

25TH ANNUAL FEDERAL WORKERS' COMPENSATION TRAINING



FECA SUBROGATION

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U.S. Department of Labor, Office of the Solicitor
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Agenda

- 1) Basics of FECA Subrogation.
- 2) What is a third-party case?
- 3) How to calculate the reimbursement to the United States.
- 4) Enforcement of FECA Subrogation.

What is Subrogation?

Subrogation is a legal doctrine whereby one person is entitled to enforce the rights of another for one's own benefit.

- Common to insurance policy claims, such as auto, property/casualty, and healthcare policy claims.
- For example, on July 4th, your neighbor's fireworks display goes crazy and causes damage to the siding and roof of your house. Because you have a homeowners' policy, your insurance company will pay to fix the property damage. But then, under the doctrine of subrogation, the insurance company "steps into your shoes" to pursue a claim against your neighbor to collect reimbursement of what was paid to you.

What is FECA Subrogation?

- The Government's right to subrogation is governed by Sections 8131 and 8132 of the FECA and its regulations at 20 C.F.R. §§ 10.705-10.719.
- FECA's subrogation provisions arise when, in the performance of duty, a federal employee's injuries are caused by someone other than their employing agency or the United States (i.e., a third party).
- Under the FECA, if that federal employee pursues the third party for damages (medical bills, lost wages, property damage, pain and suffering, etc.) and receives a monetary recovery, the United States acquires a right to a portion of the recovery.

Who handles FECA Subrogation?

- The Federal Employees' and Energy Workers' Compensation Division (FEEWC) in the Office of the Solicitor handles all FECA subrogation matters, including USPS cases. See FECA Bulletin No. 13.04 (Aug. 5, 2013).
- OWCP retains control regarding ALL other aspects of the FECA claim (including medical bill determinations).

The Law - Section 8131

- Section 8131 requires the employee or FECA beneficiary to either assign their right of action to the United States or pursue the responsible third party.
- Necessary conditions:
 - ✓ Third party responsible for employee's injury
 - ✓ The employee or FECA beneficiary must have an accepted FECA claim to trigger this requirement.
- This requirement may be waived in limited circumstances.

The Law - Section 8132

- Section 8132 provides a “Statutory Right of Reimbursement” for the United States if the employee or FECA beneficiary receives money or other property from the responsible third party in satisfaction of the third party’s liability to the beneficiary.
- Sets forth the formula for computing the statutory right of reimbursement from the recovery received from the third party.
 - This formula is basis for the Statement of Recovery.
- This requirement can not be waived under any circumstances.

Identifying Third-Party Claims

- The main role of OWCP and the employing agency is to identify claims that were caused by a third party.
- Once OWCP or the employing agency makes the initial determination that the injury was possibly caused by a third party (either initially or through subsequent events), the matter should be referred to the Office of the Solicitor, FEEWC.
- Please note: There may be coverage even if the employing agency fails to indicate that the matter involves a third party on the initial claim form.

Common Third-Party Situations

- Car Accident where a federal employee is injured or killed
- Falls due to negligent building or property maintenance
- Dog bite
- A plane crash or train accident
- Malfunctioning elevator
- Product liability (e.g., defective chair)
- Asbestos exposure
- Medical malpractice



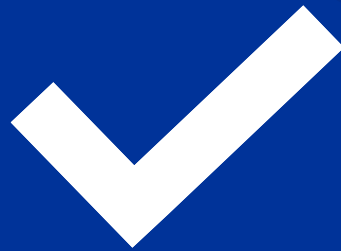
Not a Third-Party Claim

- Injury to the federal employee was caused by another Federal employee(s).
 - A fight between two employees.
 - A federal employee injured in a car accident where another federal employee was driving.
- Injury due to the employee's own negligence.
- The recovery comes from the employee's own insurance company.

Special Third-Party Situation: U.S. Census Bureau Employees

- Due to privacy considerations and at the request of the United States Census Bureau, DOL does not require census workers to pursue certain third-party claims.
- If the Census Bureau employee or worker does pursue the third-party claim and receives a recovery, the United States has a statutory right of reimbursement.

Should You Check the Box?



THIRD PARTY IDENTIFICATION

An OSHA worker is conducting an inspection at the local Post Office. While on the loading dock, an Amazon driver is unloading a pallet of packages. The pallet of packages falls on the OSHA worker causing him to have severe neck and back pain.

On the CA-1 form, do you check the box?

