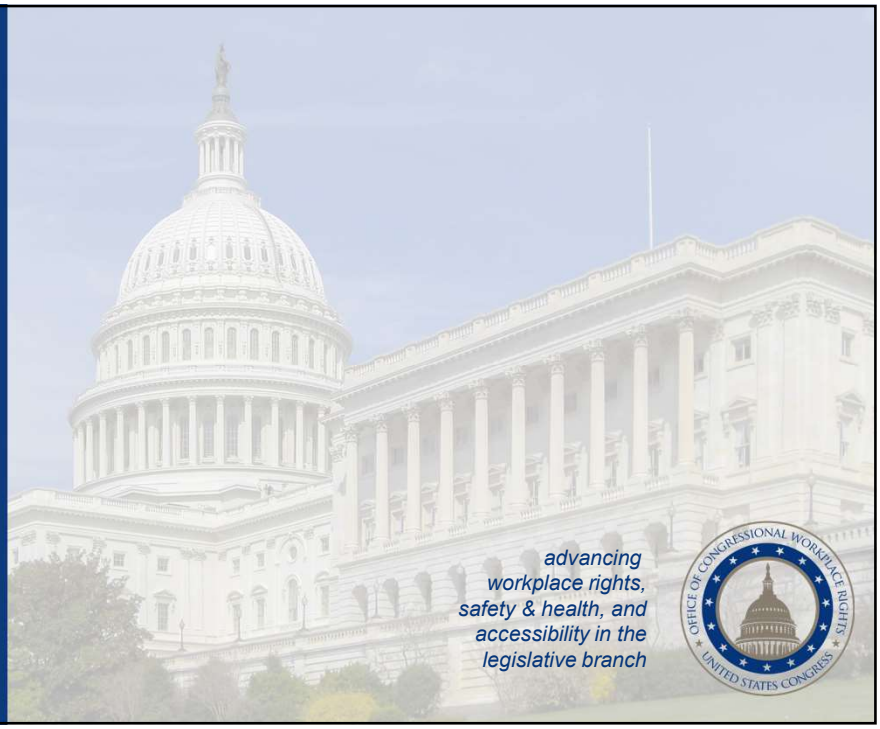
Timeliness Issues in Unfair Labor Practice Filings



Office of Congressional Workplace Rights

Office of the General Counsel

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Welcome

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Outline

- Statute of limitations background
- Concealment
- Untimely reporting from charged party
- Timeliness issues with arbitration
- Amending charges with new allegations
- Continuing violations and contract violations
- Timeliness as a non-jurisdictional defense post-*Harrow*

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Background

The CAA's Statute of Limitations

- If any person charges an employing office or a labor organization with having engaged in or engaging in an unfair labor practice and makes such charge within 180 days of the occurrence of the alleged unfair labor practice, the General Counsel shall investigate the charge and may file a complaint with the Office. 2 U.S.C. § 1351(c)(2).

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Actual or constructive knowledge required

- The 180-day clock starts when the charging party knows or reasonably should have known about the unlawful conduct.
- The charging party must engage in "reasonable diligence," not "an extreme level of suspicious imagination or hypervigilance."

  Dep't of the Interior, 68 F.L.R.A. 734, 737 (2015).

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***Dep't of the Treasury, U.S. Customs Serv. El Paso, Tx.*, 55 F.L.R.A. 43 (1998)**

- In 1993, the parties had a dispute over the agency covertly videotaping employees meeting with union representatives. The agency admitted to doing this, but the extent of the videotaping was unclear.
- In this charge, filed in 1995, the union alleged that the agency was covertly videotaping employees during investigative interviews.
- The agency responded that the charge was untimely because the union learned about the videotaping during the 1993 dispute.
- The ALJ and the FLRA found the charge timely. The union did not know, and had no reason to know, that the agency was filming investigative interviews. The early taping of union conduct was irrelevant.

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A note of caution about the CAA's deadline

- Per the CAA, charges must be filed "Within 180 days of the occurrence." This means that the 180-day clock starts on the day of the unlawful conduct.
  - A charge alleging unlawful conduct occurring on January 1, 2025, must be filed on or before **June 29, 2025**.
- An incorrect description may be "claims must be filed no later than 180 days from the alleged violation." This means the clock starts the day after the unlawful conduct.
  - Under this incorrect timeline, a charge alleging unlawful conduct occurring on January 1, 2025, must be filed on or before **June 30, 2025.**
- The FSLMRS states that "no complaint shall be issued on any alleged unfair labor practice which occurred more than six months before the filing of the charge." Counting by months, instead of days, can change the deadline.
  - A charged filed with the FLRA alleging unlawful conduct occurring on January 1, 2025, must be filed on or before **July 1, 2025**.

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Concealment

The FSLMRS explicitly allows charging parties to file late if the charged party concealed the unlawful conduct from them or failed to timely report necessary information.

- If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or any concealment which prevented discovery of the alleged unfair labor practice during the 6- month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice. 5 U.S.C. § 7118.

In practice, findings of outright concealment of ULPs are exceedingly rare in the federal sector.

