Flimsy Tools: The Limited Impact of Separation and Retirement Incentives on Department of Defense Civilian Force Shaping

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Abstract

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In the Department of Defense (DoD), civilian force reductions and shaping are accomplished through a limited number of means. The regulations controlling those means have evolved gradually from the inception of the first federal employee retention rights in 1876. As force shaping regulations have developed since World War II, it has taken longer to reduce the civilian force with each successive major force drawdown.

The principal method for force shaping is reduction-in-force (RIF), which is also the main method civilian manpower is shaped across the federal government. Though RIF is the common method, it is generally not the preferred method due to the ripple effects it causes throughout the DoD employee hierarchy, and because of its financial cost. Voluntary separation and retirement incentives also exist, including Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Pay (VSIP). These authorities are typically used to help defray the negative effects caused during RIF actions as they are less destructive to the force, both in terms of structure and morale.

Despite being the preferred method, VERA and VSIP are currently too restrained and inflexible to offer much more than token force-shaping assistance. Now, with the federal budget sequestration looming, DoD finds itself without a quality, speedy method of reducing its civilian force. In order for DoD to be able to more effectively and rapidly respond to the ever-changing fiscal environment, both now and in the future, VERA and VSIP authorities must be expanded to allow for broader and more flexible civilian force-shaping.

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I. Introduction

When considering military drawdowns and force-shaping efforts, much of the focus will inevitably be on the active duty members. Soldiers, Sailors, Airmen, and Marines are the military members that average laypeople associate with military service. Indeed, some may think only in terms of active duty personnel, and give no thought to, or have no awareness of, civilian military employees. In reality, civilians are a mission-critical component of the modern United States military force. They provide continuity and combatant support across all branches of the service, without which mission success would be impossible.

Civilians make up the largest percentage of DoD manpower today than ever in its history, and their role in the military is growing. In 1953, there were approximately 3,555,000 active duty members in service[1] versus 1,332,000 civilians, for an active duty to civilian ratio of approximately three to one.[2] By 2011, there were 1,218,000 active duty members[3] versus 774,000 civilian employees, narrowing the ratio to less than two to one.[4]

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[1] U.S. Military Personnel and Veterans, Military Personnel Records and Statistics, *DoD Deployment of Military Personnel by Country as of 30 June* 1953, http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/309hist.htm.

[2] *See* Office of Personnel Management, Data, Analysis & Documentation Section, Federal Employment Reports, *Executive Branch Civilian Employment Since 1940*, http://www.opm.gov/feddata/HistoricalTables/ExecutiveBranchSince1940.asp.

[3] *DoD Active Duty Military Personnel Strengths by Regional Area and by Country, 31 Dec 2011,* http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1112.pdf.

[4] *See DoD Active Duty Military Personnel Strengths by Regional Area and by Country December 31, 2010*, http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1012.pdf.

Civilians have been an integral part of the United States military since 1776.[5] The Board of War and Ordnance, comprised of civilians, was established that year with the responsibility of equipping and dispatching troops, maintaining personnel records, and disbursing funds.[6] Five members of the Continental Congress, several clerks and a paid secretary – Richard Peters, the first Army civilian – made up the Board.[7] Following this modest beginning, the Continental Army went on to hire civilians for driving, crafts, carpentry, and laborer jobs.[8] So began the long-term relationship between active duty and civilians within the military.

Civilians provided many of the vital combat support functions during the Civil War, handling duties such as administrative work and transportation.[9] The DoD civilian population has remained in a state of flux since World War II, and has undergone dramatic changes to its composition over the years. In 1940 when the Civil Service Commission (CSC) began to track civilian workforce numbers in a reliable fashion, DoD employment was at its lowest with approximately 256,000 employees.[10] Civilian employment exploded during the World War II years to its all-time peak in 1945 with a staggering 2,635,000 employees.[11] After falling rapidly over the next five years to 753,000 in 1950, civilian employee numbers rose rapidly during the Korean War to 1,337,000 in 1952.[12] Employment numbers began to fall gradually at the conclusion of

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[5] *See* Army Civilian Service, Section on History, *Our History*, http://www.armycivilianservice.com/content/our-history (last visited March 7, 2013).
[6] *Id*.
[7] *Id*.
[8] *Id*.
[9] K. Michael Hoskin, Civilians Accompanying the Force 3 (2003) (unpublished research project, U.S. Army War College) http://www.dtic.mil/cgi-in/GetTRDoc?AD=ada414597.
[10] *See Executive Branch Civilian Employment Since 1940*, http://www.opm.gov/feddata/HistoricalTables/ExecutiveBranchSince1940.asp.
[11] *See Id*.
[12] *See Id*.

the Korean War, to 1,030,000 in 1964, at which point employment began to steadily rise again, reaching another peak in 1969 with 1,342,000 employees.[13] Employment then gradually declined again to 960,000 in 1979 before climbing to 1,107,000 in 1985.[14] Department of Defense civilian employment dipped to 768,000 in 1996 and has remained relatively stable ever since, fluctuating during that period from a low of 636,000 in 2003 to 774,000 in 2011.[15]

Over the years, the regulations governing DoD civilian manpower reductions and force-shaping, like the rest of the federal sector's regulations, have grown increasingly more complicated and inflexible. While DoD civilian employees are not technically civil service employees, today the difference between civil service employees and DoD civilians is largely gone, and DoD employees enjoy the same job security and benefits as other federal employees.[16] Force-shaping and force reduction efforts involving civilians are now more involved, more complex, and ultimately more difficult than such efforts involving active-duty members alone.

Civilian employees actually have many employment-related rights that active duty members do not. Reduction-in-Force (RIF) is the primary tool for affecting civilian manpower changes within DoD, and across the federal government at large.[17] Federal agencies must use RIF procedures basically any time an employee faces a furlough,

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[13] *See Id*.
[14] *See Id*.
[15] *See Id*.
[16] *See e.g.* Department of Defense Instruction 1400.25, *DoD Civilian Personnel Management System: Reemployment Priority List* (July 1, 2003), *available at* http://www.dtic.mil/whs/directives/corres/pdf/1400.25-V330.pdf.
[17] *See* 5 C.F.R. § 351.201 (2012).

separation, demotion, or reassignment.[18] Unfortunately, it also happens to be an undesirable option. A RIF, even at the best of times, will be time consuming, complicated, and create ripple effects throughout the workforce. Such ripple effects stem primarily from retention rights employees develop as they progress in seniority, and/or to the extent they enjoy veterans' preference benefits.[19] The statutory retention-preference calculations also do not necessarily favor the best employees. The quality of an employee's job performance, while relevant, does not play as large of a role in job retention as one might expect.[20] Further, federal agencies must bargain many aspects of a proposed RIF with affected federal sector unions.[21] A RIF will also trigger Merit Systems Protection Board (MSPB) appeal rights.[22] The Age Discrimination in Employment Act of 1967 (ADEA) and the Older Workers Benefit Protection Act (OWBPA) play a significant role in civilian force-shaping, as well.[23]

Fortunately, alternatives to involuntary, and undesirable, RIF actions exist. The most significant of these are Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Pay (VSIP). These authorities allow federal agencies that are undergoing civilian manpower restructuring, downsizing, or reorganizing to avoid RIF actions by allowing employees to retire early, and/or and or receive lump-sum payments to voluntarily separate.[24] Unfortunately, VERA and VSIP have historically proven inadequate to the task, and the federal budget sequestration that was triggered on March 1 is now poised to fully reveal the shortcomings of civilian force reduction

[18] § 351.201(a)(2).
[19] § 351.501(a).
[20] *See Id*.
[21] 5 U.S.C. § 7117 (2012).
[22] 5 C.F.R. § 351.901 (2012).
[23] *See* 29 U.S.C. § 621(b) (2012).
[24] 5 C.F.R. § 831.114 (2012); 5 C.F.R. § 576.103 (2012).

regulations, especially VERA and VSIP, to rapidly reduce the DoD civilian workforce without harming mission effectiveness.

The purpose of this paper is to argue that VERA and VSIP regulations must be rewritten to allow for more flexible use. In the constantly shifting political environment, both in the United States and the world, change will be the norm for DoD. In light of the unwieldy nature of RIF actions, and the legal benefits bestowed upon older workers, DoD must have better tools at its disposal to shape the force. Other than potential political ramifications, the active duty force can be reduced relatively easily. No such ease exists for reducing the civilian side of the force. Voluntary Early Retirement and Separation Incentive Pay are tools that DoD can essentially use at its own discretion, but the limits and restrictions on their uses are so extensive as to render them ineffective for their primary purpose: to limit the need for RIF actions. The solution is clear; these restrictions must be eased.

In order to fully understand the problems with VERA and VSIP, especially as to how they relate to RIF actions, this paper will start with an exploration of the laws themselves, including legislative history, and judicial and administrative interpretation. Part II will introduce the Federal Civil Service, and its relation to DoD civilian employees. This section will provide background on how the civil service came into being, and the motivations behind implementation of the competitive service system and the job security federal employees now have.

Part III will cover RIF actions, starting with the history and evolution of RIF legislation. The next section will discuss the modern RIF process, beginning with a

discussion of the current law and under what circumstances force shaping or downsizing must be done using a RIF action. The next section will cover all stages of the RIF action process, including the organization of employees undergoing the action, and determining and exercising employee retention rights. The initiation of a RIF action also invokes certain rights and responsibilities, such as the duty to bargain and appellate rights. These rights have grown primarily out of administrative decisions, which will be discussed as they pertain to force management issues. Finally, furloughs and their relationship to RIF actions will be discussed.

Part IV will cover alternatives to RIF actions in order to manage the civilian workforce. Topics include both VERA and VSIP, starting with their history and purposes. The discussion will then center around their uses, approval processes, eligibility requirements, and potential impacts on employees exercising their rights under both. This part will also cover the ADEA and OWBPA, and how these laws impact the use of both VERA and VSIP.

Part V will present DoD civilian demographics, breaking the workforce down by regular appropriated fund and non-appropriate fund (NAF), and by demographics relevant to force management efforts. This part will also discuss future civilian employment projections and demographic breakdowns.

Part VI will discuss DoD civilian force reduction issues in the modern era, starting with the recent Federal budget sequestration. Next will be a discussion of the major civilian manpower drawdowns since World War II, including an analysis on how each subsequent force reduction has taken longer to reduce the force by less, and the

possible reasons behind this phenomenon. The fundamental problems caused by using RIF actions as the only method to reduce the civilian force will also be covered.

Finally, Part VII will argue that DoD cannot continue to effectively respond to the ever-changing fiscal environment without more flexible methods of force shaping and reduction. This section will make the conclusion that the two areas most ripe for change to most effectively, and easily, empower DoD in this regard is by modifying VERA and VSIP. Specifically, VERA should be made more attractive to employees in the older age groups, and VSIP eligibility and use should be expanded across the board.

II. Federal Civil Service and its Relation to DoD

The "civil service," when used as a term of art, encompasses positions in the executive, judicial, and legislative branches of the United States government.[25] The "uniformed services," which include the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration, are not included in that definition.[26] However, the difference today between civil service employees and DoD civilians is largely one of semantics. Civilians employed by DoD are treated virtually identically to those in the civil service, with the same or similar laws and regulations governing and applying to virtually all federal civilian employees.

The modern Federal Civil Service as it is known today was created by the Pendleton Civil Service Reform Act, passed on January 16, 1883.[27] Signed into law

[25] 5 U.S.C. § 2101(1) (2012).
[26] *Id*.
[27] *See* The Pendleton Civil Service Reform Act, 47 Cong. Ch. 27, 22 Stat. 403 (1883).

during the Chester A. Arthur administration, the Act was in response to President James A. Garfield's assassination by a disgruntled job seeker, Charles Guiteau.[28] President George Washington had made most of his federal appointments based on merit, but subsequent presidents began to deviate from this policy.[29] By the time Andrew Jackson was elected in 1829, the "spoils system," in which political friends and supporters were rewarded with federal employment, was the standard federal appointment method.[30]

The flaws and abuses of the spoils system, derived from the phrase "to the victor go the spoils," were quite serious.[31] Political appointees were required to spend more and more time and money on political activities for the benefit of their political patrons.[32] As the federal bureaucracy grew, Presidents were increasingly hounded by job seekers.[33] In Jackson's time, there were approximately 20,000 federal employees.[34] By 1884 there were over 130,000.[35] Additionally, with the industrialization of America, federal jobs became more specialized and required special and specific skills.[36]

The Pendleton Civil Service Reform Act eradicated the spoils system, requiring that federal government jobs be awarded on the basis of merit and that federal employees be selected through competitive exams.[37] The Act also made it unlawful to fire or demote covered civil service employees for political reasons, and forbade requiring

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[28] Our Documents, Section on 100 Milestone Documents, *Pendleton Act (1883)*, http://www.ourdocuments.gov/doc.php?flash=true&doc=48.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] 47 Cong. Ch. 27, 22 Stat. 403.

employees to give political service or contributions.[38] The Civil Service Commission (CSC) was established through the Act to enforce its provisions.[39] At the time the Pendleton Act went into effect, only 10% of the 132,000 federal employees were covered.[40] Today, more than 90% of the 2.7 million employees are covered.[41]

The CSC was not initially intended to be a central personnel agency for the federal government, but rather simply existed to police patronage.[42] The CSC's job was to screen, examine, and present a choice of applicants to fill selective civil service positions.[43] The CSC played a minimal role in general personnel management issues and employee concerns until the early 1900s.[44] It was not until 1932 that the CSC moved beyond patronage control into modern personnel administration in federal employment.[45]

In 1978, the Civil Service Reform Act of 1978[46] and the Reorganization Plan No. 2 of 1978 did away with the CSC and split its functions primarily between the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB).[47] Additional functions were assumed by the Equal Employment Opportunity Commission (EEOC), the Federal Labor Relations Authority (FLRA), and the Office of Special Counsel (OSC).[48]

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[38] *Id*.
[39] *Id*.
[40] *Pendleton Act (1883)*, http://www.ourdocuments.gov/doc.php?flash=true&doc=48.
[41] *Id*.
[42] S. REP. NO. 95-969, at 4 (1978), *available at* http://mspbwatch.files.wordpress.com/2011/11/s-rep-95-969-july-10-1978.pdf.
[43] *Id*.
[44] *Id*. at 4-5.
[45] *Id*. at 5.
[46] *See Id*.
[47] *See* Reorganization Plan No. 2 of 1978, 43 F.R. 36037, 92 Stat. 3783 (1978), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-app-reorganiz-other-dup100.pdf.
[48] *See Id*.

The Civil Service Reform Act of 1978 constituted the most extensive overhaul of federal employee management since the inception of the merit system in 1883, and is the most recent major reform aimed at the federal civil service. The principal provisions of the Act still in effect include:

- Merit system principles were codified and subjected employees who commit prohibited personnel practices to disciplinary action;
- Created the MSPB and OSC to adjudicate employee appeals and protect the merit system;
- Provided new protections for employees disclosing illegal or improper government conduct;
- Created OPM to supervise personnel management in the Executive Branch;
- Established a new performance appraisal system and new standard for dismissal based on unacceptable performance;
- Streamlined the processes for dismissing and disciplining federal employees;
- Created a Senior Executive Service (SES) embodying a new structure for selecting, developing, and managing top-level Federal executives;
- Provided a merit pay system for Grade Scale (GS) -13 to -15 managers, so that increases in pay were linked to the quality of the employees' performance;

- Authorized OPM to conduct research in public management and carry out demonstration projects that tested new approaches to federal personnel administration; and

- Created a statutory basis for the improvement of labor-management relations, including the establishment of the FLRA.[49]

III. Reduction-in-Force

As the differences between DoD and the civil service have essentially disappeared, so to have the differences in force reduction and force shaping been made uniform across the federal government. Within the federal government as a whole, each agency is responsible for managing its own manpower, which includes filling, abolishing, or vacating positions.[50] Reduction-in-Force (RIF), codified at 5 CFR § 351, is the primary tool for affecting manpower changes within all agencies of the federal government. Agencies must use RIF procedures in most cases when an employee is affected by furlough, separation, demotion, or reassignment requiring displacement.[51] The 1980 regulation amendments have largely remained unchanged since, and are still in effect today.