THIRD PARTY IDENTIFICATION

A U.S. Census worker is returning to the office after conducting a personal interview with a homeowner. It is raining heavily. She loses control of the vehicle and hits the car in front of her. The employee is treated for abrasions to her head and a concussion.

On the CA-1 form, do you check the box?

THIRD PARTY IDENTIFICATION

A U.S. Department of Commerce employee is sitting at his desk and turns in his chair awkwardly to retrieve a file. This employee injured his hip when he turned for the file and expects to have hip replacement surgery.

On the CA-1 form, do you check the box?

Later, the artificial hip replacement fails and claimant must have a rescission/repair surgery. OWCP pays for the rescission/repair surgery and the associated treatment required to recovery from the additional surgery. Would you check the box now?

THIRD PARTY IDENTIFICATION

A postal worker is delivering mail on her normal route and trips on an uneven sidewalk. She now has a sprained ankle.

On the CA-1 form, do you check the box?

THIRD PARTY IDENTIFICATION

An FBI agent is driving to conduct an interview with a witness. On the way, his government issued vehicle is rear ended by another car and he ends up hitting the car in front of him. The TSA agent experiences a back injury as a result of the car accident.

On the CA-1 form, do you check the box?

THIRD PARTY IDENTIFICATION

- If there's a question as to whether a third party is involved, you should always check the box indicating that the injury was caused by a third party
 - Boxes 30 & 31 on the CA-1
 - Boxes 33 & 34 on the CA-2
- Indications that a claim may involve a third party include:
 - Subpoenas from state courts.
 - Requests for disbursements from attorneys other than the FECA attorney.
 - Inquiries from insurance companies.

Office of Solicitor's Responsibilities

- Communicates with claimants or attorneys through the lifecycle of their lawsuit or insurance claim against the third party.
 - ✓ Informs them of their statutory obligations under the FECA.
 - ✓ Requests and documents status updates.
 - ✓ Provides total disbursements to claimants or attorneys.
 - ✓ Assists by answering questions and helping with the Statement of Recovery (SOR).
 - ✓ Approves SORs and processes incoming payments.
 - ✓ Takes appropriate action against parties that fail to satisfy the statutory right of reimbursement, such as litigation in federal courts or referral to the U.S. Treasury for collection.
- Provides legal advice to OWCP.
- Credits the employing agency for any money collected (“chargeback”). Last year, FEEWC recovered over \$18 million in refund and over \$39 million in surplus. This was an approximately 40% increase from prior years.

Our Terms

- Total Disbursements: The amount of continuation of pay and compensation paid to an employee or FECA beneficiary.
- Statement of Recovery: Form required to calculate how much of the total disbursements should be reimbursed to the United States out of a third-party recovery and is based upon the formula set forth in Section 8132 of the FECA.
- Refund: The amount owed to the United States out of a third-party recovery, as calculated on the Statement of Recovery. Note: Cannot be calculated until there is a recovery.
- Surplus: credit against future benefit payments that must be absorbed by the beneficiary before FECA benefits may resume. Note: Also, cannot be calculated until there is a recovery.
- Reimbursement: The total amount a FECA beneficiary owes to the United States, consisting of the refund and surplus, arising from the subrogation provisions in Section 8132 of the FECA.
- Excess Recovery: when FEEWC collects more money than the refund amount and must return the excess amount to the claimant.
- Other related definitions can be found in the regulations, at 20 C.F.R. § 10.5.

Total Disbursements

- Total disbursements consist of:
 - ✓ Any Continuation of Pay (COP) paid to the federal employee AND
 - ✓ Any Compensation paid to either the federal employee or other FECA beneficiary.
- Used to calculate the Reimbursement owed to the United States when a third-party recovery is received by the employee or FECA beneficiary.
- Note: Prior to December 23, 2022, COP was not included in the total disbursements. However, the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (NDAA) changed Sections 8131 and 8132 to authorize reimbursement to the United States from any third-party recovery for COP, in addition to any other compensation paid to a FECA beneficiary, and that amount will be credited to the Employees' Compensation Fund.
- FEEWC developed procedures to implement the new provisions of the NDAA, including how OWCP will collect COP data and how OWCP will credit to agencies the COP reimbursed from a third-party recovery. See FECA Bulletin No. 24-01: Changes to FECA Subrogation under the National Defense Authorization Act for Fiscal Year 2023.
- As of July 8, 2024, FEEWC now includes COP in all total disbursements.

