



REPRESENTING FEDERAL EMPLOYEES A TRAINING WEBINAR

March 5, 2025

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A. INTRODUCTION

1. Critical need

- At minimum, tens of thousands of federal employees have been terminated, with more terminations expected. More than 200,000 federal employees are probationary.
- Among other firings, Trump has called for “large-scale reductions in force” across the federal workforce, which currently totals around 3 million employees.
- Prior to 2025, some numbers suggest around 10,000 federal employees were involuntarily terminated for discipline or performance each year.

2. Limits on federal employees’ access to the courts – channeling doctrine

The channeling doctrine provides that when plaintiffs bring claims implicating a broad statutory administrative scheme, plaintiffs must “channel” those claims through the administrative process (ending with judicial review only in the court of appeals). Thus, where there is a statutory scheme that is intended to address employee claims the federal district courts lack jurisdiction to hear such cases. Courts have found that certain claims implicating federal employees should be channeled to both the MSPB and FLRA.

The case name to know on this issue is *Thunder Basin*, which is a 1994 Supreme Court decision announcing the factors courts look to determine whether a statutory scheme has impliedly stripped the jurisdiction of district courts. As the Supreme Court recently reiterated:

The Court identified three considerations designed to aid in that inquiry, commonly known now as the Thunder Basin factors. First, could precluding district court jurisdiction foreclose all meaningful judicial review of the claim? Next, is the claim wholly collateral to the statute’s review provisions? And last, is the claim outside the agency’s expertise?

Axon Enter., Inc. v. Fed. Trade Comm’n, 598 U.S. 175, 186 (2023) (cleaned up).

Although it sounds similar in some respects, the channeling doctrine is distinct from Title VII or other administrative exhaustion analysis. Indeed, courts have held that federal employee claims are channeled even if they raise constitutional or other questions that cannot be answered by the agency.

During the first Trump administration, unions challenged three executive orders involving federal bargaining and official time, and initially won at the district court in an excellent decision from now-Justice Ketanji Brown Jackson. See also, e.g., *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010) (finding jurisdiction over claim under Sarbanes-Oxley Act alleging violation of separation of powers and Appointments Clause where the Court found that there was no meaningful path for review and that the SEC didn’t have competence and expertise to hear the constitutional claims); *AFGE Loc. 446 v. Nicholson*, 475 F.3d 341, 347-48 (D.C. Cir. 2007) (jurisdiction to challenge the VA Secretary’s decision that carved certain issues out of the bargaining process, even when there was already a FLRA decision, because it concluded that the DC Circuit would have been unable to review the VA Secretary’s decision on petition for review of the FLRA decision dismissing the ULP for lack of jurisdiction); *Kreschollek v. S. Stevedoring Co.*, 78 F.3d 868, 875 (3d Cir. 1996) (jurisdiction to hear a due process challenge to the Longshore Act, even while the disabled claimant’s claim was pending with the ALJ, because

plaintiff is “at risk of irreparable harm due to the lack of a pretermination hearing” and the administrative review scheme was “inadequa[te] . . . to address the harm at issue.”).

But on appeal, the DC Circuit held that pursuant to *Thunder Basin*, there was no jurisdiction to address the challenges to the EOs, and that they needed to be brought piecemeal to the FLRA. *AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

This decision has unfortunately proved influential – in February, a federal judge in Massachusetts denied unions’ motion for a TRO challenging the Fork deferred resignation program on standing and channeling grounds. The channeling analysis there, in effect, just said that *AFGE* was instructive and governed the case, and that unions can’t bring claims against federal employers outside of the statutory process. Other courts have followed suit.

While we think this was an overreading of *AFGE* and did not address the various arguments raised by the unions showing that their case was different, it does show the tough channeling path unions face in federal court.

3. Status of existing federal court litigation as of 3/4/2025

Early successes:

- ***AFGE v. Ezell* (N.D. Cal.)* – Federal unions and nonprofits challenge mass probationary firings**
 - Court held that *unions could not bring claims due to channeling, but held that nonprofit plaintiffs had standing to sue and weren’t channeled. TRO granted on 2/27 ordering that OPM rescind efforts to direct termination of employees at 6 agencies and communicate this to the agencies.
 - Evidentiary hearing scheduled for 3/13.
- ***AFT v. Bessent* (D. Md.) – Unions bringing Privacy Act claims against Treasury, Education, and OPM**
 - TRO granted on 2/24 ordering that Education Dept and OPM are enjoined from disclosing personally identifiable information of members to DOGE
- ***Harris v. Bessent* (D.D.C.) – MSPB Chair Cathy A. Harris challenges her removal as *ultra vires* and violation of APA.**
 - Summary judgment granted 3/4 ordering that she continues to serve as a member of the MSPB.

Awaiting decisions:

- ***NTEU v. Vought (CFPB)* (D.D.C.) – union and nonprofits bringing *ultra vires*, appointments clause, APA challenges to the dismantlement of the CFPB**
 - Until TRO/PI motion is resolved, consent order requires the CFPB to preserve agency data and “not terminate any CFPB employee, except for cause related to that specific employee’s performance or conduct; nor shall Defendants issue any notice of reduction-in-force to any CFPB employee,” and not transfer money out of the CFPB reserve funds.

- PI hearing held on March 3, and evidentiary hearing being held March 10.
- **Various Schedule F complaints (D.D.C. and D. Md.) – challenges to the president’s executive order reinstating his Schedule F scheme to reclassify federal workers in policy-related jobs to strip them of civil service protections**
 - No temporary relief sought; government responses due in early April.

Early losses:

- ***NTEU v. Trump*** (D.D.C.) – challenge to mass firing of probationary employees and Fork email
 - TRO/preliminary injunction denied on channeling grounds.
- ***American Foreign Service Ass’n v. Trump*** (D.D.C.) – challenge to the dismantlement of USAID
 - While unions initially won a TRO that barred placing USAID employees on admin leave or evacuating them from their host countries, a preliminary injunction was later denied on irreparable harm and channeling grounds.
- ***AFGE v. Ezell (Fork email) (D. Mass.)*** – APA and Antideficiency Act challenge to Fork deferred resignation program
 - Deadline extended for a few days pending TRO briefing, but ultimately the TRO was dissolved on standing and channeling grounds
- ***AFL-CIO v. DOL (DOGE access to internal DOL systems) (D.D.C.)*** – *ultra vires*, APA, Privacy Act challenges to DOGE access to DOL data
 - Twice denied TRO, first on standing and then on merits, although second denial stated that more briefing was needed on the Economy Act issue to determine if DOGE is acting lawfully.

* * *

All of this to say, you and your efforts will be needed.

B. STATUTORY OVERVIEW AND INTRODUCTION TO THE AGENCIES

1. The Civil Service Reform Act

a. Structure and Framework

In 1978, the Civil Service Reform Act (“CSRA”) reformed the civil service of the United States federal government in response to distrust of the government following the Watergate scandal and the Vietnam War. The CSRA created three agencies: the Office of Personnel Management (OPM), the government’s “HR” department; the Merit Systems Protection Board

(MSPB), where individuals facing adverse employment actions may seek redress from prohibited personnel practices, and the Federal Labor Relations Authority (FLRA), which governs labor-management relations in the federal sector.

