Sexual Behavior and Your Security Clearance

By Nicole SmithYou probably expect that issues involving your credit, foreign influence or drug use will have a negative impact on your ability to be granted a security clearance. One issue that is not specifically referenced in the SF86 Questionnaire is your sexual conduct. However, there are a couple of questions on the questionnaire that can elicit potential issues surrounding your sexual conduct.For example, there are several questions in the criminal conduct section of the questionnaire that can possibly elicit past sexual conduct issues. One such question is whether you have ever been charged with or convicted of any felony offenses. Another question requires you to list any offenses you have been charged with or convicted of in the last seven years. If you have been charged with or convicted of offenses of a sexual nature that fall within the requirements of these questions (e.g., sexual assault, child pornography, engaging in sexual acts in a public place, or indecent exposure), that information must be disclosed.Additionally, the questionnaire has several questions in a section titled “Misuse of Information Technology,” which could possibly elicit disclosure of downloading child pornography or downloading pornography at work. Finally, the questionnaire requires you to list any prior divorces. If it’s disclosed during the course of an interview with an investigator that the divorce is due to infidelity by you, this can impact your ability to be favorably adjudicated.For those of you applying for jobs that will require a polygraph exam, less obvious sexual behavior concerns may be elicited during this exam, depending on the nature of the questions. Several examples include the use of dating Web sites to specifically engage in frequent sexual activity, the use of webcams to engage in sexual acts, or uploading sexually explicit material on the Internet. Although none of this is criminal in nature, it can be viewed as engaging in a pattern of compulsive or high-risk sexual behavior that a person is unable to stop or may be symptomatic of a personality disorder.The concerns about certain sexual behaviors

There are several concerns that adjudicators have when you have engaged in questionable sexual behavior. First, they are concerned that you may be susceptible to blackmail or coercion if the sexual behavior is not widely known; meaning that you can be blackmailed into disclosing classified information if under the threat of exposure. Another concern is that if you have engaged in questionable sexual behavior that reflects a lack of judgment or discretion, you may lack these qualities in other aspects of your life, to include safeguarding classified information. Finally, if you have engaged in compulsive, self-destructive, or high-risk sexual behavior, adjudicators may be concerned that you are unable to stop or that your acts may be symptomatic of a personality disorder.How to mitigate

The good news is that any questions or issues surrounding your sexual behavior can potentially be mitigated in a number of ways. First, an adjudicator will look at how old you were when you engaged in the sexual behavior. If you engaged in sexual misconduct as an adolescent rather than adult, this consideration will help to mitigate the issue. An adjudicator will also look at how long ago you engaged in the sexual behavior not only to determine the likelihood of continued conduct, but to also determine whether the behavior serves as a basis for coercion, exploitation, or duress. The adjudicator will evaluate the frequency that you engaged in the questionable sexual behavior. Conduct that occurred a couple of times rather

than multiple times will certainly be viewed more favorably. With respect to engaging in sexual behavior that may, on the surface, seem questionable, the adjudicators will look at whether the sexual behavior was strictly private, consensual, and discreet.Contact a security clearance representation attorney if you are concerned that your sexual behavior may affect your ability to secure a secure clearance, or it has prompted a denial or revocation notice.

Service Members' Rules of Engagement for Valentine's Day

By Lisa M. Windsor

It's said that love blossoms even in times of war. For the past decade, service members have had to celebrate Valentine's Day while wars waged in Iraq and Afghanistan. Now with U.S. forces having been withdrawn from Iraq and thousands of troops being pulled out of Afghanistan, many will be able to nurture love this Valentine's Day in more peaceful environments.

However, service members can get much worse than a broken heart if they engage in romantic relationships with other military personnel. Here are some tips for service members struck by Cupid's arrow and head over heels for someone else in uniform.

Tully Rinckey's Valentine's Day Tips

Activity

UCMJ Article

Offense

Love Tip

Dating a superior or subordinate service member

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Failure to obey a lawful order or regulation

Make sure you know your branch's stance on dating others in the service, particularly its position on superior/subordinate relationships. The following publication details each branch's fraternization and dating policies:

Army Regulation 600-20

OPNAVINST 5370.2C

U.S. Navy Regulation 1165

Marine Corps Manual 1100.4

Air Force Instruction 36-2909

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Fraternization

Cheating

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Conduct unbecoming of an officer and a gentleman

The military does not care if you or someone with whom you are having an affair is legally separated. If either one or both of you are married – but not to each other – and you are sleeping with each other then you are committing adultery.