A. The History of Reduction-in-Force

Prior to the Civil War, federal employees had no retention rights to their jobs, and were routinely hired and laid off at will by the federal government like any other private

[49] S. REP. NO. 95-969, at 2, *available at* http://mspbwatch.files.wordpress.com/2011/11/s-rep-95-969-july-10-1978.pdf.
[50] 5 C.F.R. § 351.201(a)(1).
[51] § 351.201(a)(2).

employer.[52] The first retention system for federal employees was established in 1876 when honorably discharged veterans were given retention preference in times of manpower reductions.[53] Veterans' preference was established in law as a RIF retention factor in 1883 with the passage of the Civil Service Act.[54] The Civil Service Act, along with the Pendleton Civil Service Reform Act, did away with the at-will employment model for the federal government.[55]

Each executive department handled RIFs in its own way without any uniform regulation or guidance until the early twentieth century.[56] In 1912, Congress enacted the Efficiency Rating Act to introduce performance ratings as a mandatory RIF retention factor.[57] A 1921 Executive Order then established a uniform performance rating system across the Executive branch, mandating that employees with the lowest performance ratings would be most vulnerable to RIF actions.[58]

The first uniform RIF regulations for the federal government were issued in 1925 by the Personnel Classification Board.[59] These regulations established absolute preference for veterans with "good" or higher performance ratings, competitive levels,

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[52] *See* U.S. Merit Systems Protection Board, *Reduction-in-Force in the Federal. Government, 1981: What Happened and Opportunities for Improvement*, at 18 (1983), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT.
[53] *See Id*.
[54] *See* 47 Cong. Ch. 27, 22 Stat. 403, enacted to end the "spoils" system and the related abuses and corruption.
[55] *See Id*.
[56] *Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement*, at 18, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT.
[57] *See* Efficiency Rating Act of 1912, Ch. 350, 37 Stat. 414 (1912).
[58] *See Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement*, at 18, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT.
[59] *Id*.

and seniority and tenure as retention factors.[60] The Civil Service Commission (CSC) assumed the functions of the Personnel Classification Board in 1932, and in 1943, increased the weight of seniority as a RIF retention factor.[61]

The current RIF system was established by the Veterans' Preference Act of 1944.[62] The Act for the most part simply codified the various practices that were commonly followed at the time throughout the Executive branch agencies.[63] The law formally established the four factors that must be considered when releasing employees pursuant to a RIF: (1) employment tenure; (2) veterans' preference; (3) length of service; and (4) performance ratings.[64] Veterans' preference inclusion in the list of retention factors stemmed from a desire to turn the Executive and regulatory orders that governed preference into national policy.[65] With victory in World War II in sight, both Congress and President Franklin D. Roosevelt were sympathetic to the plight of veterans.[66] In his endorsement of the Act, President Roosevelt wrote:

> I believe that the federal government, functioning in its capacity as an employer, should take the lead in assuring those who are in the armed forces that when they return special consideration will be given to them in their efforts to obtain employment. It is absolutely impossible to take millions of our young men out of their normal pursuits for the purpose of

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[60] *See Id*. Competitive levels are tools to assist in determining which employees are retained during a RIF.
[61] *See Id.*
[62] Veterans' Preference Act, P.L. 78-359, 58 Stat. 387 (1944).
[63] *See Reduction-in-Force in the Federal. Government, 1981: What Happened and Opportunities for Improvement*, at 18, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT.
[64] P.L. 78-359, 58 Stat. 387.
[65] *Id*.
[66] Franklin D. Roosevelt, *Letter on Preference for Veterans in Federal Employment* (Feb. 26, 1944), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=16495&st=&st1=.

fighting to preserve the Nation, and then expect them to resume their normal activities without having any special consideration shown them.[67]

While the four retention factors had been clearly delineated in the Act, no weight or order of preference was prescribed.[68] To resolve this and other shortcomings, the CSC issued regulations in the years immediately following the 1944 Act defining competitive levels, introducing assignment rights between competitive levels, lessening the weight of performance ratings as a retention factor, and further increasing the weight of seniority as a retention factor.[69] Tenure was established as the primary retention factor, and length of service as the least important factor.[70] That same year, the CSC further defined the methodology to determine retention rights during RIF, setting up a system of reassignment rights based on subgroup seniority, which formed the basis for employee "bump" rights used today.[71]

In 1947, the CSC issued regulations establishing a limited form of bumping within retention subgroups, which became modern "retreat" rights.[72] From the late 1940s to the early 1950s, RIF regulations underwent modest changes affecting the provisions

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[67] *Id*.
[68] *See* P.L. 78-359, 58 Stat. 387.
[69] *Reduction-in-Force in the Federal. Government, 1981: What Happened and Opportunities for Improvement*, at 18, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT. Competitive levels are the means by which employees are grouped for purposes of competing for retention during a RIF, and are organized by employee grade and/or occupational level and classification series.
[70] *Id*.
[71] *Id*. Bump rights allow an employee subject to a RIF to displace an employee with lower retention standing and take that employee's job.
[72] *Id*. Retreat rights allow an employee who has been released from his or her competitive level to be assigned to a position that is the same position, or an essentially identical one, previously held by the released employee.

relating to reassignment rights, tenure groups, and outplacement efforts.[73] In 1953, the CSC issued regulations limiting bump and retreat rights to a single competitive area.[74]

The weight given to veterans' preference as a retention factor was increased in the early- to mid-1950s, primarily due to the large numbers of veterans in the workforce from World War II and the Korean conflict.[75] The number of veterans employed by the federal government had grown dramatically since the end of World War II.[76] In 1945, approximately 12% of the federal workforce was considered veterans for retention purposes.[77] Forty percent were veterans by 1948, increasing to 50% in 1955, and to 52% in 1960.[78]

In the 1960s, RIF procedures were extended to cover transfers of function, assignment provisions were broadened to allow vacant positions to be affected during RIFs, the seniority computation method was adjusted, additional seniority credit was given for "outstanding" performance appraisals, and the five-day notice requirement for initiating a RIF was introduced.[79]

In 1978, the Civil Service Reform Act narrowed the scope of RIF veteran retention priority to only those veterans with a compensable service-connected disability of 30% or more.[80] From 1979 to 1980, the Office of Personnel Management (OPM), the

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[73] *Id*. at 19
[74] *Id*. Competitive areas are based on geography, and typically include multiple competitive levels.
[75] *Id*.
[76] *See Id*.
[77] *Id*.
[78] *Id*.
[79] *Id*. Transfer of function is a method by which functions are transferred from one agency to another, usually leading to manpower shifts from one agency to the other, and/or manpower reductions.
[80] Civil Service Reform Act, Pub.L. 95-454, § 307, 92 Stat. 1111 (1978).

CSC's successor agency, issued new regulations to incorporate changes mandated by the Civil Service Reform Act, and to update and simplify existing regulations.[81]

B. Reduction-in-Force Practices

The basic RIF rule is relatively simple, but executing a RIF can be time-consuming and complex. Agencies must use RIF procedures any time an employee is released from his or her competitive level by furlough for more than 30 days, separation, demotion, or reassignment requiring displacement.[82] An employee may only be released from a competitive level for one or more particular reasons, which include lack of work, shortage of funds, insufficient personnel ceilings, reorganization, the exercise of reemployment or restoration rights, or the reclassification of an employee's position due to an erosion of duties.[83] The agency has the initial burden of establishing, by a preponderance of the evidence, a *prima facie* case that it took the RIF action for a legitimate reason.[84] Once the agency does so, the burden shifts to the appellant to rebut the legitimacy of the agency's claim.[85] The agency's failure to establish a legitimate reason for a RIF will result in reversal of the action.[86]

Abolishing a position does not always require RIF procedures. The agency may simply reassign an employee to a vacant position at the same grade or pay without regard

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[81] *Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement*, at 19, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT.
[82] 5 C.F.R. § 351.201(a)(2).
[83] *Id.*
[84] *Decker v. Dept. of Health and Human Services*, 40 M.S.P.R. 119, 123 (M.S.P.B. 1989).
[85] *Id.* at 127.
[86] *See Metger v. Dept. of Navy*, 68 M.S.P.R. 225 (M.S.P.B. 1995).

to the employee's rights under the RIF regulations.[87] The vacant position can be in the same or different classification series, line of work, geographic location, and/or competitive level.[88] This option, however, may not be helpful to the agency since the employee is entitled to the same pay as before, and financial concerns are typically a motivating factor for the RIF action.

C. Organization of Employees Considered for Reduction-in-Force

Competitive levels are organized by grade and/or occupational level and classification series.[89] Positions assigned to the same competitive level must be similar enough in duties, qualification requirements, pay schedules, and working conditions that an agency may reassign employees within the level without undue interruption.[90] Further, positions within the same competitive level must be in the same grade (or occupational level) and in the same classification series, so that the incumbent of one position can successfully perform the critical elements of any other position in the level without loss of productivity beyond that expected in the orientation of any new but fully qualified employee.[91] Position descriptions are the primary means of determining what positions are similar enough to be placed in the same competitive level.[92] For example,

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[87] Office of Personnel Management, Section on Workforce Restructuring, *Reductions in Force*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/#url=Summary (last visited Mar. 8, 2013).
[88] Phillip G. Tidmore, RIFs, Furloughs, and Transfers of Function Primer, at 10 (2012)(unpublished manuscript, on file with the Air Force LLFSC Online Law Library).
[89] § 351.403(a)(1).
[90] *Id.*
[91] *Pigford v. Dept. of the Interior*, 75 M.S.P.R 250, 253 (M.S.P.B. 1997).
[92] *Simonton v. Dept. of Army*, 62 M.S.P.R. 30, 34 (M.S.P.B. 1994).

all GS-0318-05 secretaries assigned to an Air Force base undergoing a RIF would compete for retention in the same competitive level.[93]

Competitive levels are established by each agency within competitive areas.[94] Also established by the agency, competitive areas are usually defined by organizational unit and geographical location, and are the boundary within which employees will compete for retention.[95] The Air Force, for example, typically establishes competitive areas based upon the activity within a given commuting area, such as the area surrounding an Air Force base that is serviced by the base Civilian Personnel Office (CPO).[96]

An agency's definition of a competitive area will not be overturned as long as the agency presents a rational basis for its definition.[97] If challenged, the agency must show the propriety of the competitive area.[98] The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area,[99] which may consist of only a single person.[100] Additionally, a new competitive area does not emerge simply because sub-organizations within an established competitive area are changed or reorganized.[101]

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[93] Tidmore at 7.
[94] § 351.403(a)(1).
[95] See § 351.402(a-b).
[96] Tidmore at 6.
[97] *See Cowan v. United States*, 710 F.2d 803, 805 (C.A.Fed. 1983).
[98] *Webb v. Dept. of Labor*, 18 M.S.P.R. 13, 17 (1983), *aff'd*, *Webb v. MSPB*, 765 F.2d 161 (C.A.Fed. 1985).
[99] *See MSPB v. FLRA*, 913 F.2d 976, 980 (D.C. Cir. 1990).
[100] *O'Connell v. DHHS*, 21 M.S.P.R. 257, 260-261 (M.S.P.B. 1984).
[101] *Blevins v. Tennessee Valley Authority*, 46 M.S.P.R. 239, 245 (M.S.P.B. 1990).

D. Determining Retention Rights

Retention rights within each competitive level are determined by tenure, veteran preference, length of service, and performance rating credits.[102] Once the RIF competitive area is established, affected employees are first subdivided into one of three possible tenure groups within their respective competitive levels.[103] A "competing employee" is defined as an employee in tenure group I, II or III.[104] Tenure group I includes career employees, group II includes career-conditional and probationary employees, and group III includes indefinite, temporary, and other term employees.[105] Employees in group I hold retention rights superior to those in group II, who hold superior rights to those in group III.[106] Employees are stratified within each tenure group by weighing the retention factors.[107]

Employees are then further subdivided within tenure groups into one of three veterans' preference subgroups.[108] The highest preference subgroup, AD, includes preference-eligible employees with a compensable service-connected disability rating of 30% or more.[109] The next subgroup, A, includes preference-eligible employees not included in subgroup AD.[110] The final subgroup, B, includes non-preference eligible employees.[111] Employees in subgroup AD hold retention rights over those in A, who

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[102] § 351.501(a).
[103] *See* § 351.501(a)(1-3).
[104] *Bodus v. Dept. of the Air Force*, 82 M.S.P.R. 508, 513 (M.S.P.B. 1999).
[105] § 351.501(a)(1-3).
[106] *Id*.
[107] § 351.501(a).
[108] § 351.501 (c)(1-3), (d).
[109] *Id*.
[110] *Id*.
[111] *Id*.

hold retention rights over those in B.[112] An employee will usually only receive veterans' preference during a RIF if they are either a "wounded warrior" or meet a significant employment-tenure threshold.[113] The employee must meet one of three conditions in order to receive veterans' preference and be placed in subgroup A: (1) the military retirement, not including benefits received from the Department of Veterans Affairs, is directly based upon a combat-incurred disability or injury; or (2) the military retirement is based on less than 20 years of active duty service; or (3) the employee has been working for the government since November 30, 1964, without a 30 day or less break in service.[114]

Within each veterans' preference subgroup, the agency then ranks employees by their respective service dates.[115] Retired military members with 20 or more years of service who were not eligible for veterans' preference will receive retention service credit toward their service dates at this stage for service during a war, or in a campaign or expedition for which the employee received a decoration.[116] Employees may also receive retention credit based upon the average of their last three annual performance ratings.[117] The three performance ratings to be considered must have been received during the four-year period prior to the date the agency either: (1) issued specific RIF notices, or (2)

[112] *Id*.
[113] 5 U.S.C. § 3501(a) (2012).
[114] § 3501(a)(3)(A-C).
[115] 5 C.F.R. § 351.501(a)(3).
[116] § 351.501(d).
[117] § 351.504(b).

at its option, froze ratings before issuing RIF notices.[118] If an employee received more than three ratings during the four-year period, the agency uses the three most recent.[119]

Performance rating credit regulations cover situations when all employees in the competitive area fall under a single rating pattern (i.e., all employees are rated under a five-level pattern), as well as situations when employees in the competitive area are covered by more than one rating pattern.[120] As most competitive areas fall under a single five-level rating pattern, the amount of extra retention service credit under said pattern is: 20 additional years for each rating of "Outstanding" or equivalent; 16 additional years for each performance rating of "Exceeds Fully Successful" or equivalent; and 12 additional years for each performance rating of "Fully Successful" or equivalent.[121] No additional service credit is given for ratings below "Fully Successful."[122] As an example of how these ratings would actually be calculated into retention credit, say an employee with three years of Federal service has one "Outstanding" rating of record, (20), and two "Exceeds Fully Successful" (16) ratings of record.[123] The employee would receive additional service credit based upon the three ratings of record: 20 + 16 + 16 = 52, divided by 3 = 17.3, rounded up to 18 years of additional retention credit for performance.[124]

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[118] *Id.*
[119] *Id.*
[120] § 351.504(b).
[121] § 351.504(d).
[122] *Id.*
[123] *Reductions in Force*, Section on Determining Retention Standing-Performance, http://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/#url=Summary (last visited Mar. 8, 2013).
[124] *Id.*

E. Exercising Retention Rights

Once the affected employees have been stratified based on the foregoing factors,[125] the agency uses that information to create a reemployment priority list (RPL).[126] This list is used to determine the order in which employees are removed and their right to replace lower priority employees ("bump rights") or to return to positions previously held ("retreat rights").[127] Agencies are required to maintain reemployment priority lists during RIFs, and must maintain separate lists for each affected commuting area.[128] An employee's reemployment priority will only apply to jobs at the employee's former agency in the same commuting area; the employee will have no priority for jobs in any other agency or in any other location.[129]

Although agencies must maintain a reemployment priority list, there is no regulatory requirement that employees participate in available agency reemployment programs.[130] Placement on an agency reemployment priority list, therefore, is not automatic.[131] To be placed on the list, employees must first complete an application within a set timeframe.[132] Even though placement on the list is not automatic, employees are entitled to receive information from the agency that may aid them in applying for the list.[133] The agency therefore must provide all eligible employees information about its reemployment program, including appeal rights: (1) any time the agency issues a RIF separation notice or Certification of Expected Separation, or (2) the employee accepts a

[125] Tenure, veteran preference, length of service, and performance rating credits.
[126] *See* § 330.201.
[127] Tidmore at 4.
[128] §330.201(b).
[129] Tidmore at 4.
[130] *Id*. at 12.
[131] *See* § 330.202.
[132] § 330.206(a).
[133] § 330.204(b).

position at a lower grade or pay level, or (3) the employee is separated from the agency because of a compensable work-related injury.[134]

Despite some conflicting language in other C.F.R. provisions that imply an employee must actually be separated before being eligible for the RPL, the MSPB has made it clear that an employee need only be given notice of a pending RIF to be eligible.[135] This is the case even if the employee is never actually separated.[136] For example, if an employee receives notice of a pending RIF, applies for the RPL, and ultimately applies for, and transfers to, a different position in the agency, the employee may still appeal for alleged RPL-rights violations occurring prior to taking the new position.[137]

Once the reemployment priority list is finalized, the actual RIF process begins with the abolishment of positions that have been targeted using particular criteria.[138] The agency then releases its extra employees from their competitive levels in inverse order of retention standing, by tenure group and subgroup.[139] Employees not eligible for any additional service credit, including temporary appointees and term or temporary appointees, will be in group III at the bottom of the agency register, and released first.[140] Group II employees are released next, followed by those in group I.[141] Within each tenure group, those employees within subgroup B are released before those in subgroup

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[134] § 330.204(b)(1-2).
[135] *Sturdy v. Dept. of Army*, 88 M.S.P.R. 502, 510 (M.S.P.B. 2001).
[136] *Id.*
[137] *See Id.* at 504.
[138] Tidmore at 10. Reasons for position abolishment are limited to: lack of work, shortage of funds, insufficient personnel ceilings, reorganization, the exercise of reemployment or restoration rights, or the reclassification of an employee's position due to erosion of duties.
[139] § 351.601(a).
[140] § 351.602(a-c).
[141] *Id.*

A, who are released before those in subgroup AD.[142] Within subgroups, employees are simply released in the order of their service computation date beginning with the employee with the most recent date.[143] In cases of a tie, the agency will simply choose which employee to release first.[144]

