

Understanding the Termination of Federal Probationary Employees and Their Rights

This primer provides reporters with general information pertinent to the termination of federal probationary employees. The federal government generally requires new hires to complete probationary periods to assess their performance before they accrue civil service protections. (Part IV below explains how to understand/confirm an employee's personnel documentation). But probationary employees do not lack all protections, and some have full civil service protections. **This guide does not constitute legal advice.**¹

I. Probationary employees in the competitive service

Probationary employees in the **competitive service** are covered by the Civil Service Reform Act (CSRA) and the Office of Personnel Management's (OPM) implementing regulations. They have certain rights upon termination.

- ✓ **MSPB appeals alleging improper reasons for termination.** All probationary employees in the competitive service have the right to appeal to the Merit Systems Protection Board (MSPB) if their terminations are based on partisan political reasons or their marital status. [5 C.F.R. § 315.806\(b\)](#). The MSPB currently (as Feb. 2025) requires individuals to use its [electronic system](#) to file an appeal. An appeal must be filed within **30 days**.

Note: Although the MSPB has not definitively resolved the question, the MSPB might allow a claim based on *perceived* political affiliation discrimination—in other words, the government's perception that an employee has a particular political affiliation.²

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² In *Heelen v. Department of Commerce* the MSPB accepted an employee's claim of *perceived* political affiliation discrimination. But the MSPB ruled in favor of the agency because it found the agency would have taken the action anyway. The Federal Circuit overruled the MSPB and found for the employee because the

- ✓ **MSPB appeals alleging improper procedures.** When competitive service probationary employees are terminated based on conditions arising from before their hiring (generally information discovered during a background check), special procedures apply. [5 C.F.R. § 315.805](#). When the government fails to follow those procedures, employees can appeal to the MSPB. [5 C.F.R. § 315.806\(c\)](#). The MSPB currently (as Feb. 2025) requires individuals to use its [electronic system](#) to file an appeal. An appeal must be filed within **30 days**.
- ✓ **Special Counsel complaints.** Competitive service probationary employees may file complaints with the [Office of Special Counsel](#) (OSC) alleging the government committed a [prohibited personnel practice](#), such as [whistleblower retaliation](#). 5 U.S.C. §§ [1214](#), [2302](#); [5 C.F.R. part 1800](#). OSC currently (as of Feb. 2025) requires individuals to use [OSC Form 14](#) to file a complaint.
- ✓ **EEO complaints.** Competitive service probationary employees can file Equal Employment Opportunity complaints by contacting their agency's EEO office. [29 C.F.R. part 1614](#). An employee must contact the EEO office or an agency EEO counselor within **45 days**.
- ✓ **Union contracts.** Competitive service probationary employees who are in a collective bargaining unit can also contact their union for guidance on any options under their collective bargaining agreement.
- ✓ **Constitutional claims.** Competitive service probationary employees who have no other avenue to seek judicial review of constitutional claims for "equitable relief" (e.g., reinstatement or other injunctive relief) under civil service laws may be able to file a constitutional claims, such as First Amendment claims of discrimination based on political affiliation or perceived political affiliation, in federal district courts in certain circuits. While the law varies by circuit, they often must exhaust administrative remedies, if those are available.

II. Probationary employees in the excepted service

Most probationary employees in the executive branch's **excepted service** are covered by the Civil Service Reform Act (CSRA) and OPM's implementing regulations. They have certain rights upon termination.

Note: There are numerous personnel systems for excepted service employees in the federal government, each with its own rules. Some employees (such as Foreign Service Officers and certain medical professionals in the Department of Veterans Affairs) are not covered by the CSRA. Others (such as FBI employees) are covered by parts, but not all, of the CSRA. This guide addresses only employees in excepted service positions in the executive branch that are fully covered by the CSRA.

government had not properly conducted the RIF. [Heelen v. Dep't of Com.](#), 75 M.S.P.R. 366 (1997), *reversed*, [154 F.3d 1306](#) (Fed. Cir. 1998). In 2016, the Supreme Court upheld a First Amendment claim based on *perceived* political affiliation discrimination. [Heffernan v. City of Paterson, N.J.](#), 578 U.S. 266 (2016).