Don't move in with your lover if either one of you is married to someone else. The military deems two people living together "as husband and wife," when in fact they are not married to each other but they present themselves as such, as wrongful cohabitation.

It is not uncommon for charges of adultery – or even fraternization – to be consolidated into a charge of conduct unbecoming of an officer.

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Adultery

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Wrongful cohabitation

Public displays of affection

134

Indecent acts with another

Stick to making love behind closed – preferably locked – doors and in privacy. To commit this offense, you'd have to engage in indecent sexual activities that are grossly vulgar, obscene, and repugnant to most people.

This sexual conduct must be "open and notorious." Fooling around – even under covers – while other people are around or when there is the possibility of someone walking in on you could be deemed open and notorious, according to the U.S. Court of Appeals for the Armed Forces.

Love can make people do crazy things. In some cases, they may be illegal things, especially in the military. The Uniform Code of Military Justice features several laws exclusive to the military that prohibit certain types of relationships or sexual activities. Service members charged with any of these crimes of love should immediately contact a military law attorney.

Lisa M. Windsor is Of Counsel with Tully Rinckey PLLC and concentrates her practice in military law. She can be reached at lwindsor@fedattorney.com

. To schedule a meeting with one of Tully Rinckey PLLC's experienced military law attorneys call 202-787-1900.

MSPB Empowers Fed Employees Threatened or Intimidated by Customers

By Ryan C. Green, Esq.

The U.S. Merit Systems Board (MSPB)

recently decided a case on the constructive suspension doctrine. The decision provides greater protections for those federal employees who have been threatened or intimidated by customers and other members of the general public.

In November 2011, the MSPB

issued its decision in Moore v. U.S. Postal Service

. In this case, Carol Moore, a postmaster in Diamond, Ohio, alleged she was being stalked at work by a non-Agency employee. She claimed the Agency refused to reassign her to safer work environment, which forced her to take leave from her intolerable work environment.

Ms. Moore, who generally worked alone at the post office, notified her supervisor that a customer was stalking her. On one occasion, the customer went to the post office, absent legitimate business, to stare at Ms. Moore. On another occasion, the stalker followed her 15 miles to a Home Depot parking lot.

In response to her complaint, the Agency banned the individual from the Diamond Post Office. Ms. Moore, who suffered from post traumatic stress disorder (PSTD) because of these incidents, alleged that the Agency's corrective actions were inadequate. As a remedy, she requested a transfer to another post office and provided the Agency with documentation from her psychologist, who detailed the PTSD diagnosis and recommended the reassignment.

Ms. Moore appealed her use of leave to the MSPB

. An administrative judge dismissed for lack of jurisdiction. The full Board, however, held Moore's complaint constituted a non-frivolous allegation of an involuntary absence from duty because she put the Agency on notice and requested remedial action from the Agency.

The Moore

decision empowers threatened or intimated federal employees by allowing them to challenge agency inaction, when forcing employees to take leave because of intolerable conditions. Federal employees should not feel unsafe at work. If they do, and their employer fails to adequately respond to such concerns, the employee should immediately contact a federal employment lawyer.

Ryan C. Green

is an associate with Tully Rinckey PLLC working in the firm's federal employment and labor law

group. Ryan can be reached at rgreen@fedattorney.com

.To schedule a meeting with one of Tully Rinckey PLLC's experienced employment law attorneys call 202-787-1900.

Employment Practices, Not Just Politics, Behind Mounting Hostility on Capital Hill

By Rachelle S. Young

To say Capital Hill is becoming an increasingly hostile place is now an understatement, with a new report showing a dramatic increase in harassment and discrimination claims made by legislative branch employees.

The number of legislative branch employee who made discrimination and harassment claims during mandatory alternative dispute resolution counseling rose by almost 24 percent in the 2010 fiscal year to 168, compared to the previous fiscal year, the Office of Compliance (OOC) noted in its 2010 fiscal year annual report

. Since the 2006 fiscal year, the number of those complaints has actually jumped 93 percent from 87.

The OOC, which administers and enforces the Congressional Accountability Act of 1995 (CAA), did not provide an explanation for the increase in harassment and discrimination complaints. It did note that race/color, age and gender/pregnancy were the leading factors in discrimination and harassment complaints, which accounted for 69 percent of 244 alleged violations to the CAA in the 2010 fiscal year.