Once the required number of employees have been released from their competitive levels, the competitive area bump and retreat rights of each affected employee come into play.[145] The basic rule of retreat is that an employee who has been released from his or her competitive level may be assigned to a position that is the same position, or an essentially identical one, previously held by the released employee in an agency, but a significant number of factors must line up for this to happen.[146] A position is "essentially identical" to one previously held if the two positions would properly be placed in the same competitive level.[147] A released employee has the right to retreat to such a position, even if it is currently held by another employee, as long as certain other factors are met.[148] In order for an employee to have retreat rights to an occupied position, the position must be no more than three grades, or appropriate grade intervals or equivalents, below the position from which the employee is released.[149] The displaced employee must also have lower retention standing in a lower competitive level.[150] Finally, both the retreating employee and displaced employee must be within the same

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[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] § 351.701(c)(1-3).
[146] *See e.g. Magill v. Dept. of Navy*, 64 M.S.P.R. 497, 500 (M.S.P.B. 1994).
[147] *Evans v. Dept. of the Navy*, 64 M.S.P.R. 492, 495 (M.S.P.B. 1994).
[148] *See* § 351.701(a).
[149] § 351.701(c)(2).
[150] § 351.701(b).

tenure group and subgroup[151] As an example, if all these factors are met, Employee A is released from the GS-343-12 competitive level, group I-B, but may have the right to retreat to a position held by Employee B in the GS-560-11 competitive level, group I-B.[152]

A released employee may also be entitled to bump an employee in another competitive level as long as the bumping employee possesses the proper job qualifications.[153] Unlike retreat rights where both employees must be in the same tenure group and subgroup, bump rights allow the displaced employee to take a position in lower tenure groups or subgroups.[154] In other words, an employee in group I, subgroup AD, potentially has bump rights over those in I-A and B, II and III, and so on.[155]

If a released competitive service employee is eligible to retreat or bump to a different position, the agency must offer the position.[156] If the employee is not eligible or refuses an offer, he or she may at that point be furloughed or released from service.[157] If an employee qualifies to retreat or bump to more than one position, the agency is only obligated to offer the employee one of the positions; the employee is only entitled to one offer, and has no right to make a choice of positions.[158] The agency has full discretion to determine the position offered to the employee under 5 C.F.R. § 351.702(a), but such

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[151] *Id.*
[152] *Reduction in Force*, Section on Sample Retreat Rights to a Different Competitive Level, http://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/#url=Summary (last visited Mar. 8, 2013). The new position must also require no reduction (or the least possible reduction) in pay rate, must be in the same competitive area, last at least three months, and have the same type of work schedule.
[153] § 351.701(b).
[154] *Reduction in Force*, Section on Bumping Rights, http://www.opm.gov/policy-data-oversight/workforce-restructuring/reductions-in-force/#url=Summary (last visited Mar. 8, 2013).
[155] Tidmore at 11.
[156] *Id.*
[157] *Id*.
[158] *Endsley v. Dept. of Army*, 55 M.S.P.R. 46, 49 (M.S.P.B. 1992).

decisions are subject to review by the MSPB under a preponderance-of-the-evidence standard.[159] An agency is under no obligation to create positions for employees separated or furloughed due to a RIF, or even to fill vacant positions with such employees.[160]

An agency is required to notify an employee of his or her RIF rights only at the time it notifies the employee that he or she is to be assigned to a lower graded position, or released from service.[161] 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.[162] When a RIF is caused by circumstances not reasonably foreseeable, a shortened notice period of at least 30 days is permissible.[163] There is no requirement to identify the specific reason for the RIF, but other basic information must be included.[164] One case held that a RIF notice was sufficient because it stated that the RIF was necessary due to current and projected budgetary constraints, and that the personnel office was available to respond to questions.[165]

F. Terms that Must be Bargained

Most substantive proposals regarding RIF procedures, such as those regarding the filling of vacancies, freezing positions from outside hiring, determinations of retention

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[159] *Chambers v. USPS*, 77 M.S.P.R. 337, 342 (M.S.P.B. 1998).
[160] *See Patterson v. Dept. of Navy*, 6 M.S.P.R. 500, 503 (M.S.P.B. 1981).
[161] *Smitka v. U.S. Postal Service*, 66 M.S.P.R. 680, 689 (M.S.P.B. 1995), *aff'd* , *Smitka v. U.S. Postal Service*, 78 F.3d 605 (C.A.Fed 1996).
[162] 5 C.F.R. § 351.802(a)(1) .
[163] § 351.802(b).
[164] § 351.802(a)(1-6). Affected employees must be notified of (1) the action to be taken, the reasons for it, and its effective date;(2) information on the competitive area, competitive level, subgroup, service date, and three most recent ratings of record; (3) the place where the employee may inspect pertinent regulations and records; (4) the reasons for retaining a lower-standing employee in the same competitive level; (5) information on reemployment rights; and (6) The employee's right to appeal grieve the action.
[165] *May v. I.C.C.*, 20 M.S.P.R. 557, 561 (M.S.P.B. 1984), *aff'd*, *May v. I.C.C.*, 758 F.2d 666 (C.A.Fed. 1984).

standings, establishment of competitive levels and reemployment and promotion rights, to name a few, have met with findings of non-negotiability on the grounds they violate retained management rights.[166] However, there are still a wide range of issues that must be bargained that always adds additional time and complexity to RIF actions. Those proposals that have been found negotiable tend to be couched in terms of requiring management to exercise some discretionary authority in a given direction "to the maximum extent possible."[167]

Per 5 U.S.C. § 7117, the agency is obligated to bargain several types of RIF procedures with affected federal sector unions, and case law has developed in this area under the Federal Labor Relations Authority (FLRA).[168] Unless union proposals are forbidden by statute or regulation, an agency is required to negotiate provisions pertaining to RIFs in the collective bargaining agreement (CBA).[169] Although an agency decision to conduct a RIF is not substantively negotiable, an agency is still required to negotiate the impact and implementation of the decision,[170] and to bargain over proposals that require them to follow RIF regulations[171]

Agencies are further required to bargain proposals involving bump and retreat rights of bargaining unit employees.[172] For example, an agency must negotiate a proposal that the employer not release a competing employee from a competitive level while retaining an employee with a limited temporary appointment or limited temporary

[166] *See e.g. AFGE, AFL-CIO, Int'l Council of Marshals Service Locals Union and U.S. Marshals Service Agency*, 15 F.L.R.A. 333 (1984).
[167] *See Id.*
[168] Tidmore at 13.
[169] *NTEU v. Dept. of Treasury Financial Management Service Agency*, 29 F.L.R.A. 422 (1987).
[170] *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO*, 22 F.L.R.A. 91, 115 (1986).
[171] *See NTEU v. Dept. of Treasury*, 29 F.L.R.A. 422.
[172] *Nuclear Regulatory Commission v. FLRA*, 895 F.2d 152, 159 (4th Cir. 1990).

promotion.[173] Agencies must also bargain over its use of RIF principles when separating or downgrading an employee through no fault his or her own.[174] Additionally, to the extent regulations permit, agencies must negotiate over proposals which would permit displacement within subgroups between competitive levels.[175]

Finally, an agency must engage in union-initiated mid-term bargaining when RIFs are the subject of contract negotiations.[176] The Supreme Court has ruled that the FLRA was correct in finding that agencies are obligated to bargain over union-initiated proposals raised during the term of a labor agreement.[177] Under the Federal Service Labor-Management Relations Statute, agencies are obligated to bargain during the term of a CBA on negotiable union proposals concerning matters that are not contained in or covered by the term of the union's proposal, unless the union has waived its right to bargain about the subject matter.[178] The FLRA noted that waivers of bargaining rights may be established by express agreement or by bargaining history.[179] In determining whether there has been a waiver, the subject matter must have been fully discussed and consciously explored during the parties' negotiations, and the union must have consciously yielded, or otherwise clearly and unmistakably waived its interest in the matter.[180]

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[173] *See NTEU v. Nuclear Regulatory Commission*, 31 F.L.R.A. 566, 602-603 (1988).
[174] *NAGE Local R7-23 and Scott AFB*, 26 F.L.R.A. 916 (1987).
[175] *NTEU and DHHS, Region VI*, 22 F.L.R.A. 580, 582 (1986).
[176] *See U.S. Dept. of Interior v. FLRA*, 132 F.3d 157, (C.A.4 1997), *vacated by* 526 U.S. 86 (1999), *remanded to* 56 F.L.R.A. 45 (2000).
[177] *See NFFE Local 1309 v. Dept. of the Interior et al*, 526 U.S. 86, 99-100 (1999).
[178] *U.S. Dept. of the Interior and U.S. Geological Survey and NFFE Local 1309*, 56 F.L.R.A. 45, 50 (2000).
[179] *Id.* at 53.
[180] *Id.* at 53-54.

G. Terms that Need Not be Bargained

On the other hand, there are many RIF provisions that agencies have no obligation to bargain over. Fundamentally, there is no obligation to bargain over a provision that defines a RIF, to include reclassification due to changes in duties.[181] Additionally, agency bargaining obligations only extend to matters directly affecting the conditions of employees within the union's bargaining unit.[182] Finally, bargaining over the working conditions of managers and supervisors is negotiable only at the election of the agency.[183] However, if an agency elects to bargain over terms that include supervisors and managers, the FLRA will enforce any agreement reached.[184]

Most aspects of competitive areas are non-negotiable. The scope of bargaining in this area only extends to matters directly affecting the conditions of employment in the unit of recognition.[185] For example, there is no obligation to bargain union proposals to establish competitive areas affecting employees outside the union's bargaining unit, or that otherwise exceed the scope of the bargaining unit represented by the union.[186] The same rule applies if a union is seeking to affect the assignment rights of another bargaining unit.[187] There is also no requirement for an agency to bargain over a proposal to limit a particular competitive area to bargaining unit employees for RIF purposes since such a provision would be inconsistent with 5 C.F.R. § 351.402(b).[188] To be negotiable,

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[181] *See NTEU v. Dept. of Treasury*, 29 F.L.R.A. 422.
[182] *SEIU Local 556 and Dept. of Army, Office of the Adjutant General, Hale Koa Hotel, Honolulu*, 9 F.L.R.A. 687, 688 (1982).
[183] *NTEU and Department of Treasury, IRS, Wage & Investment Division*, 60 F.L.R.A. 219, 220 (2004).
[184] *AFGE Local 1815 and Army Aviation Center, Ft. Rucker*, 53 F.L.R.A. 606, 622 (1997).
[185] *SEIU Local 556 and Dept. of Army, et al*, at 687.
[186] *See Int'l Federal of Professional and Technical Engineers and Dept. of the Navy Marine Corps Security Force Battalion*, 47 F.L.R.A. 1086, 1088 (1993).
[187] *See SEIU Local 556 and Dept. of Army et al*, 9 F.L.R.A. 687.
[188] *DECA, Virginia Beach, Virginia and AFGE Local 1770*, 52 F.L.R.A. 904 (1997).

a competitive area proposal must only be defined in terms of an agency's organizational unit or geographical location.[189] However, the agency may, at its discretion, adopt union proposals for what would encompass competitive areas for RIFs.[190]

There is no obligation to bargain over the which employees are assigned to particular competitive levels, since the agency's right to retain or layoff is nonnegotiable under 5 U.S.C. § 7106(a)(2)(A). A proposal that would require employees in listed occupations to remain at the same competitive levels for the life of the agreement is also nonnegotiable since such a proposal would interfere with the agency's right to direct employees and assign work under § 7106(a)(2)(A) and (B).[191]

The retention of management rights, especially the right to assign work, is absolute and may not be surrendered through negotiations.[192] A CBA provision that conflicts with retained management rights, such as the right to assign employees, cannot serve as a bar to the enforcement of new government-wide regulations.[193] An agency decision to use RIF procedures involves a retained management right which is subject only to law and appropriate regulations.[194] For example, the application of performance credit for retention standings during a RIF process is nonnegotiable since it interferes with management's right to assign work.[195]

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[189] *SEIU Local 556 and Dept. of Army, et al,* at 689.
[190] *See Federal Trade Commission and Local 2211*, 90 F.S.I.P. 86 (1990).
[191] *AFGE Local 12, AFL-CIO and Dept. of Labor*, 17 F.L.R.A. 674, 679 (1985).
[192] *See National Treasury Employees Union and Department of Energy*, 19 F.L.R.A. 224, 232 (1985).
[193] *See Defense Logistics Agency Council of AFGE Locals AFL-CIO and Dept. of Defense Logistics Agency*, 24 F.L.R.A. 367 (1986).
[194] *See National Association of Government Employees, Local R7-23 and Department of the Air Force, Scott Air Force Base, Illinois*, 3 F.L.R.A. 184, 186-187 (1980).
[195] *See Id.* at 185-186.

Proposals regarding altering the statutory retention-right scheme are not negotiable. In a 2010 case, a union proposal that job positions be abolished in inverse order based on the employee's RIF Service Computation Date (SCD) was held to be nonnegotiable.[196] The proposal was contrary to OPM regulations governing retention standing and tenure groups, and would have been in violation of the requirement that the tenure group be considered before the SCD.[197] An agency may implement the three-grade interval limitation on bump and retreat rights where an existing collective bargaining agreement specifically mentions bump or retreat to lower grades.[198] A proposal which would assure reversion rights to all previously held positions and all intervening positions for which an employee qualifies has also been held nonnegotiable.[199]

H. Appellate Rights

In addition to bargaining with affected unions, agencies may also have to deal with appeals and other employee filings. A RIF is not an adverse action statutorily appealable to the MSPB.[200] However, RIFs are governed by 5 U.S.C. Chapter 35 and OPM regulations at 5 C.F.R. Part 351, which grant a right of appeal to the MSPB for employees separated, demoted or furloughed for more than 30 days due to a RIF.[201] As such, an employee who is released from his or her competitive level and assigned to a position carrying a lower grade or rate of pay is considered to have been demoted, and

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[196] *AFGE Local 1547 and Dept. of Air Force, Luke AFB*, 64 F.L.R.A. 813, 814-815 (2010).
[197] *See Id.*
[198] *See American Federation of Government Employees, AFL-CIO, Local 1603 and Naval Exchange, Naval Air Station, Patuxent River, Maryland*, 9 F.L.R.A. 1039, 1039-1040 (1982).
[199] *Id.*
[200] *Sirkin v. Department of Labor*, 16 M.S.P.R. 432 (M.S.P.B. 1983).
[201] 5 C.F.R. § 351.901.

has MSPB appeal rights.[202] In conducting a RIF, agencies are required to follow the procedures set forth at 5 C.F.R. § 351,[203] and the proper application of those procedures is a substantive right.[204]

If an employee is covered by a CBA, matters that customarily would be within the appellate jurisdiction of the MSPB are deemed to be covered by the negotiated grievance procedure, and thus beyond the MSPB's jurisdiction.[205] When a CBA does not exclude RIF actions from its coverage, the CBA's negotiated grievance procedures are the exclusive means for contesting RIF actions that would otherwise be appealable to the Board, except where the appellant claims discrimination.[206] In such cases, the appellant may only appeal to the Board if he or she makes a non-frivolous, good-faith claim of a prohibited personnel practice under 5 U.S.C. § 2302(b)(1).[207]

Thus, in a straightforward RIF action appeal, the appellate rights of employees can be summarized as follows:

- Employees who are not members of a bargaining unit may only appeal to the MSPB

- Bargaining unit members covered by a negotiated grievance procedure which does not exclude RIF actions from coverage may only appeal under the negotiated grievance procedure; and

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[202] *Paul v. Dept. of Navy*, 80 M.S.P.R. 174, 178 (1998).
[203] *Robinson v. U.S. Postal Service*, 63 M.S.P.R. 307, 311 (M.S.P.B. 1994).
[204] *Markham v. Department of the Navy*, 66 M.S.P.R. 559, 563 (M.S.P.B.1995).
[205] *Weslowski v. Dept. of Army*, 80 M.S.P.R. 585, 590 (M.S.P.B.1999), *aff'd*, 217 F.3d 854 (C.A.Fed. 1999).
[206] *See* 5 U.S.C. § 7121(d), (g).
[207] *Id*.

