How DOGE's Severance Plan May Affect Federal Employees

By **Aaron Peskin** (February 26, 2025)

Aaron Peskin

To say that President Donald Trump's administration is off to a fast start would be quite the understatement. The administration, working through Elon Musk's Department of Government Efficiency, is clearly looking to change how the federal government works by offering a mass severance package to roughly 2 million employees, which is virtually the entire federal workforce.

DOGE is not a Cabinet-level agency, but rather a temporarily contracted government organization under the U.S. DOGE Service Temporary Organization, which is itself a redesignation and repurposing of the U.S. Digital Service, an Obama-era information technology organization.

Shortly after taking office, the Trump administration offered a buyout to most federal employees — except U.S. Postal Service workers, military personnel, and others involved in national security, immigration enforcement and public safety — in an email from the U.S. Office of Personnel Management, titled "Fork in the Road," which is hereafter referred to as the FITR.

The buyout is essentially an offer for federal employees to resign from their positions and be placed on paid administrative leave through Sept. 30. During that time, employees could opt to not work or to seek alternative employment.

If this were the takeover of a corporation, the process would look rather simple and familiar — the new management would come in and terminate the employment of anyone they determined was not a good fit moving forward.

Indeed, this is exactly what Musk did when he took over Twitter, now X, in 2022. He sent a similar email, also titled "Fork in the Road," demanding that employees affirmatively opt into the "new Twitter" where employees would be expected to work "long hours at high intensity." Anyone who declined would be terminated and provided one month's worth of severance pay.

However, Musk ultimately did not pay those offered severance packages, claiming the employees who declined had effectively resigned their positions. This has sparked thousands of individual arbitrations and over a dozen class actions.

Putting aside Musk's failure to pay severance, something like the FITR would be entirely legal in the private sector, unless done in a discriminatory manner, or in violation of a statute or collective bargaining agreement. After all, at-will employment is the default rule in 49 states, with Montana being the sole exception, meaning an employee may be terminated without needing to establish cause for doing so.

However, in the context of federal employees, there are a number of other considerations that one must take into account when determining whether they should take the offer.

First, it is unclear whether the Trump administration has the authority to make such an offer.

Current funding for most federal agencies expires on March 14, meaning that without an act of U.S. Congress to continue funding, any employee who accepts this offer may be out of luck. And there is no guarantee that Congress will agree to pay severance to these employees.

Additionally, even without these funding considerations, the executive branch has the authority to spend money authorized by Congress for specific purposes. It is not clear that Congress authorized the Trump administration to pay employees to do nothing until Sept. 30.

Second, federal employees who have accepted the offer should be mindful that this is not a traditional severance package.

In the private sector, once an employee accepts a buyout, their employment is terminated and, barring a noncompete agreement, they are free to work where they please.

However, since those who have accepted the FITR have been placed on paid administrative leave, they remain federal employees. As such, there are questions about whether they can accept new employment and under what circumstances.

For example, can a former employee of the U.S. Department of Defense go to work for General Dynamics Corp., one of the largest defense companies in the world? Or would doing so constitute a conflict of interest?

Third, it is unclear what will happen to employees who took the offer if it is later found to be unlawful or unconstitutional.

Would they be reinstated in their earlier positions? Or would their resignations stand, and they would simply be out of luck with regard to receiving their paid administrative leave? So far this question has not been answered.

The implication of the FITR email that nearly all federal employees received is fairly clear — if you refuse to accept the offer and your views do not align with those of the current administration, your job will not be safe.

However, most rank-and-file federal government employees are not considered at will. Therefore, if an employee does not accept the offer, and the Trump administration does not want to retain them, it cannot simply fire the employee.

If a federal employee is not a political appointee or another high ranking official, they cannot be fired without cause and enjoy several protections against dismissal.

The upside of this system is that you must be fired for cause, which means more than simply having views that do not align with the Trump administration.

The downside is that there is an administrative system in place, so if you believe you are being treated unfairly, you are required to exhaust your administrative remedies before filing suit in federal court.

In order to fire a federal employee for cause, the employer must prove that the employee's conduct was egregious enough to warrant removal. Cause can include misconduct such as harassment, insubordination, security violations, or criminal behavior on or off duty. It can

also include unacceptable job performance, such as missing deadlines, poor quality work or lacking necessary skills.

Again, political views are not a valid basis for termination, and in fact, if an employee is able to prove that their termination was based on political grounds, they would be entitled to reinstatement.

An additional caveat to the cause requirement is that termination must be proportional to the offense. In other words, if you miss a single deadline and are later able to get an extension, that offense by itself likely does not warrant termination. But all situations are fact-specific.

Once the decision has been made to terminate a federal employee, the supervisor must provide the employee with a written notice of the proposed removal, along with evidence to support the alleged cause or causes for termination. After that, the employee must respond either orally or in writing, and submit evidence in their defense.

