



RELEASE - TRANSMISSION OF REVISED MATERIAL TO BE
INCORPORATED INTO THE FEDERAL (EEOICPA) PROCEDURE MANUAL:
CHAPTER 3-0400 TORT ACTION AND ELECTION OF REMEDIES.

EEOICPA TRANSMITTAL NO.09-10

September, 2009

EXPLANATION OF MATERIAL TRANSMITTED:

- This material is to be transmitted for placement in the new Unified Procedure Manual(PM) binder.
- This material incorporates updated information and guidance for handling claims in which the claimant has filed a tort lawsuit. It provides guidance to determine if election of remedies or tort offset is required due to a tort lawsuit.
- This material provides updated guidance on obtaining a signed response (affidavit) regarding a lawsuit, state workers' compensation claim, and fraud.
- This material incorporates updated procedures on tracking surplus due to a tort offset.

A handwritten signature in cursive script that reads "Rachel P. Leiton".

Rachel P. Leiton
Director, Division of
Energy Employees Occupational Illness Compensation

FILING INSTRUCTIONS:

File this transmittal behind Part 2 of the new Unified Federal (EEOICPA) Procedure Manual.

Distribution: List No. 3: All DEEOIC Employees
List No. 6: Regional Directors, District Directors, Assistant District Directors, National Office Staff, and Resource Center Staff.

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1. Purpose and Scope. This chapter describes procedures to determine if a claimant is eligible to receive Part B benefits because of a lawsuit filed against a beryllium vendor or atomic weapons employer due to the "election of remedies" provision of the EEOICPA. It also describes procedures for offsetting (reducing) EEOICPA benefits if the claimant is eligible to receive EEOICPA benefits but received settlement from a lawsuit for injuries resulting from exposure to the same toxic substance for which EEOICPA benefits are payable.

2. Authority. 42 U.S.C. § 7385 requires the offset for certain EEOICPA payments. 42 U.S.C. § 7385d requires the election of remedies for Part B beryllium vendor and atomic weapons employer employees.

3. Signed Response Regarding Lawsuit, State Workers' Compensation Claim and Fraud. Before a claim can be accepted under the Act, the claimant must provide a signed response (affidavit) reporting whether a lawsuit had been filed for exposure to the same toxic substance for which EEOICPA benefits are payable, or whether a state workers' compensation (SWC) claim had been filed for the same medical condition(s), or whether the claimant has ever pled guilty to or been convicted of fraud in connection with an application for or receipt of any federal or state workers' compensation. This signed response must be obtained regardless of the information contained on the forms EE-1 or EE-2 related to these three questions.

a. The CE may call the claimant to get an initial verbal response to the three questions. If the claimant confirms verbally or submits a signed response that he/she has not filed a lawsuit, SWC claim, or pled guilty to or been convicted of fraud, the CE may proceed with issuance of the Recommended Decision (RD).

Since a signed response from the claimant must be included in the case file before issuance of the Final Decision (FD), the CE follows up with a development letter requesting the signed response from each claimant before transferring the case to the Final Adjudication Branch (FAB). The development letter must be claim specific and clearly note that by signing the written response, the claimant agrees to report any changes to the information

3. Signed Response Regarding Lawsuit, State Workers' Compensation Claim and Fraud. (Continued)

provided in the response, immediately, to DEEOIC. The CE also advises the claimant that failure to submit a signed response will result in administrative closure of the claim.

b. If the CE is unable to obtain a verbal response from the claimant or the claimant responds affirmatively to any one of the questions, or evidence in the case file indicates that a lawsuit, SWC claim or fraud was filed or committed, the CE cannot issue a RD without further development and clarification. The CE may consider administrative closure of the claim if the claimant is not responsive to the development request for clarification but only as a last resort, and after at least two development letters.

c. It is the responsibility of the FAB to obtain this signed response if a RD is issued without receipt of the signed response (i.e. the CE only received verbal confirmation). The FAB makes every effort to obtain this signed response including calling the claimant and sending a follow up development letter. However, if the FAB is unable to obtain the signed response after 30 days from the FAB's follow up development letter, the FAB remands the case to the district office for administrative closure of the claim. The FAB sends a letter advising the claimant of this course of action.

d. If the case is with the FAB, and there is evidence in the case file of a lawsuit, a SWC claim, or fraud in connection with an application for or receipt of workers' compensation that may impact the claimant's EEOICPA benefits, further development must be undertaken. If the matter could be clarified by a telephone call, the FAB takes this action. If the matter requires extensive development, the case is to be remanded to the district office for further development.

