**Determining Negotiability**

**Introduction**

This Checklist Plus+ is designed to help you to determine the negotiability of disputed proposals and contract provisions, with reference to the governing laws and regulations and to illustrative case decisions.

While such decisions can certainly be helpful in assessing the negotiability of a proposal or provision, you should not confine your research to the few that are presented here. To make certain you arrive at an accurate appraisal of the proposal or provision, you should make full use of the tools and research sources included in ***cyber*FEDS®**.

You may wish to consult the **Checklist Plus+** [Preparing to Bargain](http://www.cyberfeds.com/GetDocByTitle?doctitle=Preparing+to+Bargain), as well as the following ***cyber*FEDS® Quick Start Guides**:

* [Negotiability](http://www.cyberfeds.com/GetQSG?title=Negotiability)
* [Past Practice](http://www.cyberfeds.com/GetQSG?title=Past+Practice)
* [Impact and Implementation](http://www.cyberfeds.com/GetQSG?title=Impact+and+Implementation)
* [Conditions of Employment](http://www.cyberfeds.com/GetQSG?title=Conditions+of+Employment)
* [Permissive Topics of Bargaining](http://www.cyberfeds.com/GetQSG?title=Permissive+Topics+of+Bargaining)
* [Good Faith Bargaining](http://www.cyberfeds.com/GetQSG?title=Good+Faith+Bargaining)
* [Management Rights](http://www.cyberfeds.com/GetQSG?title=Management+Rights)

You may work through the steps of this Checklist Plus+ in the order presented or use the summary of steps below to link directly to those areas that most interest you.

**Summary of Steps**

1. [Determine whether the proposal or provision concerns a condition of employment of bargaining unit employees.](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step1)
2. [Determine whether the proposal or provision is excluded from the definition of condition of employment.](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step2)
3. [Determine whether the proposal or provision is consistent with federal laws, including management's rights under 5 USC 7106(a).](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step3)
4. [If a management right under 5 USC 7106(a) is involved, determine whether the proposal or provision is negotiable as a '*procedure'* or as an '*appropriate arrangement.'*](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step4)
5. [Determine whether the proposal or provision is consistent with applicable rules and regulations.](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step5)
6. [Determine whether the proposal or provision is a matter covered by 5 USC 7106(b)(1) -- i.e., whether it is a 'permissive' topic of bargaining.](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step6)

**1. Determine whether the proposal or provision concerns a condition of employment of bargaining unit employees.**

The Federal Labor Relations Authority considers two specific factors in deciding whether a proposal or agreement provision concerns a condition of employment:

* Whether the proposal or provision pertains to bargaining unit employees.
* The nature and extent of the effect on the working conditions of unit employees.

**A proposal or provision concerns a condition of employment** if it focuses principally on unit employees or positions, and directly affects their work situation or employment relationship. Generally, this means it addresses either a personnel policy or practice pertaining to unit employees or positions, or directly affects the work situation or employment relationship of unit employees.

See, for example, *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 86 FLRR 1-1640, in which the FLRA concluded that employees' access to retail, recreational and medical facilities during off-duty hours had no direct relationship to working conditions.

And in *AFGE Local 2761 v. FLRA,* 866 F.2d 1443 (D.C. Cir. 1989), 89 FLRR 1-8002, the court ruled that both an annual picnic held on duty time and on agency property, and the use of military exchange facilities *were* conditions of employment.

**A proposal that peripherally affects employees outside the bargaining unit** but is principally directed at conditions of employment of bargaining unit employees may still be negotiable under the "vitally affects" test. See, for example, *Health Care Financing Administration*, 44 FLRA 1405, 92 FLRR 1-1172.

The categories of individuals subject to the FLRA's "vitally affects" test are non-supervisory employees who are not represented by any other union and non-employees (such as contractor personnel).

**If a proposal directly affects employees in other bargaining units, or supervisory personnel,** it is outside the agency's duty to bargain. The effect on the employees in the unit the union represents, even if "vital," is not considered sufficient to bring such a proposal within the scope and duty to bargain.

See, for example, *OPM*, 51 FLRA 491, 95 FLRR 1-1118; *SSA, Office of Hearings and Appeals*, 49 FLRA 1074, 94 FLRR 1-1120 ; *HCFA*, 44 FLRA 1405, 92 FLRR 1-1172; *Naval Aviation Depot, Cherry Point, North Carolina*, 45 FLRA 1154, 92 FLRR 1-1294, on remand from the court in *Naval Aviation Depot, Cherry Point v. FLRA*, 952 F.2d 1434 (D.C. Cir. 1992), 92 FLRR 1-8003.

