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AFGE NVAC/AFL-CIO

# NATIONAL VETERANS AFFAIRS COUNCIL

American Federation of Government Employees, Affiliated with the AFL-CIO

## NATIONAL GRIEVANCE

NG-7/29/22

**Date:** July 29, 2022

**To:** Denise Biaggi-Ayer  
Executive Director  
Office of Labor-Management Relations  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, NW  
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[Denise.biaggi-ayer@va.gov](mailto:Denise.biaggi-ayer@va.gov)  
*Sent via electronic mail only*

**From:** Alec Summerfield, Staff Counsel, National Veterans Affairs Council (#53) (“NVAC”),  
American Federation of Government Employees, AFL-CIO (“AFGE”)

**RE:** National Grievance against the Department of Veterans Affairs for making unilateral changes to the FECA claims process

## STATEMENT OF CHARGES

Pursuant to the provisions of Article 43, Section 11 of the Master Agreement Between the Department of Veterans Affairs and the American Federation of Government Employees (2011) (“MCBA”), American Federation of Government Employees/National Veterans Affairs Council (“the Union”) is filing this National Grievance against you and all other associated officials and/or individuals acting as agents on behalf of the Agency for failing to meet their regulatory and contractual obligations regarding the processing of claims with the Office of Workers’ Compensation Programs (“OWCP”). To date, VA has failed to remedy this violation, and as such, continues to violate policy, contract, government-wide regulations, and law.

Specifically, the VA violated 20 C.F.R. §10.211, FECA Bulletin 20-05, MCBA Articles 2 and 41, and any and all other relevant articles, laws, regulations, customs, and past practices not herein specified. The Union specifically reserves the right to supplement this grievance based upon the discovery of new evidence or information of which it is not presently aware, or otherwise, as necessary.

## STATEMENT OF THE CASE

### **Background**

FECA provides compensation and medical benefits to federal civilian employees for injury or illness sustained while on duty. FECA mandates that OWCP, a division of the United States Department of Labor, is the exclusive administrator of federal workers’ compensation programs.

The Department does not administer workers' compensation or make eligibility determinations. The Department is simply an intermediary between the injured employee or their representative and the OWCP.<sup>1</sup> The Department does not have the authority to alter the OWCP's filing requirements or other DOL policies.

20 C.F.R. §10.211 requires that as soon as the Department learns of a traumatic injury sustained by an employee, it must provide forms CA-1 and CA-16 to the employee, advise the employee of their right to receive Continuation of Pay ("COP"), inform the employee of any decision to controvert COP, and complete then transmit the CA-1, along with all pertinent information, to OWCP within 10 days. Exhibit A. Article 41 Section 3 of the MCBA mirrors this requirement.

Further, as required by the American Rescue Plan Act of 2021, FECA Bulletin No. 20-05 establishes that there is a presumption of COVID-19 transmission for federal employees who work in front-line medical professions. *See* Exhibit B. This bulletin instructs such employees who contract COVID-19 to file a CA-1. *Id.*

However, the Department has recently instructed employees who contracted COVID-19 while at work to apply for Weather and Safety Leave ("WSL") in lieu of filing a workers' compensation claim. Eventually, the WSL is denied, and the employee can no longer file a CA-1 or receive COP because the deadline to do has passed. In doing so, the Department has violated its obligations while making it more difficult for healthcare workers to request and receive compensation and medical benefits during the COVID-19 pandemic.

For example, an AFGE bargaining unit employee at the Pittsburgh VAMC was denied WSL after she contracted COVID on December 21, 2021 and could not work. She informed management that she was ill with COVID shortly after. The Agency did not provide the employee with a OWCP CA-1 form, even though it was required to per 20 C.F.R. §10.211.. Instead, the employee's supervisor, Jamila Thomas, instructed the employee to submit a WSL application. Then, on January 5, 2021, VA HR Specialist Jessica Pepler instructed the employee that the WSL application form had been updated; consequently, the employee was required to submit this form a second time. On January 22, 2021, the employee emailed her supervisor and two HR specialists, Kayla Kozminski and Jessica Pepler, requesting an update on her leave situation. Four days later, Ms. Kozminski informed the employee via email that her WSL application was denied.

The employee completed a CA-1 form on February 5, 2021 and submitted it to HR Specialist Stephanie Starks shortly after. On February 15, 2021, Ms. Starks informed the employee that her CA-1 had been controverted because it was not submitted within 30 days of injury. The situation never should have reached this point because HR should have provided this employee with a CA-1 as soon as it learned of the injury/illness. *See* Exhibit A.