3. Signed Response Regarding Lawsuit, State Workers' Compensation Claim and Fraud. (Continued)

- e. By signing the written response, the claimant agrees to notify DEEOIC of any changes in the information provided in regards to the lawsuit/SWC/fraud statement. It is not necessary to request this information again unless there is a new exposure or illness (including consequential) being accepted under EEOICPA. For instance, if the claimant had submitted a written response for lung cancer and is now filing a claim for a consequential condition of bone cancer, a new written response regarding the bone cancer is required before this consequential condition may be accepted under the Act.
4. Developing for Lawsuit. If the claimant reports, or the evidence indicates, that a lawsuit was filed (regardless of what type, what happened, when it was filed or who filed it), the CE develops for verification of the lawsuit and lawsuit payments received.
- a. Contact with Claimant. The CE confirms with the claimant as to whether a lawsuit was filed and requests documents related to the lawsuit if one was filed. The CE requests copies of any complaint, settlement document, award from a judge/jury, and settlement sheet from the legal proceeding. If the claimant states that he or she is not legally permitted to disclose the information, it may be possible to persuade him or her to do so based on the Privacy Act protections in place for claims filed under the EEOICPA.
- b. Contact with Attorney/Law Firm. The CE advises the claimant to contact the attorney who filed the lawsuit to obtain copies of required documents if the claimant does not have them. If the claimant is elderly or he or she is confused as to the type of documents that are required, the CE may need to directly contact the attorney. If the attorney considers the release on the bottom of Form EE-1 or Form EE-2 to be legally insufficient to authorize the release of the required document, the CE requests a separate written release from the claimant.

4. Developing for Lawsuit. (Continued)

If the attorney is no longer with the law firm, the CE attempts to find out who in the law firm inherited the attorney's clients, or where the records are stored.

c. Information from Other Sources. If information is not available from the claimant or the law firm, the CE attempts to obtain it from other sources. Some information can be obtained from the court where the matter was litigated, such as the complaint, judge or jury award (if any), and pertinent court orders.

d. Initial Development Letter. The CE follows up with a development letter to the claimant explaining the need for the lawsuit documents and requesting a response within 30 days. The CE requests documents as noted in paragraph 4a. The letter indicates that failure to comply with the request may result in an administrative closure of the claim.

e. No Response. If there is no response to the initial development letter after 30 days, the CE sends a second development letter. The second development letter informs the claimant that the requested information must be submitted before the claim can be fully adjudicated, and the claim will be administratively closed if no response is received.

f. Administrative Closure. The CE may administratively close the file after two development letters are sent, if no response is received from the claimant and the CE is unable to obtain the lawsuit documents from other sources.

5. Evaluating Lawsuit Documents. Once the CE has obtained the necessary documents regarding the lawsuit, he or she must review them to see what impact, if any, the lawsuit will have on the claim.

a. Complaint. A complaint is a legal document in which the plaintiff alleges that certain events took place involving exposures to toxic substances and that those

5. Evaluating Lawsuit Documents. (Continued)

events were the fault of the defendant(s). The complaint asks for certain remedies (payment for the resulting medical condition). From the complaint, the CE can discern the reason why the plaintiff filed the lawsuit, the identity of the plaintiff, the identity of the defendant and the date the lawsuit was filed.

(1) The CE determines if the alleged exposures raised by the plaintiff were the same as the exposures for which EEOICPA benefits are claimed. There may be some exposures alleged by the plaintiff in the complaint that are not exposures for which EEOICPA benefits can be paid (non-employment exposures).

(2) The CE must thoroughly understand the basis for the lawsuit (e.g., whether the plaintiff alleged that he or she was exposed as a worker rather than just as an individual who lived in a particular locale).

(3) The CE also determines the identities of the parties to the lawsuit. To do so, the CE may need to inquire whether any later amended complaints were also filed.

b. Settlement Sheet. A settlement sheet is basically a billing document. It lists the amounts received from a defendant and attorney fees and other costs that are being charged against those amounts. However, there may not be a document entitled "Settlement Sheet." Instead, a CE may receive a document that simply lists the name of each defendant and the amount that the defendant paid to settle the suit. The CE needs to be able to determine how much the plaintiff/claimant actually received.

When a settlement sheet lists the amount of the "costs" of bringing the lawsuit (not the attorney fees that are being charged), the CE must insist on an itemized list of costs, if they are not already itemized on the settlement sheet. If the legal costs are not itemized, the CE may not deduct the legal costs in calculating the amount of offset.