The CSRA is comprehensive and addresses nearly all aspects of employment with the federal government. Prior to 1978, the right of a federal employee to join a union and to bargain collectively with a department or agency in the Executive Branch was set forth in executive orders issued by President John F. Kennedy (Exec. Ord. No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962)) and President Richard M. Nixon (Exec. Order No. 11,491, 34 Fed. Reg. 17,605 (Oct. 29, 1969)). These executive orders established a limited right for federal employees to join labor organizations and bargain collectively with their employer. The CSRA also included the Federal Service Labor-Management Relations Statute, (the “Statute”). 5 U.S.C. § 7101 *et seq.* The Statute reaffirmed the rights of federal employees to form unions, and the rights of those unions to bargain collectively over conditions of employment. 5 U.S.C. § 7101(a)(1). In the Statute, Congress specifically found that the existence of labor organizations and collective bargaining on behalf of federal employees is in the public interest. 5 U.S.C. § 7101.

The Statute refines the “representation rights and duties” of both labor organizations and executive agencies. This includes the duty to bargain, defined as follows:

Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title [which address impasses], to assist in any negotiation.

5 U.S.C. § 7114(a)(4).

b. Grievance Procedures:

Section 7121(a) of the Statute provides that any collective bargaining agreement must provide for procedures to settle grievances, including arbitrability questions. 5 U.S.C. § 7121(a)(1). We call this the negotiated grievance procedure. The Statute specifically provides that any negotiated grievance procedure shall be “fair and simple,” as well as provide for “expeditious processing” 5 U.S.C. §§ 7121(b)(1)(A), (B). It also requires a grievance procedure “provide that any grievance not satisfactorily settled . . . shall be subject to binding arbitration.” 5 U.S.C. §§ 7121(C)(i)-(iii).

Thus, the grievance procedure must provide the union with the right to represent any employee in the bargaining unit. The reason is that the labor organization has a duty, whether in handling grievances or negotiating collective bargaining agreements, to represent “the interests of all employees in the unit . . . without discrimination and without regard to labor organization membership.” 5 U.S.C. § 7114(a)(1).

With certain exceptions, these “procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.” *Id.* The coverage of a grievance procedure in the federal sector is much more encompassing than most parallel processes in the private sector, or in other areas of public sector law.

A grievance procedure in the federal sector encompasses all matters that could be covered under the provisions of law, unless the parties agree to a procedure with a narrower scope. Federal sector grievances can, and often do, encompass matters like ULPs, discrimination, and agency violations of its own rules, policies and procedures.

Of note - various statutes offer an employee choices of remedies, usually either a statutory appeal or process (e.g., MSPB, EEOC), or a contractual grievance (assuming a contract covers the employee), depending on whether the employee is affected by a matter involving an unfair labor practice, a statutorily defined adverse or performance-based action, a personnel action based on whistleblowing reprisal, or an action defined as a prohibited personnel practice. Ordinarily the employee makes a choice and is bound by that choice.

If the employee selects the MSPB and then decides to file a grievance, a resulting arbitration award will, on exceptions, be vacated by the FLRA if the FLRA determines that the employee elected a process other than grievance arbitration.

The negotiated grievance procedure is available to individual employees, the union and agency officials. **This is not true of arbitration.** The union or the agency may place a case before an arbitrator, but individual employees may not. *Warner Robins Air Logistics Center*, 105 LRP 45628, 61 FLRA 245 (FLRA 2005); *Department of the Army*, 85 FLRR 1-1090, 17 FLRA 615 (FLRA 1985).

Can an Arbitrator Issue a Stay for a PPP?

Maybe. Depends on the type of PPP alleged (applies to whistleblowing and individual rights of action at OSC). 5 § USC 2302(b)(8) and (b)(9).

5 USC 7121(b)(2)(A) authorizes an arbitrator: (1) to order a stay of the personnel action in a manner similar to the manner described in 5 USC §1221(c); or (2) to direct the agency to take a disciplinary action identified under 1215(a)(3), if such an action is otherwise within the agency's authority to take. An arbitration award of a stay may be appealed to the FLRA.

2. Federal Labor Relations Authority

The Federal Labor Relations Authority (FLRA) is an independent federal agency that administers and enforces federal labor relations law under the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. Chapter 71. The FLRA oversees the rights and obligations of federal agencies, employees, and labor unions in the federal sector.

a. Jurisdiction of the FLRA:

- Unfair Labor Practice (ULP) Complaints:
 - Agency refusal to bargain in good faith.
 - Interference with union rights or employee rights under the statute.
 - Discrimination against employees for union activity.
 - Union coercion of employees.

ULP cases are investigated by the General Counsel's office, and hearings are conducted before Administrative Law Judges (ALJs), with final decisions issued by the Authority.

As there has not been a general counsel at the FLRA for 8 years, ULP charges are currently backlogged and not being prosecuted. However, labor unions can utilize their grievance arbitration process to have an arbitrator hear ULP charges.

- Representation Cases (Union Elections & Bargaining Unit Disputes)

The FLRA supervises and resolves disputes over:

- Union elections in the federal sector.
- Challenges to a union's status as the exclusive representative.
- Unit determinations (who is included in a bargaining unit).
- Negotiability Disputes (Scope of Bargaining)
 - The FLRA resolves disputes over whether a proposal is negotiable under federal labor law.
 - If an agency refuses to bargain, claiming a proposal is non-negotiable, the union can file a negotiability appeal with the FLRA.
 - FLRA decisions are final and can be appealed only to the D.C. Circuit Court of Appeals.
- Arbitration Appeals (Exceptions to Arbitration Awards)
 - FLRA reviews challenges to arbitration awards in federal labor disputes.
 - A party can file an exception to an arbitrator's decision if it believes the decision violates the law, is contrary to FLRA precedent, or involves an issue outside the arbitrator's authority.
 - The FLRA does not review arbitrators' fact-finding—only legal errors.

b. Federal Service Impasses Panel (FSIP) Jurisdiction

- When agencies and unions cannot agree during contract negotiations, the FSIP imposes a resolution.
- FSIP may order mediation, hold hearings, and issue binding decisions.

3. Merit System Protections Board

The MSPB is an independent quasi-judicial agency that reviews federal employment disputes, primarily appeals of adverse personnel actions. Its structure includes:

- Three Board Members – Nominated by the President and confirmed by the Senate.
- Administrative Judges (AJs) – Conduct hearings and issue initial decisions on appeals.
- Regional and Field Offices – Handle appeals and hearings across different locations.
- Headquarters in Washington, D.C. – Oversees policy and final appeals.

MSPB has original jurisdiction over:

- Cases brought by the Office of Special Counsel (OSC).
- Actions taken against ALJs under 5 USC § 7521.
- Requests for informal hearings by persons removed from the Senior Executive Service for performance deficiencies.

MSPB has appellate jurisdiction over:

- Adverse actions such as removals, suspensions over 14 days, reductions in grade or pay, and furloughs.
- Performance-based actions under 5 U.S.C. Chapter 43.
- Whistleblower reprisal cases under 5 U.S.C. § 2302(b)(8) and (b)(9).
- Retirement appeals and veterans' preference claims.

