**Impact and Implementation**

**Overview**

When there is a decision by an agency to change conditions of employment of unit employees, even if a protected management right is involved, there is a duty to notify the union. Also, upon request by the union, there is a duty to bargain on the procedures that management will follow in implementing its decision as well as on appropriate arrangements for employees expected to be adversely affected by the decision. This is often referred to as "impact and implementation" bargaining.

Management has the right to decide whether to take actions listed in [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(a). However, unions are entitled, under succeeding Sections 7106(b)(2) and (3), to negotiate with the agency the procedures that the agency will observe in exercising its authority under 7106, or to negotiate appropriate arrangements for bargaining unit employees adversely affected by such management decisions.

**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A* *Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**Covered by doctrine**

* A union is not entitled to engage in impact bargaining over a matter that is already "covered by" (i.e., spelled out in) the labor agreement. *Social Security Administration*, 93 FLRR 1-1148, 47 FLRA 1004 (FLRA 1993).
* The "covered by" doctrine is used as a defense to an alleged failure to satisfy a statutory bargaining obligation. Conversely, with grievances involving a dispute concerning whether a contractual, as opposed to a statutory, bargaining obligation has been violated, the arbitrator must interpret the contract to determine whether the parties have complied with the agreement. *Department of Defense, National Guard Bureau*, 102 LRP 15615, 57 FLRA 934 (FLRA 2002).
* ***Broida:*** The "covered by" doctrine was established in the federal sector after the FLRA became entangled with decisions of reviewing courts that found unpersuasive or incapable of predictable application prior approaches by the FLRA to the question of when midterm or impact and implementation bargaining was barred by provisions of existing contractual agreements. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Evolution of the Doctrine](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+B:+Bargaining+Failures,+Subsection+02:+Bargaining+Obligations+and+the+Covered+By+Doctrine:+SSA,+Part+A:+Evolution+of+the+Doctrine).
* When a party alleges a proposal is covered by an existing agreement, the Federal Labor Relations Authority applies a two part test. Under prong one the FLRA determines whether the matter is expressly contained in the agreement. If it is not, prong two asks whether the matter is inseparably bound up with, and thus plainly an aspect of a subject covered by the contract. *Internal Revenue Service*, 101 FLRR 1-1117, 57 FLRA 126 (FLRA 2001).
* A party may waive one or both prongs of the covered by defense. *Social Security Administration*, 99 FLRR 1-1046, 55 FLRA 374 (FLRA 1999).
* On remand from a federal appeals court, the FLRA majority determined that union proposals requiring an agency to waive all or a portion of the covered-by defense are not permissibly negotiable but instead mandatory subjects of bargaining. *Customs Service*, 109 LRP 63367, 64 FLRA 156 (FLRA 2009).