5. Evaluating Lawsuit Documents. (Continued)

c. Court Orders. If the lawsuit was not settled, the CE may be provided with an order of a judge, or a jury award, that states the amount that the defendant must pay to the plaintiff and the reason for payment of that amount.

d. Bankruptcy. If a claimant receives a settlement in a bankruptcy proceeding, such settlement is treated like any other settlement for purposes of the offset. The CE requests the settlement sheet from the claimant's attorney, as outlined above.

6. Election of Remedies, Part B. Depending on the circumstances of the lawsuit and the Part B claim, the claimant *may no longer be eligible* for EEOICPA Part B benefits based on the "election of remedies" provision under the Act. The election of remedies provision does not apply to Part E benefits. Different scenarios are discussed below:

a. Lawsuit against Atomics Weapons Employer (AWE) or Beryllium Vendor. The "election of remedies" provision applies only to Part B claimants who have filed a lawsuit against either an AWE or a beryllium vendor. To determine if this provision applies to a Part B claim involving a lawsuit, the CE must determine if the otherwise eligible claimant was the same person who filed the lawsuit, if the lawsuit was against an AWE or a beryllium vendor, and if the lawsuit was for employment-related exposure to either radiation or beryllium. If the answer to all three of these questions is yes, further development is required, based on the date that the lawsuit was filed.

b. Lawsuits Filed Before October 30, 2000, Terminated Prior to December 28, 2001. For lawsuits in this category, "terminated" means that the lawsuit was concluded in any way: the parties settled, after which the suit was dismissed by the judge; the claimant won the case; or even that the claimant lost the case (judgment was granted for the defendants). *This meaning of "terminated" applies to this time period only.*

6. Election of Remedies, Part B. (Continued)

The CE must look for proof that the matter has been resolved, regardless of the outcome. If the CE finds that the matter was terminated before December 28, 2001, the claimant is not disqualified from receiving any Part B benefits. The CE must include a finding in the recommended decision that the lawsuit did not cause the claimant to be disqualified.

c. Lawsuits Filed Before October 30, 2000, Still Pending as of December 28, 2001. For lawsuits in this category, the CE will need to determine if the claimant dismissed all claims in the suit that arose out of the same employment-related exposure to either beryllium or radiation that is the basis for the Part B claim by *December 31, 2003*.

Unlike the situation discussed on paragraph 6b, the suit must be *dismissed*, rather than merely terminated. That means that there must not be a final judgment in the suit for either the claimant or the defendant. If the suit was not dismissed by December 31, 2003 or if there is a final judgment in the suit, the claimant is not entitled to any Part B benefits.

d. Lawsuits Filed Between October 30, 2000 and December 28, 2001. For lawsuits in this category, the claimant will not be eligible to receive Part B benefits, if the claimant does not dismiss all claims in the suit that arose out of the same employment-related exposure to either beryllium or radiation that is the basis for the Part B claim by the *later of April 30, 2003, or the date that is 30 months after the date the claimant either received a radiation dose reconstruction from National Institute for Occupational Safety and Health (NIOSH) or a diagnosis of either beryllium sensitivity or chronic beryllium disease (CBD), depending on the occupational illness being claimed.*

e. Lawsuits Filed after December 28, 2001. For lawsuits in this category, the claimant will not be eligible for Part B benefits if a judgment is entered against the claimant (that is, the claimant loses the lawsuit). If the

6. Election of Remedies, Part B. (Continued)

judgment is entered for the claimant (the claimant wins the lawsuit), the claimant is eligible for Part B benefits.

If judgment has not been entered against the claimant, the claimant will not be eligible to receive Part B benefits, if the claimant does not dismiss all claims in the suit that arose out of the same employment-related exposure to either beryllium or radiation that is the basis for the Part B claim by the *later* of April 30, 2003, or the date that is 30 months after the date the claimant either received a radiation dose reconstruction from NIOSH or a diagnosis of either beryllium sensitivity or CBD, depending on the occupational illness being claimed.

7. Tort Offset, Parts B and/or E. If the lawsuit has not adversely affected the claimant's eligibility under Part B due to election of remedies, an offset of the potential Part B and/or E award may still be needed. EEOICPA benefits are only offset if the basis for the lawsuit and the payable EEOICPA claim are due to injuries from exposure to the same toxic substance. For example, if the claimant filed a lawsuit for lung cancer based on exposure to asbestos and the Part E claim that is payable is also based on lung cancer due to exposure to asbestos, offset is required. As long as there is one exposure that would be compensable, offset is required even if the lawsuit or EEOICPA claim is based on several other different exposures.

a. Exceptions: There are several exceptions to the offset requirement.