These statistics reflect legislative employees' prevailing efforts to assert the employment rights that are relatively new to them but that have long protected executive branch and private sector workers. It was only through the enactment of the CAA that these protections were extended to the more than 30,000 legislative branch employees.

The CAA ended Congress' wild west approach toward employment rights and applied to the legislative branch the protections provided by laws such as Title VII of the Civil Rights Act, the Family Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA)

. Most recently, Congress has added the Veterans Employment Opportunity Act (VEOA) to the list of laws applied to the congressional workplace.

Unlike executive branch employees, who can generally take their grievances over wrongful employment actions to the Office of Special Counsel (OSC), Merit Systems Protection Board (MSPB)

or Equal Employment Opportunity Commission (EEOC)

, legislative branch employees must follow alternative dispute resolution procedures. The employee can retain a private attorney at any time during this process.

Most CAA claims, excluding those generally pertaining to public access, workplace safety or labor organization, must first enter confidential counseling within 180 days of an alleged violation. The employee then has 15 days after receiving notice of the conclusion of counseling to request mediation. If a resolution cannot be reached at this stage, the employee has between 30 and 90 days after receiving notice of the end of mediation to have his or her

case heard at an OOC administrative hearing or to file a lawsuit at the appropriate federal district court.

Legislative branch employees need to remember that the anti-retaliation protections provided by the Whistleblower Protection Act. The OOC has recommended extending these protections to congressional employees. Texas Rep. Sheila Jackson Lee has even introduced legislation proposing to do that. Her Congressional Disclosures Protection Act of 2011 (H.R. 226), however, has seen little activity since February. In the meantime, legislative branch employees should consult with a federal labor lawyer to assert the rights under the CAA and hold lawmakers and their staffs accountable to the employment laws they impose on other Americans.

Rachelle S. Young

is an associate with Tully Rinckey PLLC working in the firm's federal employment and labor law group

. She can be reached at ryoung@fedattorney.com

.To schedule a meeting with one of Tully Rinckey PLLC's federal employment law

attorneys call 202-787-1900.

Pricey Gifts for Superiors Land Service Members on Military's Naughty List

By Lisa Marie Windsor

'Tis the season for giving. Service members, however, must be very careful when giving gifts to superior officers, because when such presents are too valuable they could land subordinates on the military's naughty list.

As many JAG attorneys and military lawyers know, charges against service members who violate U.S. Department of Defense (DoD) rules pertaining to gift giving are about as common to the Christmas season as sleigh bells and mistletoe. Service members who give even moderately expensive holiday gifts to superior officers could be charged with disobeying a lawful regulation in violation of Article 92 of the Uniform Code of Military Justice. The giving rules are included in the Joint Ethics Regulation (JER, DODD 5500.7-R

).

The types of gifts subordinates can occasionally give to superiors are items with a market value no more than $10. Subordinates can also give food or beverages that are offered to other DoD employees or personal hospitality at an employee's home.

Gifts given during Christmas and Hanukkah fall under the category of "occasional basis" giving. Meanwhile, gifts given to employees for a marriage, illness, child birth, adoption, termination, reassignment or retirement fall under the "special, infrequent occasions"

category. Superiors cannot accept gifts for special, infrequent occasions from groups of employees when their aggregate market value exceeds $300 and he or she knows or has reason to believe at least one contributor is a subordinate. For group gifts to superiors with an aggregate value less than $300, subordinates are limited to a $10 voluntary contribution.

The purpose of these gift-giving prohibitions is not to turn the military into a Grinch but to guard the armed services from favoritism and conflicts of interest. These rules curb service members' attempts to secure more favorable evaluations or treatment from commanders in return for expensive presents and also protects service members from feeling pressured to purchase or contribute to expensive gifts for their bosses. These value limits do not apply to gifts from superiors to subordinates. However, as the JER states, all DoD employees cannot give, accept, demand or seek "anything of value to influence any official act."

Federal employees should also take note of the military's limitations on gifts to superior officers. The JER pulls much of the language for these giving prohibitions from the Code of Federal Regulation (C.F.R. Parts 2635.201-2635.304). Military personnel charged with Article 92 or facing non-judicial punishment because of a gift given or received should contact a Washington, D.C. military justice attorney.

Lisa M. Windsor

is of counsel to Tully Rinckey PLLC and concentrates her practice in military law

and criminal defense

. She can be reached at lwindsor@fedattorney.com

. To schedule a meeting with one of Tully Rinckey PLLC's military law attorneys in Washington, D.C. call 202-787-1900.