Similarly, a Chillicothe, Ohio VAMC employee faced a similar problem when she contracted COVID-19 at work. The Agency never provided this employee with a CA-1 or informed her of her rights regarding workers' compensation claims. Instead, she was instructed to

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<sup>1</sup> Presently, the Department has elected to process workers' compensation claims at the Veterans Integrated Service Network ("VISN") level.

submit a WSL application. This application was eventually denied, more than 30 days after the injury occurred. Similar to the situation in Pittsburgh, the Agency blatantly violated OWCP regulations, and this employee was left with no recourse.

## **Violations**

By failing to inform employees of their right to file a CA-1 form with OWCP and instead directing them to apply for WSL, the Department violated 20 C.F.R. §10.211, Article 41 of the MCBA, and FECA Bulletin No. 20-05.

Additionally, Article 2 of the MCBA requires that the Department comply with applicable federal statutes and regulations in the administration of matters covered by the MCBA. Therefore, in violating, 20 C.F.R. §10.211, Article 41 of the MCBA, and FECA Bulletin No. 20-05, the Department also violated Article 2 of the MCBA.

## **Remedy Requested**

The Union asks that to remedy the above situation, the VA agree to the following:

- To cease and desist the implementation of any policy or procedure implemented by the Department failing to provide employees with an OWCP CA-1 form after the Agency learns of a traumatic workplace injury;
- To cease and desist the practice of directing employees to apply for WSL in lieu of filing a CA-1 with the OWCP;
- To cease and desist any policy or procedure that prevents, discourages, or interferes with employees filing for workers' compensation;
- To fulfill its regulatory obligations under 20 C.F.R. §10.211;
- To fulfill its regulatory obligations under FECA Bulletin 20-05;
- To fully comply with its contractual obligations under Articles 2 and 41 of the MCBA;
- To distribute an electronic notice posting signed by the VA Secretary to all bargaining unit employees, via email, concerning the Department's violations of the MCBA and federal law;
- To make whole any adversely affected bargaining unit employees, including leave restoration and/or back pay, interest, and attorney's fees;
- To comply with its obligations under federal law, regulations, and contract;
- To agree to any and all other remedies appropriate in this matter.

## **Time Frame and Contact**

This is a National Grievance, and the time frame for resolution of this matter is not waived until the matter is resolved or settled. If you have any questions, please contact the undersigned at AFGE Office of the General Counsel. The undersigned representative is designated to represent the Union in all matters related to the subject of this National Grievance.



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cc: Alma L. Lee, President, AFGE/NVAC  
William Wetmore, Chairperson, Grievance and Arbitration Committee, AFGE/NVAC  
Thomas Dargon, Jr., Supervisory Attorney, AFGE/NVAC

# EXHIBIT A

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This content is from the eCFR and is authoritative but unofficial.

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## **Title 20 - Employees' Benefits**

### **Chapter I - Office of Workers' Compensation Programs, Department of Labor**

#### **Subchapter B - Federal Employees' Compensation Act**

##### **Part 10 - Claims for Compensation Under the Federal Employees' Compensation Act, as Amended**

**Authority:** 5 U.S.C. 301, 8102a, 8103, 8145 and 8149; 31 U.S.C. 3716 and 3717; Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; Secretary of Labor's Order No. 10-2009, 74 FR 218.

**Source:** 76 FR 37903, June 28, 2011, unless otherwise noted.

##### **Subpart C - Continuation of Pay Responsibilities**

##### **§ 10.211 What are the employer's responsibilities in COP cases?**

Once the employer learns of a traumatic injury sustained by an employee, it shall:

- (a) Provide a Form CA-1 and Form CA-16 to authorize medical care in accordance with § 10.300. Failure to do so may mean that OWCP will not uphold any termination of COP by the employer.
- (b) Advise the employee of the right to receive COP, and the need to elect among COP, annual or sick leave or leave without pay, for any period of disability.
- (c) Inform the employee of any decision to controvert COP and/or terminate pay, and the basis for doing so.
- (d) Complete Form CA-1 and transmit it, along with all other available pertinent information, (including the basis for any controversy), to OWCP within 10 working days after receiving the completed form from the employee.

# EXHIBIT B

## FECA BULLETIN NO. 20-05

Issue Date: March 31, 2020

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### **Subject: Federal Employees Contracting COVID-19 in Performance of Duty**

**Background:** The Federal Employees' Compensation Act (FECA) covers injury in the performance of duty; injury includes a disease proximately caused by federal employment. The U.S. Department of Labor's (DOL) Office of Workers' Compensation Programs (OWCP) Division of Federal Employees' Compensation (DFEC) provides to an employee injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers "likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation." See [5 U.S.C. 8103](#). FECA pays compensation for disability or death of an employee resulting from injury in the performance of duty.