(1) If the lawsuit alleges exposure that is clearly outside the time frame and/or location of exposure awarded under EEOICPA or if the lawsuit and EEOICPA claim are based on exposure to two different toxic substances, offset is not required. For example, if the EEOICPA claim is based on radiation exposure from 1952 to 1962 but the lawsuit is based on radiation exposure beginning in 1965, offset is not required.

7. Tort Offset, Parts B and/or E.

(2) If the lawsuit alleges non employment exposures, offset is not required (nor is there an election of remedies requirement). For example, if a claimant alleges in a lawsuit that he was exposed to radiation because he lived in proximity to a facility that produced radiation, not because he was exposed to radiation while working in a covered facility, offset is not required.

(3) If an employee and his or her spouse were both plaintiffs with causes of action in a lawsuit they brought together and they both signed releases to settle their case, but only the spouse received tort payment and the employee was alive at that time, no offset is required.

8. Pending Tort Settlement Payment. The requirement to offset EEOICPA benefits does not apply if the claimant has not received any payments from a lawsuit at the time of the EEOICPA payment. The CE does not defer issuing the Recommended Decision (RD) or the Final Decision (FD). The RD or the FD is issued without offset since the claimant has not yet received tort payment.

However, if the claimant receives tort payment that requires EEOICPA benefits to be offset, at any time after issuing the RD or FD, but before the issuance of EEOICPA payment, the EEOICPA payment cannot be issued until the following actions are taken.

a. Tort Payment Pending at the District Office (DO). If the tort payment is pending at the time of the RD, the CE issues the RD without an offset. However, the CE states in the RD's cover letter that if the claimant receives tort payment after the issuance of the RD, but before issuance of the FD, the claim will be remanded by the Final Adjudication Branch (FAB) for offset and a new RD.

b. Tort Payment Pending at the FAB. If the tort payment is pending at the time of the FD, the FAB Hearing Representative (HR) issues the FD without an offset. However, the HR states in the FD's cover letter that if the claimant receives tort payment after the issuance of the

8. Pending Tort Settlement Payment. (Continued)

FD, but before issuance of the EEOICPA payment, the FD authorizing the payment will be vacated.

c. Tort Payment Pending at the time of EEOICPA Payment. Before issuing EEOICPA payment, the CE calls the claimant to verify that tort payment is still pending. If the claimant receives tort payment after issuance of the FD, but before issuance of the EEOICPA payment, the DO forwards the claim to the National Office for a reopening.

9. Required Tort Offset. After receipt of all relevant documents, the CE determines whether an offset is needed. If so, the CE completes the "EEOICPA Part B/E Benefits Offset Worksheet" (Exhibit 1).

The Worksheet includes detailed instructions for computing the amounts that the CE uses to calculate the amount of any offset. After completing the Worksheet, the CE staples it to the inside left cover of the case file jacket.

a. Complaint. While the complaint must be obtained if the claimant disputes the necessity of the offset, the CE may proceed with the offset without the complaint if the claimant does not dispute that offset is necessary, and the CE has sufficient evidence to fill out the EEOICPA Part B/E Benefits Offset Worksheet. This step occurs after confirming that the election of remedies does not apply.

b. EEOICPA Benefits Greater than Offset. If the amount of EEOICPA benefits to which the claimant is currently entitled is *more than* the offset, the balance due the claimant will be the amount appearing on Line 7b of the Worksheet. This is the amount of EEOICPA benefits that must be referenced in the recommended decision (RD), along with an explanation of how this amount was calculated.

c. EEOICPA Benefits Less than Offset. If the amount of EEOICPA benefits currently payable is *less than* the offset, the amount of the "surplus" payment still to be offset will appear on Line 7c of the Worksheet. All future EEOICPA

9. Required Tort Offset. (Continued)

benefit payments for the same exposure(s) that formed the basis for the lawsuit are subject to the offset to absorb a surplus. Since additional EEOICPA benefits must first become payable before a surplus payment can be absorbed, no further action to offset the surplus payment is required for a survivor's Part B claim.

(1) If a surplus payment is to be absorbed in an employee's Part B claim, this must be noted in the RD, along with an explanation that DEEOIC will not pay medical benefits until the surplus is absorbed.

(2) If a surplus is to be absorbed in an employee's Part E claim, this same explanation must appear in the RD, plus an explanation that DEEOIC will also not pay any benefits for wage loss and/or impairment that may be due in the future until the surplus is absorbed.