**De minimis changes**

* Under 5 USC 7116(a)(1) and (5), an agency is obligated to bargain over the impact and implementation of a change in unit employees' conditions of employment provided that the change has more than a de minimiseffect. *Defense Logistics Agency*, 103 LRP 34789, 58 FLRA 750 (FLRA 2003); *Social Security Administration, Malden District Office*, *Malden*, *Mass.,* 98 FLRR 1-1131, 54 FLRA 531 (FLRA 1998).
* The de minimis test applies to all changes in conditions of employment, whether they are substantively negotiable or result from the exercise of a management right. *Association of Administrative Law Judges v. FLRA*, 105 LRP 4813, 397 F.3d 957 (D.C. Cir. 2005); *Social Security Administration, Office of Hearings and Appeals,* 104 LRP 8793, 59 FLRA 646 (FLRA 2004).
* In assessing whether the effect of a decision on conditions of employment is more than de minimis, the FLRA looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change. *Defense Logistics Agency*, 103 LRP 34789, 58 FLRA 750 (FLRA 2003); *Social Security Administration, Malden District Office*, *Malden*, *Mass.,* 98 FLRR 1-1131, 54 FLRA 531 (FLRA 2003).
* A change in the workload of claims representatives, though described as "slight" by the FLRA, was ruled more than de minimis*. Social Security Administration, Malden District Office*, *Malden*, *Mass.,* 98 FLRR 1-1131, 54 FLRA 531 (FLRA 2003).
* The removal of a water cooler had more than a de minimis impact. *Department of Labor, Boston*, 90 FLRR 1-1441, 37 FLRA 25 (FLRA 1990).
* The removal of reserved parking spaces had a de minimis impact when the affected employees retained free parking in the same garage and plenty of open spaces were available. *Association of Administrative Law Judges v. FLRA*, 105 LRP 4813, 397 F.3d 957 (D.C. Cir. 2005); *Social Security Administration, Office of Hearings and Appeals,* 104 LRP 8793, 59 FLRA 646 (FLRA 2004).
* The fact that a change affects only one employee will not necessarily render it de minimis. *Eglin Air Force Base*, 105 LRP 7776, 60 FLRA 620 (FLRA 2005); *VA Medical Center, Phoenix*, 93 FLRR 1-1085, 47 FLRA 419 (FLRA 1993).
* An arbitrator's determination that a change was de minimis is a factual finding to which the FLRA will defer. *Internal Revenue Service*, 110 LRP 7992, 64 FLRA 462 (FLRA 2010).

**Conditions of employment**

* Conditions of employment are personnel policies, practices and matters, whether established by rule, regulation or otherwise, affecting working conditions. 5 USC 7103 (a)(14).
* Conditions of employment do not include matters: a) relating to political activities prohibited by statute; b) relating to the classification of any position; or c) to the extent they are specifically provided for by federal statute. 5 USC 7103 (a)(14)(A) - (C).
* The agency did not change conditions of employment when it changed the status of two employees from regular part time to intermittent. The agency had already bargained with the union over procedures for taking adverse actions. Because it adhered to those negotiated procedures, there was no change in personnel policies, practices or matters affecting working conditions. *DVA Medical Center, Sheridan, Wyo*., 103 LRP 40690, 59 FLRA 93 (FLRA 2003); *Naval Amphibious Base, Little Creek*, *Norfolk, Va.,* 82 FLRR 1-1603, 9 FLRA 774 (FLRA 1982).
* The agency did not initiate a change in conditions of employment when the employee requested reassignment and as a result lost her right to use a government vehicle. *Occupational Safety and Health Administration, Region 1*, 103 LRP 131, 58 FLRA 213 (FLRA 2002).
* Although the employee's working conditions changed when she was no longer privileged to use a government vehicle, conditions of employment did not change. The employee was voluntarily reassigned to a position not covered by the policy allowing employees to use government vehicles. The policy itself is the condition of employment and it never changed. Working conditions and conditions of employment are related, but they are not the same thing. Concurring opinion of Chair Dale Cabaniss in *Occupational Safety and Health Administration, Region 1*, 103 LRP 131, 58 FLRA 213 (FLRA 2002).
* Apparently rejecting the point advanced by Chair Cabaniss, the FLRA found that a majority of the FLRA has refused to consider the term "working conditions" outside the context of the term "conditions of employment." The courts and the FLRA ruling on issues concerning working conditions have accorded the term a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with conditions of employment. The FLRA concluded that there is no substantive difference between working conditions and conditions of employment as those terms are practically applied. *355th MSG/CC, Davis Monthan Air Force Base and AFGE Local 2924*, 109 LRP 61687, 64 FLRA 85 (FLRA 2009).
* A federal appeals court signaled its approval of the *Davis-Monthan* rationale, declaring it "reasonable." The agency may have followed existing policies, but the changes it made were contrary to past practices and very broad in scope. *Department of Homeland Security v. FLRA*, 111 LRP 55338, 647 F.3d 359 (D.C. Cir. 2011).
* Conditions of employment did not change where the determination of work assignments was made by a non-bargaining unit employee rather than a crew chief or shop chief. The established practice of modifying work assignments in response to mission and workload fluctuations did not change. *Eglin AFB*, 103 LRP 31219, 58 FLRA 626 (FLRA 2003).
* Where an agency had a practice of assigning and reassigning employees to different tours of duty in response to workload requirements, assigning employees to an established, though seldom used, tour of duty did not change their conditions of employment. *Immigration and Naturalization Service, Houston*, 95 FLRR 1-1015, 50 FLRA 140 (FLRA 1995).
* Conditions of employment did not change where the agency decided to bring prisoners apprehended at one station to a different station for processing. Although there was some increase in processing workload at the receiving station, the requirement to process prisoners and the procedures for doing so remained the same. There was no showing that employees were required to process prisoners more expeditiously or with greater frequency. *Customs and Border Protection, Tucson, Ariz.*, 104 LRP 42104, 60 FLRA 169 (FLRA 2004).

