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Cheri Cannon agrees with members of the MSPB that the new VA law may violate constitutional rights of employees.

New VA law creates constitutional due process concerns

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** IN FOCUS:**

The changes imposed by the Veterans Access, Choice, and Accountability Act of 2014 that allow the secretary of the Department of Veterans Affairs to immediately fire or demote senior executives for poor performance or misconduct could set the stage for more comprehensive governmentwide legislation, according to Tully Rinckey partner Cheri Cannon. With VACA fundamentally changing VA senior executives' rights as compared to other employees, "What's to stop Congress from taking away more rights from the next agency that faces a scandal?" Cannon asked. In fact, another bill, H.R. 5169, has already been approved by the House Oversight and Government Reform Committee, which would:

- Expand the categories for which Senior Executive Service employees can be fired and add a broader "promote efficiency of the service" standard.**
- Allow SES employees to be suspended for fewer than 14 days similar to most federal employees.**
- Eliminate rules that allow SES employees to retain their SES salary when they are demoted for performance and placed in a new General Schedule job.**
- Allow agencies to place senior executives on mandatory leave when they are being proposed for termination.**

Both Cannon and members of the Merit Systems Protection Board have voiced concerns that the new VA law violates constitutional due process rights for senior executives. Essentially, executives who are fired or demoted have seven days

to appeal to an administrative judge and the MSPB AJ has 21 days to issue a decision. The MSPB AJ's decision is final, with no appeal to the full MSPB available as is provided by current law and regulations. If the AJ does not meet the 21-day deadline, the agency decision stands, irrespective of the merits of the executive's appeal. During the appeal process, executives who are removed can't receive pay, bonuses, or benefits. Demoted employees may receive only the compensation and benefits associated with the new position so long as they report for work. The MSPB is required to submit a plan to Congress by Aug. 21 to implement these expedited reviews, as well as request any resources that will be required. MSPB general counsel Bryan Polisuk told cyberFEDS® that getting that process in place has been difficult, but the MSPB "is going to get that done." MSPB review

Polisuk said it's too early to tell what impact appeals filed under VACAA will have on the MSPB's workload, but they will clearly have to be prioritized because of the expedited time frame. MSPB board members are also concerned because of the lack of full board review, he said, adding that the three-member panel consists of "presidentially appointed and Senate-confirmed officers that are being told that they cannot do the work that they were appointed to do." In addition to the lack of full board review, Cannon said allowing an agency's action to stand with no appeal rights if the AJ does not issue a decision in 21 days creates additional constitutional concerns. "Taking away the right to a decision on appeal is fundamentally unconstitutional because it is causing harm to the employee because of the adjudicator's failure to act -- an outcome that the employee cannot control," she explained. The law also poses problems for the VA, because it does not allow the agency to appeal to the full board if the MSPB AJ reverses the agency decision or otherwise finds the VACAA-based removal or demotion unconstitutional, she explained. Pre-deprivation due process

Cannon said federal employees, including SES, have a property interest in their jobs and federal salaries, so in the course of normal disciplinary actions, agencies must provide "pre-deprivation due process" before taking away their pay or positions. Pre-deprivation due process requires agencies to provide notice of the proposed action and

an opportunity to reply before terminating employees or suspending them from pay and duty, she explained. "Case law strongly suggests that it is unconstitutional for an agency to deprive employees of their property interest in their pay without pre-deprivation due process," she noted. But under the new law, "if the secretary decides the individual warrants termination, then she is terminated and may not be placed on administrative leave with pay pending the appeal to the administrative judge," she told cyberFEDS®. Cannon pointed out, however, that the VA does not have to use the expedited process to terminate or demote SES employees, meaning the department may continue to use Title 5 procedures. 120-day rule

VACAA, Cannon said, could very well impact the VA's ability to retain skilled SES employees. As a general rule, when an agency is transitioning from one politically appointed department head to another, "a legal moratorium goes into effect for 120 days that states that the new agency head cannot take any action with respect to SES employees, meaning they can't be fired, demoted, reassigned etc. during that period," Cannon explained. The purpose of this 120-day rule is to "protect SES employees from the spoils system and politically based hiring, firing, or reassignment decisions." However, Congress decided to exempt VA from the 120-day rule, allowing a new department head to "get rid of any of them at any time." Consequently, she said, the VA will likely have an enormous problem retaining and recruiting decent SES employees because "no one will want to work there when they are subject to the whim of a political appointee with no real right to cure any unlawful termination or other action." Reprinted with permission from: cyberFEDS® on the Web, Copyright © 2014 by LRP Publications, 360 Hiatt Drive, Palm Beach Gardens, FL 33418. All rights reserved. For more information on this or other products published by LRP Publications, please call 1-800-341-7874 or visit our website at: www.cyberfeds.com or www.lrp.com

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