MSPB Information Sheets: <https://www.mspb.gov/appeals/infosheets.htm>

4. Office of Special Counsel (OSC)

The OSC is an independent agency that investigates and prosecutes prohibited personnel practices (PPPs) in the federal workforce.

Structure:

- Investigation Division – Examines complaints from federal employees.
- Prosecution Division – Pursues cases before the MSPB.
- Whistleblower Disclosure Unit – Reviews disclosures of agency wrongdoing.
- Hatch Act Unit – Enforces restrictions on political activity by federal employees.

Jurisdiction:

- OSC investigates and seeks corrective action for commission of the 14 Prohibited Personnel Practices (PPPs) under 5 U.S.C. § 2302
- OSC can petition the MSPB to discipline federal employees who commit PPPs.

For more information, see OSC fact sheets "[How Complaints are Received and Processed](#)," "[How Complaints are Investigated and Prosecuted](#)," and "[How OSC's Mediation Program Works](#)." Other information is also available at <https://osc.gov/Services/Pages/PPP-Resources.aspx>

5. Interplay Between MSPB and OSC.

Whistleblower Cases: Employees must file a complaint with OSC before appealing to MSPB through an Individual Right of Action (IRA) appeal if OSC does not seek corrective action. (NB: At the MSPB, an employee may still be able to bring whistleblower retaliation as a defense to an employment action. If representing an employee with this type of claim, it's worth it to explore both options).

Corrective Action: If OSC finds a PPP, it may try to settle or bring a case before the MSPB for enforcement.

Disciplinary Action: OSC prosecutes federal employees for PPPs, and the MSPB adjudicates these cases.

Appeal Rights: If OSC does not act within 120 days, an employee can file an IRA appeal directly with the MSPB.

6. Class Actions at MSPB and OSC.

MSPB rules (5 C.F.R. § 1201.27) contemplate the utilization of class actions, however, in practice they are rarely seen. The rule provides that Fed. R. Civ. P. 23 shall be used as guidance but is not binding on the MSPB. More commonly, the MSPB will join or consolidate individual claims in the interest of efficiency and consistency.

- Joinder of Claims (Multiple Appellants in One Case). 5 C.F.R. § 1201.36
 - MSPB rules allow multiple employees to file a joint appeal if their claims:
 - Arise from the same agency action or policy (e.g., a RIF, furlough, or systemic adverse action).
 - Involve common questions of law or fact.
 - Joinder of Claims is discretionary with the AJ.
- Consolidation of Cases, 5 C.F.R. § 1201.36(b)
 - The Board may consolidate cases when:
 - Appeals involve similar legal issues.
 - Efficiency and fairness are best served by hearing them together.
Example: If multiple employees were removed under a single agency policy, the cases might be consolidated into one hearing.
 - Impact Cases with Precedential Value

SPB decisions can have a broad impact when they set legal precedent.

- A union or advocacy group may bring multiple related cases to establish a new legal rule.

OSC has traditionally not provided for formal class actions, but it can:

- Investigate systemic violations of PPPs affecting multiple employees.
- Seek corrective action for a group of employees filing whistleblower disclosures.
- Petition the MSPB for disciplinary action against an agency official.

If OSC finds a pattern of retaliation or a Hatch Act violation affecting multiple employees, it may:

- Seek corrective action (e.g., reinstatement, back pay).

- Ask the MSPB to issue an order against the agency.

7. Other Class-Like Options.

Other options to consider:

- EEOC Class Complaints (if discrimination is involved).
- Union Grievances (under collective bargaining agreements).
- FLRA Group ULP Charges (for labor law violations).
- Congressional or Inspector General Complaints (for widespread agency fraud, waste, abuse).

C. CATEGORIES OF FEDERAL EMPLOYEES

The Merit Systems Protection Board (MSPB) is the primary forum for individual federal employees to challenge adverse personnel actions such as removals, suspensions over 14 days, demotions, and pay reductions. However, an employee's right to appeal to the MSPB depends on a number of factors such as their type of federal employment, appointment status, and length of service.

Most federal employees in the General Schedule (GS) pay system fall under Title 5 of the U.S. Code (Title V employees) and have full MSPB appeal rights once they complete their probationary period. However, not all federal workers are classified under Title 5. Some operate under different pay systems (e.g., Title 38 for VA medical professionals, Title 10 for certain DoD employees, and Title 32 for National Guard technicians) or serve in the excepted service, where their appeal rights may be limited or nonexistent.

For employees with restricted MSPB appeal rights, alternative routes for redress may be available, such as:

- The Office of Special Counsel (OSC) – Employees who believe they were subjected to prohibited personnel practices (PPP), including whistleblower retaliation, political coercion, or nepotism, can file a complaint with the OSC. This is an option for many excepted service employees, intelligence employees, and Title 38 medical professionals who do not have direct MSPB appeal rights.
- Agency-Specific Grievance Procedures – Employees under FAA, TSA, intelligence agencies, and certain excepted service positions may have internal grievance procedures instead of MSPB appeal rights.
 - The VA Disciplinary Appeals Board (DAB) – VA medical professionals under Title 38 must appeal adverse actions related to Professional Conduct and Competency to the DAB, not the MSPB, for most of their adverse employment actions.
- Union Arbitration – Federal employees covered by collective bargaining agreements may have arbitration as an appeal option instead of the MSPB.

Understanding which category an employee falls under is crucial to determining their rights, including whether they can appeal directly to the MSPB or need to seek relief through other avenues.

Employees by Category

1. Competitive Service (GS, Title V)

- Most employees on the GS scale in the federal government.

2. Excepted Service Employees (Other Pay Scales)

- Usually a highly specialized type of service (intelligence, national security, professional degrees).
- Hiring authorities include schedules A-F(PC), Title 42, Title 38, etc.
- Excepted service agencies set their own qualification requirements and are not subject to the appointment, pay, and classification rules of Title V.
- “Hybrid” positions exist where the pay is set by a non-Title V pay scale but employees are still granted Competitive Service rights at MSPB, etc.

3. Temporary & Term Employees (GS or Other Pay Scales)

- Temporary appointments are usually one year or less (can extend to 24 months).
- Term employees are appointed to up to four-year terms. Usually project based.

4. Intermittent, On-Call, and Seasonal Employees (GS or Other Pay Scales)

- Seasonal employees are annually employed for less than 12-month tours (wildland firefighters).
- Intermittent/on call means employed without a regular tour of duty.

5. Reemployed Annuitants (GS or Other Pay Scales)

- Retired under either the Federal Employees Retirement System or the Civil Service Retirement System and are reemployed in any position for which they are qualified, on either a temporary or permanent basis.

6. Senior Executive Service (SES) (SES Pay Scale)

- “Bridge the gap” between the GS workforce and political appointees, e.g., NLRB Regional Directors are in the SES.
- Up to 10% may be politically appointed. Vast majority are career, apolitical.
- Some agencies have their own excepted senior executives that are not SES.

7. Executive Service Employees (EXE Pay Scale)

- Political appointees.

8. National Guard Technicians (Dual-Status)

- DoD civilian employees that are also members of the military.
- Employment conditioned on being National Guard or Army/Air Force Reserve.