- Bargaining unit members covered by a negotiated grievance procedure which excludes RIF actions from coverage may only appeal to the MSPB.[208]

These general rules do not apply, however, when an employee raises additional allegations, such as unfair labor practices, prohibited personnel practices, or discrimination.[209] In a situation where a bargaining unit employee alleges that a RIF constitutes a ULP, he or she has the option of using the negotiated grievance procedure or ULP procedures, but not both.[210] Similarly, where an employee raises allegations that a RIF is per se a prohibited personnel practice, that employee may elect to contest the RIF action either to the MSPB or under the negotiated grievance procedure, but not both.[211] Employees alleging unlawful discrimination in a RIF action, upon receipt of the MSPB's decision, may also petition the EEOC for review.[212] If the employee is a member of a bargaining unit covered by a CBA, he or she may instead elect to grieve the matter through the negotiated grievance procedure, unless it is excluded from coverage, rather than pursuing an EEOC action.[213]

A common point of contention is whether competitive levels have been properly constituted.[214] An employee has a substantive right to be placed in a properly constituted competitive level and competitive area during a RIF, and the agency bears the burden of establishing it made a valid competitive level determination.[215] An employee's

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[208] Tidmore at 15.
[209] *Id.* at 16.
[210] 5 U.S.C. § 7116(d) (2012); *Villante v. Dept. of Navy*, 33 M.S.P.R. 542, 545 (M.S.P.B. 1987). The employee may make a forum selection only if RIF actions have not been excluded from CBA coverage.
[211] § 7121(d) (2012); § 2302(A)-(E). Coverage includes discrimination on the basis of race, color, religion, sex, national origin, age, sex, a handicapping condition, marital status or political affiliation.
[212] § 7702(b)(1) (2012).
[213] § 7121(a), (d).
[214] *See* Tidmore at 7.
[215] *Jicha v. Dept. of Navy*, 65 M.S.P.R. 73, 76-77 (M.S.P.B. 1994).

competitive level, however, will not simply be determined by where an employee is detailed to, or the type of position the employee is acting in.[216] The MSPB will look at the evidence of the actual duties performed by the employees in each of the positions in question.[217] When looking at a competitive level, any employee who qualifies for one position must be able to qualify for all.[218]

Whether an employee has been subjected to an appealable RIF action has also been heavily litigated, and usually turns on whether the employee made a voluntary employment election pertaining to the RIF.[219] An employee who voluntarily stays in a position and is never released from his or her competitive level during a reorganization has not been subjected to an appealable RIF action.[220] An employee voluntarily accepting a reassignment to avoid the consequences of an impending RIF has likewise not been subjected to an appealable RIF action.[221] Further, an employee has no appeal rights for voluntarily accepting a lower-graded position rather than be separated by RIF since the employee has the right to appeal RIF separations to the MSPB.[222]

The lack of a voluntary employment election on the employee's part usually results in MSPB appeal rights.[223] An assignment to a lower-graded position constitutes a RIF demotion even when the employee voluntarily applies for, or is offered an assignment to, that position, as long as the assignment was made after the agency informed the employee that his or her original position had been abolished and that he or

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[216] *Id.*
[217] Tidmore at 8.
[218] *Disney v. Dept. of Navy*, 67 M.S.P.R. 563, 567 (M.S.P.B. 1995).
[219] *See* Tidmore at 8.
[220] *Wessels v.USPS*, 76 M.S.P.R. 1, 2-3 (M.S.P.B. 1997).
[221] *See Paul*, 80 M.S.P.R. 174, 178.
[222] *Johnson v. Dept. of Army*, 83 M.S.P.R. 141, 144-145 (M.S.P.B. 1999).
[223] *See* Tidmore at 8.

she had not been selected for assignment to a position at the former grade level.[224] A RIF demotion occurs when an employee is actually released from a competitive level during an agency reorganization and is assigned to a position carrying a lower grade or rate of pay.[225] When an agency offers a permanent employee a reassignment to a temporary position in lieu of a RIF separation, such reassignments are appealable RIF actions.[226]

An employee must suffer demotion or loss of pay as a threshold requirement in order to have a claim under 5 C.F.R. § 351.901 appealable to the MSPB.[227] However, the precedential decision in *Smith v. Department of the Air Force*, rendered in 2012, revealed how broadly the MSPB interprets employee appeal rights when undergoing a reduction in grade or pay during a RIF.[228]

The term "demotion" is defined in the regulation as a change of an employee, while serving continuously within the same agency:

> (i) To a lower grade when both the old and the new positions are under the General Schedule or under the same type of graded wage schedule; or
>
> (ii) To a position with a lower rate of pay when both the old and new positions are under the same type of ungraded wage schedule, or are in different pay method categories.[229]

In *Smith*, the appellant had been informed she had been reached for a RIF action due to agency reorganization.[230] The agency offered her a change in grade from her

[224] *Harants v. USPS*, 130 F.3d 1466, 1469 (C.A.Fed. 1997).
[225] *Cash v. USPS*, 75 M.S.P.R. 407, 409-410 (M.S.P.B. 1997).
[226] *Nguyen v. Dept. of Veterans Affairs*, 92 M.S.P.R. 326, 330 (M.S.P.B. 2002).
[227] *See* Tidmore at 8.
[228] *See Smith v. Dept. of the Air Force*, 117 M.S.P.R. 488 (M.S.P.B. 2012).
[229] 5 C.F.R. § 210.102(b)(4).

current position of Pay Pool Advisor, YA-0301-02, to Budget Analyst, GS-0560-09.[231] The appellant accepted the change with the understanding that she would be separated if she did not accept.[232] As a result of the "demotion," the appellant's pay actually increased by almost $10,000 per year.[233] Despite this windfall, the appellant filed an EEO complaint alleging the agency's action was motivated by discrimination.[234] On the appeal form, the appellant indicated she was appealing a "reduction in grade or pay."[235] The administrative judge dismissed the appeal for lack of jurisdiction, finding the appellant's reassignment did not result in an appealable reduction in pay.[236] On appeal, the appellant conceded she was not reduced in pay, but instead contended she was subjected to the RIF action as a result of illegal discrimination.[237]

The MSPB held where, as in this case, an employee is moved from a position in one pay method category to another pay method category (i.e. NSPS to GS), it is the representative rate of pay for the position, not the pay actually received by the employee, which determines whether there has been a demotion.[238] Assignment to a position in a different pay system constitutes a demotion under § 210.102(b)(4)(ii) if the representative rate of the position to which the appellant is assigned is lower than that of the employee's former position.[239] Since the representative rate for the YA-02 Pay Pool Advisor position the appellant previously held was higher than the GS-09 Budget Analyst position she was

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[230] *Smith*, 117 M.S.P.R. at 489.
[231] *Id*.
[232] *Id*.
[233] *Id*.
[234] *Id*.
[235] *Id*.
[236] *Id*.
[237] *Id*.
[238] *Id*.
[239] *Smith* at 490, citing *Campbel v. Department of the Treasury,* 61 M.S.P.R. 99, 102 (M.S.P.B. 1994).

assigned to, the appellant was held to have suffered an appealable demotion action.[240] The fact the appellant had in actuality received a pay raise was irrelevant to the question of whether the Board had jurisdiction under 5 C.F.R. § 351.901.[241]

Thus, if an employee is reassigned pursuant to RIF procedures, but is not demoted, the action is not appealable to the MSPB.[242] If an employee's position is downgraded through reclassification, but with pay and grade retention, the downgrade is not a RIF and does not come under MSPB jurisdiction.[243] However, as evidenced by the *Smith* case, many employees may have standing to appeal even in what appears to be relatively benign RIF actions.

I. Furloughs

Employers that choose to merely furlough employees, instead of demoting or releasing them, may still have to follow RIF procedures in order to do so. Even though furloughs are not usually considered RIF actions, a furlough for more than 30 days technically releases an employee from his or her competitive level.[244] Employees furloughed for 30 consecutive days, or 22 work days, are therefore treated the same way as employees facing a RIF, and enjoy all of the same rights.[245]

1. Basic Furlough Law

A furlough is defined as "...the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other non-disciplinary

[240] *Id*. at 491.
[241] *See Id*.
[242] *Myers v. Dept. of Army*, 87 M.S.P.R. 77 (M.S.P.B. 2000).
[243] *Grubb v. Dept. of Interior*, 96 M.S.P.R. 377, 397-398 (M.S.P.B. 2004).
[244] *See* 5 C.F.R. § 351.201(a)(2).
[245] *Id*.

reasons."[246] Two types of furloughs are possible: administrative furloughs or shutdown furloughs.[247] An administrative furlough is planned by an agency in order to absorb reductions necessitated by downsizing, reduced funding, lack of work, or any budget situation other than a lapse of appropriations.[248] A shutdown or emergency furlough occurs when there is a lapse in appropriations, which may happen at the beginning of a fiscal year if no funds have been appropriated, or upon expiration of a continuing resolution, such as the budget sequestration issue currently facing the federal government.[249] Agencies typically have very little to no lead time to plan and implement a shutdown furlough.[250] An officer or employee of the United States is not allowed to voluntarily serve, thus, a furloughed employee cannot legally be allowed to work.[251]

A furlough of 30 consecutive days or less is (unlike other RIF actions) an adverse action covered under Chapter 75 procedures.[252] A furloughed employee is entitled to at least 30 days advance notice.[253] The employee has seven days to answer, may be represented by an attorney, and is entitled to a written decision at the earliest possible date.[254] A furloughed employee must also be given the basis for his or her selection as

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[246] 5 U.S.C. § 7511(a)(5).
[247] Office of Personnel Management, Section on Pay & Leave, *Furlough Guidance*, http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Overview (last visited Mar. 10, 2013).
[248] *Id*.
[249] *Id*.
[250] *Id*.
[251] 31 U.S.C. § 1342 (2012).
[252] 5 U.S.C. § 7512 (2012).
[253] § 7513(b)(1) (2012). These notification rights do not apply during shutdown furloughs.
[254] § 7513(b)(2)-(4).

the employee to be furloughed.[255] An employee covered by a CBA may appeal either to the MSPB or through the negotiated grievance procedure, but not both.[256]

If an emergency occurs and an agency must immediately furlough employees, but does not have time to provide the 30 day notice required by 5 U.S.C § 7513(b), the agency is not then required to provide such notice.[257] The regulation states: "The advanced written notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities."[258] Any federal employees that may be released under sequestration in early 2013, however, do not fall into this emergency category since federal agencies have been on notice that a budgetary shortfall crisis exists. At this point, federal employees are due their full statutory notice requirements before they may be furloughed.

To further complicate matters, it is possible for agencies to take certain personnel actions that may be construed by the MSPB as furloughs, thereby unintentionally giving rise to RIF rights. In one case, the United States Postal Service had placed employees, having either temporary or permanent light duty assignments, in non-pay, non-duty status for periods of up to four hours on sixteen occasions over a two-month period.[259] The Federal Circuit upheld the MSPB and ruled these actions were in fact furloughs coming under the Board's jurisdiction.[260] The Postal Service had argued the actions it took were allowed under the collective bargaining agreement, but the MSPB held that it will look

[255] 5 C.F.R. § 752.404(b)(2) (2012).
[256] 5 U.S.C. § 7121(e)(1) (2012).
[257] 5 C.F.R. § 752.404(d)(2).
[258] *Id.*
[259] *Horner v. Schuck*, 843 F.2d 1368, 1370 (C.A. Fed. 1988).
[260] *See Id.* at 1376-1378.

past the collective bargaining agreement to the substance of the agency action, regardless of how it is labeled. [261]

2. Bargaining Obligations

Sparse case law exists on furloughs, but there are a few matters to be noted.[262] Like RIF actions, bargaining obligations also exist for agencies initiating furloughs, and any furlough will require the agency to bargain impact and implementation.[263] Certain union proposals must be negotiated as they would be with a RIF, including some that grant unions surprising power beyond what they have during RIF bargaining.[264] For example, union proposals requesting that agencies reimburse employees for wages and other lost compensation resulting from furloughs are negotiable as long as they are legally permissible, and to the extent appropriations allow.[265] Additionally, the FLRA has held that whether furloughs are to be continuous or discontinuous is also negotiable, and not solely within the purview of the agency's right to assign work.[266]

Like RIF bargaining obligations, there are several furlough aspects that agencies need not bargain over. Chief among these are proposals that run counter to mandatory terms contained in the furlough regulations. For example, a union proposal requiring the agency to consider furloughing rather than separating employees by RIF was held to be

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[261] *See Id.*
[262] Tidmore at 1.
[263] *Id.*
[264] *Id.*
[265] *Nat'l Weather Service Employees Organization and U.S. Dept. of Commerce, Nat'l Weather Service, Washington, D.C.*, 39 F.L.R.A. 1279, 1280-1281 (1991).
[266] *AFGE Local 32, AFL-CIO and Office of Personnel Management*, 22 F.L.R.A. 307, 311-313 (1986). The proposal required the Agency, first, to notify employees to be furloughed that they would be entitled to unemployment compensation for any furlough of more than five continuous days and, second, to offer those employees the opportunity to take their furlough on continuous days so as to qualify for unemployment compensation.

nonnegotiable; government regulations do not allow employees to be separated by RIF while employees with lower retention standing are on furlough.[267]

Union proposals may not infringe on an agency's right to assign work or to detail employees. For example, a union proposal is nonnegotiable when it seeks to require an agency to place an employee who would be furloughed in a vacant position the agency decided to fill, regardless of the employee's qualifications; such a proposal would violate the agency's right to detail employees.[268] The FLRA has also held that matters such as a change in office hours or the designation of certain holidays implicates an agency's right to assign work, and is therefore nonnegotiable.[269]

IV. RIF Alternatives and the Impact of the ADEA

Reduction-in-force is not the only tool at the disposal of federal agencies to shape or reduce its civilian workforce. While RIF actions are sometimes unavoidable, other options do exist, such as VERA and VSIP, but they largely are still extremely limited. Additionally, the Age Discrimination in Employment Act (ADEA) is a factor to be considered when exercising these other options.

A. Voluntary Early Retirement Authority

Voluntary Early Retirement Authority allows agencies that are undergoing substantial restructuring, reshaping, downsizing, transfer of function, or reorganization

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[267] *NTEU Chapter 202 and Dept. of the Treasury, Bureau of Government Financial Operations*, 22 F.L.R.A. 553, 554-557 (1986).
[268] *NAGE Local Rl-144 and Dept. of Navy, Naval Underwater Systems Center*, 29 F.L.R.A. 471, 478-479 (1987).
[269] *West Point Elementary School Teachers Assoc. v. U.S. Military Academy Elementary School, West Point*, 29 F.L.R.A. 1531, 1537-1538 (1987).

through a RIF action to temporarily lower the age and service requirements in order to increase the number of employees who are eligible for retirement.[270] This theoretically encourages more voluntary separations and helps the agency complete the needed organizational changes with minimal disruption to the workforce.[271] By offering these short term opportunities, an agency can make it possible for employees to receive an immediate annuity years before they would otherwise be eligible.[272]

1. Overview and History

The VERA program was first created in 1973 by Public Law 93-39, which allowed the Civil Service Commission (now Office of Personnel Management) to authorize agencies undergoing major RIF actions to allow employees not affected by the RIF to retire early. Upon its enactment, 29,000 federal employees took advantage of it to retire early between 1973 and 1974.[273] A major tool in the post-Vietnam drawdown, approximately 125,000 (10.5%) of all federal civilian retirees on the rolls at the end of 1978 had retired early under VERA.[274] Before 1973, there existed only a provision in

[270] 5 C.F.R. § 831.114 (f) (2012); § 842.213(f) (2012).
[271] Office of Personnel Management, Section on Workforce Restructuring, *Voluntary Early Retirement Authority*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/ (last visited Mar. 12, 2013).
[272] *Id.*
[273] U.S. GENERAL ACCOUNTING OFFICE, STATEMENT ON VOLUNTARY EARLY RETIREMENT UNDER THE CIVIL SERVICE RETIREMENT SYSTEM BEFORE THE SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS COMMITTEE ON POST OFFICE AND CIVIL SERVICE UNITED STATES HOUSE OF REPRESENTATIVES, at 2 (1980), *available at* http://archive.gao.gov/d46t13/112605.pdf.
[274] U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CONGRESS OF THE UNITED STATES, VOLUNTARY EARLY RETIREMENTS IN THE CIVIL SERVICE TOO OFTEN MISUSED, FPCD-81-8, at 3 (1980), *available at* http://www.gao.gov/assets/140/131594.pdf. VERA has been utilized in all major civilian force reductions since the Vietnam War, but never to the same degree.

law for involuntary early retirements for employees meeting the age and service criteria who lost their jobs through RIFs.[275]

The basic purpose of the law was to reduce involuntary separations and thereby save the jobs of younger workers not yet eligible for retirement benefits, who might otherwise be dismissed in a RIF.[276] Congress was also concerned with lessening the degree of disruption on the operations of the affected agency or installation, and the effect on the agency's or installation's future capability to effectively carry out its mission.[277] Other objectives were to spread the separations over the affected organizations and diminish the effect of RIFs on local economies.[278]

The implementing law provided that VERA would be authorized upon agency request when at least 5% of the employees in a geographic area, agency, or unit were facing involuntary separations.[279] Under certain circumstances, agencies could obtain permission to offer VERA with expected separation rates below 5%.[280] These guidelines remained intact until the Civil Service Reform Act took effect in 1979.[281]

Though it has never been used to the same degree that it was following the Vietnam War, VERA use has grown somewhat as laws and regulations governing its application have become more expansive on the conditions of its use. The Civil Service

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[275] *See* STATEMENT ON VOLUNTARY EARLY RETIREMENT UNDER THE CIVIL SERVICE RETIREMENT SYSTEM BEFORE THE SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS COMMITTEE ON POST OFFICE AND CIVIL SERVICE UNITED STATES HOUSE OF REPRESENTATIVES, at 3.
[276] *Id*.
[277] REPORT TO THE CONGRESS OF THE UNITED STATES, VOLUNTARY EARLY RETIREMENTS IN THE CIVIL SERVICE TOO OFTEN MISUSED, at 2.
[278] STATEMENT ON VOLUNTARY EARLY RETIREMENT UNDER THE CIVIL SERVICE RETIREMENT SYSTEM BEFORE THE SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS COMMITTEE ON POST OFFICE AND CIVIL SERVICE UNITED STATES HOUSE OF REPRESENTATIVES, at 3.
[279] *Id*. at 4.
[280] *Id*.
[281] Pub. L. 95-454, 92 Stat. 1111 (1978).

