**Unilateral Changes**

**Overview**

An agency may be guilty of an unfair labor practice when it changes the conditions of employment of bargaining unit employees without notifying the union and providing it with an opportunity to bargain over the change. There are times when the union has the right to bargain over the substance of the change. When the change involves an exercise of management rights, the union may bargain only over its impact and implementation. However, there are occasions when a change in conditions of employment does not give rise to a duty to bargain. There have also been cases where the Federal Labor Relations Authority found the union waived its right to bargain. The alleged failure to bargain over a change is one of the most frequently occurring ULP complaints.

**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.

**Basic requirements**

* When an agency proposes to change conditions of employment pursuant to an exercise of its management rights, it has an obligation to notify the union and to bargain at the union's request over procedures and arrangements. *General Services Administration*, 108 LRP 6377, 62 FLRA 341 (FLRA 2008).
* An agency has no obligation to bargain over a change that has a de minimis impact on conditions of employment. This is true whether the change would be negotiable as to substance or impact. *Association of Administrative Law Judges v. FLRA*, 105 LRP 4813, 397 F.3d 957 (D.C. Cir. 2005); *Social Security Administration*, 104 LRP 8793, 59 FLRA 646 (FLRA 2004).
* In assessing whether the effect of a change in 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 on bargaining unit employees. *General Services Administration*, 108 LRP 6377, 62 FLRA 341 (FLRA 2008); *Internal Revenue Service*, 101 FLRR 1-1034, 56 FLRA 906 (FLRA 2000).
* In applying the de minimis standard, the FLRA must examine the reasonably foreseeable impact of a change in conditions of employment. It may not summarily reject evidence simply because the evidence concerns non-bargaining unit employees. *AFGE v. FLRA*, 106 LRP 29006, 446 F.3d 162 (D.C. Cir. 2006).
* 5 USC 7113 (b) requires an agency to inform a union with national consultation rights of any substantive changes in conditions of employment. *National Guard Bureau*, 101 FLRR 1-1134, 57 FLRA 240 (FLRA 2001).
* ***Broida:*** Although a proposal may have been triggered by a specific personnel situation that has been resolved by the time the FLRA addresses the negotiability of the proposal, the FLRA proceeding is not moot if the proposal could benefit employees in the future. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Proposal No Longer Relevant](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Mootness;+Changed+Circumstances,+Section+C:+Proposal+No+Longer+Relevant), *citing* *DVA,* *VA Connecticut Healthcare Systems,* 109 LRP 63363, [64 FLRA 132](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=64+FLRA+132) (FLRA 2009).
* If one or more union proposals concerning a change in conditions of employment are negotiable, the agency will be found to have violated the statute if it implements the change without completing bargaining. *Pension Benefit Guaranty Corporation*, 103 LRP 37848, 59 FLRA 48 (FLRA 2003).
* An agency cannot relieve itself of liability by asserting for the first time in a ULP proceeding that the union's proposals were nonnegotiable. *Wright-Patterson AFB*, 87 FLRR 1-1041, 25 FLRA 541 (FLRA 1987).
* 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*, 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).

