

Employment and Labor

Suitability

Suitability Determinations

We represent federal employees and federal applicants in suitability determinations. Suitability responses are an increasingly important issue for federal government applicants and federal employees given the state of U.S. Government security concerns. Our firm serves as suitability lawyers for federal employees and applicants who encounter difficulties or need legal advice in the suitability investigations and appeals process.

The Suitability Process

We are often asked about the suitability process. Federal employment positions often include important duties that do not require a security clearance but are considered to be sensitive in nature. As a result, a suitability or background investigation is required in order to obtain or keep the position. For instance, included in these types of positions are certain types of IT professionals, federal law enforcement officers, comptrollers, and public safety and health professionals. These positions are often referred to as public trust positions. They are subject to background investigations, which include a National Agency Check and Inquiries (NACI) review, and potential personal interview and reference checks.

Suitability/Background Investigations

The first step in a suitability, background or public trust investigation often comes from an individual's completion of the SF-85 (Questionnaire for Non-Sensitive Positions), SF-85P (Questionnaire for Public Trust Positions) and even occasionally an SF-86 (usually used for secret level clearances). The investigation can also include follow up information requests (interrogatories) and/or interviews regarding areas of concern.

Suitability Issues Which Cause Concerns

When making suitability concerns, under [5 C.F.R. § 731.202](#), an agency or OPM will consider:]

- (1) Misconduct or negligence in employment;
- (2) Criminal or dishonest conduct;
- (3) Intentional false statements, deception, fraud;
- (4) Refusal to furnish testimony;
- (5) Alcohol abuse, without evidence of rehabilitation;
- (6) Illegal use of narcotics, drugs or other controlled substances, without evidence of rehabilitation;
- (7) Knowing and willful engaged in acts designed to over the U.S. Government by force; and
- (8) Any statutory or regulatory bar that prevents the lawful employment of the person at issue.

Preliminary Response to Suitability Concerns

If background or suitability concerns are not resolved during the investigation, a federal agency and/or the Office of Personnel Management ([OPM](#)) can take what is known as a suitability action. Suitability actions are governed by federal regulations at [5 C.F.R. Part 731](#) and are taken when an employee or applicant is deemed to be unsuitable. During suitability actions, a federal applicant or employee will be given notice of the suitability issues and be given an opportunity to respond to these issues. The goal of a suitability response is to mitigate or show that the allegations are not warranted.

Pursuant to [5 C.F.R. § 731.202 \(a\) and \(b\)](#), federal agencies and OPM should consider the following in mitigating potential suitability concerns:

- (1) The nature of the position that the individual is applying for or is employed;
- (2) The nature and seriousness of the conduct;
- (3) The circumstances surrounding the conduct;
- (4) The recency of the conduct;
- (5) The age and maturity of the person involved at the time of the conduct;
- (6) Contributing societal conditions; and
- (7) The absence or present or rehabilitation or efforts towards rehabilitation.

A federal applicant or employee will normally be provided the opportunity to respond to the alleged suitability concerns within a short period of time, often 30 days, usually in writing. In preparing that written response, it is critical for an individual to take the time needed to seriously rebut the allegations at issue and provide evidence of mitigation. This can often include providing documentation rebutting the allegations, and providing character affidavits and/or declarations. If a suitability action is sustained, then an appeal may be required to overturn the result. A negative action can result in a loss of the position and/or debarment by OPM from federal employment for a certain number of years.

Suitability Appeals to the MSPB

If an applicant is deemed unsuitable, depending on their federal employer they may be able to appeal the suitability denial to the Merit Systems Protection Board ([MSPB](#)). The MSPB must find that the suitability allegations against the federal employee or applicant can be shown by a preponderance of the evidence. If the federal employee or applicant is successful in rebutting all allegations made, the matter will be remanded to OPM or the agency for a determination as to whether the original action was appropriate. Please see our article in [Key Points in Responding to Suitability Concerns](#).

How We Can Help

Berry & Berry, PLLC are federal suitability attorneys that handle federal employee and applicant suitability issues and appeals throughout the United States. Our experienced attorneys have assisted numerous federal government employees and applicants in the suitability process by providing legal advice or representation during the investigation, response and appeals process. In addition, our firm belongs to the [Security Clearance Lawyers Association](#). Please contact

[Berry & Berry, PLLC](#) to schedule a consultation with a suitability attorney.