**Note**, however, that the "vitally affects" test is not applicable if a proposal relates:

* Principally to employees in the union's bargaining unit.
* And does not directly affect any category of individuals outside the unit. *Defense Mapping Agency, Louisville, Kentucky*, 45 FLRA 1132, 92 FLRR 1-1291.

**Note also** that the possibility a proposal might indirectly affect such other categories is not sufficient to remove it from the statutory duty to bargain.

See, for example, *Library of Congress*, 53 FLRA 1334, 98 FLRR 1-1031, in which a union proposal for a proportionate share of agency parking spaces was found to be negotiable, even though it would reduce the number of spaces available to other employees in the agency.

For further examples of case decisions involving a general determination of whether a matter involves the conditions of employment of unit employees, see the ***cyber*FEDS® Quick Start Guide** [Negotiability](http://www.cyberfeds.com/GetQSG?title=Negotiability).

For assistance in determining the negotiability of a specific bargaining topic, go to ***cyber*FEDS®** [Advanced Search](http://www.cyberfeds.com/CF3/advancedsearch.jsp?topic=) and search the Quick Start Guides for that specific topic.

**2. Determine whether the proposal or provision is excluded from the definition of condition of employment.**

Congress expressly excluded a number of areas from the definition of "condition of employment," and, therefore, from the obligation to bargain. Excluded are any policies, practices or matters relating to:

* Prohibited political activities.
* The classification of any position.
* Matters specifically provided for by federal statute.

Two notes about the statutory exclusionsmay be helpful here. First, as to the exclusion of matters related to the classification of any position -- proposals that would dictate the title, series, grade or pay level of a position are non-negotiable. See, for example, *Bureau of Engraving and Printing*, 33 FLRA 711, 88 FLRR 1-1429, (Proposal 13).

However, proposals that would merely require that employees be furnished with accurate position descriptions are considered *within* the scope of bargaining and negotiable. See, for example, *IRS*, 13 FLRA 48, 83 FLRR 1-1266.

Second, as to the exclusion of "matters specifically provided for by federal law," the emphasis is on the word, "specifically." In other words, the law involved must provide a precise prescription of what is to be done to remove the matter from the bargaining table. Mere reference or mention of a matter within a law is notsufficient to exclude it from the definition of conditions of employment. *Naval Underwater Systems Center, Newport, RI*, 38 FLRA 456, 90 FLRR 1-1603.

For illustration purposes, consider the subject of pay. The wages and fringe benefits of most federal employees are precisely (i.e., "specifically") set by law. Consequently, pay for employees under such precise systems is excluded from the definition of conditions of employment and, therefore, is outside the scope of bargaining. See *Department of Defense, Office of Dependents Schools*, 45 FLRA 1185, 92 FLRR 1-1297.

Similarly, note that if the law leaves a matter up to the "sole and exclusive authority" or "unfettered discretion" of an agency head to determine, it will also be excluded from the duty to bargain. See, for example, *Department of the Treasury, Office of Thrift Supervision*, 47 FLRA 884, 93 FLRR 1-1136 , affirmed 46 F.3d 73 (D.C. Cir. 1995), 95 FLRR 1-8002.

However, where a law grants the agency head broad discretion to determine pay, the matter is not "specifically provided for" within the meaning of 5 USC 7103(a)(14)(c). In such situations, pay-related proposals are negotiable, if they are otherwise consistent with applicable laws and regulations. See *Bureau of Engraving and Printing*, 50 FLRA 677, 95 FLRR 1-1073. See also *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (S. Ct. 1990), 90 FLRR 1-8054 ; *Eglin Air Force Base Florida*, 24 FLRA 377, 86 FLRR 1-1873; and *Fort Bragg Dependents Schools*, 12 FLRA 519, 83 FLRR 1-1217.

**3. Determine whether the proposal or provision is consistent with federal laws, including management's rights under 5 USC 7106(a).**

In order to fall within the duty to bargain, a proposal or provision must not conflict with:

* Federal laws.
* Government-wide rules and regulations.
* Agency rules and regulations for which a compelling need exists (unless the union represents a majority of the agency's employees).

