**Conditions of Employment**

**Overview**

Conditions of employment is the term used to describe those matters that are ripe for collective bargaining either as to their substance or, when they involve the exercise of a management right, their impact and implementation. 5 USC 7103 (a)(14) defines conditions of employment as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." The statute excludes certain matters from the definition. These are policies, practices and matters relating to prohibited political activities or the classification of any position. Also excluded are matters specifically provided for by federal statute.

Conditions of employment include both the environmental and administrative aspects of employment, everything from the physical design and layout of employee workspaces to work schedules, procedures for leave approval, disciplinary procedures, and an endless array of other matters.

The terms "conditions of employment" and "working conditions" are often used interchangeably by practitioners. However, the language of the statute would seem to indicate they mean different things. In a concurring opinion in *Department of Labor*, 103 LRP 131, 58 FLRA 213 (FLRA 2002), then-Federal Labor Relations Authority Chair Dale Cabaniss argued that the terms are similar but are not the same. She contended that it is possible to change an individual's working conditions without changing the conditions of employment, the personnel policies or practices that created the working conditions.

Cabaniss made a similar argument in a separate opinion in *Social Security Administration*, 99 FLRR 1-1144, 55 FLRA 978 (FLRA 1999). However, the majority found no need to make such a distinction, labeling Cabaniss' position a "novel doctrine." In 2009, Cabaniss' argument was firmly rejected by the FLRA in *355th MSG/CC, Davis Monthan Air Force Base and AFGE Local 2924*, 109 LRP 61687, 64 FLRA 85 (FLRA 2009).

**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.

**In general**

* 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 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).
* To determine whether a proposal concerns a condition of employment, the FLRA applies a two-part test: 1) whether the proposal pertains to bargaining unit employees; 2) whether there is a nexus between the proposal and the work situation or employment relationship of bargaining unit employees. *Broadcasting Board of Governors*, 103 LRP 53112, 59 FLRA 447 (FLRA 2003); *Antilles Consolidated Education Association*, 86 FLRR 1-1640, 22 FLRA 235 (FLRA 1986).
* ***Broida:*** In 2004, the FLRA changed preexisting law to require a threshold of a *de minimis* change in conditions of employment before an agency's obligation to bargain concerning either substantive changes in working conditions or the impact of substantive changes in working conditions, in *Social Security Administration Office of Hearings and Appeals, Charleston, S.C.*, 104 LRP 8793, 59 FLRA 646 (FLRA 2004). [*Broida Guide to Federal Labor Relations Authority Law and Practice:* *De Minimis* Changes -- *SSA OHA*](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+04:+Absence+of+Impact,+Part+C:+De+Minimis+Changes:+SSA+OHA).
* ***Broida:*** A proposal that directly affects conditions of employment of employees in other bargaining units is outside the duty to bargain. *See* *Social Security Administration, Office of Hearings and Appeals, San Diego*, 94 FLRR 1-1120, 49 FLRA 1074 (FLRA 1994). [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Matters Affecting Nonunit Employees](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+02:+Employment+Conditions,+Section+C:+Matters+Affecting+Nonunit+Employees).
* ***Broida:*** Section 704(a) of the Civil Service Reform Act requires agencies to negotiate on any terms and conditions of employment that were the subject of negotiations prior to Aug. 19, 1972, under the Prevailing Rate Systems Act of 1972, permitting negotiation over certain pay practices and other matters, including craft classifications, in accordance with prevailing practices in the private sector. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Pay and Pay Practices](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+06:+Subjects+of+Bargaining:+Specific+Applications+of+Negotiability+Determinations,+Subchapter+15:+Pay,+Premiums,+and+Allowances,+Section+E:+Prevailing+Rate+Employees;+Pay+and+Pay+Practices,+Subsection+02:+Pay+and).
* The agency did not change conditions of employment when it effected non-disciplinary adverse actions against two employees. The agency had already bargained the procedures for taking adverse actions. Because it adhered to those procedures, there was no change in "existing personnel policies, practices or matters affecting working conditions." *Little Creek Naval Amphibious Base*, 82 FLRR 1-1603, 9 FLRA 774 (FLRA 1982).
* The FLRA has ruled that civilian employee access to military exchange and exchange-related facilities concerns a condition of employment and is therefore negotiable. *Luke Air Force Base, Ariz.*, 110 LRP 21406, 64 FLRA 642 (FLRA 2010).
* Bargaining proposals concerning access to dining facilities at a military installation concern food prices and services and are therefore negotiable conditions of employment. *Luke Air Force Base, Ariz.*, 110 LRP 21402, 64 FLRA 635 (FLRA 2010).

**Effect of past practices**

* ***Broida:*** Once a past policy or practice has matured into a term or condition of employment, it cannot be unilaterally changed. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Necessity for Impact and Implementation Bargaining](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subsection+01:+Necessity+for+Impact+and+Implementation+Bargaining), *citing Social Security Administration*, 83 FLRR 1-1286, 13 FLRA 112 (FLRA 1983).
* A matter that is not otherwise a condition of employment does not become a condition of employment through past practice. When determining whether an agency is required to bargain over a change in practice, the FLRA first examines whether the change concerns a condition of employment*. Internal Revenue Service*, 108 LRP 29053, 62 FLRA 411 (FLRA 2008); *Internal Revenue Service, Hartford, Conn.*, 87 FLRR 1-1251, 27 FLRA 322 (FLRA 1987).
* The fact that a matter that is not a condition of employment has been allowed to occur repeatedly over an extended period of time does not render it a condition of employment. *Panama Canal Commission*, 85 FLRR 1-1116, 17 FLRA 890 (FLRA 1985).
* In close cases where a matter might or might not be a condition of employment, the existence of a past practice can be determinative. *Department of Labor*, 105 LRP 627, 60 FLRA 533 (FLRA 2004); *AFGE Local 2761 v. FLRA*, 89 FLRR 1-8002, 866 F.2d 1443 (D.C. Cir. 1989).
* Where a past practice establishes a condition of employment, that condition of employment becomes incorporated into the collective bargaining agreement. *Defense Contract Management Agency*, 103 LRP 19393, 58 FLRA 519 (FLRA 2003).