VA Can't Say Definitively Its Nursing Homes Have Bucked Deficiencies: GAO

By Greg T. Rinckey

The U.S. Department of Veterans Affairs still cannot provide assurances that patient care problems identified years ago at some of its 132 nursing homes have been resolved, according to the federal government's watchdog agency.

In a new report

, the Government Accountability Office (GAO) stated there are "weaknesses" in the VA's process for responding to deficiencies at its nursing homes, also referred to as community living centers (CLCs). The GAO warned that such administrative problems "may compromise the quality of care and quality of life of veterans in CLCs." The GAO reached this conclusion after evaluating the VA's process for responding to CLC care deficiencies identified by a federal contractor in 2007 and 2008.

Following reports about sub-par care at CLCs that made headlines in 2004, the VA over the next three years conducted unannounced reviews of certain CLCs. It hired Long Term Care, Inc. (LTCI) in 2007 to conduct a more expansive, two-year investigation of 116 VA-operated

nursing homes. LTCI uncovered a host of deficiencies at many CLCs, some relating to a dearth of competent skilled nurses and unsanitary and unsafe conditions. For example, 90 percent of the 116 investigated CLCs were found to have dignity deficiencies, meaning veterans in their care had poor hygiene and lacked privacy. Fifty-nine percent of the CLCs had infection control deficiencies caused by staff who skirted proper isolation procedures and hand washing requirements, according to the GAO report.

In response to these findings, the VA required CLCs to establish corrective action plans to address the LTCI-identified deficiencies. The VA also rolled out a national training and education initiative to address care concerns. Additionally, it ordered another LTCI investigation of all agency-operated nursing homes in 2010 and 2011.

However, the GAO found the VA lacks a “clear and complete” process for documenting the feedback it provides to CLCs on their corrective action plans. Due to lax reporting requirements to VA regional networks, the GAO said, “VA headquarters does not know whether CLCs fully implemented their plans and corrected all LTCI-identified deficiencies.” Insufficient verification requirements for the training and education initiative were also cited. The GAO said VA officials want to wait until LTCI delivers the findings of its 2010-2011 investigation to learn how well CLCs addressed deficiencies identified in the 2007-2008 report.

This wait-and-see strategy is unacceptable. It unnecessarily puts some of the 46,000 disabled veterans who receive care at VA nursing homes at risk of medical malpractice.

While the VA seems content to wait to see its CLC employees have kicked the deficient practices that put disabled veterans at risk, veterans should not delay in consulting with a VA medical malpractice attorney about filing an administrative claim with the agency if they have suffered from an employee’s negligent or wrongful act or omission. There is a two-year deadline for filing such claims.

Greg T. Rinckey

, a former military and federal attorney, is a managing partner of Tully Rinckey PLLC. He concentrates his practice on military law

, federal employment and discrimination litigation

and national security clearance mitigation

. He can be reached at grinckey@fedattorney.com

.

House Passes Bill to Extend Hostile Work Environment Protections to Service Members

By Greg T. Rinckey

Service members who felt vulnerable after a federal appellate court earlier this year ruled the

Uniformed Service Employment and Reemployment Rights Act (USERRA)

does not protect them from hostile work environments now have reason to be hopeful. Legislation proposing to protect service members from work environments in which their military duty is a source of hostility is advancing in Congress.

The U.S. House of Representatives on Oct. 12 passed the Veterans Opportunity to Work Act of 2011 (VOW Act, H.R. 2433). Among the bill's many provisions, which mostly aim to help veterans to more easily transition into civilian employment, is one that would amend USERRA

. The bill proposes to clarify USERRA

's definitions for employment benefits to include "the terms, conditions, or privileges of employment."

It was because this phrase was missing from USERRA

that the U.S. 5th

Circuit Court of Appeals ruled in Carder v. Continental Airlines, Inc.

that the law's employment protections do not cover hostile work environments. Other anti-discrimination-based federal laws, such as Title VII of the Civil Rights Act and the Americans with Disabilities Act, feature this phrase. The protection for "conditions…of employment" is what is crucial for employees seeking to enforce their rights when facing a hostile work environment.

As the 5th

Circuit noted in its Carder

decision, the U.S. Supreme Court said in Harris v. Forklift Systems, Inc.

that "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions

of the victim's employment and create an abusive working environment, Title VII is violated." In Carder

, a group of Continental Airlines pilots who also served in the U.S. Armed Forces Reserves and Air National Guard sued the airline because of their supervisors' discriminatory, harassing and degrading comments based on their military duty.