**Advance notice requirement**

* Notification of an intended change while indicating that impact bargaining would be futile does not constitute notice as required by the Statute. *Air Force Logistics Command*, 90 FLRR 1-1632, 38 FLRA 887 (FLRA 1990).
* Notice provided after a change has already been implemented does not meet the notification requirement. *Air Force Accounting and Finance Center, Denver*, 91 FLRR 1-1477, 42 FLRA 1196 (FLRA 1991).
* After receiving notice of an intended change in conditions of employment, a union may assert its right to bargain by requesting bargaining, requesting more time or requesting information. Absent an agreement provision to the contrary, a union does not necessarily have to assert its bargaining right by submitting proposals. *Defense Commissary Agency*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006).
* Prior to implementing a change in conditions of employment that will affect bargaining unit employees, an agency must provide the exclusive representative with notice of, and an opportunity to bargain over, the areas of the change that are within the duty to bargain. *General Services Administration*, 108 LRP 6377, 62 FLRA 341 (FLRA 2008).
* Before implementing a change in conditions of employment of unit employees the agency must provide the union reasonable advance notice of the intended change. *Army Corps of Engineers, Memphis, Tenn.*, 97 FLRR 1-1078, 53 FLRA 79 (FLRA 1997).
* The amount of advance notice that will be deemed "reasonable" depends on the circumstances of the situation. *Customs Service, Region I*, 84 FLRR 1-1767, 16 FLRA 654 (FLRA 1984).
* Six days notice of intent to implement a change following a declaration of impasse was sufficient notice. *Customs Service*, 84 FLRR 1-1701, 16 FLRA 198 (FLRA 1984).
* Notice of an intended change must be sufficiently specific to enable the union to determine whether it wishes to request bargaining. *Ogden Air Logistics Center, Utah*, 91 FLRR 1-1345, 41 FLRA 690 (FLRA 1991).
* Notice of a change that is provisional (i.e., conditioned on something that may or may not happen) does not meet the statutory obligation to notify the union. *Internal Revenue Service*, 82 FLRR 1-1724, 10 FLRA 326 (FLRA 1982).
* Upon receipt of notice of an intended change a union may request additional information. *Naval Air Station, Whidbey Island*, 91 FLRR 1-1343, 41 FLRA 662 (FLRA 1991).

