



**The Duty to Bargain Under the CAA**

**Part 1  
From Certification to Contract Bargaining**

Office of Congressional Workplace Rights

Office of the General Counsel

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*advancing workplace rights, safety & health, and accessibility in the legislative branch*



**Welcome**

## Introduction

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## Outline

### Part 1 – From Certification to Contract Bargaining

- Summary of the duty to bargain
- Prohibition on changing conditions of employment w/o bargaining
- Substantive bargaining vs. impact and implementation bargaining
- Maintaining status quo during contract bargaining
- Resources and questions

## Disclaimers

- This is not legal advice
- This presentation is not comprehensive – it is a practical overview
- This meeting is not confidential
- Please ask questions! But feel free to follow-up one-on-one if you'd prefer to ask confidentially.

## The Duty to Bargain

## Background

- The Congressional Accountability Act of 1995 applied the Federal Service Labor-Management Relations Statute to most employing offices of the legislative branch.
- The FLRA enforces the FSLMRS for executive branch employees
- The OCWR is the FLRA of the legislative branch
- OCWR relies on FLRA interpretation of the Statute

## The Duty to Bargain in Good Faith

- Statute requires employers and unions to meet and:
  1. Approach negotiations with a sincere resolve to reach an agreement;
  2. Meet at reasonable times and convenient places as often as necessary; and
  3. Avoid unnecessary delay.
- Failure to do any of the above is an unfair labor practice, filed with the OCWR.

5 U.S.C. § 7114(b)

## Prohibition on Unilateral Implementation

### Unilateral Implementation is Prohibited

- Before changing conditions of employment, an employing office must provide the union with notice and an opportunity to bargain.
- If union demands to bargain, employer must maintain status quo until there is agreement or until impasse proceeding is completed.
- Failure to do so is an unfair labor practice.

*See U.S. Dep't of Homeland Sec., U.S. Citizenship & Immigr. Servs., 69 F.L.R.A. 515 (2016)*

## What is a Condition of Employment?

- Defined as: “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]”

5 U.S.C. § 7103(a)(14)

## What is NOT a Condition of Employment?

- Changes related to political activities prohibited by the Hatch Act;
- Changes related to the classification of any position; or
- Changes specifically provided for by Federal statute.

5 U.S.C. § 7103(a)(14)

- Change must be more than *de minimis*.
  - For example, reassignment of one employee, less than a mile from original duty station, with no change in pay or hours worked, was found to be *de minimis* and no bargaining was required. *FAA & PASS*, 20 F.L.R.A. 430, 434 (1985).

## Examples of Conditions of Employment

- Cancelling already-approved leave
- Disciplinary actions, including terminations and imposition of last-chance agreements
- Changing an employee's shift
- Changing already-existing program such that employee travel increased
- Changing criteria for approval of outside employment
- Employer-provided lockers or other secure area for personal belongings

Peter Broida, *A Guide to Federal Labor Relations Authority Law and Practice*, 435-463 (2016)

## Other Notes About Conditions of Employment

- For conditions of employment outside of employing office's control – like ventilation – the parties can bargain over a recommendation/communication to the office with control. *Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983).
- Must be a condition of employment of the bargaining unit employees. For example, request that supervisor be accountable for implementation of an EEO program is not negotiable. *AFGE & Healthcare Financing Admin.*, 44 F.L.R.A. 1405 (1992).
- Proposal directed at the public is not a condition of employment, even if it implicates conditions of employment indirectly. For example, union proposal that public tours show employee workstations was not negotiable. *AFGE Local 1812 & Broadcasting Board of Governors*, 59 F.L.R.A. 447 (2003).

## What is Sufficient Notice?

- In advance, with enough time to request to bargain.
- Must include “the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change.”
- Sufficiency of notice depends on parties’ relationship and circumstances surrounding the proposed change.

*Army Corps of Eng’rs, Memphis Dist., 53 F.L.R.A. 79 (1997)*

## Substantive vs. Impact and Implementation Bargaining



## Management Rights

- Management has the right to:
  - Determine the mission, budget, organization, number of employees, and internal security practices;
  - Hire, assign, direct, layoff, and retain employees;
  - Suspend, remove, reduce pay, and discipline employees;
  - Take whatever actions may be necessary to carry out agency mission during emergencies.

5 U.S.C. § 7106

## Right to Negotiate Appropriate Arrangements

- BUT! Union can negotiate:
  - “procedures which management officials of the agency will observe in exercising any authority under this section”; and
  - “appropriate arrangements for employees affected by the exercise of authority under this section.”
- This is known as “impact and implementation” bargaining.

5 U.S.C. § 7106(b)

## Examples of I&I Bargaining

- Management action: Re-assigning employees in a manner that reduced overtime pay.
- Union Proposal: Solicit volunteers for assignment, with management retaining right to assess qualifications among volunteers.
  - Finding: proper for I&I bargaining – proper procedure under the statute as long as management makes final selection for assignment

*Dep't of Transp., FAA, 63 F.L.R.A. 502 (2009) (discussing "procedures" under § 7106(b)(2))*

## Examples of I&I Bargaining

- Management action: Installing metal detectors at prison yard.
- Union proposal: All watches that do not clear metal detectors will be confiscated, limiting "bottlenecking" of inmates – a safety hazard.
  - Finding: Proper for I&I bargaining – minimal burden on management, provides benefit for adversely affected employees.
- Union proposal: Install additional access gate to remove inmates during metal detector process.
  - Finding NOT proper for I&I bargaining – too much of an impact on management right to determine internal security practices.

*AFGE Local 506 & BOP, FCC Coleman, 66 F.L.R.A. 819 (2012)*

## Maintaining Status Quo During Contract Bargaining

### Maintaining Status Quo During Contract Bargaining

- “Where parties are bargaining over a proposed change in conditions of employment, an agency is generally obligated to maintain the status quo pending the completion of the bargaining, including impasse procedures.” *Space Sys. Div. Los Angeles*, 45 F.L.R.A. 899, 903-904 (1992)
- “It is well established that the duty to bargain extends to ground rules for negotiations.” *Dep’t of Treasury & NTEU*, 59 F.L.R.A. 703, 709 (2004)
- “[P]roposals which require an agency to maintain the status quo during the bargaining process, consistent with its obligation to bargain, are negotiable procedures under the Statute.” *Nat’l Weather Serv. Emps. Org. & Nat’l Weather Serv.*, 37 F.L.R.A. 392, 396 (1990)



<b>Resources</b>	
	<ul style="list-style-type: none"><li>• OCWR Materials<ul style="list-style-type: none"><li>• Labor-Management Relations in the Legislative Branch: Duty to Bargain and Scope of Bargaining FAQs</li></ul></li><li>• FLRA Materials<ul style="list-style-type: none"><li>• ULP Case Law Outline</li><li>• Guide to Negotiability<ul style="list-style-type: none"><li>• <a href="https://www.flra.gov">flra.gov</a> → Resources &amp; Training → Guides &amp; Manuals</li></ul></li></ul></li><li>• Peter Broida, <i>A Guide to Federal Labor Relations Authority Law and Practice</i> (2016)</li></ul>

## Preview of Coming Attractions

- Part 2 – the Duty to Bargain During Contract Bargaining
- Part 3 – the Duty to Bargain with a Contract in Effect
- Dates TBD!

Questions?