9. 12. Contractors (Not Federal Employees)

- If a federal agency exerts significant control over employment, employee may claim rights under USERRA.
- If employees have been subject to a personnel action, they can check their classification by looking at Box 34 on the SF-50 (the notification of personnel action).

Additional information regarding the specific MSPB appeal and other rights, broken down by category of employee, can be found in an Appendix at the end of this material.

D. **ACTIONS UNDERTAKEN AGAINST EMPLOYEES AND WHERE TO SEEK RELIEF**

There are various legal processes that may be available to a federal employee seeking to challenge a termination or other workplace action. To simplify, we focus here on the rules generally applicable to career employees in the competitive and excepted service.

Thus, the discussion below does **not** apply to political appointees, members of the senior executive service or foreign service, and temporary employees. Also, special rules apply to some or all employees of certain agencies, such as the intelligence agencies, the FAA, USPS, and VA. Finally, we do not address here the rights that employees may have under a collective bargaining agreement if they are represented by a union.

We have provided a chart that summarizes the main options available to a competitive or excepted service employee who seeks to challenge a termination, reduction in force, transfer, or requirement to return to in-person work. (This chart is available in the Appendix to this material.)

It is important to be aware that filing a claim in one forum will often preclude filing a claim in other forums. See, e.g., 5 § USC 7121(g). Thus, it is important to carefully consider all of an employee's options before filing any claim on their behalf.

We now describe these options in more detail.

1. **Challenging a termination**

a. **Challenging termination without cause at the MSPB**

Generally, federal government employees cannot be terminated without cause after they have completed their probationary or trial period. For most competitive service employees, the probationary period is one year. For most excepted service employee, the trial period is two years.

For employees who have this statutory protection, the Merit Systems Protection Board (MSPB) provides the main mechanism for challenging a termination without cause. The process is laid out at 5 U.S.C. §§ 7511-7515 and 5 C.F.R. §§ 752.401-406. A challenge to termination without cause is referred to in MSPB rules as an "appeal" of the termination. For a guide on how to file an appeal, see <https://www.civilservicestrong.org/resource/us-mspb-how-to-file-an-appeal#:~:text=A%20petition%20for%20review%20must,NW%2C%20Washington%2C%20DC%2020419>.

Generally, an employee must file an appeal within **30 days** of the effective date of termination. 5 C.F.R. § 1201.22(b). Appeals are initially heard by an administrative judge.

Administrative judges typically permit some discovery, including document requests and depositions, prior to hearings. ALJ can order reinstatement, and the agency is bound to comply unless the order is reversed by the MSPB or the Federal Circuit. But the agency is not required to pay backpay or award service credit until the order is affirmed by the Board.

The MSPB Judge's Handbook is a useful resource on MSPB procedure:
<https://www.mspb.gov/appeals/files/ALJHandbook.pdf>

After the administrative judge issues an opinion, the employee or agency may seek review by the MSPB Board; if neither party seeks review, the administrative judge's opinion becomes final. A final administrative judge decision or MSPB Board decision can be appealed to the U.S. Court of Appeals for the Federal Circuit.

b. Challenging a termination under Title VII, ADEA, or the Rehabilitation Act

Federal government employees are covered by the federal civil rights laws, including Title VII, the ADEA, and the Rehabilitation Act. Thus, an employee can challenge a termination under these laws. However, there is a unique process for raising these claims, set forth at 5 C.F.R. Part 1614, entitled "Federal Sector Equal Employment Opportunity" (we use "EEO" as shorthand below).

One benefit of this process as compared to the MSPB appeal process is that an employee can more easily bring their claim to court. Also, a probationary or trial employee can bring claims under this process even if they do not have the right to appeal to the MSPB.

The first step of the federal government EEO process is called "informal counseling." Employees initiate this step by contacting their agency's EEO office. Employees have only **45 days** to initiate a claim with the agency EEO office. Agencies often try to facilitate an informal mediation at this stage.

If a claim is not resolved in the initial stage, the agency EEO office will issue a notice with instructions for submitting a formal complaint. The complaint must typically be submitted within **15 days**.

At this point, the agency performs an investigation (sometimes outsourced to an investigator outside the agency). An investigation is supposed to end within 180 days, though that period can be extended with the employee's consent. Investigators may interview the complainant and other involved employees, typically by asking them to submit sworn affidavits that respond to specific questions.

At the end of the investigation process, the investigator provides the agency and employee with a report. Typically, the report is a summary of the information collected by the investigator, without stating a conclusion as to whether discrimination occurred.

At this point, the employee must choose between two options. First, the employee can request that the agency issue a decision regarding whether the employee was treated unlawfully. In most cases, the agency will rule against the employee. The employee can then appeal to the EEOC's Office of Federal Operations or file a lawsuit in the local federal court.

Alternatively, rather than requesting a decision from the agency, the employee can request a hearing before an administrative judge at the EEOC. If the administrative judge rules against the

employee, the employee can appeal to the EEOC's Office of Federal Operations or file a lawsuit in federal court.

c. Mixed cases

If an employee seeks to pursue a claim of termination without cause while also pursuing a claim under a civil rights statute, a complicated process applies, which includes potential litigation before both the MSPB and EEOC. The procedure is set forth in 5 U.S.C. § 7702. Proceed with caution.

2. Prohibited personnel practices

Separate from the civil rights statutes and protection from termination without cause, federal employees are protected from "prohibited personnel practices." The "prohibited personnel practices" statute prohibits discrimination on the basis of:

- Race, color, religion, sex, or national origin;
- Age;
- Sex;
- Handicapping condition; or
- Marital status or political affiliation.

In addition, the statute prohibits retaliation for making disclosures or complaints about the following:

- Violations of any law rule, or regulation
- Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety

If an employee believes that their termination constitutes a prohibited personnel practice, they may be able to bring that claim directly to the MSPB. That option is available to permanent employees who ordinarily have the right to appeal termination to the MSPB, as well as probationary employees who allege discrimination on the basis of political affiliation or marital status.

However, in other categories—e.g., a claim of whistleblower retaliation for a probationary employee—the employee can file a complaint with the Office of Special Counsel. The Special Counsel is required to investigate the complaint and has the authority to seek from the MSPB a stay of personnel action while the investigation is pending. 5 USC § 1214. However, there are generally no hard deadlines for the Special Counsel to complete the investigation.

For a limited subset of complaints, the employee can then bring the complaint to the MSPB if the Special Counsel either ends the investigation or fails to complete the investigation within sixty days. This option applies to complaints related to:

- Retaliation for disclosing information or making a complaint about violations of law or gross mismanagement/waste of funds; or
- Retaliation for participating in that complaint process, including as a witness; or

- Retaliation for refusing to obey an order that would require the individual to violate a law, rule, or regulation.

Litigation is currently ongoing regarding President Trump's removal of Special Counsel Hampton Dillinger, who was appointed by President Biden and was slated to serve a five-year term through 2029.

3. Reduction In Force

If an employee is terminated as part of a reduction in force, different rules and procedures apply, set forth at 5 C.F.R. Part 351. Generally, agencies must provide 60 days' notice of a RIF, but this can be shortened to 30 days if based on unforeseeable circumstances. 5 C.F.R. § 351.801. Agencies are required to rank employees in a specific manner and, in certain cases, allow them to transfer into other positions. See, e.g., *id.* § 351.501.