On government-wide and agency rules and regulations, see [Step 5](http://www.cyberfeds.com/CF3/printDoc.jsp?docid=5008&chunkid=203901#step5), below.

**Note:** Practitioners should also be alert to a possible fourth boundary line -- any agreement that may have been negotiated at a higher level of the organizations involved, such as a national or consolidated unit agreement. See, for example, *Bureau of Prisons, FCI Petersburg*, 31 FLRA 37, 88 FLRR 1-1053.

Proposals or options that are inconsistent with any provision of federal law are outside the duty to bargain, unless they are covered by some exception. This includes the provisions of 5 USC 7106 (a), which prescribe management rights under the Federal Labor-Management Relations Statute.

**Management rights**

The principal federal law limiting bargaining is the statute itself, particularly the management rights provision set forth in 5 USC 7106(a). That provision reserves to management the exclusive authority:

(1) to determine the mission, budget, organization, number of employees, and internal security practices of an agency; and in accordance with applicable law:

A. to hire, assign, direct, layoff and retain employees, or to suspend, remove, reduce in grade or pay, or to take other disciplinary action against employees;

B. to assign work, to make contracting out determinations, and to determine the personnel by which agency operations will be conducted;

C. in filling positions, to make selections for appointment from among properly ranked and certified candidates for promotion or from any other appropriate source; and

D. to take whatever actions may be necessary to carry out an agency's mission during emergencies.

As to the requirement that the rights listed in section 7106(a)(2) must be exercised "in accordance with applicable laws," the FLRA has held that the term "applicable laws" includes:

* The U.S. Constitution.
* Relevant provisions of the U.S. Code and other statutes.
* Controlling judicial decisions, judgments and decrees.
* Presidential executive orders issued pursuant to express statutory authorization.
* Rules, regulations and other directives prescribed by controlling authorities which have the force and effect of law.

See, for example, *Department of the Treasury, IRS*, 42 FLRA 377, 91 FLRR 1-1424, on remand from the U.S. Supreme Court's decision in *IRS v. FLRA*, 494 U.S. 922 (S. Ct. 1990), 90 FLRR 1-8052.

But not every "official" document qualifies. In one case, the FLRA determined that the House and Senate Appropriations Committee Reports and other Congressional committee member statements involved did not have the requisite "force and effect of law." *Department of Health and Human Services*, 43 FLRA 385, 91 FLRR 1-1527.

**Exceptions to management rights**

The right of management to take the actions described in 5 USC 7106(a) bars, for the most part, bargaining on any proposals that conflict with management's exercise of its statutory authority. As with many legal restrictions, however, there are exceptions. In this case, there are three:

1. Negotiation of alternate work schedules under the *Flexible and Compressed Work Schedules Act* (5 USC 6101, 5 USC 6106, [5 USC Sections 6120-6133](http://www.cyberfeds.com/CF3/servlet/CFSearchAll?searchstring=%28%28title%3D5+USC%29+AND+%28%286120%7C6121%7C6122%7C6123%7C6124%7C6125%7C6126%7C6127%7C6128%7C6129%7C6130%7C6131%7C6132%7C6133%29+within+section%29%29&searchscreen=%2FCF3%2Fstatsearch.jsp&destination=index.jsp%3Ftopic%3D%26results%3Dyes&db=STATSREGS&thesaurus=yes&sortorder=document&results=20&title=&chapter=&part=&section=&restrictors=section&restrictors=title&restrictors=chapter&restrictors=part)).
2. Negotiation of official time for union representatives under 5 USC 7131.
3. Negotiation of matters covered by 5 USC 7106(b). These include:
   1. Procedures that management will follow in exercising its statutory authority under section 7106(a).
   2. Appropriate arrangements for employees who may be adversely affected by management's exercise of any such authority.
   3. Other specific matters negotiable only at the election of management.
   4. Conditions of employment and other benefits of prevailing rate employees that were the subject of negotiations prior to August 19, 1972. See, for example, *Department of the Interior, National Park Service, Lake Mead*, 51 FLRA 229, 95 FLRR 1-1101.