**Union's request for bargaining**

* The request to bargain must come from the level of exclusive recognition. *Immigration and Naturalization Service*, 84 FLRR 1-1689, 16 FLRA 80 (FLRA 1984).
* Failure to request bargaining within a reasonable time after notification can result in a determination that the union waived its right to bargain. *Bureau of Engraving and Printing*, 92 FLRR 1-1105, 44 FLRA 575 (FLRA 1992).
* Proposals or a request to bargain delivered at the 11th hour after reasonable advance notice can result in a determination that the union waived its right to bargain. *Customs Service, Region I, Boston*, 84 FLRR 1-1767, 16 FLRA 654 (FLRA 1984).
* A failure to request bargaining regarding past changes does not constitute a waiver of the right to bargain in subsequent situations. *Marine Corps Logistics Base*, 91 FLRR 1-1120, 39 FLRA 1060 (FLRA 1991).
* ***Broida:*** At issue in *Customs Service*, 104 LRP 9090, 59 FLRA 703 (FLRA 2004) was a dispute, arising in the context of review of an arbitration award, over whether the union could tie a request for impact bargaining to a request for negotiations of ground rules for a term agreement. The FLRA held that the impact bargaining request could be no broader than the circumstances that motivated it, and that the request was nonnegotiable because it was too broad. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Improper Tying of Requests for Impact Bargaining and Term Bargaining](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subchapter+08:+Appropriate+Arrangements,+Section+B:+Reasonably+Foreseeable+Adverse+Effects;+Speculative+Adverse+Effect,+Subsection+01:Tailoring+the+Proposal+to+Suit+the+Harm;+Overbroad+Proposals;+Minerals+Management,+Part+A:).

**Management's bargaining obligations**

* ***Broida:*** Although many management decisions may be nonnegotiable, such as a determination to conduct a reduction in force, the immediate impact or reasonably foreseeable effects of those decisions may be negotiable. An example would be the ability of employees who are downgraded to secure consideration for future vacancies at a higher grade. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Necessity for Impact and Implementation Bargaining](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+D+Unilateral+Changes+in+Employment+Conditions+and+Past+Practice,+Subsection+01:+Necessity+for+Impact+and+Implementation+Bargaining).
* Management is not obligated to bargain before reaching a decision to make a change that will affect conditions of employment. *Social Security Administration, Region I, Boston*, 93 FLRR 1-1076, 47 FLRA 322 (FLRA 1993).
* An agency is not obligated to bargain on proposals that are not directly related to the impact of the management change on bargaining unit employees. *FLRA v. Department of Justice*, 93 FLRR 1-8010, 994 F.2d 868 (D.C. Cir. 1993).
* Parties must approach negotiations with a "sincere resolve" to reach an agreement, as explained in 5 USC 7114(b)(1), and an agency will be guilty of violating the statute by changing conditions of employment without completing bargaining. *Department of Veterans Affairs*, 103 LRP 133, 58 FLRA 261 (FLRA 2002).
* There is no statutory requirement that a party bargain below the level of recognition. It is, however, a permissive matter. *Food and Drug Administration*, 98 FLRR 1-1023, 53 FLRA 1269 (FLRA 1998).

**Waiver of bargaining rights**

* A union may waive its right to bargain over a proposed action either explicitly through agreement or implicitly through inaction. *Letterkenny Army Depot*, 104 LRP 57679, 60 FLRA 456 (FLRA 2004).
* A union doesn't waive its right to bargain when a change is announced as a fait accompli and a request to bargain will be futile. *Customs and Border Protection*, 110 LRP 37858, 64 FLRA 916 (FLRA 2010).
* The mere fact that discussion of a particular matter has temporarily ceased while impact bargaining continues does not constitute evidence of a waiver of the right to bargain upon it. *Michigan Air National Guard*, 92 FLRR 1-1373, 46 FLRA 582 (FLRA 1992).
* Dropping a proposal in exchange for a concession constitutes a waiver of the right to bargain further on that matter. *Naval Facilities Engineering Command*, 92 FLRR 1-1063, 44 FLRA 77 (FLRA 1992).