- ✓ **Many have no right to file MSPB appeals.** Many excepted service employees who are serving probationary periods have no right to file MSPB appeals. Important exceptions to this general rule are discussed in Section III, below.
- ✓ **Special Counsel complaints.** Excepted service probationary employees may file complaints with the [Office of Special Counsel](#) (OSC) alleging the government committed a [prohibited personnel practice](#), such as [whistleblower retaliation](#). 5 U.S.C. §§ [1214](#), [2302](#); [5 C.F.R. part 1800](#). OSC currently (as of Feb. 2025) requires individuals to use [OSC Form 14](#) to file a complaint.
- ✓ **EEO complaints.** Excepted service probationary employees can file Equal Employment Opportunity complaints by contacting their agency's EEO office. [29 C.F.R. part 1614](#). An employee must contact the EEO office or an agency EEO counselor within **45 days**.
- ✓ **Union contracts.** Excepted service probationary employees who are in a collective bargaining unit can also contact their union for guidance on any options under their collective bargaining agreement.
- ✓ **Constitutional claims.** Excepted service probationary employees who have no other avenue to seek judicial review of constitutional claims for "equitable relief" (e.g., reinstatement or other injunctive relief) under civil service laws may be able to file a constitutional claims, such as First Amendment claims of discrimination based on political affiliation or perceived political affiliation, in federal district courts in certain circuits. While the law varies by circuit, they often must exhaust administrative remedies, if those are available.

III. Probationary employees with full MSPB appeal rights

A subset of federal probationary employees in the competitive or excepted service may have for-cause termination protection and full MSPB appeal rights—**that is to say, they may have broader rights than the groups described in Parts I and II above**. This group consists of individuals who meet the definition of “employee” in [5 U.S.C. § 7511\(a\)\(1\)](#) and are not otherwise excluded under [5 U.S.C. § 7511\(b\)](#). The application of these statutory provisions is complex, and this guide does not attempt to cover all situations. Instead, it highlights some significant applications for the educational benefit of reporters. Again, this guide does not provide legal advice.

Three Types of Employees

The definition of “employee” in [5 U.S.C. § 7511\(a\)\(1\)](#) covers three types of federal employment. To qualify as an “employee” and have for-cause termination protection and MSPB appeal rights, an individual must meet the definition of “employee” for their type of employment, discussed below. (As we explain later, to have these protections, an individual who meets the definition of “employee” *also* must not be excluded under another part of [5 U.S.C. 7511](#).)

- ✓ **Competitive service employees.** An individual in the competitive service is an “employee” if they have completed **1 year** of current continuous service, provided that their service was not under a temporary appointment limited to 1 year or less. [5 U.S.C. § 7511\(a\)\(1\)\(A\)\(iii\)](#).³
- ✓ **Excepted service employees who are preference eligible.** An individual is preference eligible only if they meet requirements in [5 U.S.C. § 2108](#) applicable to certain veterans and some of their close family members. A preference eligible probationary employee in an excepted service position qualifies as an “employee” if they have completed **1 year** of current continuous service in the **same or similar** positions in an executive branch agency, the U.S. Postal Service or the Postal Regulatory Commission. [5 U.S.C. § 7511\(a\)\(1\)\(B\)](#).
- ✓ **Excepted service employees who are NOT preference eligible.** A non-preference eligible probationary employee in an excepted service position qualifies as an “employee” if they have completed **2 years** of current continuous service in the **same or similar** positions in an executive branch agency, provided that their service was not under a temporary appointment limited to 2 years or less. [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(ii\)](#).⁴

Exclusions from MSPB appeal rights and related protections

If an individual meets the definition of “employee” in [5 U.S.C. § 7511\(a\)\(1\)](#), the next step is to examine whether subsection (b) excludes them from protections against termination.

Subsection (b) **excludes** the following groups from protections against termination: presidential appointees; employees in “confidential, policy-determining, policy-making or policy-advocating” positions (currently Schedule C employees); reemployed annuitants who elect to continue receiving annuities; Foreign Service employees; CIA and Government Accountability Office employees; any “alien or noncitizen” working outside the United States; and Veterans Health Administration employees covered by title 38, U.S. Code, except those appointed under section [38 U.S.C. 7401\(3\)](#).