**4. If a management right under 5 USC 7106(a) is involved, determine whether the proposal or provision is negotiable as a '*procedure'* or as an '*appropriate arrangement.'***

Although 5 USC 7106(a) precludes bargaining on proposals that conflict with management's authority to make the decision to exercise any of its statutory rights, the actual exercise of those rights is subject to negotiation over:

* The procedures to be followed.
* The arrangements for employees who may be adversely affected by the decision.

In short, management's decision-making authority is non-negotiable, but, as explained below, procedures and arrangements may be negotiable if they meet certain tests.

**Procedures**

Under 5 USC 7106(b)(2), an agency has a duty to bargain on negotiable procedures that management will observe in exercising its reserved rights. A negotiable procedure is one that does not directly interfere with a management right. *Wright-Patterson Air Force Base*, 2 FLRA 604, 80 FLRR 1-1199, affirmed sub nom. *DOD v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), 81 FLRR 1-8011, cert. denied 455 U.S. 945 (S. Ct. 1982). See also *Bureau of Land Management*, 29 FLRA 1491, 87 FLRR 1-1590, (Provision 9), affirmed *sub nom*. *Department of Interior, BLM v. FLRA*, 873 F.2d 1505 (D.C. Cir. 1989), 89 FLRR 1-8017.

**Appropriate arrangements**

Under 5 USC 7106(b)(3), an agency has a duty to bargain on appropriate arrangements for employees who may be adversely affected by the exercise of a management right. An appropriate arrangement is one that does not excessively interfere with a reserved right. See *Kansas Army National Guard*, 21 FLRA 24, 86 FLRR 1-1492.

Excessive interference is something more than direct interference. *AFGE Local 1923 v. FLRA*, 819 F.2d 306 (D.C. Cir. 1987), 87 FLRR 1-8019. Thus, a proposal or contract provision that interferes with a right of management is considered negotiable if it does not significantly hamper the ability of an agency to get its job done.

In order to constitute an "appropriate arrangement" within the meaning of section 7106(b)(3), two threshold conditions must be met:

* A reasonably foreseeable adverse effect flowing from a management action has been identified.
* The arrangement proposed must be tailored to benefit or compensate employees suffering (or reasonably expected to suffer) the adverse effect.

See *Minerals Management Service v. FLRA*, 969 F.2d 1158 (and other consolidated cases) (DC Cir. 1992), 92 FLRR 1-8030; INS v. FLRA, 975 F.2d 218 (5th Cir. 1992), 92 FLRR 1-8041.

For additional information on check the ***cyber*FEDS® Quick Start Guide** [Appropriate Arrangements](http://www.cyberfeds.com/GetQSG?title=Appropriate+Arrangements).

**5. Determine whether the proposal or provision is consistent with applicable rules and regulations.**

**Government-wide rules and regulations**

Under the statute, government-wide rules and regulations are those regulations and other official declarations of policy that are binding on the federal agencies and officials to which they apply. See *NTEU Chapter 6 and IRS, New Orleans District*, 3 FLRA 748, 80 FLRR 1-1366.

The principal government-wide rules and regulations that limit bargaining are those promulgated by the Office of Personnel Management, the General Services Administration, the Department of Labor and the General Accounting Office.

Proposals that conflict with mandatory requirements of such government-wide regulations are usually non-negotiable. See, for example *VA Medical Center, Newington, Connecticut,* 32 FLRA 206, 88 FLRR 1-1201.

However, a government-wide rule or regulation that merely restates a statutory management right will not bar negotiation of negotiable procedures under 5 USC 7106(b)(2) or appropriate arrangements under 5 USC 7106(b)(3). See *OPM v. FLRA*, 864 F.2d 165 (D.C. Cir. 1988), 88 FLRR 1-8057.

Moreover, negotiation on proposals is not barred simply because they may conflict with the guidance contained in government-wide issuances, provide that guidance is not mandatory for agency officials. See, for example, *U.S. Customs Service*, 21 FLRA 6, 86 FLRR 1-1490, *affirmed sub nom. Department of the Treasury v. FLRA*, 836 F.2d 1381 (D.C. Cir. 1988), 88 FLRR 1-8012.

Additionally, 5 USC 7116(a)(7) prohibits agencies from attempting to enforce any rule or regulation (other than a rule or regulation implementing 5 USC 2302, related to prohibited personnel practices) that conflicts with a provision of a collective bargaining agreement, if the agreement was in effect before the rule or regulation.