Reform Act expanded VERA coverage to agencies undergoing major reorganizations or transfers-of-function, in addition to RIFs.[282] In response to the law, OPM revised its VERA regulations to require that only 5% of the encumbered positions be abolished or transferred rather than 5% of the agencies' employees face separation, as was previously required.[283] This change allowed early retirements in organizations where no employees were actually facing involuntary separation.[284] A 1982 amendment removed this loophole, requiring employees to actually face separation or reduction in pay in order for VERA to be granted.[285] The amendment also removed annuity entitlement for employees who declined comparable position offers in lieu of early retirement.[286]

Significant changes were made to the law by the Chief Human Capital Officers Act of 2002, which is still in effect today.[287] The Act empowered agencies to use VERA to delayer, restructure, or reshape their workforce, and allowed them to use VERA and VSIP in conjunction, allowing employees to accept both VERA and VSIP.[288] Voluntary early retirement is no longer reserved exclusively for downsizing an agency, nor is it limited to one fiscal year in duration.[289] Agencies may now additionally request approval from OPM to use VERA to help reshape the workforce and correct skill imbalances.[290] The approval period for VERA is no longer statutorily limited, and approval may be

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[282] STATEMENT ON VOLUNTARY EARLY RETIREMENT UNDER THE CIVIL SERVICE RETIREMENT SYSTEM BEFORE THE SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS COMMITTEE ON POST OFFICE AND CIVIL SERVICE UNITED STATES HOUSE OF REPRESENTATIVES, at 4, *available at* http://archive.gao.gov/d46t13/112605.pdf.
[283] *Id*.
[284] *Id*. at 4-5.
[285] *See* Pub. L. 97-253, 96 Stat. 763, § 308(a) (1982).
[286] *Id*.
[287] 5 U.S.C. § 8336.
[288] *See* Office of Personnel Management, *Guide to Voluntary Early Retirement Regulations*, at 1 (2006), http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/vera_guide.pdf.
[289] *See Id*.
[290] *See Id*.

obtained for as long as it can be justified, making it easier for agencies to carry out long-term restructuring plans.[291]

2. Uses and the Approval Process

Though regulations have expanded somewhat regarding its use, obtaining permission to use VERA in the first place remains difficult. An agency must request VERA and receive approval from OPM before it may offer early retirement to its employees.[292] Very specific and detailed information is required, and the bar for approval is quite high. As part of the request, the agency develops a VERA plan to explain why the authority is needed, how it will be implemented, and which employees will be eligible.[293] The request must identify the agency and/or component(s) for which VERA is being requested, and list the reasons why the agency needs VERA authority.[294]

Employee eligibility for VERA can be based on organizational unit, occupational series or grade, geographic location, specific periods, skills, knowledge, factors related to specific positions, or a combination of such factors.[295] The request must also include a detailed summary of the agency's personnel and/or budgetary situation, and explain why its particular situation will result in an excess of personnel requiring a workforce restructuring or reshaping.[296] The agency must include the date it expects to accomplish the workforce restructuring or reshaping, and the time period during which it plans to

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[291] *Id*. at 9.
[292] STATEMENT ON VOLUNTARY EARLY RETIREMENT UNDER THE CIVIL SERVICE RETIREMENT SYSTEM BEFORE THE SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS COMMITTEE ON POST OFFICE AND CIVIL SERVICE UNITED STATES HOUSE OF REPRESENTATIVES, at 4, *available at* http://archive.gao.gov/d46t13/112605.pdf.
[293] *See, e.g.,* 5 C.F.R. § 831.114(c).
[294] § 831.114(c)(1-2).
[295] *Guide to Voluntary Early Retirement Regulations*, at 11, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/vera_guide.pdf.
[296] 5 C.F.R. § 831.114(c)(2).

offer VERA.[297] The agency must also include the total number of non-temporary employees in the agency or affected component(s), and then further detail the total number of these employees who may be involuntarily separated, downgraded, transferred, or reassigned as a result of the workforce restructuring or reshaping.[298] The agency must further provide the total number of affected employees who are eligible for VERA, an estimate of the number of these employees who are expected to retire early during the period covered by the VERA request, and a description of the types of personnel actions anticipated as a result of the agency's need for VERA.[299]

If OPM approves the VERA request, its approval message will stipulate a period of time during which the option will remain available.[300] Requests are evaluated based on the detailed request, an outline of the intended use of VERA, or the agency's human capital plan outlining its intended use of VERA and the changes in organizational structure it expects to make as a result of VERA.[301] Regardless of the method used, the request must include all of the required information.[302] The approval from OPM may cover the entire period of workforce restructuring or reshaping proposed by the agency, or only the initial portion of that period with a requirement for subsequent information and justification if such period covers multiple years.[303] After OPM approves an agency's request, the agency must immediately notify OPM of any subsequent changes in

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[297] § 831.114(c)(3-4).
[298] § 831.114(c)(5-6).
[299] § 831.114(c)(7-9).
[300] *Guide to Voluntary Early Retirement Regulations*, at 8-9, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/vera_guide.pdf.
[301] § 831.114(d).
[302] § 831.114(e).
[303] § 831.114(f).

the conditions that served as the basis for VERA approval.[304] Depending upon the circumstances involved, OPM will modify the authority as necessary to better suit the agency's needs.[305]

Early retirement authority may be terminated early if OPM determines that the condition(s) that formed the basis for the approval no longer exist.[306] The authority may also be amended, limited, or terminated by OPM to ensure that VERA regulations are properly followed.[307] Agencies must provide OPM with interim and final reports typically detailed in OPM's approval letter to the agency.[308] If the agency does not remain in compliance with reporting requirements, OPM may suspend or cancel VERA authorization.[309]

As with any incentive, when approved by OPM, the agency may use VERA at its own discretion.[310] The agency may further limit VERA offers based on an established opening and closing date for the acceptance of applications, or the acceptance of a specified number of applications.[311] Within the timeframe specified for VERA, the agency may subsequently establish a new or revised closing date, or reduce or increase the number of early retirement applications it will accept, if management's downsizing and/or reshaping needs change.[312] If the agency issues a revised closing date, or a revised number of applications to be accepted, the new date or number of applications must be

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[304] § 831.114(g).
[305] *Id.*
[306] § 831.114(n).
[307] § 831.114(o).
[308] § 831.114(p).
[309] *Id.*
[310] *See* § 831.114(i).
[311] *Id.*
[312] *Id.*

announced to the same group of employees included in the original announcement.[313] On the other hand, if the agency issues a new window period with a new closing date, or a revised number of applications to be accepted, the new window period or number of applications may be announced to a different group of employees as long as they are covered by the approved VERA.[314] Agencies are responsible for ensuring that employees are not coerced into accepting VERA.[315] If an agency finds any instances of coercion, it must take appropriate corrective action.[316]

Certain federal agencies, such as DoD, have been granted internal agency-specific VERA authority, and are not required to seek OPM approval. The National Defense Authorization Act for Fiscal Year 2004 gave DoD permanent agency-specific VERA authority.[317] As long as all other eligibility requirements are met, the Secretary of Defense may offer VERA at his or her discretion in order to reduce or reshape the civilian workforce.[318] Despite this relative freedom, employee eligibility for VERA and the impacts of its acceptance on employees remains a stumbling block for anything more than limited use in DoD force-shaping efforts.

3. Employee Eligibility and the Potential Impacts upon Annuities and Subsequent Employment

Voluntary Early Retirement offers apply to employees covered under both of the major federal retirement systems, the Civil Service Retirement System (CSRS) and the

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[313] *Id.*
[314] *Id.*
[315] § 831.114(l).
[316] *Id.*
[317] Pub. L. 108-136, 117 Stat. 1392, § 1101 (2003); 5 U.S.C. § 9902(f) (2011).
[318] § 9902(f)(1) and (4).

Federal Employees Retirement System (FERS).[319] When an agency has received VERA approval from OPM, an employee who meets the general eligibility requirements may be eligible to retire early.[320] In order to be eligible, the employee must: (1) Meet the minimum age and service requirements; (2) have served in a position covered by the OPM authorization for the minimum time specified; (3) served in a position covered by the agency's VERA plan; and (4) separate by the close of the early-out period.[321]

The negative aspect of electing to retire early under VERA is that it may detrimentally affect an employee's annuity, especially for employees under the CSRS plan. Under CSRS, a retiring employee's annuity is calculated based on the average high-three salary, and on years and months of creditable service.[322] If the employee is under age 55, however, this calculation is reduced by one-sixth of one percent for each full month the employee is under age 55, or in other words, 2% per year.[323]

For FERS, the basic annuity is also calculated based on the average high-three salary, and years and months of creditable service.[324] However, there is no annuity reduction for employees who retire early under age 55.[325] A FERS transferee with a CSRS component in his or her annuity who retires before age 55 will have the CSRS portion of the payable annuity reduced per the CSRS calculation; no reduction will be

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[319] *Voluntary Early Retirement Authority*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/.
[320] § 831.114(k).
[321] *See Id.* An "eligible employee" is at least 50 years of age and has completed 20 years of service, or any age with at least 25 years of creditable Federal service. The minimum time an employee must have been in a position in order to be eligible for a VERA offer is usually at least 30 days prior to the date of the agency request for VERA authorization.
[322] *Voluntary Early Retirement Authority*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/.
[323] *Id.*
[324] *Id.*
[325] *Id.*

applied to the FERS component.[326] A FERS Annuity Supplement is payable to an employee who has completed least one calendar year of FERS service when he or she reaches Minimum Retirement Age (MRA), which is 55 to 57, depending on date of birth.[327] The annuity supplement is payable until eligibility for Social Security begins at age 62, but is subject to an earnings limitation.[328]

Early retirement can also have an impact on other benefits. Employees retiring under either VERA or VSIP must have been covered under the Federal Employees Health Benefits (FEHB) Program: (1) for the last five years of their federal civilian service in order to continue such coverage in retirement, or (2) if less than five years, for all service since the employee was eligible for these benefits, unless waived.[329] Coverage as an annuitant is identical to coverage as an employee, but premiums are not paid on a pre-tax basis.[330] Federal Employees Group Life Insurance can be continued provided the employee has carried the coverage for at least five years prior to retirement.[331] Value and cost depend on elections made at retirement.[332]

There are also considerations regarding employment after early retirement that could affect employees. For non-federal employment, employees are not subject to any restrictions regarding their annuity.[333] The one exception to this general rule is employees covered under FERS who qualify for the annuity supplement could have the

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[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.*

supplement reduced or discontinued due to an earnings limitation.[334] For employees returning to the federal workforce, the annuitant is then considered a "reemployed annuitant."[335] In such cases the annuity will continue, but the new federal salary will be offset by the annuity, unless the employing agency seeks and is granted a waiver of the salary offset by OPM.[336]

B. Voluntary Separation Incentive Payment Authority

The Voluntary Separation Incentive Payment Authority, also known as buyout authority, allows agencies that are downsizing or restructuring to offer employees lump-sum payments up to $25,000 as an incentive to voluntarily separate.[337]

1. Overview and History

The current VSIP law was put in place with the passage of the Chief Human Capital Officers Act of 2002.[338] Agencies may request OPM approval to provide VSIP offers to surplus or discharged employees who separate by voluntary retirement or resignation.[339] Agencies previously had to seek legislative authority independently in order to offer VSIP payments, but may now offer VSIP either separately or in conjunction with VERA.[340] Employees, if eligible, may therefore be paid lump sums of up to $25,000 (under VSIP) and then retire early (under VERA) during agency downsizing or restructuring.[341]

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[334] *Id.*
[335] *Id.*
[336] *Id.*
[337] 5 U.S.C. § 3523(3) (2012).
[338] Pub. L. 107-296, 116 Stat. 2139, § 1301 (2002).
[339] § 3523(b)(4).
[340] *See* GAO REP. 06-324 (2006), *available at* http://www.gao.gov/assets/250/249481.html.
[341] *See Id*.

A federal agency, DoD, was first given VSIP authority in 1993.[342] Most other non-DoD Executive Branch agencies were granted VSIP authority between 1994 and 1997.[343] The VSIP authority came about for three distinct purposes.[344] This authority was initially used to ease RIFs following the end of the Cold War.[345] Later, during the Clinton administration's National Performance Review, VSIP was used to reduce "management control" positions.[346] Finally, VSIP was used to save money by reducing the federal workforce in pursuit of a balanced budget.[347]

2. Eligibility and the Approval Process

Agencies may offer VSIP to employees who are in surplus positions or have skills that are no longer needed in the workforce who volunteer to separate by resignation, optional retirement, or by voluntary early retirement.[348] By allowing employees to volunteer to leave government employment, agencies can minimize or avoid involuntary separations caused by the use of costly and disruptive RIFs.[349] Agencies that have been granted agency-specific VSIP authority are not required to seek OPM approval for their use of this option.[350] As with VERA, when approved by OPM, VSIP is used at the discretion of the agency.[351]

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[342] Pub. L. 102-484, 106 Stat. 2315, § 371 (1992).
[343] *See* Pub. L. 103-226, 108 Stat. 111 (1994); Pub. L. 104-208, 110 Stat. 3009 (1996).
[344] GAO Rep. 06-324.
[345] *Id*.
[346] *Id*. These positions included managers, supervisors and employees in personnel, budget, procurement, and accounting occupations.
[347] *Id*.
[348] *See* 5 C.F.R. § 576.103(a) (2013).
[349] Office of Personnel Management, Section on Workforce Restructuring, *Voluntary Separation Incentive Payments*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/ (last visited Mar. 8, 2013).
[350] *Id.*
[351] *Id.*

The head of an agency must submit a VSIP plan to OPM for approval.[352] As with VERA, the approval process is quite involved. This plan must include identification of the specific positions and functions to be reduced or eliminated, identified by organizational unit, geographic location, occupational series, grade level and any other factors related to the position, such as skills, knowledge, or retirement eligibility.[353] The agency must also lay out the time period during which incentives may be paid, the number and maximum amounts of VSIP to be offered, a description of how the agency will operate without the eliminated or restructured positions and functions, and a proposed organizational chart displaying the expected changes in the agency's organizational structure after the agency has completed VSIP.[354] Finally, the agency must explain how VSIP authority will be used in conjunction with separation incentives offered under any other statutory authority, such as VERA.[355]

Any employee who meets the general eligibility requirements may accept a VSIP offer.[356] The employee must: (1) be serving in an appointment without time limit; (2) be currently employed by the Executive Branch of the federal government for a continuous period of at least three years; (3) be serving in a position covered by an agency VSIP plan (i.e., in the specific geographic area, organization, series and grade); (4) apply for and receive approval for a VSIP from the agency making the offer; and (5) not be included in any of the ineligible categories listed below.[357]

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[352] 5 C.F.R. § 576.102 (2013).
[353] § 576.102(a)(1-2).
[354] § 576.102(a)(3-6).
[355] § 576.102(a)(8).
[356] *Voluntary Separation Incentive Payments*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/.
[357] *Id.*

Despite the seemingly broad range of employees that may be eligible for VSIP, there are a number of exceptions limiting that eligibility. Employees in the following categories are not eligible for VSIP.[358] Employees who: (1) are reemployed annuitants; (2) have a disability such that the individual is or would be eligible for disability retirement; (3) have received a decision notice of involuntary separation for misconduct or poor performance; (4) previously received any VSIP from the federal government; (5) during the 36-month period preceding the date of separation, performed service for which a student loan repayment benefit was paid, or is to be paid; (6) during the 24-month period preceding the date of separation, performed service for which a recruitment or relocation incentive was paid, or is to be paid; and (7) during the 12-month period preceding the date of separation, performed service for which a retention incentive was paid, or is to be paid.[359]

If an employee is eligible for VSIP, the agency computes the employee's VSIP on the basis of the lesser of: (1) an amount equal to the amount of severance pay the employee would be entitled to receive, as computed under 5 U.S.C. 5595(c), without adjustment for any previous payment made; or (2) an amount determined by the agency head, not to exceed $25,000.[360] The amount that the employee actually receives will be less than the amount determined using the above computations because of the deduction of taxes, including federal, state, social security, and Medicare[361]

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[358] *Id.*
[359] *Id.*
[360] 5 U.S.C. § 3523(3)(A-B).
[361] *Voluntary Separation Incentive Payments*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-separation-incentive-payments/.

Even after VSIP is granted, recoupment remains a possibility. An employee who receives VSIP and later accepts employment for compensation with the federal government within five years of the date of the separation on which the VSIP is based, including work under a personal services contract or other direct contract, must repay the entire amount of the VSIP to the agency that paid it before the individual's first day of reemployment.[362] If the proposed employment is with an agency other than the General Accounting Office (GAO), the United States Postal Service, or the Postal Rate Commission, the Director of OPM may, at the request of the head of the agency, waive the repayment only if: (1) the proposed reemployment is with an Executive Branch agency; (2) the individual involved possesses unique abilities and is the only qualified applicant available for the position; or (3) in case of emergency involving a direct threat to life or property, the individual has skills directly related to resolving the emergency, and will serve on a temporary basis only as long as the individual's services are made necessary by the emergency.[363]

Like VERA authority, the Secretary of Defense has been granted the authority to offer VSIP to employees in order to reduce or restructure the civilian workforce without having to obtain approval from OPM.[364] However, in addition to observing other eligibility requirements, the Secretary is limited to authorizing VSIP to no more than 25,000 employees per fiscal year.[365] Employees receiving VSIP as a result of a military installation closure or realignment (BRAC) are not included in that number.[366]

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[362] 5 C.F.R. § 576.202 (2013).
[363] 5 C.F.R. § 576.203(a) (2013).
[364] 5 U.S.C. § 9902(f)(1) (2011).
[365] § 9902(f)(2)(A).
[366] *Id*.