Probationary employees are covered by the RIF regulations and have the right to appeal an improperly-conducted RIF. See 5 C.F.R. § 351.202 (regs cover "each civil employee in . . . [t]he executive branch," with specified exceptions such as SES employees, but no exception for probationary employees); *Lowmack v. Dept. of the Navy*, MSPB Dkt. No. DC-0752-97-0572-I-1 (Jan 6, 1999) ("[F]or purposes of the reduction-in-force (RIF) regulations, probationary employees have appeal rights to the Board. . . . Thus, whether the appellant was a probationary employee would be irrelevant for jurisdictional purposes under the RIF regulations.").

4. Challenging Other Adverse Actions

For employees with the right to appeal their termination to the MSPB, those same rights and procedures generally apply to suspension without pay of more than 14 days, reduction in grade, and certain other actions. See 5 U.S.C. § 7512.

For actions not covered by these procedures, the EEO or OSC processes or OSC complaint likely provide the best remedies (not accounting for a potential grievance under a CBA). For example, if an employee is involuntarily transferred, an MSPB appeal likely is not an option, but the employee could claim that the transfer violated a civil rights statute or constituted a prohibited personnel practice.

E. PRACTICE BEFORE THE AGENCIES

1. Choice of Forum: Grievance v. MSPB v. EEOC

Many federal employees are represented by a union such as AFGE, NTEU, NAGE, NFFE, and others. As such, they would be covered by a collective bargaining agreement (CBA). Most CBAs provide for covered employees to file grievances through the negotiated grievance procedure, but there are election of remedies issues to consider. If you are contacted by a federal employee, among the first questions you should ask is whether they are represented by a union. If they are, you should suggest that the employee contact the union president or business agent. For adverse actions involving discipline for 14 days or less, failure to promote, or other lesser adverse actions, the grievance procedure may be the exclusive remedy available.

As it relates to recent events, we'll focus on major adverse actions. Adverse actions generally include removals (including involuntary resignation or retirement), reduction in grade or pay, suspension for more than 14 days, or furlough for 30 days or less for cause that will

promote the efficiency of the service. 5 U.S.C. §§ 7511-7514. An adverse action promotes the efficiency of the service when the grounds for the action relate to either an employee's ability to accomplish his duties satisfactorily or to some other legitimate government interest. *Morgan v. U.S.P.S.*, 48 M.S.P.R. 607 (1991). Ordinarily, agencies bear the burden of proof to justify the adverse action, and employees may allege any number of defenses but bear the burden of proof on those affirmative defenses.

Employees can generally file a grievance under their negotiated grievance procedure or file an MSPB appeal, but not both. 5 U.S.C. § 7121(e)(1). The employee makes their election with whatever action is filed first, either the grievance or MSPB appeal. *See also* 5 CFR 1201.3.

Employees can also file EEO complaints if they believe they were discriminated against on the basis of one of the 9 protected classes that the EEOC protects. However, an employee may not file both a grievance and an EEO complaint. 5 U.S.C. § 7121(d). Here, the filing of a formal complaint of discrimination (versus an informal complaint or EEO counseling) or the filing of a grievance constitutes an election to proceed in that forum, whichever happens first. Remember that employees bear the burden of proof on claims of discrimination.

Similarly, an employee may choose to challenge an adverse action through an MSPB appeal or an EEO complaint alleging discrimination, but not both. 29 C.F.R. § 1614.302(b). Again, the filing of a formal complaint of discrimination (not consulting the informal process) or filing of MSPB appeal constitutes election of that forum, depending on which is filed first.

2. Factors to Consider When Choosing a Forum

If advising or representing employees before they've chosen a forum, there are a number of factors to consider prior to the election of a forum. These considerations include the availability of a forum based on the employee's status and hiring authority, timeframes, available remedies, costs, and discovery. This is not an exhaustive list, and there may be other unique circumstances that may persuade a practitioner or employee to seek one forum or another.

a. Which Forums are Available to the Employee?

With limited exceptions, probationary employees are not entitled to file MSPB appeals or grievances through the negotiated grievance procedure. Therefore, most probationary employees will have to avail themselves of OSC or EEO complaints. For more information on probationary rights, see AFGE's [FAQs on the Rights of Probationary Employees](#).

If an employee is covered by a CBA, the employee can choose between the negotiated grievance procedure, MSPB appeal, or EEO complaint, but only one of those three forums, typically. Bear in mind that in addition to contractual violations, grievances can raise EEO violations, Whistleblower Protection Act claims, anti-union animus claims, and claims of violations of other statutes.

Employees may also consider filing an OSC complaint. However, if an employee has already filed an MSPB appeal alleging a prohibited personnel action (PPP) or grievance under the CBA, OSC may lack jurisdiction over the complaint. 5 U.S.C. § 7121(g). Complainants who allege retaliation for making protected whistleblower disclosures under 5 U.S.C. 2302(b)(8) or retaliation for engaging in certain protected activities under 5 U.S.C. § 2302(b)(9) may seek corrective action in direct appeals to MSPB known as "individual right of action" or IRA appeals.

However, by law, employees must first seek corrective action from OSC before filing IRA appeals.

b. Timelines

The deadlines for filing appeals or complaints will vary depending on the forum. CBAs will typically stipulate the deadline by which employees must file grievances, and these can vary from CBA to CBA. A 30-day grievance filing deadline is common, however. Thereafter, grievances can proceed to arbitration in relatively short order, as the grievance timelines and deadlines to invoke arbitration are typically weeks rather than months. An employee seeking a quick resolution may want to pursue the grievance/arbitration forum for this reason alone.

MSPB appeals must be filed within 30-days of the adverse action. 5 C.F.R. § 1201.22(b)(1). The Board adjudicates cases within 120 days, which also offers employees a faster turnaround and potential for relief.

EEO complaints must be initiated within 45 days of the discriminatory conduct and are subject to other procedural timelines and requirements thereafter. 29 C.F.R. § 1614.105(a)(1). There are no regulations imposing any time limits on the adjudication of an EEOC complaint, so EEOC cases tend to take several months or years to conclude.

In general, employees have 3 years within which to file an OSC complaint alleging a PPP. 5 U.S.C. § 1214(a)(6)(A)(iii). If an employee is filing an MSPB appeal after first filing a complaint with OSC, the appeal must be filed within 65 days of the date of the OSC notice advising the employee that the Special Counsel will not seek corrective action or, within 60 days after the date of the OSC notice, whichever is later, or at any time after the expiration of 120 days, if the Special Counsel has not notified the appellant that it will seek corrective action on the employee's behalf. 5 C.F.R. § 1209.5. The MSPB will then adjudicate the appeal within 120 days.

c. Available Remedies

- **Back Pay Act (BPA) (*available in all forums with jurisdiction over adverse actions*)**

The BPA entitles the employees to back pay with interest and benefits due to the unlawful personnel action. 5 U.S.C. § 5596, et seq. Under the BPA, an award of back pay is authorized if: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; (2) the personnel action directly resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials; and (3) but for such action, the grievant otherwise would not have suffered the withdrawal or reduction. *See, for example, AFGE, Local 31 and U.S. Dep't of Veterans Affairs, Medical Center, Cleveland, Ohio*, 41 F.L.R.A. 514, 517 (1991). A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the BPA. *DOJ, Immigration and Naturalization Service and AFGE, National Immigration and Naturalization Service Council*, 42 F.L.R.A. 222, 232 (1991). Because the second and third requirements of the Back Pay Act require evidence of a causal relationship between the violation and a loss or reduction in pay, allowances, or differentials, backpay is authorized only where the violation resulted in such a loss or reduction. *See U.S. Dep't of the Treasury, Customs Service, South Central Region, New Orleans, Louisiana and NTEU, Chapter 168*, 43 F.L.R.A. 337, 340-41 (1991).