(3) If a surplus is to be absorbed in a survivor's Part E claim and further monetary benefits may be payable based on the deceased employee's calendar years of qualifying wage loss, this must be noted in the RD, along with an explanation that DEEOIC will absorb the remaining surplus out of those benefits if and when they become payable.

e. FAB Award Letter. In situations involving a surplus, the FAB issues an award letter which accompanies the final decision and advises the claimant of the exact amount of the surplus. In the award letter, the FAB representative explains that the surplus will be absorbed out of medical benefits payable under EEOICPA (and lump-sum payments due in the future under Part E). The FAB representative instructs the claimant to submit proof of payment of medical bills to the District Office (DO) until notice is received that the surplus has been absorbed, and to advise medical providers to submit proof of payment of medical bills to the DO during this time.

9. Required Tort Offset. (Continued)

f. ECMS Coding. Upon issuance of the final decision that concludes with a surplus, the FAB reviewer updates ECMS in the condition status field with the "0" (Offset) code for the affected medical condition(s) on the medical condition screen for the employee's claim. The offset only applies to the employee's claim, even in the event that the employee died prior to adjudication of the case, and the survivor is entitled to compensation. The "0" code is entered only for the medical condition(s) that derived from the same exposure(s) that formed the basis for the tort claim. During the time in which the "0" code remains in the medical condition status screen, the bill processing agent (BPA) denies medical bills related to the medical condition coded as "0" and generates explanations of benefits that the bills are not payable due to a surplus. Once the surplus is absorbed, the CE replaces the "0" code with "A" (Accepted) code.

10. Actions to Absorb Surplus. Each District Director appoints a qualified individual to serve as the point of contact (POC) to monitor surplus situations for both tort settlements and state workers' compensation (SWC) benefits. Tort settlement and SWC benefit surpluses are absorbed until the surplus is exhausted and EEOICPA benefit disbursement can commence. The POC tabulates the amounts of proofs of payment, using the DEEOIC Offset Tracking Database, until they equal or exceed the surplus amount.

a. While the surplus is being absorbed, the POC temporarily places the affected case file in a red jacket denoting that a surplus exists. All case file contents are maintained in the red jacket throughout the process of surplus depletion.

b. No further payments related to the same toxic exposure(s) that formed the basis for the lawsuit are made on any case file contained in a red jacket until such time the offset has been absorbed. Should an unpaid bill be submitted to the POC during the surplus period, it must be forwarded to the BPA so an explanation of benefits can be generated.

10. Actions to Absorb Surplus. (Continued)

c. During the time in which the surplus is being monitored for depletion, the POC continually tracks the offset using the DEEOIC Offset Tracking Database, which is accessible through the shared drive. Upon payment of impairment benefits, wage loss compensation, or proof of payment of medical bills, the POC enters the dollar amount being applied toward the offset into the appropriate field in the DEEOIC Offset Tracking Database, until such time the surplus has been absorbed.

d. While medical benefits are not being paid because of a surplus that is being absorbed, the CE may find it necessary to obtain a second opinion examination, a referee examination, or a medical file review. If so, DEEOIC pays the costs for these directed examinations or reviews and reimburses any reasonable expenses incurred by the employee, including medical travel expenses, without adding to the surplus. Therefore, offset does not apply to any prior approval medical conditions in ECMS, coded with a medical condition type of "PA." In such situations, the CE enters a comment into ECMS case notes authorizing the BPA to pay all bills related to the directed medical examination or medical file review.

In a case with a surplus, BPA creates a thread for all medical travel refund requests to the POC requesting authority to deny or proceed with payment. Medical travel expenses related to a directed medical examination must be approved for payment and are not subject to offset.

e. Once the surplus is completely absorbed and EEOICPA benefits may commence, the POC removes the temporary red file jacket and returns the case contents to the original file jacket. Removal of the red file jacket signifies that future benefit payments may be made on the case. Once the surplus is absorbed, the CE also replaces the "0" in the condition status field in ECMS with "A" (Accepted) code. However, cases **are not** to be deleted from the DEEOIC Offset Tracking Database once the offset has been absorbed.

10. Actions to Absorb Surplus. (Continued)

f. The POC sends a letter to the claimant that the surplus is absorbed. The letter provides the claimant with the address of the BPA and instructs him or her to submit all future unpaid medical bills to that address for processing. To avoid duplicate payment of medical bills that were applied toward the offset, BPA creates threads for all submitted medical bills with service dates prior to the date that condition status "O" was changed to "A" in ECMS. The CE reviews the threads and advises BPA if the medical bills can be paid by checking the DEEOIC Offset Tracking Database to determine if the medical bills were applied toward the offset.