This legislation, which was forwarded to the Senate, would plug an egregious oversight in USERRA

. The law already prohibits employers from discriminating against service members by denying them employment, reemployment, retention in employment, promotion and employment benefits based on their military service. How would the purposes of USERRA

be served when despite such protections employers are still allowed to get away with harassing the service members they employ? In ruling against the pilots in Carder

, the 5th

Circuit said the Supreme Court's emphasis on the importance of the specific word "conditions" to hostile work environment claims "cannot be ignored." The Senate, too, should not ignore the omission of this word from USERRA

and pass the VOW Act.

Service members need to remember that just because USERRA

does not specifically provide protections against hostile work environments, they still have options. They could, for example, sue an employer for violating their USERRA

rights for constructive discharge if a supervisor’s harassment becomes so unbearable that they are driven to resign. Service members who have been harassed because of their military duty should immediately contact a military law attorney.

Greg T. Rinckey

, a former military and federal attorney, is managing partner of Tully Rinckey PLLC. He concentrates his practice on military law

, federal employment and discrimination litigation

and national security clearance mitigation

. He can be reached at grinckey@fedattorney.com

.

OPM and EEOC Join Forces in Effort to Close Gender Pay Gap

By Corinna A. Ferrini

Nearly a half-century after the Equal Pay Act of 1963 was enacted, the federal government is still scratching its head over how to close the gender pay gap in the federal civil service. Two federal agencies, however, are standing together in emphasizing the need to uncover any discriminatory factors underlying the perplexing pay divide.

On Aug. 6, the Office of Personnel Management (OPM) and Equal Employment Opportunity Commission (EEOC)

issued a joint memorandum

reaffirming their intent to close the pay gap, which has diminished from females earning 28 cents to every male-earned dollar in 1988 to 11 cents in 2008. The memo assured the two agencies are “working to ensure that all federal employees have the opportunity to realize the promise of equal pay for equal work.” It came on the heels of recommendations from the National Equal Pay Enforcement Task Force, established by President Barack Obama in 2010.

Over a year ago, the task force mandated that OPM and EEOC

work together in helping the U.S. Government Accountability Office (GAO) determine the causes for male and female employee pay differences that are not linked to measurable factors. Although position-based factors (i.e. skill requirements and grade level) and individual factors (i.e. experience and education) may account for some of the pay disparities between men and women, the government has not ruled out discrimination as a reason for the still-existing gap.

What federal employees need to know:

The Equal Pay Act

requires equal pay for equal work, regardless of gender.

The EPA

covers various types of pay, including, but not limited to, salary, bonuses and overtime pay.

Federal employees are not required to file a complaint with the EEOC

alleging an Equal Pay Act violation before filing a civil suit.

In cases involving unlawful compensation claims, there is a two-year deadline for filing an EPA

charge with the EEOC

or a lawsuit in court. The filing deadline is extended to three years for willful violation cases.

Unlike Title VII, the Equal Pay Act

does not require the employee to prove that the employer intentionally discriminated against him or her. This can make a case for discrimination easier to prove in court.

While OPM and EEOC

's joint efforts to resolve this pay disparity are commendable, federal employees should not wait for the government to solve this pay puzzle. Federal employees who believe they have been subjected to unlawful pay discrimination should contact a federal sector employment law attorney, who will protect their rights by filing an EEO complaint or a civil suit on their behalf.

Corinna A. Ferrini

is an associate with Tully Rinckey PLLC who concentrates her practice on federal employment law

and congressional investigations

. She can be reached at cferrini@fedattorney.com

. To schedule a meeting with one of Tully Rinckey PLLC's experienced employment law attorneys call 202-787-1900.

KIA Bracelets Receive Corps Commandant's OK

By Greg T. Rinckey

The Marine Corps has backed away from a ban against bracelets honoring fallen comrades. Service members, nevertheless, need to beware that other slight modifications to their uniforms can still get them in trouble.

On Oct. 18, Commandant of the Marine Corps, Marine Gen. James F. Amos said

Marines are now authorized to wear memorial bracelets memorializing troop who were killed in action and wounded or injured in combat. Under a Sept. 19, 1972 SECNAV message, Marines and Navy sailors have been allowed to wear prisoners of war and missing in action bracelets. Amos' approval adds KIA and WIA bracelets to the Corps' short list of authorized jewelry. Under Marine Corps Order 1020.34G

, the KIA/WIA bracelets had been banned, though they were not specifically named in the uniform regulation.