A prevailing employee may recover back pay for the period running from the inception of the unjustified or unwarranted personnel action and the ending upon correction of the action. *Id.*; see also *Dep't. of Defense Dependents Schools and Federal Education Association*, 54 F.L.R.A. 773 (1998). The FLRA has held that an arbitrator is an “appropriate authority” under the BPA. *Alabama Ass'n. of Civilian Technicians and Dep't of Defense, Alabama National Guard*, 52 F.L.R.A. 1386 (1997); see also 5 C.F.R. § 550.803.

Back pay may begin no earlier than six years prior to the filing of a grievance. There is no statutory limitation on the ending date. *Federal Aviation Association, National Airway Systems Engineering Division, Oklahoma City*, 105 LRP 2922, 60 FLRA 565 (2005).

NOTE: When the EEOC finds that an employee was discriminated against, the agency shall provide the individual with non-discriminatory placement into the position s/he would have occupied absent the discrimination, with back pay computed in the manner consistent with the BPA. See 29 C.F.R. § 1614.501(c)(1). However, unlike the BPA's computation of relief, under Title VII, GINA, and the Rehabilitation Act, back pay is limited to two years prior to the date the discrimination complaint was filed.

- **Leave restoration (available in all forums with jurisdiction over adverse actions)**

The restoration of leave lost because of an unjustified or unwarranted personnel action is a proper remedy under the BPA. *Social Security Administration*, 109 LRP 52341, 63 FLRA 661 (2009).

- **Compensatory Damages (available in all forums but only where statutory authority provides for compensatory damages; e.g., Title VII/discrimination claims, FLSA claims, etc.)**

The FLRA upheld an award of \$50,000 in compensatory damages in a case where the agency violated the CBA and Title VII of the Civil Rights Act. *Department of Justice, Federal Bureau of Prisons, FCC Yazoo City, Miss.*, 123 LRP 23556, 73 FLRA 620 (2023).

- **Liquidated Damages (available in all forums but only where statutory authority provides for liquidated damages; e.g., ADEA, EPA, FLSA, FMLA, USERRA)**

The FLRA majority upheld an arbitrator's award granting the grievants compensatory damages of \$95,650.66 (pecuniary), and the same amount in liquidated damages, for the agency's “continuous and ongoing willful” violations of the FLSA. *Federal Bureau of Prisons, FCI Guaynabo, P.R.*, 122 LRP 3673, 72 FLRA 636 (2022).

- **Attorney's Fees (available in all forums but only where the statutory authority provides for a waiver of sovereign immunity)**

In order for an arbitrator to award back pay or other monetary compensation, there must be a waiver of sovereign immunity by the United States that is unequivocally expressed in a statute. A waiver will not be implied. *Department of the Navy, Commander Navy Region Southwest, San Diego*, 118 LRP 49685, 70 FLRA 978 (2018). Under the BPA, before an arbitrator may grant or deny attorney's fees, a grievant/union must present a request for fees to the arbitrator, and the arbitrator must grant the agency the opportunity to respond to the request. *Department of Veterans Affairs Medical Center, Beckley, W.Va.*, 119 LRP 21473, 71 FLRA 165 (2019).

The MSPB is authorized by various statutes to order payment of attorney fees and, where applicable, costs, expert witness fees, and litigation expenses. These statutory authorities can be found in the regulations at 5 CFR § 1201.202. A request for attorney fees must be made by motion, must state why the appellant believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. The regulations governing a petition for fees to the MSPB can be found at 5 CFR § 1201.203.

Attorney's fees can be available in EEO complaints, but under varying statutory authority. More specifically, complainants who prevail on claims alleging discrimination in violation of Title VII and the Rehabilitation Act are presumptively entitled to an award of attorney's fees and costs, unless special circumstances render such an award unjust. 29 C.F.R. § 1614.501(e)(1). Contrast this with complainants prevailing on claims under the ADEA and EPA who are not entitled to attorney's fees at the administrative level. Furthermore, only where a Title VII, GINA, or Rehabilitation Act complainant rejects an offer of resolution made in accordance with 29 C.F.R. § 1614.109(c) and does not obtain more relief than the agency had offered, may the EEOC limit or deny an award of fees.

- **Interim Relief (*usually only available in MSPB and EEOC actions*)**

If the appellant in an appeal governed by 5 U.S.C. § 7701 is the prevailing party, the MSPB Administrative Judge's initial decision may provide interim relief, if appropriate, effective until the date of the final order of the Board on any PFR. See 5 U.S.C. § 7701(b)(2); 5 C.F.R. § 1201.111(b)(4) and (c).

If an employee prevails in their discrimination complaint before the EEOC and the Administrative Judge orders interim relief, the agency is required to provide such interim relief pending any agency appeals to the OFO. 29 CFR § 1614.505.

NOTE: The specific terms of the CBA between the agency and the employee union may also detail the conditions for granting interim relief. If this is the case, interim relief may also be ordered/awarded by an arbitrator who hears a grievance filed under such a CBA.

d. Cost

In deciding which forum to pursue, employees and/or unions may consider the fact that most statutory forums involve no cost to the employee or union. This includes the filing of an OSC complaint, MSPB appeal, or EEO complaint. And while the filing of a grievance under a CBA may be free, the arbitration, which includes the arbitrator's expenses, court reporting fees, transcripts, and travel expenses are ordinarily borne by the parties, the share of which is often expressly stipulated in the CBA.

Therefore, even if an employee is covered by a CBA and represented by a union, it may not be financially possible for the union to take the case to arbitration. Unions, not employees, also decide which cases go to arbitration. Therefore, sometimes it may not be possible to take a grievance to arbitration, and one of the other forums must be selected instead.

e. Discovery

Generally, discovery is only available in MSPB (5 CFR § 1201.73) and EEOC cases (Management Directive 110, Chapter 7). Under certain circumstances, if an employee is

represented by the Union in an arbitration, the Union may propound requests for information (RFI) under 5 U.S.C. § 7114(b)(4). Agencies are not permitted to propound RFIs on Unions or employees. Employees may want to consider whether or not they wish to be exposed to formal discovery by the Agency or whether an RFI will suffice.

Appendix A**

Employee Categories & Rights

by Suzanne Summerlin

*****These charts provide a general overview of federal sector law and are intended as starting points for further research. They are not exhaustive and should not be relied upon as definitive legal guidance. Users should exercise their own professional judgment and consult relevant statutes, regulations, case law, or outside legal counsel as needed.***

Employees by Category & MSPB Appeal Rights:

1. Competitive Service Employees (GS, Title VI)

- Enjoy full civil service protections.