**Bargaining not required**

* The covered-by doctrine is a defense to an agency's refusal to negotiate over a change in conditions of employment. It excuses parties from bargaining on the ground that they already bargained and reached agreement on the matter. *Federal Bureau of Prisons*, 109 LRP 15424, 63 FLRA 132 (FLRA 2009); *Social Security Administration*, 93 FLRR 1-1148, 47 FLRA 1004 (FLRA 1993).
* Where actions are taken consistent with pre-established conditions of employment agreed to at the time of hiring, and there is no evidence those conditions were changed by practice or agreement of the parties, such actions do not constitute changes in conditions of employment. *Immigration and Naturalization Service*, 96 FLRR 1-1146, 52 FLRA 582 (FLRA 1996).
* An agency's obligation to bargain over a proposed change is predicated on the union's submission of negotiable proposals. If all pending proposals are nonnegotiable, a unilateral change will not violate the statute. *Pension Benefit Guaranty Corp.*, 103 LRP 37848, 59 FLRA 48 (FLRA 2003).
* Failure on the part of a union to request bargaining after receiving adequate notice of a proposed change may result in a finding that the union has waived its bargaining rights. *Defense Commissary Agency*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006); *Bureau of Engraving and Printing*, 92 FLRR 1-1105, 44 FLRA 575 (FLRA 1992).
* An agency is not required to bargain when it implements guidelines that merely affirm an existing practice. *Customs and Border Protection*, 104 LRP 22938, 59 FLRA 910 (FLRA 2004).
* An agency was not required to bargain over union proposals submitted outside the contractually mandated time period. *Air Force Materiel Command*, 96 FLRR 1-1064, 51 FLRA 1532 (FLRA 1996).
* An agency may lawfully refuse to bargain over union proposals that are beyond the scope of the intended change in conditions of employment. *NTEU v. FLRA*, 105 LRP 32743, 414 F.3d 50 (D.C. Cir. 2005).
* If a law indicates that an agency's discretion is to be exercised only by the agency -- referred to by the FLRA as "sole and exclusive discretion," the agency is not obligated to exercise its discretion through collective bargaining. *Bureau of Indian Affairs*, 103 LRP 233, 58 FLRA 246 (FLRA 2002).
* Policies and practices that affect only managers and supervisors may be changed unilaterally. The FLRA found the agency had no obligation to notify the union when it changed a checklist used by supervisors to document employee behavioral problems. *Supervisor of Shipbuilding, Conversion and Repair*, 80 FLRR 1-1459, 4 FLRA 578 (FLRA 1980).

**Adequate notice**

* ***Broida:*** Adequate notice of a proposed change in conditions of employment triggers the exclusive representative's responsibility to request bargaining over the change. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Failure to Request Bargaining; Inaction](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+02:+Management+Violations,+Section+B:+Bargaining+Failures,+Subsection+01:+Waivers+of+Bargaining+Rights,+Part+B:+Failure+to+Request+Bargaining;+Inaction), *citing,**e.g.,**U.S. Penitentiary, Leavenworth, Kan*., [99 FLRR 1-1111, 55 FLRA 704](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=55+FLRA+704) (FLRA 1999); *Defense Commissary Agency*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006).
* Notice of a proposed change in conditions of employment must be sufficiently specific and definitive to provide the union with a reasonable opportunity to request bargaining. *Memphis District Corps of Engineers*, 97 FLRR 1-1078, 53 FLRA 79 (FLRA 1997).
* A notice of a change in conditions of employment must advise the union of the planned timing of the change. *NFFE v. FLRA*, 104 LRP 36739, 369 F.3d 548 (D.C. Cir. 2004).
* There is no absolute requirement that adequate notice of an intended change include an exact effective date. Providing the union with reduction-in-force summary reports and a retention register was adequate to notify the union that the change was imminent. *Defense Commissary Agency*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006).
* A union has the right to designate its own representatives for specific purposes. This includes the union official who will receive notification of changes in conditions of employment. *Willow Grove Air Reserve Station*, 102 FLRR 1-1091, 57 FLRA 852 (FLRA 2002).
* When a substantial amount of time passes between the original notice provided by an agency concerning a change in conditions of employment and the time the agency actually effectuates the change, the union may be entitled to a second notice. *Letterkenny Army Depot*, 104 LRP 57679, 60 FLRA 456 (FLRA 2004).

**Union response to notice**

* Just as in negotiating a term agreement, a union has the right to negotiate over ground rules after being notified of a proposed change in conditions of employment. *Environmental Protection Agency*, 84 FLRR 1-1757, 16 FLRA 602 (FLRA 1984).
* Although the union had not submitted specific proposals, an agency violated the statute by making a unilateral change when it failed to respond to a union's request to negotiate. *Immigration and Naturalization Service*, 99 FLRR 1-1135, 55 FLRA 892 (FLRA 1999).
* A union does not necessarily have to submit bargaining proposals as part of a bargaining request. It may submit proposals, ask for additional information, or request additional time. *Defense Commissary Agency*, 106 LRP 50876, 61 FLRA 688 (FLRA 2006).
* When an agency does not respond to a union's request to bargain over a change, it is not necessary for the FLRA to examine the negotiability of the union's proposals in order to find a unilateral change violated the statute. *Pension Benefit Guaranty Corp.*, 103 LRP 37848, 59 FLRA 48 (FLRA 2003); *Immigration and Naturalization Service*, 100 FLRR 1-1092, 56 FLRA 351 (FLRA 2000).
* When an agency believes it has no duty to bargain, at a minimum it must respond to a union's request to bargain over a perceived change in conditions of employment. *Customs and Border Protection*, 104 LRP 22938, 59 FLRA 910 (FLRA 2004).