While all federal employees who contract COVID-19 related to their federal employment are entitled to FECA coverage, special case handling considerations apply to those employees engaged in high-risk employment. In the case of COVID-19, federal employees who are required to have in-person and close proximity interactions with the public on a frequent basis – such as members of law enforcement, first responders, and front-line medical and public health personnel – will be considered to be in high-risk employment triggering the application of [Chapter 2-0805-6](#) of the FECA Procedure Manual. In such cases, there is an implicit recognition of a higher likelihood of infection related to such federal employment. OWCP DFEC recognizes that certain kinds of employment routinely present situations that may lead to infection by contact with sneezes, droplet infection, bodily secretions, and surfaces on which the COVID-19 virus may reside. Conditions such as COVID-19 (like the diseases covered in Chapter 2-0805-6) more commonly represent a work hazard in health care facilities, correctional institutions, and drug treatment centers, among others. The employment-related incidence of COVID-19 appears more likely to occur among members of law enforcement, first responders, and front-line medical and public health personnel, and among those whose employment causes them to come into direct and frequent in-person and close proximity contact with the public.

DOL has created new procedures to specifically address COVID-19 claims. Employees filing a claim for workers' compensation coverage as a result of COVID-19 should file [Form CA-1, Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation](#). The new procedures will also call the adjudicator's attention to the type of employment held by the employee, rather than burdening the employee with identifying the exact day or time they contracted the novel coronavirus.

**Purpose:** To provide targeted instructions to claims staff on the handling of COVID-19 FECA claims by federal employees.

**Action:**

1. A special indicator has been assigned to all COVID-19 claims. The indicator is available for input in the Employees' Compensation and Management Portal (ECOMP) or can be added by case-create clerks where the form is received on paper or by fax. However, where the indicator is not included (such as in cases where the agency uses its own electronic data interchange (EDI) system or where the agency did not elect to use the indicator available in ECOMP), claims examiners should alert their District Director that the COVID-19 indicator must be added.
2. An OWCP DFEC COVID-19 Task Force has been created to help ensure cases are handled expeditiously in a fair and consistent manner. The Task Force will review all COVID-19 claims development and adjudications.
3. **EXPOSURE FROM HIGH-RISK EMPLOYMENT:** If a COVID-19 claim is filed by a person in high-risk employment (by job category or otherwise confirmed by the employer<sup>1</sup>), OWCP DFEC will accept that the exposure to COVID-19 was proximately caused by the nature of the employment. If the employer supports the claim and that the exposure occurred, and the CA-1 is filed within 30 days, the employee is eligible to receive Continuation of Pay for up to 45 days.
4. **EXPOSURE FROM OTHER EMPLOYMENT:** If a COVID-19 claim is filed by a person whose position is not considered high-risk, OWCP DFEC will require the claimant to provide a factual statement and any available evidence concerning exposure. The employing agency will also be expected to provide OWCP DFEC with any information they have regarding the alleged exposure, and to indicate whether they are supporting or controverting the claim. If the employer supports the claim, including that the exposure occurred, and the CA-1 is filed within 30 days, the employee is eligible to receive Continuation of Pay for up to 45 days.
5. **TESTING:** The results of any COVID-19 testing should be submitted to OWCP if available. If the employee has encountered difficulty in obtaining such testing, OWCP will authorize such testing if the employee is working in high-risk employment or otherwise has a confirmed COVID-19 employment exposure.
6. **MEDICAL:** Medical evidence establishing a diagnosis of COVID-19 is needed. You will need to provide medical evidence establishing that the diagnosed COVID-19 was aggravated, accelerated, precipitated, or directly caused by your work-related activities. For health and safety reasons, claimants may wish to use telehealth to obtain medical evidence from a qualified physician – OWCP encourages this flexibility.
7. **CAUSAL RELATIONSHIP:** Establishing causal relationship generally requires a qualified physician's opinion, based on a reasonable degree of medical certainty, that the diagnosed condition is causally related to employment conditions. This opinion must be based on a complete factual and medical background. In the case of high-risk employment, the factual and medical background would include the physician's recognition that the employee is engaged in high-risk employment that included exposure to COVID-19 while in federal employment. See *D.M. (T.M.)* Docket No. 19-0358 (issued March 19, 2020) (ECAB found the employee's death due to meningococemia was causally related to her high-risk employment as a nurse at the employing establishment, as her employment routinely presented

situations which could lead to infection by contact with human blood, bodily secretions, and other substances.)

8. USE OF THE DISTRICT MEDICAL ADVISOR (DMA): In the case of high-risk employment where testing establishes a diagnosis of COVID-19 but no physician's signature is on file following appropriate development, the CE may use the DMA to establish the diagnosis and provide the above-referenced recognition that the employee is engaged in high-risk employment that included exposure to COVID-19 while in federal employment.
9. DISABILITY: FECA pays compensation for partial or total disability of an employee resulting from injury in the performance of duty. Just as with other conditions/claims, disability is claimed by the filing of a CA-7, Claim for Compensation, with the employing agency and requires an incapacity because of an employment-related injury to earn wages.