**Invoking FSIP assistance**

* If the parties reach impasse during impact bargaining and the agency provides notice of its intent to implement the discussed change(s), the union may be deemed to have waived its right to bargain if it does not contact the FSIP for assistance. *Naval Ordnance Station, Louisville, Ky.*, 85 FLRR 1-1117, 17 FLRA 896 (FLRA 1985).
* If the agency implements a change following declaration of impasse and was unaware that the union had requested FSIP assistance it is not liable to a ULP finding. *EEOC, Washington*, 93 FLRR 1-1209, 48 FLRA 306 (FLRA 1993).
* If a union timely invokes the services of the FSIP following a declaration of impasse, the agency is obliged to maintain the *status quo* to the extent "consistent with the necessary functioning of the agency." *HUD, Kansas City Region*, *Kansas City, Mo.,* 86 FLRR 1-1786, 23 FLRA 435 (FLRA 1986).
* To establish that implementation of a policy is necessary to the agency's functioning, the agency must establish, with evidence, that a delay in implementation would have impeded its ability to effectively and efficiently carry out its mission. *Customs and Border Protection*, 107 LRP 67753, 62 FLRA 263 (FLRA 2007).
* The phrase "consistent with the necessary functioning of the agency" is synonymous with "necessary for the agency to perform its mission." *Border Patrol, Laredo, Texas*, 86 FLRR 1-1733, 23 FLRA 90 (FLRA 1986); *Bureau of Alcohol, Tobacco and Firearms*, 85 FLRR 1-1206, 18 FLRA 466 (FLRA 1985).
* Failure to maintain the status quo after a party timely invokes the services of the FSIP, even if the FSIP ultimately declines jurisdiction, constitutes a ULP. *Social Security Administration*, 92 FLRR 1-1127, 44 FLRA 870 (FLRA 1992).

**Appropriate arrangements**

* In order to constitute an "appropriate arrangement," a proposal must mitigate the adverse affects flowing from the exercise of a management right, but cannot "excessively interfere" with its exercise. *Kansas Army National Guard*, 86 FLRR 1-1492, 21 FLRA 24 (FLRA 1986).
* In order to constitute an "appropriate arrangement" a proposal must be "tailored" to benefit employees suffering from a reasonably foreseeable adverse affect flowing from the exercise of a management right. *Department of the Interior v. FLRA*, 92 FLRR 1-8030, 969 F.2d 1158 (D.C. Cir. 1992).
* A proposal that would have applied to all employees, rather than only those that could be expected to suffer adverse effects in the wake of a RIF, did not constitute an appropriate arrangement. *Philadelphia Naval Shipyard*, 95 FLRR 1-1116, 51 FLRA 451 (FLRA 1995).
* Proposals based on speculation as to future events do not constitute appropriate arrangements. *National Park Service*, 97 FLRR 1-1142, 53 FLRA 967 (FLRA 1997).
* Proposals intended as arrangements for employees affected by the exercise of management rights must address the reasonably foreseeable adverse effects on employees. *Department of the Treasury v. FLRA*, 92 FLRR 1-8016, 960 F.2d 1068 (D.C. Cir. 1992).

**Remedies**

* ***Broida:*** The retroactive bargaining order, or RBO, is frequently used in cases, involving a loss of monetary benefits, resulting from an agency's failure to engage in impact rather than decision bargaining. Under the FLRA's current formulation of the RBO, it is generally employed when a *status quo ante* remedy would not be practical. [*Broida Guide to Federal Labor* *Relations Authority Law and Practice:* Retroactive Bargaining Orders; Make Whole Remedies](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+B:+Failure+to+Bargain,+Subsection+01:+Retroactive+Bargaining+Orders;+Make+Whole+Remedies).
* The filing of a negotiability appeal will not obligate an agency to postpone implementation of an intended change; however, if the proposal at issue is subsequently determined negotiable, the agency is liable to a ULP finding for failure to bargain. *Internal Revenue Service, Atlanta*, 85 FLRR 1-1228, 18 FLRA 731 (FLRA 1985).
* In a remedy for a finding of a failure to bargain, the FLRA may order retroactive bargaining, with retroactive implementation of the terms to which the parties agree. *NTEU v. FLRA*, 90 FLRR 1-8060, 910 F.2d 964 (D.C. Cir. 1990).