Reimbursement

- When the employee or FECA beneficiary receives a third-party recovery, they must complete a Statement of Recovery to determine the Refund and Surplus owed to the United States.
- The Refund is non-negotiable once a recovery is obtained. FEEWC cannot approve a repayment amount for less than the Refund, as calculated on the Statement of Recovery.
- The Surplus is non-negotiable once a recovery is obtained. OWCP must credit all future benefits for that injury once the surplus has been established.
- Many attorneys representing claimants in third-party cases call the reimbursement a “lien,” which is incorrect. Remember, the United States has a Statutory Right to Reimbursement, which arises by operation of law under the specific language of 5 U.S.C. § 8132 when a claimant receives a recovery from a third party.

Statement of Recovery

- Approved OMB Forms – CA-1108 and CA-1122.
- Use only the approved form, do not alter or modify an OMB-cleared form.
- Why? Changing an OMB-cleared form can have Paperwork Reduction Act consequences, and can adversely affect DOL's ability to get other forms cleared through OMB.
- All relevant OWCP Forms are available at:
www.dol.gov/agencies/owcp/FECA/regs/compliance/forms

Will the United States be reimbursed for the entire total disbursements?

- Short answer, no.
- The FECA beneficiary is entitled to retain at least twenty percent of the tort recovery after expenses of suit and reasonable attorney's fees are deducted.
- The formula generally results in a considerable reduction in the amount to be refunded by the FECA beneficiary and/or credited against future FECA benefits.
- A portion of the recovery may be allocated for loss of consortium for the spouse and children of an injured employee (and/or wrongful death and survival, in a death case).



Print Reset

OMB No. 1240-0001
Expiration Date: 02/28/2025

File Number: _____

Employee: _____

LONG FORM STATEMENT OF RECOVERY

(See following pages for instructions)

1. Gross Recovery (Entire Amount of the Award).....1. \$ 150,000.00

2. Amount of Recovery Percentage charged by the attorney here: 33.33

Enter the actual fees paid to the attorney here: \$ 50,000 9. 50,000.00

10. Subtotal D (Line 8 minus Line 9).....10. 100,000.00

11. Costs of suit or settlement (Costs must be reduced by the percentage entered on Lines 4, 6, or 7)** SEE INSTRUCTIONS BEGINNING PAGE 5. 2,000.00

Enter total costs here: \$ 2,000 11.

12. Subtotal E (Line 10 minus Line 11).....12. 98,000.00

13. 20% of Subtotal E (Line 12 x .20)**.....13. 19,600.00

14. Subtotal F (Line 12 minus Line 13).....14. 78,400.00

15. Total Disbursements (Refundable Disbursements and Continuation of Pay).....15. 25,000.00

16. Subtotal G (Lower of Line 14 or Total Disbursements).....16. 25,000.00

17. Government's Allowance for Attorney's Fees (% on Line 9 x Line 16) (This amount does not include a reduction for costs)****.....17. 8,333.33

18. Refund to be paid to the United States (Line 16 minus Line 17).....18. 16,666.67

19. Credit Against Future Benefits (Surplus) (If Line 14 is greater than Line 15, then Line 14 minus Line 15, otherwise enter "0")**.....19. 53,400.00

Recovery was from both a Wrongful Death action and a Survival action.

** The regulation requires that the gross recovery allocated for loss of earnings be reduced by the percentage entered on Lines 4, 6, or 7.

*** Pursuant to the statute, "the beneficiary is entitled to retain, as a minimum, at least one-fifth of the net amount of the money or other property remaining after the expenses of a suit or settlement have been deducted; and in addition to this minimum and at the time of distribution, an amount equivalent to a reasonable attorney's fee proportionate to the refund to the United States." This is captured in Lines 13 and 17.

Settling for Less...

Unless permission in writing is given by OWCP or SOL, the FECA beneficiary *may not* settle or dismiss a case filed against a third party for any amount less than the total disbursements. See 20 CFR § 10.707.

Releasing the Obligation to Pursue

- A FECA beneficiary or their attorney may make a written request to FEEWC to be released from Section 8131's requirement that the beneficiary initiate a lawsuit against a third party. See 20 CFR § 10.709.
- The beneficiary or their attorney should include as much information as possible in the request.
 - Have they tried to get any attorney?
 - Was the injury so minor as to be a nuisance?
 - Is the third party judgement proof (i.e., homeless, criminal, hit and run, no insurance, etc...)
- DOL will emphasize that this discharge extends only to the prosecution requirement of Section 8131.
- Note: if the beneficiary ever receives a recovery from a third party for that injury, the reimbursement requirement imposed by Section 8132 is still in effect.