While other branches have already authorized POW, MIA and KIA bracelets, the Marines' approval of WIA bracelets is unique. With ALARACT 140/2007, the Army changed its uniform and insignia rules (Army Regulation 670-1

) to authorize POW, MIA and KIA bracelets so long as they are black or silver in color. Under Air Force Instruction 36-2903

, Air Force airmen, too, are authorized to wear POW, MIA and KIA bracelets, though this regulation provides strict guidelines for such jewelry. Both the Air Force and Army limit service members to one bracelet per hand.

Service members need to remember that their failure to adhere to uniform regulations could result in their being charged with failure to obey a lawful general order or regulation in violation of Article 92 of the Uniform Code of Military Justice. This offense carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances and two years of confinement. Service members must be careful about adopting "faddish" or "eccentric" styles that might be all the rave in the civilian realm but do not satisfy the military's conservative tastes.

Style is a very subjective matter, and the interpretation of uniform regulations can be much the same. MCO 1020.34G states that "good judgment will govern the application of this policy in the field environment." One commander's good judgment, however, can vary from the next commander's good judgment. It is also not uncommon for service members to forget to remove a piece of jewelry or other article. Therefore, it is imperative that service members charged with violating a uniform regulation to contact a military law

attorney who can point out ways in which their uniform did in fact comply with regulations or deviations stemmed from innocent oversights.

Greg T. Rinckey

, a former military and federal attorney, is managing partner of Tully Rinckey PLLC. He concentrates his practice on military law

, federal employment and discrimination litigation

and national security clearance mitigation

. He can be reached at grinckey@fedattorney.com

.

OSC Seeks Smaller Clubs to Beat Hatch Act Violators

By Neil A.G. McPhie

The federal agency charged with cracking down on government employees who unlawfully mix work and politics is asking Congress to cut federal employees a break.

With the 2012 presidential election a little more than a year away, the U.S. Office of Special Counsel (OSC) recently submitted to Congress draft legislation

proposing to ease the penalties for violators of the 72-year-old Hatch Act. The agency wants Congress to reform the law's draconian penalties for government employees who engage in prohibited political activities. It also wants to loosen the prohibitions against what state and local employees cannot run for elected office.

These Hatch Act reforms are decades overdue. Even Special Counsel Carolyn Lerner said the Hatch Act's penalties are "inflexible and sometimes unfair." What makes the penalties so draconian is their one-size-fit-all structure.

Currently, the default penalty for Hatch Act violations is removal. Federal employee prohibitions include using one's official authority to influence the results of elections; knowingly soliciting, accepting or receiving political contributions, except under certain circumstance; running for office in a partisan election; or soliciting or dissuading people from running in such elections. There are also prohibitions for when and where federal employees cannot engage in political activities, such as during work hours or while in official uniform or on government property.

The current law is not entirely unforgiving. It authorizes the U.S. Merit Systems Protection Board (MSPB)

to reduce a penalty to at least 30 days without pay when a violation does not merit removal. A unanimous board vote is required for such penalty reductions. OSC's proposed reforms would smash the one-size-fit-all penalty structure. Its proposed penalties include:

Removal;

reduction in grade;

up to a five-year debarment from federal employment;

suspension;

reprimand; or

up to $1,000 fine.

Federal employees need to know they are playing with fire when involving themselves in political campaign fundraising initiatives. Soliciting campaign funds while on the job is one of the most egregious Hatch Act offenses federal employees can commit. Many employees who

violate this prohibition often to so by sending or forwarding e-mails from their office computers.

Between the 2005 and 2010 fiscal years, the number of new Hatch Act complaints the OSC received more than doubled, from 245 to 526, according to agency annual reports. OSC, which is responsible for investigating Hatch Act complaints and enforcing the law, filed seven disciplinary action complaints with the MSPB

in the 2010 fiscal year and obtained 10 disciplinary actions against federal employees.

In the current political climate, a growing number of federal employees are allowing their passion and allegiance to particular social issues and candidates to cloud their better judgment. While their passion may be admirable, their engagement in such activities could cost them their jobs. Government employees accused of violating the Hatch Act should immediately contact a federal employment lawyer.

Neil McPhie

is the Virginia managing partner for Tully Rinckey PLLC and concentrates his practice in federal sector employment and labor law

. He can be reached at

nmcphie@fedattorney.com

. To schedule a meeting with any of Tully Rinckey PLLC’s federal sector employment attorneys

call 703- 525-4700.