 - No extensions



13

Pathways Appointments


- Not an exception
 - May count towards probationary period completion (see Part 315)
 - May count towards current continuous service (see Part 752)
- Pathways appointments
 - Temporary not-to-exceed (NTE) – Tacking on...
 - Indefinite – Tacking on and current continuous service...
- **Remember, a person may both be serving a probationary period and meet the current continuous service required to be an employee under 5 U.S.C. § 7511.**



14

Student Employment


- Scientific, Technology, Engineering, and Mathematics (STEM) Student Employment Program (SSEP)
- SSEP Direct Hire Authority
 - Temporary, NTE 1 year
 - Flexible Term Lengths
- Non-competitive conversions must complete applicable probationary period
- Time may be credited under Part 315



15

Be Wary of Extensions


- Extensions may be in name only
 - 5 C.F.R. 315.802(c): "Nonpay time in excess of 22 workdays extends the probationary period by an equal amount"
- Periods of non-pay status do NOT constitute a break in service for "current continuous service"
- **Be cognizant of the impacts of this when dealing with students, seasonal workers, etc.**



16

Prior Civilian Service Credit


- "Tacking On" – Prior Civil Service which counts toward the completion of a **probationary period**
 - Same Agency
 - Same line of work; and
 - No more than a single break in service not exceeding 30 calendar days
 - 5 CFR 315.802
- Military Departments/Components = Individual Agencies
 - Francis v. Dept. of the Navy, 53 MSPR 545 (1992)
- Same Line of Work
 - Based upon the duties performed/position requirements, NOT the Occupational Series



17

Determining if an Individual is "Employee"


- Review the individual's personnel file
- Determine the appointment type (competitive or excepted service)
 - If excepted, ascertain preference eligibility status
- Identify the effective date of the appointment
- Review prior federal service
 - Identify if prior service is current, continuous
 - Determine if work is for same/similar position (excepted service)
 - Does "tacking on" apply for probationary period
- Look at the 5 USC §7511 definition
 - Remember, an individual can be both serving a probationary period AND meet the definition of an "employee" under 5 U.S.C. §7511
- **Review the personnel file in its entirety. Don't stop with just the appointment SF-50!**



18

If You Take Nothing Else Away...

- The definition of "employee" (5 U.S.C. §7511) is critical
- Look at more than the appointment SF-50
 - The MSPB is going to, so you should too!




19

What if Individual IS an "Employee"

- "Employees" MUST be given full due process before effecting an adverse action against the individual
 - Minimum 30-day advance notice of adverse action (i.e., proposal letter)
 - Notice of charge(s)/offense(s), proposed penalty, and any and all aggravating factors or information that will be considered in rendering decision
 - Opportunity to review evidence against them
 - Opportunity to respond orally, in writing, or both prior to decision on proposal being issued
 - Apply the Douglas Factors
 - Notice of right to appeal the adverse action to MSPB
- "Employees" have full MSPB appeal rights for adverse actions and the merits of the action are reviewed


• Errors = Reinstatement and Back Pay



20

What if an Individual is NOT an "Employee"


- Termination for **Post-Employment** Reasons
- Notify in writing -
 - Reason(s) for termination
 - Effective date of termination – **don't wait until the last day!**
- No due process
- Limited MSPB appeal rights
 - Partisan political activity
 - Marital status
 - Procedures within 5 C.F.R. §315, Subpart H were not followed
- No grievances
 - DOJ, INS v. FLRA, 709 F.2d 724 (1983)
 - Reiterated in 2013: NTEU v. FLRA, 12-2574
- Can file Individual Right of Action with MSPB or an EEO complaint



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What if an Individual is NOT an "Employee" (cont.)


- Termination for Pre-Employment Reasons
- Advance written notice of proposed action, including reason(s) for termination
- "Reasonable" period to provide a written answer/reply
- Written decision
- Notice of MSPB appeal rights IF terminated not in accordance with 5 C.F.R. §315.805 procedures
- If "employee" status is not clear, use caution and provide due process

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Other Historic Cases


- Gutierrez v. Dept. of Treasury, 99 MSPR 141 (2005)
 - Non-pay status counted towards current continuous service
- Steinhoff v. Dept. of Veterans Affairs, 2006 MSPB 72 (2006)
 - Effecting a termination at the end of day on the final day of the probationary period results in a completed period
- Greene v. Defense Intelligence Agency, 100 MSPR 447 (2005)
 - For excepted service, "an Executive agency" does not limit the time to a single agency
- McCrary v. Dept. of the Army, 2006 MSPB 261 (2006)
 - 5 C.F.R Part 315 "Tacking on" rules apply to excepted service
- Fitzgerald v. Dept. of the Air Force, 108 MSPR 620 (2008)
 - Excepted service can be applied to competitive service probationary periods and current continuous service

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Scenario Walkthrough #1


- Individual began competitive service career in a non-DoD Agency in 2011
- Termination/Transfer Out of Agency effected August 29, 2019
- Appointment to Air Force competitive service position effected August 29, 2019
 - SF-50 Remarks: Subject to Two Year Probationary Period
- Termination during probationary period effected on February 22, 2021
- Timely appeal made to the MSPB
- 2-year current continuous service requirement met = employee with due process and appeal rights

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24

Scenario Walkthrough #2


- Individual appointed to a temporary competitive service position March 26, 2009
- Converted to excepted service position under 5 C.F.R. Part 213
 - Temporary appointment pending conversion to competitive service
 - Individual was not preference-eligible
- In January 2013, promoted to another excepted service position pending conversion to competitive service
- Termination was effected on September 6, 2015
- Timely appeal made to the MSPB
- 2-year current continuous service, same/similar position, Executive agency requirements met = employee with due process and appeal rights



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Scenario Walkthroughs


- Did those sound familiar?
- Scenario #1 – McCormick v. Air Force, 307 F.3d 1339 (2002)
- Scenario #2 – Van Wersch v. Dep't of Health and Human Services, 197 F.3d 1144 (1999)



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Practical Tips and Takeaways


- Don't stop with the appointment SF-50
- 5 U.S.C. §7511 is your friend
- Review the entire OPF, not just the appointment SF-50
- Look at any resumes in OPF for prior service
- When in doubt, take the long route
- DO YOUR RESEARCH!!!
- Takeaways for HR to take to supervisors



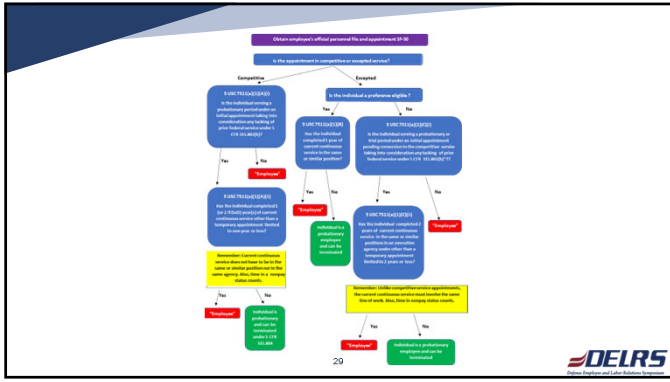
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If You Take Nothing Else Away...

- The definition of "employee" (5 U.S.C. §7511) is critical!
- Look at more than the appointment SF-50
 - The MSPB is going to, so you should too!



28



29



ANY QUESTIONS



30



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