EEOICPA PART B/E BENEFITS OFFSET WORKSHEET
(For internal DEEOIC use only)

Employee:

Claimant:

Claim Number:

1. Gross Settlement/Final Judgment Amount.....\$_____
 - a. Amount of Line 1 that is for damages to real/personal property (if any).....\$_____
 - b. Amount of Line 1 that is for medical treatment before filing date (if any).....\$_____
 - c. Subtract Lines 1a and 1b from amount on Line 1 and enter balance here.....\$_____

2. Were the amounts entered at Step 1 only paid to or on behalf of one party (see Instructions, Step 2)?.....Y / N
 - a. If no, go to either Step 3 or Step 4
 - b. If yes, go to Step 5

3. Allocation Between Parties Provided by Judge or Jury:
 - a. Amount of Line 1c awarded to employee for injuries due to covered exposure to toxic substance.....\$_____
 - b. Amount of Line 1c awarded to other party(s). Go to Step 5.....\$_____

4. CE Allocation Between Parties (all other cases):
 - a. Standard allocation for living employee is 75% of Line 1c. Enter result here and go to Step 4c.....\$_____

- b. Standard allocation for deceased employee is 50% of Line 1c. Enter result here and go to Step 4c.....\$_____
- c. Good cause shown for different allocation?.....Y / N
- d. If yes, allocation for living/deceased employee is ____% of Line 1c. Enter dollar amount here.....\$_____

5. Allowable Deductions From Payment:

- a. Costs of Suit (see Instruction Step 5)....\$_____
 - Divide costs by gross payment to determine costs percentage (Line 5a/Line 1).....%
- b. Multiply Line 1c, 3a, 4a, 4b or 4d (one only) by the costs percentage. Enter here....\$_____
- c. Attorney Fees.....\$_____
 - Divide attorney fees by gross payment to determine attorney fees percentage (Line 5c/Line 1).....%
- d. Multiply Line 1c, 3a, 4a, 4b or 4d (one only) by the LESSER of attorney fees percentage or 40%. Enter here.....\$_____
- e. Enter amount of Line 1 that was paid to satisfy workers' compensation lien of a state authority or insurer (if any).....\$_____

6. Net Amount of Payment to be used for Offset:

- a. Subtract Line 5b from Line 1c, 3a, 4a, 4b or 4d, as appropriate. Enter balance here.....\$_____
- b. Subtract Line 5d from Line 6a. Enter balance here.....\$_____

c. Subtract amount on Line 5e (if any) from Line 6b to arrive at amount of offset and enter result here.....\$_____

7. Offset of Part B/E Benefits, Surplus Payment:

a. Amount of unpaid lump-sum payment.....\$_____

b. If Line 7a is larger than Line 6c, subtract Line 6c from Line 7a and enter balance due claimant here.....\$_____

c. If Line 7a is smaller than Line 6c, subtract Line 7a from Line 6c and enter amount of surplus to be recovered from future lump-sum payments and/or medical benefits here.....\$_____

* * * * *

INSTRUCTIONS FOR COMPLETING THE WORKSHEET

READ BEFORE THE WORKSHEET IS COMPLETED: Lump-sum payments and/or medical benefits to be awarded for an accepted condition are only "offset" or reduced to reflect the amount of any settlement or final judgment payment for injuries due to exposure to the same toxic substance for which EEOICPA payments are payable. If the payment was for injuries due solely to exposure to some other toxic substance, no offset of EEOICPA benefits is required. For example, a Part B award for lung cancer due to exposure to radiation is NOT offset to reflect a settlement or final judgment payment in a suit that only alleges exposure to asbestos fibers. Also, if the tort complaint alleges exposure that is clearly outside the time frame and/or location of exposure awarded under EEOICPA, offset is not required. As long as there is one exposure that would be compensable, offset is required even if the tort suit or EEOICPA claim has several other different exposures. In order to determine whether offset will be necessary, the CE must examine the complaint to see what alleged exposure is identified as causing the alleged injuries.

The CE does not have to fill out the Worksheet if the employee or his/her survivor(s) has had their workers' compensation benefits, or a RECA section 4 or 5 award, or a prior award of EEOICPA Part B/E benefits offset to reflect the full amount of a settlement or final judgment payment. However, if the reduction of those prior benefits was not enough to fully offset the payment, leaving a surplus payment still requiring an offset, enter the dollar amount of the surplus payment on Line 6c and complete the remainder of the Worksheet. The CE does not have to complete the entire Worksheet if he or she is only offsetting a claimant's current Part B/E lump-sum award or future medical benefits to reflect a surplus payment.

Step 1 - Putting a Value on a Settlement or Final Judgment.