C. Employment Law and its Impact on Federal Workforce Reshaping

One of the most impactful laws on a federal agency's ability to shape its workforce is the Age Discrimination in Employment Act of 1967 (ADEA).[367] The Act was passed in order to promote employment of older persons based on ability rather than age, prohibit arbitrary age discrimination in employment, and to help employers and workers find ways of meeting problems arising from the impact of age on employment.[368]

1. Overview and History

The ADEA was passed based on a number of Congressional findings.[369] First, in the face of rising productivity and affluence, older workers were disadvantaged in not only keeping their jobs, but especially in getting rehired when displaced from jobs.[370] Second, employers setting arbitrary age limits regardless of potential for job performance had become a common practice, and certain "otherwise desirable practices" worked at times to the disadvantage of older employees.[371] Third, the incidence of unemployment, especially long-term unemployment leading to deterioration of skill, morale, and employer acceptability, was, relative to younger ages, high among older workers; their numbers were great and growing, and employment problems grave.[372] Fourth, the existence of arbitrary discrimination in employment because of age in industries affecting commerce burdened commerce and the free flow of goods.[373]

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[367] *See* 29 U.S.C.A. § 621(b) (2012).
[368] *Id*. The law protects employees over the age of 40.
[369] § 621(a).
[370] § 621(a)(1).
[371] § 621(a)(2).
[372] § 621(a)(3).
[373] § 621(a)(4).

Specifically, the ADEA made it unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect their status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with the Act.[374] Additionally, with few exceptions, it was unlawful for an employer, employment agency, labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which required or permitted (1) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or reduction of an employee's benefit accrual, because of age, or (2) in the case of a defined contribution plan, to cease allocations to an employee's account, or reduce the rate at which amounts are allocated to an employee's account, because of age.[375]

The Older Workers Benefit Protection Act of 1990 (OWBPA), was passed to amend the ADEA to prohibit age discrimination in employee benefits and establish minimum standards for an employee's voluntary waiver of an ADEA claim.[376] The OWBPA allows waiver of ADEA protection in order to get something else from the employer, such as severance pay or early retirement benefits, and lays out requirements for any such waiver to be valid.[377] The OWBPA was passed in response to the Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts*, which held that

[374] § 623(a)(1-3).
[375] § 623(i)(1)(A-B).
[376] Pub. L. 101–433, 104 Stat. 978 (1990).
[377] Tidmore at 2.

the ADEA did not address employee benefits, and therefore did not prohibit employee benefit discrimination.[378]

2. Regulation and Enforcement

The EEOC has been granted the authority to regulate and enforce the ADEA, and does so through its regulations at 29 C.F.R. Part 1625. The EEOC regulation implementing the OWBPA provisions became effective January 10, 2001.[379] The requirements for waivers of rights and claims under the ADEA are quite specific.[380] The ADEA expressly provides that waivers may be valid and enforceable under the ADEA only if the waiver is knowing and voluntary, and lays out minimum requirements for determining whether a waiver is in fact knowing and voluntary.[381] Other facts and circumstances may bear on the question of whether the waiver is knowing and voluntary, as, for example, if there is a material mistake, omission, or misstatement in the information furnished by the employer to an employee in connection with the waiver.[382]

The waiver must be worded to be understood by the average eligible employee, be in writing, drafted in plain language, must not mislead or misinform, must specifically refer to the ADEA, must advise the employee in writing to consult an attorney, not contain a waiver of future rights other than employee's obligation to retire on a certain date pursuant to the agreement, and must provide consideration.[383] The employee must receive at least 21 days to consider the agreement, or if an exit incentive such as VERA

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[378] *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 181-182 (1989).
[379] *See* 29 C.F.R. § 1625 (2013).
[380] § 1625.22.
[381] *See* 29 U.S.C. § 626(f)(1) (2009).
[382] 29 C.F.R. § 1625.22(a)(3).
[383] § 1625.22(a-d).

or VSIP is offered, at least 45 days.[384] The agreement must be revocable and not enter into effect until seven days after execution of the agreement.[385]

For waivers associated with an exit incentive or other employment termination program offered to a group or class of employees, the employer must notify employees in writing as to the class, unit, and/or group covered by the program, eligibility factors for the program, any time limits involved, job titles and ages of all eligible individuals and ages of all individuals in the same job classification or organization unit who are not eligible.[386] The purpose of the informational requirements is to provide employees with enough information regarding the exit incentive program, and their rights related to such program, to make an informed choice whether to sign the waiver agreement.[387]

Exit incentive programs and other employment termination programs are two types of programs under which employers seeking waivers must make these written disclosures.[388] Usually an exit incentive program is a voluntary program offered to a group or class of employees where such employees are offered consideration in addition to anything of value to which the individuals are already entitled (or additional consideration) in exchange for their decision to voluntarily resign or retire.[389] Federal VERA and VSIP are classic examples of such exit incentive programs. Usually "other employment termination programs" refers to a group or class of employees who were

[384] § 1625.22(e)(1)(i-ii).
[385] § 1625.22(e)(2).
[386] § 1625.22(f)(1)(i-ii).
[387] § 1625.22(f)(1)(iv).
[388] § 1625.22(f)(1)(iii)(A).
[389] *Id.*

involuntarily terminated and who are offered additional consideration in return for their decision to sign a waiver.[390]

The question of the existence of a "program" will be decided based upon the facts and circumstances of each case.[391] A program exists when an employer offers additional consideration for the signing of a waiver pursuant to an exit incentive or other employment termination (e.g., a reduction-in-force) to two or more employees.[392] Typically, an involuntary termination program is a standardized formula or package of benefits that is available to two or more employees, while an exit incentive program typically is a standardized formula or package of benefits designed to induce employees to sever their employment voluntarily (such as VERA and VSIP).[393] In both cases, the terms of the programs generally are not subject to negotiation between the parties.[394]

Finally, no ADEA waiver agreement, covenant not to sue, or other equivalent arrangement may impose any condition precedent, any penalty, or any other limitation adversely affecting any individual's right to challenge the agreement.[395] This prohibition includes but is not limited to provisions requiring employees to tender back consideration received, and provisions allowing employers to recover attorney's fees and/or damages because of the filing of an ADEA suit.[396] However, employers are not precluded from recovering attorney's fees or costs specifically authorized under federal law.[397]

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[390] *Id.*
[391] § 1625.22(f)(1)(iii)(B).
[392] *Id.*
[393] *Id.*
[394] *Id.*
[395] § 1625.23(b).
[396] *Id.*
[397] *Id.*

As in other Title VII discrimination cases, the *McDonnell Douglas* burden-shifting analysis is used to establish a prima facie case of age discrimination in RIF actions.[398] Elements of the prima facie case include the plaintiff showing that he or she: (1) is in the protected age group (40+); (2) is qualified for the position; (3) suffered as a result of a personnel action; and (4) was disadvantaged in favor of a younger person.[399] Age differences as small as seven years have been held sufficient to support the fourth element,[400] but courts have held less than five-year differences do not.[401]

3. Applicability to the Federal Government

The ADEA was written to apply in its entirety to all private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations.[402] The federal government as an employer was basically excluded from the statute at large, with only § 633a drafted to specifically apply to federal agencies.[403] This section simply prohibits the federal government from age discrimination in any personnel action affecting employees or applicants 40 years of age or older.[404] No upper age limit for the protected group exists for federal employees.[405] Federal employees also need not file an administrative complaint before initiating suit in federal court.[406]

The language contained in the statute, however, is only the starting point. The EEOC regulations enacted to enforce the ADEA expanded the requirements on the

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[398] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[399] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000).
[400] *Rivera-Rodriquez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 23 (C.A.1 2001).
[401] *Williams v. Raytheon Co.*, 220 F.3d 16, 21 (C.A.1 2000).
[402] 29 U.S.C.A. § 630(a)-(d). A requirement also exists that such employers, unions, and agencies affect interstate commerce.
[403] *See* § 633a(f).
[404] § 633a(a).
[405] § 633a(b).
[406] § 633a(d).

federal government. Waivers of rights and claims under the ADEA in order to get something else from the employer, such as VERA or VSIP, are allowable, but subject to specific requirements that must be exactly followed.[407] Waivers that fail to do so will be voided by the EEOC, and the employee is not obligated to return the consideration he or she received in exchange for such agreement before bringing suit.[408] The MSPB has held that failure to comply with the OWBPA will not result in the underlying settlement agreement waiver being invalidated, but that the employee will have the opportunity to prove age discrimination.[409] The EEOC has held, however, that when a settlement agreement waiver does not comply with the OWBPA, reinstatement of the entire complaint, not just the age claims, is appropriate.[410]

Even though the federal government is not included in the ADEA's definition of an employer, the 5th Circuit has held that "the legislative history makes it clear that Congress intended the federal government to have both the same obligations and flexibility as do private employers.[411]" The *Mason* case predates the enactment of §633a(f), but has never been overruled.[412] One commentator has noted: "Courts will view the protection for federal employees under the ADEA as broader than those for private or other public employees. If it benefits [the] complainant, a court will apply private sector ADEA principles as necessary to effectuate the purposes of the statute."[413]

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[407] 29 C.F.R. § 1625.22.
[408] *See Oubre v. Entergy Operations, Inc*., 522 U.S. 422, 427-428 (1998).
[409] *Harris v. Department of the Air Force*, 98 M.S.P.R. 261, 265 (2005).
[410] *Solano v. Department of Homeland Security*, 01A53729 (2005), *available at* http://www.eeoc.gov/decisions/01a53729r.txt.
[411] *Mason v. Lister*, 562 F.2d 343, 345 (C.A.Tex 1977).
[412] *See Id*.
[413] *Age Discrimination Outline*, at 6, Labor Law Field Support Center (2012), (unpublished manuscript maintained at the Air Force LLFSC online database).

The federal government therefore must exercise the utmost care when offering VERA or VSIP to employees covered by the ADEA.

V. DoD Civilian Demographics

A. Appropriated Fund Employees

With more than 900,000 civilian employees worldwide, DoD's civilian workforce is the largest of any federal agency.[414] As of August 2012, DoD employed 780,038 appropriated fund (or regular) civilian employees, all of whom are potentially vulnerable to RIF actions, and may also be eligible for VERA or VSIP.[415] The breakdown per force is: Army—255,251 (32.72%); Navy—202,534 (25.96%); Air Force—151,365 (19.40%); DoD Other—113,250 (14.52%); and National Guard—57,638 (7.39%).[416] A large majority of the workforce (67.32%) falls within the typical GS pay plan group.[417] This total population also includes a Senior Leader population of 1,355 (0.21%).[418] These Senior Executive Service (SES) and equivalent employees are not eligible for VERA or VSIP, unless the Principal Deputy Under-Secretary of Defense (Personnel and Readiness) approves the voluntary separation incentive to avoid RIF action or to restructure the workforce.[419]

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[414] *See* DoD Defense Civilian Personnel Advisory Service (DCPAS), *About CPP/DCPAS*, http://www.cpms.osd.mil/Subpage/About/ (last visited Mar. 15, 2013).
[415] *See* DCPAS, *DoD Workforce Demographics*, https://extranet.apps.cpms.osd.mil/Divisions/Strategic%20Analysis%20and%20Reporting/DOD%20Demographics.aspx (last visited Oct. 17, 2012).
[416] *Id.*
[417] *Id.* The SES equivalent employees include Senior Level, Scientific and Technical, Defense Intelligence Senior Executive Service, Defense Intelligence Senior Level, those in pay band positions above the GS-15 level, and non-appropriated fund executives.
[418] *Id.*
[419] DoD Website, Section on OSD Personnel & Readiness, *Transition Information*, http://www.defense.gov/personneltransition/faqs.aspx#RIF (last visited Mar. 16, 2013).

White collar jobs make up a large majority (81.13%) of the workforce, with blue collar jobs making up the rest (18.87).[420] Employees with Supervisory duties make up 13.78% of the workforce, while 86.22% have no supervisory duties.[421] White Collar employees have slightly more supervisory responsibilities (14.80% that do versus 85.20% that do not) than do Blue Collar (9.39% that do versus 90.61%that do not).[422] A little more than half (56.52%) of employees are represented by a bargaining unit, 24.29% are ineligible for a bargaining unit, 19.15% are eligible but not in a bargaining unit, and 0.03% are in transition.[423] Only half (50.17%) of White Collar employees are in a bargaining unit, versus a large majority (85.15%) of Blue Collar employees.[424] Almost all DoD civilian employees (95.35%) are employed on a full-time permanent basis.[425]

Years of Service (YOS) breaks down as follows: Less than 1 year—50,607 (6.49%); 1-2—119,771 (15.35%); 3-5—141,706 (18.17%); 6-10—145,965 (18.71%); 11-15—73,572 (9.43%); 16-20—46,358 (5.94%); 21-25—71,218 (9.13%), and Over 25—130,827 (16.77%).[426] Education levels breaks down as follows: Non-High School Graduate—4,441 (0.57%); High School Graduate—296,272 (37.98%); College/Occupational Program—162,066 (20.78%); Bachelor's Degree—186,105 (23.86%); Post Bachelor—14,393 (1.85%); Master's Degree—91,396 (11.72%); Post Master—5,443 (0.70%); Doctorate—12,023 (1.54%); Post Doctorate—1,382 (0.18%);

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[420] *DoD Workforce Demographics*, https://extranet.apps.cpms.osd.mil/Divisions/Strategic%20Analysis%20and%20Reporting/DOD%20Demographics.aspx.
[421] *Id.*
[422] *Id.*
[423] *Id.*
[424] *Id.*
[425] *Id.*
[426] *Id.*

and Education Level Not Reported—6,515 (0.84%).[427] For age: Under 30—95,549 (12.25%); 31-40—144,547 (18.53%); 41-49—200,032 (25.64%), 50-59—255,437 (32.75%), 60-69—78,913 (10.12%), and Over 70—5,560 (0.71%).[428]

Veterans' Preference breaks down as follows: No Preference—494,872 (63.44%); 5-Point—185,363 (23.76%); 10-Point Disability—4,741 (0.61%); 10-Point Compensable—26,516 (3.40%); 10-Point Compensable 30%—67,124 (8.61%); and 10-Point Compensable Other—1,422 (0.18%).[429] Prior Military Service breaks down as follows: Retirees—133,422 (17.10%); Other Veterans—203,839 (26.13%); and Not Prior Military—442,777 (56.76%).[430]

New hires for FY 2012 are at a five-year low, having fallen each year since 2009: 2007—81,167; 2008—106,731; 2009—119,113; 2010—112,763; 2011—90,863; and 2012—64,422.[431] Most employees (77.21%) are enrolled in the FERS Regular retirement plan, 10.41% in FERS Special, 8.25% in CSRS, and less than 5% in various other plans.[432]

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[427] *Id.*
[428] *Id.*
[429] *Id.* Veterans meeting the preference-eligibility qualification requirements will have either 5 or 10 points added to their passing Federal employment examination score. For 5-point eligibility, veterans must have served during a time of war and separated or retired honorably below the rank of Major or Lieutenant Commander. For 10-point eligibility, veterans must possess all of the 5-point eligibility requirements, and have a service-connected disability rating of between 10 and 30 percent; spouses, widows, widowers and mothers of veterans may also be eligible for 10-point preference. A veteran's particular disability rating (i.e. 10 versus 30 percent) affects the disability pay he or she receives, but has no bearing on preference; all 10-point preference veterans receive the same 10-point examination boost.
[430] *Id.*
[431] *Id.*
[432] *Id.*

B. Non-Appropriated Fund Employees

While a large majority of DoD employees are regular appropriated fund employees, DoD also employed 133,015 non-appropriated fund (NAF) employees in 2012.[433] These employees are not paid from congressionally-appropriated funds.[434] They work in military exchanges and morale, welfare, and recreation programs, and are paid from funds generated by those activities.[435] Non-Appropriated Fund employees range across the Army, Navy, Air Force, Marine Corps, Navy Exchange, Office of the Secretary of Defense (OSD), the Defense Logistics Agency (DLA), the Defense Finance and Accounting Service (DFAS), the Defense Human Resource Activity (DHRA), the Army and Air Force Exchange Service (AAFES), and the Armed Forces Information Service.[436] Like appropriated fund employees, they enjoy RIF-action rights, and may be eligible for VSIP and/or VERA.[437]

While NAF employees are federal employees, they are not covered by most laws administered by OPM unless specifically provided for by statute.[438] The DoD NAF Personnel Policy Division of CPMS develops and administers NAF personnel policy in collaboration with the military departments, and provides NAF employers with advisory and consultation services.[439] The age breakdown of these employees is: Under 30—

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[433] *Id.*
[434] DCPAS, Section on Civilian Personnel Management System, *NAF Information*, http://www.cpms.osd.mil/ASSETS/87993068876A450DA03A6C76F6737D28/Who%20are%20NAF%20employees-Item%20of%20Interest.pdf (last visited Oct. 19, 2012).
[435] *Id*
[436] *Id.*
[437] *See* DoD Instruction 1400.25, *Voluntary Separation Programs*, at 8 & 18 (June 13, 2008), *available at* http://www.dtic.mil/whs/directives/corres/pdf/1400.25-V1702.pdf.
[438] *Id.* For example, separate statutes cover NAF employees in areas such as wage-grade pay and labor relations.
[439] *Id.*

45,921 (34.52%); 31-40—23,020 (17.31%); 41-50—28,219 (21.21%); 51-60—25,420 (19.11%); 61-70—8,684 (6.53%); and Over 70—1,744 (1.31%).[440]

The DoD also employs 54,771 local national employees abroad.[441] However, foreign national employees are employed under international agreements, the terms of which vary between host countries, and will not necessarily be affected by regular and NAF employee actions.[442]

C. Future Projections

The number of total employees eligible for optional retirement will grow significantly over the next five years. Currently 12.55% of the workforce is eligible for early retirement, and that number will grow to 27.90% by 2017.[443] Employees are working longer and retiring at an older age, a trend that has steadily increased each year over the last four years. In 2009, the average age at retirement was 59.28, the average YOS was 26.58, and the number of employees eligible to retire was 19,010.[444] The numbers in each of these categories has increased every year since. In 2012 the average retirement age was 60.32, the average YOS was 27.72, and the number of retirement-eligible employees peaked in 2011 at 25,621 and dropped to 24,723 in 2012.[445]

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[440] *Id.*
[441] *Id.*
[442] *See* DoD Instruction 1400.25, *Employment of Foreign Nationals* (July 5, 2011), *available at* http://www.dtic.mil/whs/directives/corres/pdf/1400.25-V1231.pdf.
[443] *DoD Workforce Demographics*, https://extranet.apps.cpms.osd.mil/Divisions/Strategic%20Analysis%20and%20Reporting/DOD%20Demographics.aspx.
[444] *Id.*
[445] *Id.*

VI. DoD Civilian Force Reduction Issues in the Modern Era

The size of the DoD workforce mixed with the nature of the current force-shaping regulations makes any force reduction action a slow and unwieldy process. The introduction of the federal budget sequestration now threatens to bring these issues to a head and create a scenario where DoD cannot make meaningful manpower reductions without impacting mission effectiveness.

