



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

March 21, 2007

MEMORANDUM FOR CHIEF HUMAN CAPITAL OFFICERS

FROM: LINDA M. SPRINGER
Director

A handwritten signature in blue ink, appearing to be "LMS", written over the printed name and title.

Subject: Change in Employee Coverage Under Adverse Action Procedures

As you know, two decisions of the U.S. Court of Appeals for the Federal Circuit, *Van Wersch v. Dept. of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999) and *McCormick v. Dept. of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002), have revised the interpretation of the definition of "employee" in 5 U.S.C. 7511 and invalidated portions of the adverse actions regulations at 5 CFR part 752. Following these decisions, the Merit Systems Protection Board addressed another aspect of the definition of "employee" under 5 U.S.C. 7511 in *Payano v. Dept. of Justice*, 100 MSPR 74 (2005). The effect of these decisions is to provide procedural and appeal rights to certain individuals serving on a probationary period in the competitive service and on a trial period in the excepted service.

While we previously advised your human resources staff working in employee and labor relations about these cases and their impact on adverse action procedures, I want to ensure you also are fully aware of the ramifications of these decisions and have taken steps to revise agency policies in a manner consistent with these decisions. In our February Unified Agenda submission to OMB, OPM indicated that it would be submitting proposed regulations to revise part 752. Proposed regulations to conform part 752 to the case law will shortly be forwarded to OMB for its review. Even prior to completion of the regulatory process, however, your agency policies must ensure the following individuals also are "employees" for purposes of taking an adverse personnel action against them:

- Competitive service employees currently serving a probationary or trial period when they have
 - completed one year of current continuous service under other than a temporary appointment limited to one year or less, regardless of the position previously held
- Excepted service employees (other than preference eligibles) currently serving a probationary or trial period when they have
 - completed two years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to two years or less

If your policies are inconsistent with these decisions, you must revise them immediately. Should you have questions concerning this matter, please contact your OPM Human Capital Officer.

cc: Human Resources Directors