2. Excepted Service Employees (GS or Other Pay Scales)

- Limitation: No MSPB rights unless they have two years of continuous service in the same or similar position under 5 U.S.C. 7511(a)(1)(C).
- Exceptions: Preference-eligible veterans get MSPB rights after one year.

2. Temporary & Term Employees (GS or Other Pay Scales)

- Limitation: Cannot appeal unless they have one year of continuous service under an appointment not limited to one year or less.
- Exceptions: Veterans with preference eligibility may have additional rights.

3. Intermittent, On-Call, and Seasonal Employees (GS or Other Pay Scales)

- Limitation: No MSPB rights unless they serve at least 260 days in a pay status within a year.
- Exceptions: Veterans may qualify after one year of service.

4. Reemployed Annuitants (GS or Other Pay Scales)

- Limitation: Serve at-will with no MSPB appeal rights.
- Exceptions: Those rehired after receiving federal workers compensation benefits may retain limited rights.

5. FAA & TSA Employees (Other Pay Scales)

- FAA Limitation: Covered if they meet the definition of “employee” under 5 U.S.C. 7511.
- TSA Limitation: Historically excluded but gained limited MSPB rights for removals since 2021.

6. Intelligence Employees (GS or Other Pay Scales)

- Limitation: No MSPB coverage under 5 U.S.C. 7511(b)(8) due to national security exemptions.
- Exceptions: Whistleblower retaliation claims may be reviewed by specialized boards.

7. U.S. Postal Service Employees (Other Pay Scales)

- Limitation: No MSPB rights unless they are preference-eligible veterans, supervisors, or in confidential roles.
- Exceptions: Certain statutory protections under 39 U.S.C. 1005(a) apply to managers and supervisors.

8. Senior Executive Service (SES) (SES Pay Scale)

- Limitation: Cannot appeal performance-based removals.
- Exceptions: Can appeal removals for misconduct under 5 U.S.C. 7543.

9. Executive Service Employees (SES or Other Pay Scales)

- Limitation: Serve at-will, no MSPB rights.
- Exceptions: None—unless covered by a specific statutory provision.

10. National Guard Technicians (Dual-Status) (GS or Other Pay Scales)

- Limitation: Cannot appeal if the removal is due to military fitness.
- Exceptions: Can appeal non-military personnel actions.

11. VA Medical Professionals (Title 38 Pay Scale)

- Limitation: Claims for discipline based on professional conduct or competence appeal to the VA Disciplinary Appeals Board (DAB).
- Exceptions: Claims brought based on performance evaluations may be brought to OSC or the MSPB. Limited whistleblower protections may apply under 5 U.S.C. 2302. The MSPB has also accepted USERRA claims by Title 38 veterans. *Davison v. Department of Veterans Affairs*, [111 LRP 12518](#) , [115 MSPR 640](#) (MSPB 2011)
 - “Hybrid” Employees: “Hybrid” employees, appointed under [38 USC Section 7401](#) (3), are subject to Chapter 74, Title 38 provisions, except that “all matters relating to adverse actions, disciplinary actions, and grievance procedures” are governed by provisions of Title 5. [38 USC 7403](#) (f)(3). *Office of Personnel Management v. Von Zemenszky, et al.*, [102 LRP 30681](#) , 284 F.3d 1310 (Fed. Cir. 2002). This also applies to RIFs. *Graves v. Department of Veterans Affairs*, [110 LRP 37804](#) , [114 MSPR 245](#) (MSPB 2010), *citing* [38 USC 7403](#) (f)(3).
 - The exclusion from MSPB jurisdiction of major adverse actions involving VA health care professionals creates analytical difficulties as to constructive adverse actions, most frequently with allegedly coerced resignations or retirements. *Falso v. Office of Personnel Management*, 97 FMSR 7019 , 116 F.3d 459 (Fed. Cir. 1997) was equivocal as to board jurisdiction, but the subsequent decision in *Khan v. United States*, 114 LRP 39206 , 201 F.3d 1375 (Fed. Cir. 2000) unequivocally relegated constructive adverse actions involving VA Title 38 health care professionals to forums other than the MSPB, e.g., to the VA grievance system.

12. Contractors (Not Federal Employees)

- Limitation: No MSPB rights as they are not federal employees.
- Exceptions: If a federal agency exerts significant control over employment, they may claim rights under USERRA.

Federal Employee MSPB Appeal Rights Summary

<u>Employee Type</u>	<u>Pay Scale</u>	<u>Full MSPB Appeal Rights?</u>	<u>Limitations on MSPB Coverage</u>
<u>Competitive Service</u>	<u>GS</u>	<input checked="" type="checkbox"/> Yes	<u>None once probation is complete</u>
<u>Excepted Service</u>	<u>GS/Other</u>	<u>⚠ Limited</u>	<u>Must have 2 years of continuous service (1 year for veterans)</u>
<u>Temporary & Term</u>	<u>GS/Other</u>	<u>⚠ Limited</u>	<u>Must have 1 year of continuous service under an appointment not limited to one year or less</u>
<u>Intermittent, On-Call, Seasonal</u>	<u>GS/Other</u>	<u>⚠ Limited</u>	<u>Must have 260+ days in pay status within a year</u>
<u>Reemployed Annuitants</u>	<u>GS/Other</u>	<input checked="" type="checkbox"/> No	<u>Serve at-will, no appeal rights unless reemployed after OWCP benefits</u>
<u>FAA Employees</u>	<u>Other</u>	<u>⚠ Limited</u>	<u>Must meet 5 U.S.C. 7511 definition of employee</u>
<u>TSA Employees</u>	<u>Other</u>	<u>⚠ Limited</u>	<u>Gained limited MSPB rights for removals in 2021</u>
<u>Intelligence Employees</u>	<u>GS/Other</u>	<input checked="" type="checkbox"/> Very Limited	<u>Excluded under national security exemptions (5 U.S.C. 7511(b)(8))</u>
<u>U.S. Postal Service</u>	<u>Other</u>	<u>⚠ Limited</u>	<u>Postal Service employees who may appeal adverse actions are preference-eligible employees with one year continuous service and certain Postal Service supervisors, managers, and employees engaged in personnel work.</u>

<u>Senior Executive Service (SES)</u>	<u>SES</u>	<u>⚠ Limited</u>	<u>Cannot appeal performance-based removals, only misconduct-based removals</u>
<u>Executive Service</u>	<u>SES/Other</u>	<u>✗ No</u>	<u>Serve at-will, no MSPB rights</u>
<u>National Guard Technicians</u>	<u>GS/Other</u>	<u>⚠ Limited</u>	<u>No appeal if termination is due to military fitness</u>
<u>VA Medical Professionals (Title 38)</u>	<u>Title 38</u>	<u>✗ Very Limited</u>	<u>Limited MSPB rights; most appeals go through VA Disciplinary Appeals Board (DAB). “Hybrid” employees retain MSPB rights.</u>
<u>Contractors</u>	<u>Not Federal</u>	<u>✗ No</u>	<u>Not federal employees, no MSPB rights unless they prove agency control (USERRA claims)</u>

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Employees by Category and Appeal of Politically Motivated Adverse Actions

Federal employees who believe they have been subjected to politically motivated adverse actions (such as removal, suspension, demotion, or reassignment due to political affiliation or beliefs) may have different appeal rights depending on their employment status.