Settlements or final judgments can include both an initial cash payment and future payments. The "value" of future payments is their present value, not the sum of the future payments (which will always be more than the present value of the future payments). If the future payments are made through an annuity, the CE may accept the purchase price of the annuity as the present value of the future payments. Do not attempt to put a value on a future payment that is contingent upon an event that has not yet taken place, such as the diagnosis of another medical condition. This particular type of future payment cannot be valued and is not to be included in the amount listed on Line 1 of the Worksheet. However, if the event in question has occurred by the time a later award under Part E becomes payable, any payment for that event must be added to the amount entered on Line 1, and the Worksheet must be completed again. Any payment for the aggravation, by medical malpractice, of illnesses caused by the same exposure for which EEOICPA benefits are payable is an amount that must be reported to OWCP and included in the amount listed on Line 1.

In some rare cases, a complaint alleging injuries due to exposure to a toxic substance may contain causes of action for unrelated damages to either personal property or real property of the plaintiff(s). If this occurs, and the payment listed on Line 1 includes an amount for damages to personal or real property, enter this amount on Line 1a. If there is a question about whether or not the complaint contains a cause of action of this sort, contact the National Office.

Since EEOICPA benefits are not offset to reflect the amount of any payment for medical treatment provided BEFORE the date an employee files a claim, enter the amount of the payment listed on Line 1 that is explicitly designated as being for this medical treatment on Line 1b, even if the payment was made directly to the provider. Also, if a malpractice payment is included in the amount on Line 1, and it only constitutes a reimbursement for medical treatment provided before the employee filed a claim, include the malpractice payment in the amount listed on Line 1b and complete the remainder of the Worksheet. If a malpractice payment constitutes anything other than a reimbursement for medical treatment provided to the employee before he/she filed a claim for EEOICPA benefits, do not complete the Worksheet and refer the case to the National Office.

Some law suits, such as those related to exposure to asbestos, may involve multiple defendants making multiple payments over time. EEOICPA benefits currently payable will be reduced to reflect the total of only those settlement or final judgment payments received. Payments received at a later date may be offset from any future EEOICPA award of lump-sum benefits or payment of medical benefits, at which time another Worksheet must be completed, listing on Line 1 the total of the payments received since the completion of the prior Worksheet (also add any prior unabsorbed surplus from any earlier offset of benefits to the amount in Line 6c).

Step 2 - Single Recoveries vs. Joint Recoveries.

A payment on a final judgment or settlement is a joint recovery only if it was paid to multiple parties. Joint recoveries are "allocated" or split up between multiple parties at either Step 3 or 4 of the Worksheet. If only one party received the amounts on Lines 1a, 1b and 1c of the Worksheet, AND THAT PARTY WAS THE EMPLOYEE OR ANOTHER PERSON WITHOUT THEIR OWN CAUSE OF ACTION IN THE COMPLAINT, fill in the remainder of the Worksheet. It is rare that a payment will be made to a person who does not have their own cause of action in the complaint. However, if an unmarried employee files suit and then dies, a court may appoint another person to take charge of the suit. While this person will not have their own cause of action, he will be the proxy for the deceased employee.

If someone other than these two specific parties received the entire payment, and the employee was alive at the time it was paid, no offset is needed and the Worksheet does not need to be completed. For example, if an employee and his or her spouse were both plaintiffs with causes of action in a case they brought together and they both signed releases to settle their case, but only the spouse received a payment and the employee was alive at that time, no offset is required.

Step 3 - Judge/Jury Allocation of Joint Recoveries.

If a judge or jury specifies how to allocate a joint recovery between multiple parties, the CE MUST use that allocation to fill in the blanks in Step 3, as appropriate. In these situations, the CE must obtain a copy of either the judge's order or the jury's verdict making the allocation.

Step 4 - All Other Allocations for Living/Deceased Employees.

In all other situations involving a joint recovery, the CE will automatically allocate 75% of the amount on Line 1c to the employee and the remaining 25% to the other parties to the litigation if the employee was alive at the time the payment was made, then enters this amount on Line 4a of the Worksheet. If the employee died before a payment was made, the CE automatically allocates 50% of the amount on Line 1c for the employee's occupational illness/covered illness, and enters this amount on Line 4b.

If the claimant wants to allocate less than the standard percentages to the recovery of the employee (which will reduce the amount by which the EEOICPA award must be offset), the claimant must submit evidence and legal argument to the CE that shows that a lower percentage is appropriate. This evidence MUST show that:

A. State law in the relevant state provides a cause of action for loss of consortium (tort claim based on deprivation of a spousal or parental relationship due to injuries) or wrongful death for the family member to whom the recovery is attributed, and

B. A cause of action for loss of consortium or wrongful death was actually asserted by that family member, either in the same action or in separate actions.

