What is Subrogation?

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

What is FECA Subrogation?

In any case where a FECA beneficiary is injured by a person other than the United States (third party), they can bring a claim against that third party for damages (medical bills, lost wages, property damage, pain and suffering, etc.).

The government’s right of subrogation comes from Sections 8131 and 8132 of FECA which provides the United States acquires a right to be reimbursed from the recovery.
Who handles FECA Subrogation?

- As of August 5, 2013, the Federal Employees’ and Energy Workers’ Compensation Division (FEEWC) of 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).

Section 8131

- To the extent that an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a “third party” to pay damages, OWCP may require the FECA beneficiary to assign a right of action to enforce that liability to the U.S. or to prosecute an action in their name.

Section 8132

- Provides a “Statutory Right of Reimbursement” for the United States.
- Sets forth the formula for computing the statutory right of reimbursement due to the United States after a FECA beneficiary receives money or other property from a third party in satisfaction of the third party’s liability to the beneficiary.
- Formula is basis for Statement of Recovery.
Requirements of FECA Subrogation

- Under § 8131, claimants are generally required to pursue a claim or lawsuit against a third party who is legally liable for the work-related injury.
- This requirement in certain limited circumstances can be waived by FEEWC.
- Under § 8132, if there is a recovery ($$$), claimants are required to reimburse the United States the appropriate amount.
- This requirement can never be waived, reduced or compromised.

Statutory Right of Reimbursement

- The amount owed (refund and surplus) to the U.S. when a claimant achieves a recovery from a third party arises by operation of law under the specific language of 5 U.S.C. § 8132 (Statutory Right of Reimbursement).
- However, most attorneys representing claimants in third party cases will speak in terms of a "lien," because that is the term used in many state workers’ compensation actions, with which they are more familiar.

Our Terms

- Reimbursement: The total amount owed to government includes both the refund and surplus.
- Refund: Amount owed to the government for benefits paid as calculated on Statement of Recovery.
- Surplus: Credit against future benefit payments that must be absorbed before FECA benefits may resume. FYI, the District Office tracks absorption of the surplus, not FEEWC.
- Statement of Recovery: Form required to calculate how much is owed to the United States.
- Excess Recovery: When FEEWC collects more money than the refund amount and must return the excess to the claimant.
Identifying Third Party Claims

- The main role of OWCP, the agency and a representative in subrogation issues is identifying third party claims.
- A FECA covered injury may involve a third party even if the employing agency fails to indicate that it involves a third party on the initial claim.
- Once it has been determined that the injury was possibly caused by a third party (either initially or through subsequent events), the matter should be referred to the Solicitor’s Office.

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

When is it not a third party?

- Injury caused by other Federal employees
- Injury due to the employee’s own negligence
- If the recovery is from the employee’s own insurance company
THIRD PARTY IDENTIFICATION
Special Case: Census Bureau Employees

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

Should You Check the box?

THIRD PARTY IDENTIFICATION

A TSA agent is taking a taxi from his hotel to the airport to return home from training. On the way, the taxi driver rear ends a car at a stop light, injuring the agent’s back. Should you refer?
THIRD PARTY IDENTIFICATION

A USPS postal carrier is delivering his route when he is attacked by a dog. During the attack, he has a heart attack and dies. Should you refer?

THIRD PARTY IDENTIFICATION

A DOL statistician, during her official break, goes to the vending machine to get a cup of coffee. When drinking the coffee, she swallows a cockroach that had been in the cup. Should you refer?

THIRD PARTY IDENTIFICATION

A USPS Postal Carrier is delivering her route when she trips over an orange construction cone and breaks her foot. While hospitalized for that injury, she attempts to go visit her mother who was a patient in the same hospital, and injures herself while climbing the stairs on crutches. Should you refer?
THIRD PARTY IDENTIFICATION

A census worker is returning to the office after conducting a personal interview with a home owner, when she has to stop suddenly on an interstate on-ramp. She is rear ended by a car behind her, being driven by another census worker, her supervisor. Should you refer?