After the employee submits their response, the deciding official, usually someone higher up than the direct supervisor, makes the call about whether to terminate.

Once the decision has been made, and if the decision is to remove the employee, the employee may be able to appeal the decision to the Merit Systems Protection Board. If the employee requests a hearing, their appeal will be heard by an impartial administrative law judge.

The employee can make a myriad of arguments before the MSPB, including discrimination, retaliation, that the termination was not for cause, that the agency failed to follow required procedures, and that the penalty of removal was too severe under the circumstances.

The agency bears the burden of proof by a preponderance of the evidence to prove the alleged conduct and that termination is warranted. If the agency fails to meet that burden, the removal will be reversed. If the removal is upheld, the employee may appeal to the MSPB.

It is also important to note that, during this period, the agency may engage in settlement talks with the employee to determine if an agreement can be reached before a final decision is rendered.

One wrinkle to note about the MSPB: It is composed of three members, and two members are required for a quorum to be present in order to render a decision on an appeal.

For over five years, from 2017 to 2022, the board had less than two members and was unable to issue final decisions on petitions for review. Trump nominated several individuals to the board during his first term, but the U.S. Senate never confirmed any of them.

Ultimately, President Joe Biden nominated two members to the board in 2022, both of whom were subsequently confirmed by the Senate, at which point a quorum was present once again. A third member was also confirmed later that same year.

However, Trump recently terminated Chairman Cathy Harris' position on the board. This move may not be lawful, as an MSPB member can only be removed for inefficiency, neglect of duty or malfeasance in office.

Harris has since sued the Trump administration over her dismissal in the U.S. District Court for the District of Columbia. On Feb. 18, in Harris v. Bessent, U.S. District Judge Rudolph Contreras issued a temporary restraining order mandating that she remain as chair of the MSPB, at least until the court has the opportunity to rule on a full motion for preliminary injunction.

Thus, the MSPB remains at three members for now. However, in addition to Harris' legal battle, member Raymond Limon's term expires on March 1. This means that if Harris' termination is ultimately found to be lawful, and if Trump fails to appoint another member who is confirmed by the Senate, the MSPB will be reduced to a single member.

If the board does become reduced to one or fewer members, it will not have a quorum unless and until Trump appoints a new member that is confirmed by the Senate.

At that point, the aggrieved employee's options are to either file an appeal to the board with the understanding that it may be quite some time before that appeal is heard, or opt not to appeal and let the decision become final. But for now, federal employees can expect that the MSPB will be able to hear their appeals in a timely fashion.

If the MSPB upholds the removal, the employee's administrative remedies have been exhausted. At that point, they may appeal to the appropriate forum. Depending on the claims and defenses presented and ruled upon, the forum may be the U.S. Equal Employment Opportunity Commission, the U.S. Court of Appeals for the Federal Circuit or the appropriate federal district court.

Claims of discrimination are heard de novo, while other claims and arguments are reviewed on an abuse of discretion standard for findings of fact. However, removal decisions can also be reversed if proper procedure was not followed or if the decision was unsupported by substantial evidence.

As if it was not already obvious, circumstances in this administration seem to change at the speed of light. On Feb. 12, in American Federation of Government Employees, AFL-CIO v. Ezell, in the U.S. District Court for the District of Massachusetts, Judge George A. O'Toole lifted the stay of the deadline to accept the FITR offer, which he had imposed the week prior.

However, he did not rule on the merits of the FITR. Rather, he held that the union plaintiffs lacked standing to challenge the offer. It is therefore unclear how future litigation may be resolved.

For now, it appears that the FITR has moved forward and the deadline to accept the offer passed on Feb. 12. According to the Trump administration, approximately 75,000 workers accepted the offer, far fewer than the 5% to 10% of the federal workforce that Musk estimated would take it.

Ultimately, the FITR creates many questions, but few have been answered.

For an employee who was already seeking to leave the federal workforce, and possibly already had a job offer in hand, accepting the severance offer might be a good decision because there would be little to lose from doing so.

But for dedicated employees who have made a career out of government work, and who want to continue doing so, there were many risks associated with this offer, especially

considering the protections currently afforded to those employees. That said, circumstances may change, and it is indeed possible that Congress could pass new laws weakening or even eliminating those protections.

It is also possible that Trump's termination of Harris will ultimately be found lawful, and he may subsequently appoint a new member to the board who is sympathetic to his position regarding the federal workforce.

But without such major changes, these unanswered questions coupled with protections for federal employees are likely a major reason why such a small percentage, a fraction of the amount the Trump administration had hoped for, accepted the offer.

Aaron L. Peskin is senior counsel at Kang Haggerty LLC.