To make these required showings, the claimant must submit a copy of the complaint filed on behalf of the spouse and/or children, and citations to appropriate state case law or statutes. If the CE determines that the evidence as noted above support allocating a lower percentage to the employee, the CE circles "Y" at Line 4c and enters the lower percentage for the employee in the appropriate blank in Line 4d. Using this percentage, the CE calculates the new allocation for the employee and enters this amount on Line 4d. Any situations where this matter is unclear should be referred to the National Office for guidance.

In the event there are multiple payments over time constituting joint recoveries by an employee and other plaintiffs, and the employee dies after receiving at least one payment (but before all of the payments are made), the CE calculates the amount of the offset of an EEOICPA award by using two Worksheets. Using two Worksheets enables the CE to allocate the appropriate percentage of the joint recoveries to the employee. The CE completes one Worksheet for payments received prior to the employee's death (entering that amount on Line 1), and another Worksheet for payments received after the employee's death.

Step 5 - Allowable Deductions from a Payment.

Costs that may be listed on Line 5a of the Worksheet are reasonable out-of-pocket costs and expenses involved in bringing a lawsuit, but do not include fees paid to co-counsel or normal office expenses like secretary or paralegal services or in-house record copying costs. Before the CE may approve the deduction of any costs, the costs MUST be itemized so the CE may evaluate the nature of each individual cost to ensure that it is allowable. Costs that are allowable could include filing fees, travel expenses, record copy services, witness fees, court reporter costs for transcripts of hearings and depositions, postage, and long distance telephone calls. Once the allowable costs have been identified and the sum of those costs are listed on Line 5a, the CE must divide these costs by the amount of the gross payment listed on Line 1 of the Worksheet to determine the

percentage of the payment that is represented by the allowable costs, rounded up to the next highest tenth. For example, 26.121% is rounded up to 26.2%. Once this rounded percentage is calculated, the CE must multiply it by the amount listed on Line 1c (if the only party paid was the employee or another person without their own cause of action), or the amount listed on Line 3a, 4a, 4b or 4d (if multiple parties were paid) to calculate the amount of costs to deduct. The CE then enters the result on Line 5b.

Attorney fees submitted for consideration should be entered on Line 5c of the Worksheet. Using the same basic calculation method used for costs, the CE should divide Line 5c by Line 1 to determine the percentage of the gross payment that is represented by the attorney fees, rounded up to the next highest tenth. For example, 26.121% is rounded up to 26.2%. Enter the rounded percentage in the space provided after Line 5c. In general, any fee that exceeds 40% will be considered unreasonable. To determine the amount of allowable attorney fees to be deducted, the CE must multiply the amount listed on Line 1c (if the only party paid was the employee or another person without their own cause of action), or the amount listed on Line 3a, 4a, 4b or 4d (if multiple parties were paid), by the LOWER of the attorney fees percentage that was entered in the space after Line 5c or 40%, and enter the result on Line 5d. If the attorney fee percentage exceeds 40%, the CE should inform the claimant and allow an opportunity to establish that an attorney fee in excess of 40% is reasonable.

The circumstances which should be taken into account in determining the reasonableness of both attorney fees and costs of suit include prevailing local fees, cases of similar complexity and the amount of the gross settlement or final judgment at issue. CE determinations in these areas are made for the sole purpose of administering § 7385 of EEOICPA and do not have any effect on a fee agreement between an attorney and client or any other matter not involving the application of the Act.

Sometimes after an attorney receives a settlement or final judgment payment, but before the attorney distributes that payment to his or her clients, the attorney has to pay out a

portion of the payment to satisfy the lien of a state workers' compensation system or an insurer for amounts paid by the system or insurer for the employee's medical condition. When this has occurred, the CE enters the amount of the payment that was made to satisfy the lien on Line 5e of the Worksheet.

Step 6 - Calculating the Amount of the Offset.

To calculate the amount by which EEOICPA benefits must be offset, the CE subtracts Line 5b from Line 1c, 3a, 4a, 4b or 4d, as appropriate, and enters the result on Line 6a. The CE then subtracts Line 5d from Line 6a, and enters the result on Line 6b. Finally, the CE subtracts the amount on Line 5e (if any) from Line 6b, and enters the result on Line 6c. This last amount is the amount by which the claimant's Part B or E award must be offset.

Step 7 - Amount of Part B/E Benefits Due or Surplus Payment.

At Step 7 of the Worksheet, the CE determines either the net amount of EEOICPA benefits due the claimant, or the amount of the surplus payment remaining that must still be absorbed from either future Part E lump-sum payments, or future medical benefits under either Part B or Part E.