One additional exclusion, in [5 U.S.C. § 7511\(b\)\(8\)](#), is worth highlighting. That provision excludes from protection **non-preference eligible** employees in the FBI, the Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, and military intelligence offices. It does not exclude **preference eligible** employees in those agencies.

³ In limited cases, an individual can also qualify as an employee if they are serving under an “initial appointment” and have completed a required probationary or trial period. [5 U.S.C. § 7511\(a\)\(1\)\(A\)\(iii\)](#). Under [5 C.F.R. § 315.802\(b\)](#), prior federal civilian service is counted toward completion of a probationary period **only** if it was in the “same agency,” in the same “line of work” and “[c]ontain[ed] or [was] followed by no more than a single break in service that [did] not exceed 30 calendar days.”

⁴ A very limited category of non-preference eligible excepted service employees may also qualify as an “employee” under [5 U.S.C. § 7511\(a\)\(1\)\(C\)\(i\)](#), but that provision applies **only** if an individual is serving under an **initial appointment pending conversion to the competitive service**, which is less common than other types of excepted service appointments.

Rights of an individual who is an “employee” under 5 U.S.C. § 7511(a)(1) and is not excluded under subsection (b)

An individual who meets the definition of “employee” in [5 U.S.C. § 7511\(a\)](#) and is not excluded under subsection (b) has several rights:

- ✓ **The right to be terminated only for cause.** Under [5 U.S.C. § 7513\(a\)](#), the individual may be terminated “only for such cause as will promote the efficiency of the service,” which has been interpreted as requiring the agency to prove that the termination was for cause.
- ✓ **The right to advance notice of their proposed termination and an opportunity to respond.** Under [5 U.S.C. § 7513\(b\)](#), the individual is entitled to:
 - (1) at least 30 days’ advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
 - (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
 - (3) be represented by an attorney or other representative; and
 - (4) a written decision and the specific reasons therefor at the earliest practicable date.

Regulations of the Office of Personnel Management explain that **the notice of proposed termination must “inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice.”** [5 C.F.R. § 752.404\(b\)\(1\)](#). Under [5 U.S.C. § 7513\(c\)](#), the agency also must adhere to any additional protections granted under its own regulations.

- ✓ **The right to file an appeal with the MSPB.** If the agency decides to terminate the employee after considering the employee’s response, the employee may appeal the termination to the MSPB under [5 U.S.C. § 7513\(d\)](#). If the employee is a collective bargaining unit, the employee may work with their union to challenge the termination through the union’s grievance and arbitration procedures. But, as provided in [5 U.S.C. § 7121\(e\)\(1\)](#), the employee **cannot pursue both** an MSPB appeal and a grievance under the collective bargaining procedure.

Note: As part of the MSPB appeal, an employee may raise a constitutional claim, such as a Fifth Amendment due process claim or a First Amendment claim, including a claim of discrimination based on political affiliation or perceived political affiliation.

- ✓ **The right to further review of the MSPB’s decision.** If the employee is dissatisfied with the decision of the MSPB’s hearing officer (usually an Administrative Judge or an Administrative Law Judge), the employee may petition to board members of the MSPB for review. If no petition for review is filed by either side, the hearing officer’s decision becomes the final decision of the MSPB. If a petition is filed, the board’s decision is the final decision of the MSPB. The law provides employees the right to seek judicial review of the MSPB’s decision. Ordinarily, the U.S. Court of Appeals for the Federal Circuit will conduct the review. [5 U.S.C.](#)

[§ 7703](#). However, employees must seek review in federal district courts if their MSPB appeals included certain types of discrimination claims. [5 U.S.C. § 7702](#).

IV. Reading an employee's personnel documentation

The government issues a [Notification of Personnel Action](#) (SF-50) when it hires an employee or takes any other personnel action. That form indicates whether the employee is eligible for veterans preference in box 23:

EMPLOYEE DATA			
23. Veterans Preference			
	1 - None	3 - 10-Point/Disability	5 - 10-Point/Other
	2 - 5-Point	4 - 10-Point/Compensable	6 - 10-Point/Compensable/30%

The form indicates the employee's type of employment in box 34:

POSITION DATA		
34. Position Occupied		
	1 - Competitive Service	3 - SES General
	2 - Excepted Service	4 - SES Career

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