THIRD PARTY IDENTIFICATION

A DOD employee driving to work shortly before his shift is struck while on base by another DOD employee who had come by on his day off to visit the credit union. Should you refer?

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 matter include:
  - Subpoenas from state courts.
  - Requests for disbursements from attorneys other than the FECA attorney.
  - Inquiries from insurance companies.
Statute of Limitations

- Every state has a time limit on filing a third-party case.
- The employee’s right to sue the third party is lost if suit is not timely filed.
- Timely referral is important.

What Does The Solicitor’s Office Do?

- Communicate with claimants and attorneys to see that they are pursuing the third party.
- Communicate with them to get status updates on the case.
- Assist by answering questions and helping with Statement of Recovery (SOR).
- Approve SORs and process checks.
  - This ensures the Agency gets credit for any money collected (“charge back”).
- Last year, we recovered over $15 million in refund and over $20 million in surplus.
- Take appropriate action against parties that fail to satisfy the statutory right of reimbursement, such as litigation or referral for collection.

Reimbursement

- The Refund and Surplus are calculated on the Statement of Recovery.
- The Refund is non-negotiable once a recovery is obtained. We cannot approve a repayment amount for less than the Refund.
- 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.
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.
- Forms are available at: https://www.dol.gov/owcp/dfec/regs/compliance/forms.htm

Settling for Less...

Unless permission in writing is given by OWCP or SOL, the beneficiary may not settle or dismiss a case for any amount less than the refundable disbursements as defined in 20 C.F.R. § 10.714.

See 20 CFR § 10.707.
Does the government get all $?

- 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.
- Claimant is entitled to retain at least twenty percent of the tort recovery after expenses of suit and reasonable attorney’s fees are deducted.
- 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).
- COP is not included in the refundable disbursements.

Releasing the Obligation to Pursue

- A beneficiary or their attorney may make a written request to FEEWC pursuant to 20 CFR § 10.709 to be released from Section 8131’s requirements that the beneficiary prosecute a claim against a third party.
- 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…)

Releasing the Obligation to Pursue

- The beneficiary will be provided written notice regarding the request.
- DOL will emphasize that this discharge extends only to the prosecution requirement of section 8131.
- 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

- **Claimant/Attorney** must take action (including filing a lawsuit, if necessary) against a responsible third party to satisfy the requirements of §§ 8131 and 8132 of the FECA.
- Claimant/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 respond to requests to initiate a third party action or for information may result in forfeiture of right to compensation, 20 C.F.R. § 10.708, or the right to compensation may be suspended.
- Claim is then referred back to the District Office for an appropriate decision.

It's Not That We Will Not Waive Reimbursement…

We CANNOT.

Willie E. Cantrell, 13 ECAB 490, 492 (1962), "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.” (emphasis added)

See also Charles Howell, 38 ECAB 421 (1987).

When all else fails…

Take them to court.
U.S. v. Lorenzetti

- 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.
- i.e., pain and suffering v. economic damages

Citation: 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. Michael D.J. Eisenberg

- Attorney Eisenberg settled claim for $650,000 and promptly paid his attorney fee and the claimant. With no documentation, Eisenberg decided OWCP's refund was $52K, when it was actually $96K, and only kept that amount in his trust account.
- OWCP sued Eisenberg, who alleged numerous defenses, including estoppel, civil conspiracy, and denial of due process.
- Judge 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 (the $52K) was not sufficient to establish assurance of the United States interest in the refund.
- Eisenberg eventually paid the $96K.
The attorney who wanted to deduct costs and expenses twice

- In *Durand v. USDOL*, 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 § 8132. The attorney argued that the costs of suit should be deducted from the refund due to the United States; the Ninth Circuit agreed with DOL that there was no ambiguity in the language of 8132, and that the costs and expenses of suit 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.

Questions?

References

- 20 CFR Part 10 FECA Regulations
- DOL Website has links for fillable Statements of Recovery:
  - Short form CA-1122
  - Long form CA-1108
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