**Effect of law**

* If an agency contends that a matter is not a condition of employment because it is provided for by federal statute, it must identify the statute and explain why the statute removes the matter from the obligation to bargain. *National Guard Bureau v. FLRA*, 93 FLRR 1-8004, 982 F.2d 577 (D.C. Cir. 1993).
* If an agency has unrestricted discretion, either by law or regulation, to prescribe a matter, it is not open to negotiation as a condition of employment. *Office of the Comptroller of the Currency*, 106 LRP 73094, 61 FLRA 871 (FLRA 2006); *Office of the Comptroller of the Currency*, 104 LRP 16918, 59 FLRA 815 (FLRA 2004).
* If a statute generally describes a matter but leaves other elements of it to agency discretion, those elements may be negotiable as conditions of employment. *Internal Revenue Service*, 87 FLRR 1-1231, 27 FLRA 132 (FLRA 1987).
* Mere reference to a matter in a statute does not remove it from the definition of conditions of employment. An agency's new body search policy concerned conditions of employment. *Immigration and Naturalization Service*, 100 FLRR 1-1092, 56 FLRA 351 (FLRA 2000).

**Classification of positions**

* A classification action is the determination of the title, series, and grade or pay system of a position. Such matters are excluded from the definition of conditions of employment and are not within the scope of bargaining. *IRS Martinsburg Computing Center*, 104 LRP 5872, 59 FLRA 627 (FLRA 2004).
* A proposal to assign a specific grade to a position does not concern conditions of employment and is outside the duty to bargain. *Navy Public Works Center*, 103 LRP 22842, 58 FLRA 561 (FLRA 2003).
* Because the resolution of a dispute concerning employees' entitlement to hazard pay would require a review of a classification matter, the dispute was not within the jurisdiction of the FLRA. *Naval Surface Warfare Center*, 103 LRP 11298, 58 FLRA 371 (FLRA 2003).
* A proposal to establish a certain staffing pattern that did not require the agency to classify or reclassify any position concerned conditions of employment and was negotiable at the agency's election. *Defense Automated Printing Service*, 99 FLRR 1-1072, 55 FLRA 509 (FLRA 1999).
* A proposal to maintain an employee's grade level until a desk audit was performed related to the classification of a position and therefore did not concern a condition of employment. *Defense Commissary Agency*, 98 FLRR 1-1185, 54 FLRA 1302 (FLRA 1998).
* An agency's decision to reclassify a position does not concern a condition of employment and therefore cannot be the subject of an unfair labor practice complaint. *305th Air Mobility Wing*, 98 FLRR 1-1183, 54 FLRA 1243 (FLRA 1998).
* A proposal requiring the union's agreement on the title, series and grade of a position did not concern conditions of employment and was nonnegotiable. *Nuclear Business Office, Norfolk Naval Shipyard*, 97 FLRR 1-1043, 52 FLRA 1341 (FLRA 1997).
* A proposal requiring the use of a particular job description form concerned a condition of employment in that it did not seek to determine the classification of any position. *Army Corps of Engineers*, 95 FLRR 1-1122, 51 FLRA 526 (FLRA 1995).

**Matters deemed not to be conditions of employment**

* Although a workplace concern may raise a societal, ethical or environmental issue, it does not necessarily qualify as a condition of employment. *Social Security Administration*, 83 FLRR 1-1330, 13 FLRA 422 (FLRA 1983).
* A union proposal directed at the interests of the public does not pertain to conditions of employment even when bargaining unit members are indirectly implicated. *Broadcasting Board of Governors*, 103 LRP 53112, 59 FLRA 447 (FLRA 2003); *101st Airborne Division*, 86 FLRR 1-1731, 23 FLRA 59 (FLRA 1986).
* Proposals seeking to regulate the conditions of employment of non-unit personnel and supervisors do not fall within the scope of conditions of employment of bargaining unit employees. *Naval Aviation Depot, Cherry Point v. FLRA*, 92 FLRR 1-8003, 952 F.2d 1434 (D.C. Cir. 1992).
* Proposals directly implicating the conditions of employment of employees in a different bargaining unit are outside the duty to bargain. *DVA Connecticut Healthcare System*, 106 LRP 29980, 61 FLRA 593 (FLRA 2006).
* Selection procedures for supervisors do not concern conditions of employment. However, agencies may elect to bargain over such matters. *Department of Labor*, 105 LRP 627, 60 FLRA 533 (FLRA 2004).
* Proposals affecting the work assignments of supervisors directly implicate the conditions of employment of non-unit personnel and are negotiable only at the agency's election. *Federal Aviation Administration*, 100 FLRR 1-1082, 56 FLRA 288 (FLRA 2000).
* A proposal specifying how management negotiators will address union negotiators did not seek to regulate the conditions of employment of supervisors. It was instead a proposal to establish ground rules for negotiation. *ACT Wichita Air Capitol Chapter v. FLRA*, 104 LRP 1910, 353 F.3d 46 (D.C. Cir 2004).