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Federal Worker Back Pay Act Rights Reduced in Proposed Rule (1)

Federal employees would no longer be entitled to collect back pay for unjustified personnel actions such as overtime payment shortfalls or incorrect performance bonus rejections, under a proposed rule that the government's central human resources office calls the first substantive change to the agency's Back Pay Act regulations since 1981.

Unions that represent federal workers also would no longer be eligible to recover attorneys' fees for Back Pay Act actions under the proposal. The law contemplated payments to eligible employees, and not their union representatives, the Office of Personnel Management said in a [proposed rule](#) released Tuesday.

The proposal would narrowly define personnel actions covered by the Back Pay Act to include only those that directly affect regular take-home pay, such as promotions or demotions, removals or suspensions, and transfers or reassignments, the OPM said in a preamble to the proposed rule.

This means back pay recoveries would no longer be available in challenges to actions that don't directly reduce a federal worker's regular earnings.

As an example of the kind of action that would no longer be covered by the Back Pay Act, the OPM said an arbitrator held in January that a VA hospital should have given an employee a \$1,000 performance award. The arbitrator also ordered the Department of Veterans Affairs to pay more than \$30,000 in attorneys' fees, the OPM said.

"Requiring agencies to pay tens of thousands of dollars in attorney fees in litigation over much smaller performance awards wastes agency resources. It also encourages agencies to broadly distribute performance awards, to avoid litigation," it said.

The OPM didn't immediately respond to requests for additional comment.

Why Make Changes Now? "This proposed rule, if enacted, will significantly curtail the instances in which attorneys' fees are available under the Back Pay Act to

the prevailing employee," because of both the limits on the types of actions covered and the ban on unions being reimbursed for attorneys' fees, said Diane Seltzer Torre of the Seltzer Law Firm in Bethesda, Md.

"Why are they changing their regulations now, after almost 40 years?" Seltzer Torre asked. The changes, if finalized, likely will result in legal challenges, said Seltzer Torre, who represents management and workers, including federal employees, in employment disputes.

Tony Reardon, president of the National Treasury Employees Union, said the NTEU intends to submit comments objecting to the proposed rule.

"OPM's proposed changes to its longstanding interpretation of the law would unduly narrow the types of cases to which the Back Pay Act would apply. It would also exclude labor organizations, and all other potential representatives, from receiving attorney fees under the law," Reardon said.

Rachel Greszler, a research fellow at the Heritage Foundation, which describes its mission as supporting free enterprise and limited government, said the proposed rule if finalized would mean substantial savings for taxpayers.

The OPM's "clarification" of who can be an employee representative under the Back Pay Act is important because the courts' current interpretation means taxpayers foot attorneys' bills for federal workers who sue the government over everything from dismissals to non-granted promotions or bonuses, she said.

"These changes mark a small positive step towards improving efficiency in the federal government and ensuring better stewardship of taxpayers' dollars," Greszler said.

Comments on the proposed rule are due within 30 days of its expected publication on Wednesday, the OPM said.

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