

## Employment and Labor

### Federal Adverse and Disciplinary Actions

Federal employees have the right to due process before a federal agency takes an adverse or a disciplinary action against them. These types of actions are covered under Chapter 75 of Title 5, United States Code and also Part 752 of Title 5, Code of Federal Regulations (CFR). Some types of federal agency adverse actions include removal, demotion, reduction in grade, or suspensions of greater than 14 days. Some types of disciplinary actions include letters of warning, letters of reprimand, oral or written counseling, or suspensions of less than 15 days.

If a federal employee is issued a Notice of Proposed Removal, Proposed Suspension or Notice of Disciplinary Action, the Notice should include a detailed description of the alleged misconduct and the type of charge against the employee (e.g., lack of candor, fraud, insubordination, lack of performance, etc.). Federal employees in adverse action matters (suspensions 15 days and above, and demotion matters) and in some disciplinary actions (suspensions of any length (usually 14 days and below)) have the right to an attorney, to respond to the Notice in writing or orally, and to review the materials relied upon in the issuance of the Notice.

Of particular importance to federal employees is their right to review the materials (documents, data, or other records) relied upon in proposing a disciplinary action such as a suspension, removal or demotion. However, this rule may not apply to federal employee letters of counseling, warning and reprimand unless the agency affords it. When we represent federal employees facing adverse or disciplinary actions, we typically request from the agency all of the materials it relied upon. Often times a federal agency does not fully explain the alleged misconduct or performance issues in question, so it is important to review and obtain a copy of the materials that the agency relied upon in order to prepare a full legal defense to the merits.

We also generally recommend, in most cases, that a federal employee present both a written response and an oral response to the allegations in a proposed disciplinary or adverse action. The oral response portion of a federal employee's response can be very important. Typically, when we assist federal employees in this regard, we obtain a full statement of facts from the federal employee involved and prepare a written rebuttal to the allegations. We also contact the deciding official in the personnel action and request an oral response. In these types of cases, we respond to the merits of the alleged misconduct and argue for mitigation under the Douglas Factors. Douglas Factors typically are mitigating reasons as to why a particular disciplinary penalty should be reduced (i.e., based on years of successful service, no prior disciplinary actions, and other reasons why a disciplinary penalty should not be so harsh).

The following are helpful articles in this area of practice:

[Representing Federal Employees in Misconduct Investigations](#)

[Responding to Proposed Disciplinary Actions](#)

[Proposed Indefinite Suspensions for Federal Employees](#)

[Performance Improvement Plans for Federal Employees](#)

[Douglas Factor Defense for Federal Employees](#)

Please [contact Berry & Berry, PLLC](#) to schedule a consultation with an attorney to discuss your matter. It is important that federal employees who have been issued proposed discipline of any nature consult with an attorney who is familiar with these areas as soon as possible. The timelines for responding to a proposed action and in requesting the materials relied upon can be extremely short (e.g., 7 to 14 days), so it is important to consult with an attorney as soon as an action is received or contemplated.