**Effect of past practices**

* An agency is required to fulfill its obligation to bargain in good faith when it changes a condition of employment that was established through past practice. *USDA Food Safety and Inspection Service*, 108 LRP 19510, 62 FLRA 364 (FLRA 2008).
* ***Broida:*** To constitute a past practice, that is, a term or condition of employment, the practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. For there to be a statutory violation, there must be a unilateral change in a condition of employment. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Historical Patterns](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+02:+Defining+Past+Practice,+Part+B:+Historical+Patterns).
* When responsible management knowingly acquiesces in a practice and the practice continues for a substantial amount of time, it may not be changed unilaterally. *Social Security Administration*, 105 LRP 2920, 60 FLRA 549 (FLRA 2005).
* 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); *IRS Hartford*, 87 FLRR 1-1251, 27 FLRA 322 (FLRA 1987).
* Even when an agency's decision to terminate a past practice involves the exercise of a management right, the agency must give notice to the union and an opportunity to engage in impact bargaining. *U.S. Geological Survey*, 82 FLRR 1-1571, 9 FLRA 543 (FLRA 1982); *DOD, Domestic Dependent Elementary and Secondary Schools*, 105 LRP 48955, 61 FLRA 327 (FLRA 2005).

**Effect of impasse**

* When the services of the Federal Service Impasses Panel are invoked, the agency generally may not make a planned change until the impasse is resolved. In order to implement a change in conditions of employment while the matter is at impasse, the agency must establish, with evidence, that the change was necessary to its effective functioning. *Securities and Exchange Commission*, 108 LRP 34551, 62 FLRA 432 (FLRA 2008); *DHS, Customs and Border Protection*, 107 LRP 67753, 62 FLRA 263 (FLRA 2007).

**Remedies**

* When an agency unlawfully makes unilateral changes, the typical remedy is for the FLRA to order a make whole or status quo ante remedy. The purpose of such a remedy is to ensure agencies bargain with their unions. *Federal Deposit Insurance Corp. v. FLRA*, 92 FLRR 1-8045, 977 F.2d 1493 (D.C. Cir. 1992).
* ***Broida:*** The use of a *status quo* remedy depends in part on whether the agency failed to bargain on substance or impact. *Immigration and Naturalization Service*, 103 LRP 47892, 59 FLRA 387 (FLRA 2003) summarizes the doctrine. Where an agency has an obligation to bargain over the substance of a matter, and fails to meet that obligation, the FLRA will grant a *status quo ante* remedy in the absence of special circumstances. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* *Status Quo* Remedy Required](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+B:+Failure+to+Bargain,+Subsection+02:+Status+Quo+Remedy+Required); *see also* *Warner Robins Air Logistics Center*, 98 FLRR 1-1062, 53 FLRA 1664 (FLRA 1998); *Defense Commissary Agency, Northeast Region*, 103 LRP 56106, 59 FLRA 472 (FLRA 2003).
* ***Broida:*** By contrast, where an agency has an obligation to bargain over only the impact and implementation of a matter, and fails to meet that obligation, the FLRA applies the factors set forth in *FCI Petersburg, Va.*, 82 FLRR 1-1487, 8 FLRA 604 (FLRA 1982), to determine whether a *status quo ante* remedy is appropriate. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* *Status Quo* Remedy Required](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+08:+Unfair+Labor+Practices,+Subchapter+05:+Remedies,+Section+B:+Failure+to+Bargain,+Subsection+02:+Status+Quo+Remedy+Required), *citing* *Immigration and Naturalization Service*, 103 LRP 47892, 59 FLRA 387 (FLRA 2003).
* In lieu of a status quo ante order, the FLRA may issue a retroactive bargaining order where it is clear some employees were harmed by an agency's unlawful conduct, but it is not possible to ascertain their identities. An RBO allows the parties to negotiate and implement their agreement retroactively, thereby creating the results that would have been achieved but for the agency's failure to bargain. *Letterkenny Army Depot*, 104 LRP 57679, 60 FLRA 456 (FLRA 2004).