A. Federal Budget Sequestration

The mandatory budget sequestration is, with some limited exceptions, simply an across-the-board federal spending cut.[446] Due to the supposedly unpalatable nature of the cuts to both political parties, sequestration was never actually intended to be implemented.[447] The specter of harmful across-the-board cuts to defense and nondefense programs was intended to motivate Congress to compromise in enacting a deficit reduction plan.[448]

1. The Origins of Sequestration

In 2011, Congress and the President, through the Budget Control Act, agreed to raise the debt limit.[449] As part of the bargain, the debt-limit deal immediately placed ceilings to cap the defense budget and other forms of discretionary spending, and placed

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[446] *See* Budget Control Act of 2011, Pub.L. 112-25, 125 Stat. 240 (2011).
[447] Office of Management and Budget, *OMB Report Pursuant to the Sequestration Transparency Act of 2012 (P. L. 112–155)*, at 1, *available at* http://www.nffe.org/ht/a/GetDocumentAction/i/59435.
[448] *Id.*
[449] The Foreign Policy Initiative, *FPI Fact Sheet: The Dangers of Deep Defense Cuts: What America's Civilian and Military Leaders are Saying*, 2012, http://www.foreignpolicyi.org/content/dangers-deep-defense-cuts-what-america%E2%80%99s-civilian-and-military-leaders-are-saying.

a deadline on Congress to enact a plan to reduce the deficit by $1.2 trillion.[450] In August 2011, bipartisan majorities in both the House and Senate voted for the threat of automatic budget sequestration as a mechanism to force Congress to act.[451]

In implementing the budgetary caps under the Budget Control Act, the President proposed in his FY 2013 budget to cut Pentagon spending by roughly $487 billion over the next decade.[452] However, a blueprint for reducing the expected federal budget deficits by the required $1.2 trillion was not accomplished by the deadline in November 2011.[453] As a result, the Budget Control Act called for sequestration to begin in January 2013, with $546 billion in savings supposed to come from defense programs by 2021.[454] The commencement of sequestration was later delayed until March 1, 2013.[455]

An Office of Management and Budget (OMB) report suggests that sequestration would be deeply destructive to national security, domestic investments, and core government functions.[456] The DoD is scheduled to absorb a full half of the forecasted federal cuts over the decade.[457] Under the assumptions required by the Sequestration Transparency Act of 2012, sequestration would result in a 9.4% reduction in non-exempt defense discretionary funding and an 8.2% reduction in non-exempt nondefense

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[450] *Id.*
[451] *OMB Report Pursuant to the Sequestration Transparency Act of 2012 (P. L. 112–155)*, at 1, *available at* http://www.nffe.org/ht/a/GetDocumentAction/i/59435.
[452] *FPI Fact Sheet: The Dangers of Deep Defense Cuts: What America's Civilian and Military Leaders are Saying*, http://www.foreignpolicyi.org/content/dangers-deep-defense-cuts-what-america%E2%80%99s-civilian-and-military-leaders-are-saying.
[453] *Id.*
[454] *OMB Report Pursuant to the Sequestration Transparency Act of 2012 (P. L. 112–155)*, at 6, *available at* http://www.nffe.org/ht/a/GetDocumentAction/i/59435.
[455] American Taxpayer Relief Act of 2012, Pub.L. 112-240, 126 Stat. 2313 (2013).
[456] *OMB Report Pursuant to the Sequestration Transparency Act of 2012*, at 1, http://www.nffe.org/ht/a/GetDocumentAction/i/59435.
[457] *See Id.* at 5.

discretionary funding.[458] Sequestration would also impose cuts of 7.6% to other non-exempt nondefense mandatory programs, and 10% to non-exempt defense mandatory programs.[459]

In late March 2013, Congress passed a continuing resolution that reduced the FY 2013 impact on DoD to $41 billion in spending cuts instead of the original $54.667 billion, and gives DoD limited flexibility in where it takes such spending cuts.[460] Despite this significant reprieve, DoD still anticipates being short at least $22 billion in FY 2013.[461] As it now stands, total defense function spending must still be reduced by $54.667 billion in FY 2013, and each year after that until FY 2021.[462]

2. Projected Impact on DoD Civilian Personnel

Late in 2011, then-Secretary of Defense Leon Panetta outlined to Congress the potential impacts DoD faced if sequestration cuts came to pass:

> If… sequestration is triggered, DoD would face huge cuts in its budgets. Compared with the President's budget plan for FY 2012, we are already planning on budget reductions over the next ten years of more than $450 billion. These cuts are difficult and will require us to take some risks, but they are manageable. If the maximum sequestration is triggered, the total cut will rise to about $1 trillion compared with the FY 2012 plan.

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[458] *See Id* at 6-7.
[459] *See Id.*
[460] *See* Consolidated and Continuing Appropriations Act, H.R. 933 EAS (2013), *available at* http://docs.house.gov/billsthisweek/20130318/BILLS-113hr933eas.pdf.
[461] U.S. Department of Defense Website, Section on News, *Hagel Announces Fewer Furlough Days for Civilians* (Mar. 28, 2013), http://www.defense.gov/news/newsarticle.aspx?id=119647.
[462] *OMB Report Pursuant to the Sequestration Transparency Act of 2012*, at 6, http://www.nffe.org/ht/a/GetDocumentAction/i/59435.

> The impacts of these cuts would be devastating for the Department…
>
> We would also be forced to separate many of our civilian personnel involuntarily and, because the reduction would be imposed so quickly, we would almost certainly have to furlough civilians in order to meet the target. These changes would break faith with those who maintain our military and seriously damage readiness.
>
> The situation does not get better beyond FY 2013. In this period, cuts to the DoD budget under maximum sequestration would equal about $100 billion a year compared with the FY 2012 plan. Facing such large reductions, we would have to reduce the size of the military sharply. Rough estimates suggest after ten years of these cuts, we would have the smallest ground force since 1940, the smallest number of ships since 1915, and the smallest Air Force in its history...[463]

According to Secretary Panetta, these spending cuts would reduce civilian personnel spending by 20% over the next 10 years, and would lead to the smallest civilian workforce since DoD became a Department.[464] Such a spending reduction is estimated to shrink the civilian workforce to about 630,000 employees by 2021.[465]

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[463] Letter from Leon Panetta, Secretary of Defense, to John McCain, Committee on Armed Services, U.S. Senate (Nov. 14, 2011), *available at* http://www.mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=a4074315-fd3e-2e65-2330-62b95da3b0e9

[464] *Id*.

[465] *See* Sean Reilly, *Experts: DoD could slash 150K jobs*, Federal Times (2011), http://www.federaltimes.com/article/20111204/BENEFITS01/112040307/Experts-DoD-could-slash-150K-jobs.

Additionally, even with DoD offering VERA and VSIP, one commentator expects a sizable RIF is inevitable.[466] Another commentator believes DoD will have enough management flexibility to avoid a RIF, but anticipates another round of base realignments and closures will be pursued.[467] One example held up as a model for the current force-reduction situation is the post-Cold War downsizing between 1989 and 1997, during which some 300,000 civilian jobs were shed through attrition and early-out incentives.[468]

In addition to a potential RIF, virtually all of DoD's civilian employees will be furloughed to some degree over the remainder of FY 2013.[469] More than 700,000 employees will receive furlough notices in early May, and furloughs will happen over seven two-week periods until the current fiscal year ends at the end of September.[470] The current projection is that the vast majority of DoD civilian employees will be furloughed for a total of 14 days over the remaining fiscal year.[471]

The OPM has also prepared human resources guidance for agencies and employees in the event of shutdown (or emergency) furloughs.[472] A shutdown furlough occurs when there is a lapse in annual appropriations.[473] Shutdown furloughs can occur at the beginning of a fiscal year, if no funds have been appropriated for that year, or upon expiration of a continuing resolution, if a new continuing resolution or appropriations law

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[466] *Id.*
[467] *Id.*
[468] *Id.*
[469] *See Hagel Announces Fewer Furlough Days for Civilians*, http://www.defense.gov/news/newsarticle.aspx?id=119647.
[470] *Id.*
[471] *See Id.*
[472] Office of Personnel Management, Section on Furloughs, *Guidance and Information on Furlough*, http://www.opm.gov/furlough/index.asp (last visited Oct. 25, 2012).
[473] *Id.*

is not passed.[474] If a shutdown furlough occurs, affected agencies will have to shut down any activities funded by annual appropriations that are not excepted by law.[475]

Despite the threat of sequestration, almost 10,000 more civilians were employed in September 2012 than there were in September 2011.[476] Ironically, DoD has attempted to reduce the force during that time through a variety of means, including several rounds of VERA and VSIP offers.[477] The Air Force, for example, recently offered both three times, first in September 2011 seeking 6,005 applicants.[478] Unsatisfied with the number of employees that took the offer, the Air Force offered both VERA and VSIP again in January 2012,[479] and then again in May 2012.[480]

B. A Culture of Gradual Reductions

Historically, federal civilian manpower reductions have been gradual, and the current state of force-shaping regulations leaves DoD ill-equipped to conduct sudden manpower reductions.[481] The budget sequestration, with sudden and steep cuts, creates a significant challenge for DoD to reduce the force quickly without damaging mission

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[474] *Id.*
[475] *Id.*
[476] *See* Office of Personnel Management, *Report of Federal Civilian Employment, Department of Defense* (Sep. 30, 2011), http://siadapp.dmdc.osd.mil/personnel/CIVILIAN/fy2011/september2011/consolid.pdf. The Air Force planned to shed 13,500 positions by October 2012, and the Army planned to eliminate 8,500 civilian positions in the fall of 2012.
[477] Debbie Gildea, *AF officials announce civilian early retirement, separation incentive options*, The Official Website of the U.S. Air Force (2011), http://www.af.mil/news/story.asp?id=123272603.
[478] *Id.*
[479] The Official Website of the U.S. Air Force, *Air Force offering second round of VERA/VSIP* (2012), http://www.af.mil/news/story.asp?id=123284940.
[480] The Official Website of the U.S. Air Force, *Air Force officials announce third round of VERA/VSIP* (2012), http://www.af.mil/news/story.asp?id=123295163.
[481] *Reduction-in-Force in the Federal Government, 1981: What Happened and Opportunities for Improvement*, at 18, http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=317684&version=318099&application=ACROBAT.

effectiveness or the future composition of the force. This culture of gradual manpower changes has not always been the case, but has developed gradually over time.

Since the inception of the modern RIF system, DoD has taken longer to reduce the civilian work force by less with each successive major RIF.[482] The first major RIF of the DoD civilian work force using the modern RIF system took place immediately following World War II.[483] From 1945 to 1950, the civilian workforce was shrunk from approximately 3,786,000 to 1,934,000.[484] The post-World War II RIF remains the largest in history, almost halving the DoD civilian workforce, and was accomplished in only five years.[485] The next major RIF occurred following the Korean conflict, but took longer to reduce the force by much less.[486] From 1953 to 1960, the civilian workforce was reduced from 2,532,000 to 2,240,000, a reduction of approximately 292,000 personnel.[487]

The most recent major civilian employee drawdown began as the Cold War declined in 1987, and was not completed until 1995.[488] The DoD took a full eight years to reduce its civilian workforce by approximately 25%, around 284,000 positions.[489] Upon finally reaching its target civilian personnel goal, DoD found itself in need of further downsizing, and immediately began to drawdown again.[490] The goal was to shed an additional 10% of its civilian personnel, and was projected to take six years to

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[482] *See Id*.
[483] *See Id*.
[484] *Id* at 18-19.
[485] *See Id*.
[486] *See Id* at 19.
[487] *See Id*.
[488] *See* GAO/NSIAD REP. 96-143BR, at 1 (1996), *available at* http://gao.justia.com/department-of-defense/1996/4/civilian-downsizing-nsiad-96-143br/.
[489] *Id*.
[490] *See Id*. at 2.

accomplish.[491] After that, DoD civilian employment remained in a constant state of drawdown for almost 20 years, finally leveling off in 2004.[492]

1. Minimizing the Impact on Readiness and Mission Effectiveness

Two closely-related factors have contributed to the current state of DoD force-shaping regulations, and the gradual slowing of civilian manpower reductions. The first reason is to minimize the impact on readiness and mission effectiveness.[493] During the mid-1990s, drawdowns significantly slowed in response to the armed services assertions that downsizing effects were having a negative impact.[494] For example, during that time period, the Army claimed negative impacts in the area of public works, repairs, and maintenance.[495] The Army and Air Force also both encountered effects to morale and welfare programs such as recreational and family services.[496] Additionally, all branches of the armed services were concerned with workforce morale due to limited career and promotion opportunities, job insecurity, and longer working hours.[497]

The DoD historically had not had comprehensive strategies to guide downsizing or force streamlining decisions, but by 1993 such strategies were finally being developed.[498] Future workforce reductions were to be based on contracting out or consolidating functions, employing better business practices, and downsizing specific

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[491] *See Id*.
[492] Congressional Research Service, *The Federal Workforce: Characteristics and Trends*, at 3 (2011), *available at* http://assets.opencrs.com/rpts/RL34685_20110419.pdf.
[493] *See* GAO/NSIAD Rep. 96-143BR, at 2 (1996), *available at* http://gao.justia.com/department-of-defense/1996/4/civilian-downsizing-nsiad-96-143br/.
[494] *See Id*.
[495] *Id*.
[496] *Id*.
[497] *Id*.
[498] *See Id*. at 28.

work groups.[499] In 1993, DoD began focusing its workforce reduction efforts on particular functions. Civilians in finance, personnel, procurement, and headquarters staff were specifically targeted for reduction.[500] In order to avoid having to utilize RIFs, and to closely monitor the effects of these workforce reductions, the targeted reductions were to be limited to no more than 4% per year until 1999.[501]

2. The Lack of Comprehensive Force Planning

The second reason for the slowing of civilian manpower reductions was a lack of strategic planning regarding DoD's future civilian manpower requirements, as well as the structure and composition of the future force.[502] This lack of planning in large part created the first problem of attempting to limit the impact on readiness and mission effectiveness. Strategic planning is now being better utilized, but issues created by this lack of planning are still in the process of being corrected.