Thus, when a collective bargaining agreement becomes effective, any *subsequently* issued regulation, with the exception of a government-wide regulation issued under 5 USC 2302, cannot affect the terms of the agreement. See *Bureau of Engraving and Printing*, 25 FLRA 113, 87 FLRR 1-1009; and *U.S. Customs Service,* 9 FLRA 983, 82 FLRR 1-1644. With the limited exception noted, a provision of a negotiated agreement will control in any conflict with a subsequently issued government-wide regulation.

Proposals that would incorporate in a collective bargaining agreement a specific restriction on management based on a regulation, without providing for possible future revision or elimination of the regulation, are considered outside the duty to bargain. That's because the effect of such proposals would be to continue to impose the restriction as a substantive contract limitation even after the underlying regulation was revised or repealed. See, for example, *Immigration and Naturalization Service*, 40 FLRA 521, 91 FLRR 1-1219; and *Health and Human Services*, 21 FLRA 178, 86 FLRR 1-1516.

**Agency rules and regulations**

Under 5 USC 7117(a)(2), if a union involved in negotiations does not represent a majority of an agency's employees, the agency may raise its own internal regulations as a bar to negotiation on proposals that conflict with those regulations. The bar is limited to regulations issued by the agency at the national level or by a "primary national subdivision."

An agency's assertion of such a regulation as a bar to negotiations may, of course, be challenged by a union in a negotiability appeal to the FLRA. In such a case, the agency will have to establish that there is a "compelling need" for its regulation.

The FLRA has provided in its regulations at 5 CFR 2424.11 that an agency which asserts a compelling need for a regulation must demonstrate that the regulation meets one or more of the following criteria:

* The regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or execution of the functions of the agency, in a manner that is consistent with the requirements of an effective and efficient government.
* The regulation is necessary to ensure the maintenance of basic merit system principles.
* The regulation implements a mandate under law or other outside authority, and implementation is essentially nondiscretionary.

As a practical matter, this has proven a difficult test for agencies to pass.

**6. Determine whether the proposal or provision is a matter covered by 5 USC 7106(b)(1) -- i.e., whether it is a 'permissive' topic of bargaining.**

5 USC 7106(b)(1) permits bargaining "at the election of the agency" on:

* The numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty.
* The technology, methods and means of performing work.

Or, to view this provision from another perspective, an agency is not required to bargain on these topics; i.e., it can deem them non-negotiable at its own election.

**Other permissive topics**

There are other matters not covered by section 7106(b)(1) that are also considered permissive topics of bargaining. Two examples are promotion procedures for first-line supervisory positions, and fitness centers or fitness activities where fitness is not a job requirement.

Such matters are outside an agency's duty to bargain because they are not conditions of employment for bargaining unit employees. An agency may, however, elect to bargain on such subjects to the extent negotiations are consistent with law, rule and regulation. See, for example, *VA Medical Center, New York,* 22 FLRA 710, 86 FLRR 1-1698.

Also note that if an agency elects to bargain on a permissive subject, the agency may cease bargaining on the matter any time prior to reaching final agreement without committing an unfair labor practice. *Department of Labor, Mine Safety and Health Administration*, 21 FLRA 1046, 86 FLRR 1-1610 (Proposal 1).

**Effect of including permissive subjects in agreements**

If the parties agree to cover a permissive subject in their collective bargaining agreement, they will be bound by the provision for the duration of the agreement. When the agreement expires, however, either party is free to terminate the policy or practice contained in the expired provision.

A party may not insist upon continuation of the provision once it has been informed that the other party no longer wishes to be bound. Doing so to the point of impasse will constitute bad faith bargaining. See, for example, *U.S. Customs Service, Region II*, 17 FLRA 221, 85 FLRR 1-1033; and *Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington*, 14 FLRA 644, 84 FLRR 1-1465.

**Effect of previous agreements**

In determining the negotiability of proposals or options (i.e., whether they properly may be bargained, agreed to and incorporated in a contract), negotiators should note that the mere fact that a previous agreement contained an identical provision has no effect on the negotiability of the present proposal. See, for example, *Navy Public Works Center, Norfolk, Virginia*, 25 FLRA 3, 87 FLRR 1-1001.

For additional information and case citations, visit the ***cyber*FEDS® Quick Start Guide** [Permissive Topics of Bargaining](http://www.cyberfeds.com/GetQSG?title=Permissive+Topics+of+Bargaining).

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