For most federal employees, politically motivated adverse actions are considered a “prohibited personnel practice” under 5 U.S.C. 2302(b)(1), and can file an appeal at the OSC or the MSPB. Those with limited rights (including many probationary employees) may still be able to file an OSC complaint but not appeal to the MSPB.

Here’s how each category can seek redress:

1. Competitive Service Employees (Title 5, GS)

- Appeal to: MSPB or Office of Special Counsel (OSC)
- Why? Competitive service employees are covered under 5 U.S.C. 2302(b)(1), which prohibits politically motivated personnel actions.
- Process: File a prohibited personnel practice (PPP) complaint with OSC first. If OSC does not take corrective action, the employee may appeal to the MSPB.

2. Excepted Service Employees (GS or Other Pay Scales)

- Appeal to: OSC
- Why? Excepted service employees are partially covered under 5 U.S.C. 2302, but cannot always appeal to the MSPB.
- Process: File a complaint with OSC for prohibited personnel practices, including political coercion or discrimination.

3. Senior Executive Service (SES) Employees

- Career SES: Can appeal to OSC for political coercion but not to MSPB for removals due to political reasons.
- Non-Career SES: Cannot appeal to MSPB or OSC. Serve at-will.
- Process: Career SES members alleging politically motivated adverse actions can file a PPP complaint with OSC.

4. Temporary, Term, and Intermittent Employees

- Appeal to: OSC (in limited cases)
- Why? They have some protections under 5 U.S.C. 2302 if they have completed the required service time.
- Process: File a PPP complaint with OSC.

5. FAA & TSA Employees

- Appeal to: OSC

- Why? FAA and TSA employees are not covered under MSPB appeal rights for political coercion, but OSC can investigate complaints under 5 U.S.C. 2302.
- Process: File a PPP complaint with OSC.

6. U.S. Postal Service Employees

- Appeal to: OSC (in limited cases)
- Why? Most USPS employees do not have direct MSPB rights, but OSC can investigate political coercion complaints under 5 U.S.C. 2302.
- Process: File a PPP complaint with OSC.

7. Intelligence Employees (CIA, NSA, DoD Intelligence Components)

- Appeal to: OSC (if eligible) or internal agency review
- Why? Most intelligence employees are exempt from MSPB jurisdiction, but they may be covered by OSC in limited cases.
- Process: File a PPP complaint with OSC or use agency-specific grievance procedures.

8. National Guard Technicians (Dual-Status)

- Appeal to: OSC (limited cases)
- Why? Dual-status technicians fall under Title 32, meaning MSPB appeals are restricted, but OSC can investigate political coercion claims under 5 U.S.C. 2302.
- Process: File a PPP complaint with OSC.

9. VA Medical Professionals (Title 38)

- Appeal to: OSC
- Why? Title 38 employees do not have MSPB rights, but OSC can investigate prohibited personnel practices, including political coercion.
- Process: File a PPP complaint with OSC.

10. DoDEA Teachers (Overseas & Stateside)

- Appeal to: OSC (for politically motivated actions)
- Why? DoDEA teachers may not have MSPB appeal rights, but they are protected under 5 U.S.C. 2302.
- Process: File a PPP complaint with OSC.

11. Executive Service Employees (Political Appointees, Non-Career SES)










- No Right to Appeal
- Why? Serve at the discretion of the President or agency head, meaning they can be removed for political reasons.

- Process: No formal appeal route exists.

12. Contractors

- No Right to Appeal
- Why? Not federal employees, so they do not fall under OSC or MSPB jurisdiction.
- Process: No federal appeal rights exist unless covered by USERRA for military discrimination claims.

Summary Table: Appeal Routes for Politically Motivated Actions

Employee Type	Can Appeal?	Appeal To:
Competitive Service (GS, Title 5)	<input checked="" type="checkbox"/> Yes	MSPB or OSC
Excepted Service	 Limited	OSC
Senior Executive Service (SES) (Career SES only)	 Limited	OSC
Temporary, Term, Intermittent	 Limited	OSC
FAA & TSA Employees	 Limited	OSC
U.S. Postal Service Employees	 Limited	OSC
Intelligence Employees	 Limited	OSC (in some cases) or agency review
National Guard Technicians	 Limited	OSC (Title 32 restrictions apply)
VA Medical Professionals (Title 38)	 Limited	OSC
DoDEA Teachers (Overseas & Stateside)	 Limited	OSC
Executive Service (Political Appointees, Non-Career SES)	<input checked="" type="checkbox"/> No	No appeal rights

Contractors	<input checked="" type="checkbox"/> No	No appeal rights
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Appendix B

Summary of Potential Legal Remedies for Federal Employees

By Danny Rosenthal

Summary of potential legal remedies for federal employees (career competitive and excepted service)

	Termination				RIF	Transfer	Return to work
	Appeal for lack of cause	Claim of discrimination under Title VII/ADEA/Rehab Act	Claim of partisan political basis	Claim of other Prohibited Personnel Practice (e.g., whistleblower claims)			
Competitive service, probationary (generally one year)	No	Yes: Internal agency complaint, then EEOC/court. For mixed cases, see written materials.	Yes: MSPB (5 CFR 315.806(b))	Yes: OSC, then possibly MSPB (5 USC 1214)	Yes, as to claims that agency did not follow proper RIF procedures: MSPB (5 C.F.R. § 351.901)	OSC, if based on Prohibited Personnel Practice; EEOC if violation of civil rights law	OSC, if based on Prohibited Personnel Practice; EEOC if violation of civil rights law (i.e., Rehab Act)
Competitive service permanent	Yes: MSPB (5 USC 7511 et seq)		MSPB (see left)	Yes: OSC or MSPB			
Excepted service, Schedules A, B, D, E, trial period (generally two years)	No		Yes: OSC, then possibly MSPB (5 USC 1214)	Yes: OSC, then possibly MSPB (5 USC 1214)			
Excepted service, Schedules A, B, D, E, permanent	Yes: MSPB (5 USC 7511 et seq)		MSPB (see left)	Yes: OSC or MSPB			
Not addressed in this chart: Excepted service schedule C, SES, temporary employees, employees at certain agencies or hired under special hiring authorities							
Prepared by Danny Rosenthal, James & Hoffman							

Appendix C

RESOURCES

The following sources may be useful...

On MSPB Process and Law:

- <https://www.civilservicestrong.org/resources/filing-e-appeal-with-mspb-gov>
- Broida's Treatise: <https://deweypub.com/store/24MSPB.html>
- MSPB Judges' handbook: <https://www.mspb.gov/appeals/files/ALJHandbook.pdf>.

On FLRA Process and Law:

- Broida's Treatise: <https://deweypub.com/store/24FLRA.html>

On rights of probationary employees:

- <https://www.justsecurity.org/107230/federal-employee-rights-probationary-faqs/>

On federal employees' legal rights generally:

- www.federalworkerrights.com (maintained by James & Hoffman)

For online legal research (also has access to Broida):

- www.cyberfeds.com (requires subscription)