Failure to Respond

- The employee or FECA beneficiary, and their attorney, must take action (including filing a lawsuit, if necessary) against a responsible third party to satisfy the FECA subrogation requirements of Sections 8131 and 8132 of the FECA.
- The employee or FECA beneficiary and their attorney are also required to provide periodic status updates and other relevant information in response to OWCP or SOL requests. See 20 C.F.R. § 10.707.
- Failure to initiate a third-party action or to respond to requests for information may result in the forfeiture or suspension of the FECA beneficiary's right to compensation. See 20 C.F.R. § 10.708.
- FEEWC will refer the claim to the District Office for an appropriate decision.

It's Not That We Will Not Waive Reimbursement... We Cannot.

“Terms of the [FECA] are specific as to what shall be charged against the proceeds of a third-party recovery and neither the Bureau (OWCP’s predecessor agency) nor the Board has the authority to waive or compromise the requirements of the Act.” Willie E. Cantrell, 13 ECAB 490, 492 (1962); see also Charles Howell, 38 ECAB 421 (1987).

When all else fails...

Take them to court.

U.S. v. Lorenzetti

- Claimant received a third-party recovery for only pain and suffering, which are noneconomic damages, and refused to reimburse the United States. At issue: noneconomic damages v. economic damages.
- The Supreme Court ruled that the statutory right of reimbursement under 5 U.S.C. 8132 attaches to the entire recovery, regardless of the elements of damages for which recovery is had.
- U.S. v. Lorenzetti, 467 U.S. 167 (1984).

U.S. v. Richard Epstein

- DOL sued the attorney representing a FECA beneficiary in a third-party action, asserting that the attorney was jointly and severally liable because he failed to first satisfy the United States' right of reimbursement under § 8132 before distributing the proceeds of a settlement.
- Epstein paid himself \$210,000 first along with the court costs from the \$230,000 up-front cash from a structured settlement and sent DOL only \$7,000 for the United States' right of reimbursement (well below the amount owed).
- The U.S. District Court entered judgment in the amount of \$114,000 against Epstein. As a result, Epstein paid DOL the full \$114,000.
- U.S. v. Epstein, 2007 WL 2617174 (W.D. Pa. 2007).

U.S. v. Michael D.J. Eisenberg

- Attorney Eisenberg settled a lawsuit for \$650,000 and promptly paid his attorney fee and the claimant. Absent any documentation, Eisenberg decided OWCP's refund was \$52,000, when it was actually \$96,000, and only kept that \$52,000 amount in his attorney trust account.
- OWCP sued Eisenberg in federal court. Eisenberg asserted numerous defenses, including estoppel, civil conspiracy, and denial of due process.
- The Court summarily dismissed all of Eisenberg's claims and found that Eisenberg was jointly and severally liable to repay the refund and that having part of that refund (\$52,000) was not sufficient to establish assurance of the United States' interest in the refund.
- Eisenberg eventually paid the entire \$96,000 sum.
- U.S. v. Eisenberg, 149 F.Supp.3d 71 (D.D.C. 2015).

Durand v. Dep't of Labor

- The Court of Appeals for the Ninth Circuit affirmed DOL's calculation of the refund due to the United States under the statutory formula set forth in Section 8132.
- The opposing attorney argued that the costs of lawsuit should be deducted from the refund due to the United States.
- The Court rejected that argument and agreed with DOL that there was no ambiguity in the language of Section 8132, and that the costs and expenses of lawsuit were to be deducted from the gross recovery (as clearly set forth in line 10 of the long form statement of recovery, CA-1108), not from the refund amount.
- Durand v. Dep't of Labor, 662 F.3d 1106 (9th Cir. 2011).

Questions?

The image features a solid blue background. In the upper center, the word "Questions?" is written in a bold, yellow, sans-serif font. In the bottom right corner, there are several faint, overlapping, wavy lines in a slightly darker shade of blue, creating a decorative, abstract pattern.

References



- FECA, 5 U.S.C. § 8101 et seq.
- FECA Regulations, 20 C.F.R. § 10.0 et seq.
- Part 2, (FECA) Procedure Manual
- DOL Website has links for fillable Statements of Recovery:

Short form: <http://www.dol.gov/owcp/regs/compliance/ca-1122.pdf>

Long form: <http://www.dol.gov/owcp/regs/compliance/ca-1108.pdf>

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