The DoD and Congress were apparently unprepared for the significant changes the end of the Cold War would bring to the civilian force structure. Initially, when the post-Cold War drawdowns were directed in the late 1980s, the Congressional mandate to DoD was simply to downsize the civilian force and to report on its progress.[503] This proved to be much more difficult than one would think. The DoD was at a crossroads in the post-Cold War era, and this force reduction was to take place in the midst of a debate between DoD and Congress about future military force structure, support requirements,

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[499] *Id*. at 29
[500] *See Id*. at 23.
[501] *See Id.*
[502] *See* GAO/NSIAD Rep. 93-194, at 2 (1993), *available at* http://www.gao.gov/assets/220/217979.pdf.
[503] *See Id.* at 11.

and funding levels.[504] Between fiscal years 1987 and 1992, DoD for the most part relied solely on voluntary attrition and hiring freezes to achieve force reductions.[505] These reductions were quite modest, with only approximately 46,000 civilian employees shed by the end of fiscal year 1992.[506]

Hardly any RIFs were conducted to that point as Congress and DoD debated how to proceed on a variety of issues.[507] The first of these issues involved the role base closures and realignments (BRAC) would play in the force reshaping. Certain bases were going to undergo BRAC, but which bases and when was undetermined.[508] As a part of BRAC, certain functions and forces were to be consolidated, but again, it was not clear to what extent or when that would happen.[509] In any event, even once the full ramifications of decisions have been considered, base closures are certainly not a swift method to downsize the civilian force.[510] It routinely takes up to six years between the decision to close a base and the actual closure, with the accompanying termination or transfer of employees.[511]

The second issue was waiting on a decision regarding to what degree functions would be contracted out instead of being handled internally by DoD employees.[512] Without this information, DoD had significant difficulty developing a plan that coherently predicted where and when force reductions would occur, and which force-

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[504] *See Id*.
[505] *See Id*. at 4.
[506] *Id*.
[507] *See Id*.
[508] *See Id*.
[509] *See Id*.
[510] *See Id*. n.5.
[511] *See Id*.
[512] *Id*. at 11.

reductions tools would be best for the task.[513] Ironically, as civilian manpower cuts now loom, over the last year DoD has been moving away from the use of contractors and working to increase the expertise of its in-house workforce.[514] As part of its now-required workforce planning, DoD is required to conduct an assessment of the appropriate mix of military, civilian, and contractor personnel in order to achieve mission goals in the most cost-effective manner possible.[515] In its 2010-2018 workforce plan, however, DoD did not include such an assessment, and only two of the 11 functional communities provided the mix of their workforces.[516] Without a complete assessment, it may be difficult for DoD to know if its civilian workforce is properly sized, or properly constituted, to carry out its vital missions.[517] It is therefore unclear, especially in light of the current fiscal environment, why DoD has elected to move away from contractors in favor of in-house manpower, and what information that decision was based upon.

The third issue was created by the purely voluntary attrition downsizing method that had been used up until the end of fiscal year 1992, and was exacerbated by the hiring freeze. The use of voluntary attrition alone creates difficulty in planning downsizing in an orderly manner, and achieving reductions when and where they are most needed.[518] The hiring freeze plus a disproportionate loss of junior to mid-level employees led to imbalances in both skill and demographics, resulting in a higher-graded and more senior work force.[519] Between 1987 and 1992, the percentage of DoD employees in GS-11

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[513] *See Id*.
[514] GAO REP. 12-1014, at 1 (2012), *available at* http://www.gao.gov/assets/650/648917.pdf.
[515] *See Id*. at 14.
[516] *Id*.
[517] *Id*. at 16.
[518] GAO/NSIAD Rep. 93-194, at 4, *available at* http://www.gao.gov/assets/220/217979.pdf.
[519] *Id*. at 5.

grades and below decreased from 74.2% of the force to 67.2%, as GS-12s and higher increased from 25.8% of the force to 32.8%.[520]

The Air Force's San Antonio Air Logistics Center is one example of the negative effects that can be created by a skill imbalance resulting from a poorly planned downsizing effort.[521] Between October 1991 and November 1992, the Center found itself suffering from a large skill imbalance due to widespread voluntary attrition.[522] Unable to fill any needed positions externally due to the hiring freeze, the Center attempted to remedy the problem by shifting 2,280 employees in surplus skill positions into some of the needed positions.[523] Such efforts are often less than ideal solutions as employees will find themselves in positions for which they are not really qualified, or cannot perform productively without extensive supervision.[524] Despite this effort, the Center still had 1,354 employees in surplus positions who could not qualify for 924 needed vacant positions, with no further means at its disposal to remedy the problem.[525]

For reasons that are unclear, the solely-voluntary attrition DoD had used to reduce the force had not initially included VERA or VSIP.[526] In 1993, the Air Force Materiel Command (AFMC), hoping to escape the voluntary-attrition rut and correct skill imbalances, requested RIF authority to separate 8,300 surplus employees.[527] The requested RIF authority was not granted, but authorization for VERA and VSIP use for

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[520] *Id*. at 5-6.
[521] *See Id*. at 6.
[522] *Id*.
[523] *Id*.
[524] *Id*. n.8.
[525] *Id*.
[526] *See Id*. at 9.
[527] *Id*.

surplus positions finally was.[528] Faced with the poor results of voluntary attrition, DoD officials finally relented and authorized VERA and VSIP to employees across the Air Force, but only for 36,000 of them.[529] Despite the relatively meager number of offers, they had an almost immediate effect. By the end of 1993, 70 to 80% of the VERA and VSIP offers had been accepted.[530] In light of this success, VERA and VSIP authority, which had been held at the Deputy Secretary of Defense level, was delegated to component heads with guidance to further delegate the authority to the lowest practical level.[531] The individual services finally had the means at their disposal to attempt to correct some of the gross manpower imbalances they had been facing. For example, using this financial incentive, AFMC was able to reduce its surplus employees to approximately 700; however, it proved to be only a partial solution as the force remained imbalanced with 1,300 necessary positions remaining vacant.[532]

The workforce shaping strategies that were finally in place by 1994 came too late. In the contracting field, for example, poor planning in the force drawdown beginning in 1987 led to a seniority imbalance by 2011, with too much of the workforce reaching retirement eligibility at the same time.[533] The average age of the acquisition workforce is between 47 and 51 years, with at least 36% of the workforce becoming eligible to retire over the next 10 years.[534] This imbalance could lead to a potentially debilitating loss of

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[528] *See Id*. at 6, n.9.
[529] *See Id* at 9, n.14. Severance payments were a lump-sum payment equal to the lesser of the severance pay an employee would be entitled to if involuntarily separated, or $25,000.
[530] *Id*. at 9-10.
[531] *Id*. at 10.
[532] *Id*. at 6, n.9.
[533] *See* GAO REP. 12-962T, at 11 (2012), *available at* http://gao.gov/assets/600/593011.pdf.
[534] *Id*.

talent and experience within DoD's acquisition function.[535] The rest of DoD's civilian workforce is not much better off, with approximately 30% of the workforce, and 60% of its civilian senior leaders, eligible to retire by March 31, 2015.[536]

To avoid similar issues in the future, Congress implemented a requirement in 2006 for DoD to have an ongoing strategic workforce plan.[537] This plan includes, among other things, an assessment of skills, competencies and gaps, projected workforce trends, and necessary funding of its civilian workforce.[538] Effective strategic planning for the workforce takes time, a luxury DoD will not have as it faces the impending sequestration cuts. The DoD developed six principles workforce planning should follow in order to successfully plan for the future:

- aligning workforce planning with strategic planning and budget formulation;
- involving managers, employees, and other stakeholders in planning;
- identifying critical skills and competencies and analyzing workforce gaps;
- employing workforce strategies to fill the gaps;
- building the capabilities needed to support workforce strategies through steps to ensure the effective use of human capital flexibilities; and

[535] *See Id*.
[536] GAO REP. 12-1014, at 1 (2012), *available at* http://www.gao.gov/assets/650/648917.pdf.
[537] GAO REP. 12-962T, at 11, *available at* http://gao.gov/assets/600/593011.pdf..
[538] *Id*. at i.

- monitoring and evaluating progress toward achieving workforce planning and strategic goals.[539]

The Government Accountability Office (GAO) reported to Congress in July 2012 that DoD was lagging behind in its efforts to address particular shortcomings of its strategic human capital plan, namely competency gap analysis and monitoring progress.[540] The GAO has identified strategic human capital management as "high risk" across the federal government at large, and has begun an initiative to develop and institutionalize a comprehensive approach to reduce mission-critical skill gaps.[541] Unfortunately, this initiative, as it pertains to the civilian personnel reductions now demanded by sequestration, is likely too late to provide the information necessary to mitigate the potential damage to DoD mission-critical occupations.

Competency gap analyses enable an agency to develop specific strategies to address current workforce needs and plan for future needs.[542] Without analyzing gaps in critical skills, experience and competencies, DoD may not be able to effectively design and fund the best recruiting, hiring and retention strategies to obtain, develop and keep the best possible workforce.[543] For example, DoD has identified 22 mission-critical civilian occupations, but has conducted competency gap assessments in only eight of those occupations.[544] Competency gap assessment for the senior leader ranks is also only

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[539] *Id*. at 7.
[540] *See Id*. at 8-9.
[541] *Id*. at 10, n.20.
[542] *See Id*. at 9.
[543] *See Id*.
[544] GAO REP. 12-1014, at GAO Highlights page, *available at* http://www.gao.gov/assets/650/648917.pdf. Mission-critical occupations include Civil Engineering, Accounting, Auditing, Budget Analysis, Financial Administration, Human Resources Management, Computer Engineering, Computer Scientist, Electronics Engineering, IT Management, Fire Protection & Prevention, Safety & Occupational Health, Intelligence

partially complete.[545] Even though some competency gap assessments have been conducted, DoD has not actually reported the results of these assessments, so Congress at this time has no way of knowing of any competency gaps that may be made worse by civilian manpower cuts.[546]

Monitoring progress demonstrates the contribution of workforce planning to achieve program goals.[547] Failing to monitor the progress of its human capital plan could lead to DoD leadership having insufficient information to make informed civilian manpower reductions.[548] The DoD is also required to define critical skills and competencies that will be required in the future to meet its strategic program goals.[549] However, the DoD human capital strategic plan for 2010 to 2018 provides only "some discussion" for 17 of the 22 mission-critical occupations, and none for the remaining five.[550]

In some cases, competency models needed to conduct the gap assessments are still not even complete.[551] Some functional communities, for example, are so large that they require an automated tool in order to fully assess critical gaps.[552] Other communities have simply reported other pressing requirements have given them

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Specialist, Language Specialist, Police, Logistics Management, Clinical Psychology, Medical Officer, Nurse, Pharmacist, Social Work, and Security Specialist. *Id*. at 5-6.
[545] GAO REP. 12-962T, at 9, *available a*t http://gao.gov/assets/600/593011.pdf.
[546] GAO REP. 12-1014, at 10-11, *available at* http://www.gao.gov/assets/650/648917.pdf.
[547] GAO REP. 12-962T, at 9, *available a*t http://gao.gov/assets/600/593011.pdf.
[548] *See* GAO REP. 12-1014, at 10, *available at* http://www.gao.gov/assets/650/648917.pdf.
[549] GAO REP. 12-1014, at 9, *available a*t http://gao.gov/assets/600/593011.pdf.
[550] *Id*.
[551] *Id*. at 11.
[552] *Id*.

insufficient time to conduct gap analyses.[553] In any event, it appears that DoD does not currently have the ability to make fully informed workforce-reduction decisions.

C. The Problems with Reduction-in-Force Actions

Reduction-in-force actions, even in the current fiscal environment, remain undesirable. The principle reason RIF authority was withheld for so long during the post-Cold War force drawdown is that the process of implementing a RIF can, ironically, actually exacerbate skill imbalances caused by voluntary attrition rather than helping them.[554] Due in large part to bump and retreat rights, a RIF can cause up to a three- to five-fold multiplier effect on the number of employees affected.[555] Senior employees, being qualified for, or having prior experience in lower-graded positions, can bump or retreat to those positions, knocking junior employees out of those positions, precipitating a domino effect down through the employee ranks.[556] Rampant skill imbalances are then a risk as these senior employees, exerting their RIF rights in order to be placed in these new positions, are oftentimes only minimally qualified for the positions.[557]

Reduction-in-force actions also have significant associated financial costs.[558] Even though senior employees may lose their previously higher-graded positions and retreat into lower-graded ones, one of the RIF bump and retreat rights is pay retention.[559] These rights, called "save-pay" rights, extend for many years, and the force is then

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[553] *Id*.
[554] *See* GAO/NSIAD Rep. 93-194, at 6, *available at* http://www.gao.gov/assets/220/217979.pdf.
[555] *Id*.
[556] *See Id*.
[557] *Id*. at 6-7.
[558] *Id*. at 8.
[559] *See Id*.

burdened with a large number of highly-paid employees in more junior positions.[560] An employee moved into a lower-graded job pursuant to a RIF is entitled to retain his or her former pay undisturbed for two years.[561] Beyond that, he or she may still be entitled to indefinite pay retention if it does not exceed 150% of the top rate of the grade the employee has retreated to.[562] The Army, for example, wound up spending $49 million in save-pay costs alone during the post-Cold War force reduction.[563]

In addition to save-pay costs, DoD must also pay relocation costs for displaced employees who get priority consideration for geographically-separated vacancies.[564] In 1992, DoD paid relocation reimbursements to 2,200 employees.[565] Averaging $30,000 per move, these reimbursements totaled $66 million, and were some of the most significant expenses incurred by DoD as a result of RIF actions.[566] Additional "hidden" RIF costs also arise, such as productivity loss, increased sick leave usage, and increased workman's compensation claims.[567] Such costs predictably have long-term financial effects impacting the bang for the civilian manpower buck, reducing the number of personnel that may be employed by DoD overall.[568]

VII. Solution

The DoD will attempt to use furloughs alone to get through fiscal year 2013 without eliminating many civilian positions. These furloughs are currently projected to

[560] *See Id*. n.11.
[561] *Id*.
[562] *See Id*.
[563] *See Id*. at 8
[564] *Id*.
[565] *See Id*. n.12.
[566] *See Id*. at 8.
[567] *See Id*. at 8-9.
[568] *See Id*. at 8-9.

be 14 workdays, in which case RIF procedures will not be necessary. This will hopefully give sufficient time to finish necessary human capital planning in order to minimize the negative impact on the civilian force if drawdowns begin in fiscal year 2014. Such planning must include finding ways to minimize RIF action usage. While some will most likely be inevitable, DoD must get better use out of VERA and VSIP. As it stands now, VERA and VSIP has received very limited use since the post-Vietnam force drawdown.[569]

In order to accomplish this, regulations governing VERA and VSIP use should be expanded to allow for broader and more flexible use. Most importantly, VERA must be made more attractive to employees in the 50 to 59 age group, both to immediately reduce the force and to prevent an unmanageable loss of experience all at once five years from now.[570] One way to accomplish this may be by reducing the CSRS annuity penalty. For example, reduce the penalty to 1% per year for every year the employee is under the age of 55, instead of the current 2%.[571] Waiving the 20 years of federal service eligibility requirement for employees in the 50 to 59 age range that are considered desirable for separation should also be considered.[572]

The current regulations limit VSIP usage to the point it cannot be used as a wide-spread force-reduction tool, and the separation incentive is insufficient. First, VSIP authority should be expanded, like VERA, to be usable beyond the current limit of

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[569] *See* U.S. GENERAL ACCOUNTING OFFICE, FPCD-81-8, at 3, http://www.gao.gov/assets/140/131594.pdf.
[570] *See DoD Workforce Demographics*, https://extranet.apps.cpms.osd.mil/Divisions/Strategic%20Analysis%20and%20Reporting/DOD%20Demographics.aspx.
[571] *See Voluntary Early Retirement Authority*, http://www.opm.gov/policy-data-oversight/workforce-restructuring/voluntary-early-retirement-authority/.
[572] *See, e.g.,* 5 C.F.R. § 831.114(k).

25,000 per-year limit.[573] The Secretary of Defense should be given the discretion to make a cost-savings and mission-impact analysis in order to determine if more widespread use of VSIP would be a better option than what is currently available; as it stands now, the statutory limit cannot be exceeded under any condition. Second, the $25,000 incentive should be raised for all employees. The incentive amount has never changed since VSIP was first used by DoD in 1993, and no longer works as much of an enticement to voluntarily separate or retire. The GAO came to the same conclusion back in 2006, and also recommended increasing the dollar amount of the incentive.[574] Third, in order to induce more employees in the 50 to 59 age range to accept VERA, the Secretary of Defense should be granted the discretion to raise VSIP incentive amounts even further for that particular age group.

The alternative to these proposals is to change the RIF regulations themselves. In order to best control experience and grade balance within the work force, the most effective change would be to handle civilian force shaping just as the active duty members are handled. In such a scenario, the recommendation is that all GS-13 employees, for example, in a particular career field and/or geographic area would compete based on their performance reports plus veterans' preference status. Each GS level would compete internally, and seniority would have no bearing. Employees selected for the RIF would be paid a severance, except for those that are retirement eligible, who would be involuntarily retired. Job retention rights, such as bump and retreat, would also have to be done away with.

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[573] *See* § 5 U.S.C. § 9902(f)(2)(A).
[574] *See* GAO REP. 06-324, *available at* http://www.gao.gov/assets/250/249481.html.

Modifying the RIF regulations in this way, however, is not the preferred method. The changes would have to be much more sweeping than those proposed for VERA and VSIP, taking away rights and job security, and inviting litigation and poor morale. The changes proposed for VERA and VSIP would be a positive expansion of benefits, focused primarily on the most problematic age and tenure groups.

VII. Conclusion

The regulations governing civilian force reductions have never been less responsive than they are now, at a time when rapid force reduction is most needed. The purpose of this paper has not been to criticize the fact that this has occurred, but to focus on solutions that are now badly needed. A number of significant events over the years have gradually led to this point, but unfortunately steps must now immediately be taken to correct the situation.

The cost-benefit analysis of whether to use RIF actions under the current regulations and bear the inevitable costs and detriments to the force, or to forge ahead with significant changes to the VERA and VSIP regulations, is beyond the scope of this paper. However, it seems likely that force fluctuations will continue into the foreseeable future, and it would behoove DoD and Congress to have more responsive tools in its force-shaping tool box. If changes are not made now, tomorrow's DoD civilian force shaping efforts may simply be attempts to fix problems that may have been avoided today.