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***Regency Grande Nursing & Rehab.*, 347 N.L.R.B. 1143 (2006)**

- Local 300s and SEIU1199 began organizing nursing employees in March 2003. In May 2003, Local 300s and the nursing home presented authorization cards to an arbitrator, who certified that Local 300s had a majority.
- Local 300s and the employer did not announce publicly that Local 300s achieved majority status or that they were bargaining a contract. The evidence showed that Local 300s spoke to two or three employees about desired improvements, but there were no meetings or press releases.
- Local 300s and the employer signed a CBA on January 8, 2004. Several employees testified that they had not heard of Local 300s before the contract was executed.

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Regency Grande Nursing & Rehab., 347 N.L.R.B. 1143 (2006), *cont'd*

- SEIU1199 filed the charge on February 19, 2004, alleging that the nursing home unlawfully recognized Local 300s as a minority union and then unlawfully signed a CBA with a union security clause.
- Local 300s and the employer argued that the charge was untimely because Local 300s spoke to some employees about the recognition and their knowledge should be attributed to SEIU1199.
- The evidence showed that even if some employees knew, their knowledge could not be attributed to SEIU1199. Moreover, Local 300s and the employer actively concealed the recognition and CBA bargaining. Without evidence that SEIU1199 knew of the recognition, the six-month statute of limitations was tolled because of the concealment.

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Untimely Reporting from the Charged Party

***U.S. DOJ, INS,* 43 F.L.R.A. 241 (1991)**

- For years, employees were permitted to smoke throughout the office.
- When a new employee – a smoker – started in August 1987, management informed him and the other smokers that they could only smoke at their desks and only if no one objected. Management did not inform the union of this change.
- In mid-January 1989, a bargaining unit employee complained to management about the in-office smoking. In response, management told the smokers that they could only smoke in a basement lobby.
- The union filed a charge in January 1989, alleging that the January 1989 implementation was an unlawful unilateral change without prior notice and an opportunity to bargain.

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***U.S. DOJ, INS,* 43 F.L.R.A. 23 (1991)**

- The agency responded that the charge was untimely, arguing that the agency put the union on notice of the change in August 1987, when it instructed employees that they could only smoke if no one objected.
- The ALJ and FLRA disagreed – the agency did not notify the union of the change in 1987. By failing to report the change at the time, the agency prevented the union from filing the charge. As such, the later charge was timely.

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Filing Timely ULPs Related to Arbitration

Failure to comply with an arbitration award is an unfair labor practice. The 180-day period to file such a ULP may begin:

1. When a party expressly notifies another party that it will not comply with an award;
2. When an award establishes a deadline for implementing obligations required by the award and the deadline passes without compliance; or
3. If there is no deadline or expressed refusal to comply, the facts of each case will determine the filing deadline. The deadline will depend on the requirements of the award, the actions (if any) of the charged party in response to the award, and the communication (if any) between the parties.

Dep't of Treasury, IRS, 61 F.L.R.A. 146, 150 (2005).

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***Fed. Educ. Assoc. v. FLRA*, 927 F.3d 514 (D.C. Cir. 2019)**

- In November 2003, an arbitrator found in favor of the union and issued awards finding that the agency was not paying teachers appropriately.
- Awards required the agency to create new online payment programs that show teachers what pay they receive and the basis for that pay.
- The parties met over several years to discuss the implementation. In 2010, the arbitrator wrote the agency a letter detailing exactly what the new payment program would include. The parties continued to meet.
- In May 2015, the agency told the arbitrator that it had made some of the changes, but some changes would never be made.
- The arbitrator issued a final award in August 2015, finding that the agency had been in non-compliance since 2004.

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Fed. Educ. Assoc. v. FLRA*, 927 F.3d 514 (D.C. Cir. 2019), *cont'd

- The union filed a ULP in October 2015, alleging non-compliance with the 2003 awards.
- The agency argued that the charge was untimely because the union learned from the meetings in 2010 that the agency would not comply.
- The FLRA agreed with the agency and dismissed the charge as untimely because the agency expressly stated it was unable to comply.
- The D.C. Circuit reversed and found the charge timely, holding that the record reflected that this was not a case of express refusal. Instead, the facts showed the parties working together toward compliance. The clock did not start until the arbitrator's final decision in 2015.

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Amending in New Allegations

After the 180-day period ends, a charging party may amend a charge to include new allegations only if:

1. The events in the amended charge are closely related to events or matters complained of in the original charge; and
2. The events in the amended charge occurred within the 6-month period preceding the original charge.

Dep't of Veterans Affairs., 42 F.L.R.A. 333, 340 (1991).

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***Nuclear Regul. Comm'n*, 44 F.L.R.A. 370 (1992)**

- In November 1989, the incumbent union filed a charge alleging that a supervisor unlawfully solicited employees in August, September, and October 1989 to revoke their dues authorizations and support a rival union.
- The union amended the charge on January 24, 1990, adding the allegation that in May, June, and early July 1989, the supervisor unlawfully served as a representative of the incumbent union and participated in bargaining on behalf of bargaining unit employees he supervised.
- The FLRA GC issued a complaint based only on the additional allegations in the amended charge.

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Nuclear Regul. Comm'n*, 44 F.L.R.A. 370 (1992), *cont'd

- The FLRA dismissed the complaint as untimely. The amended allegations were not "closely related" to the original ones.
- The original allegations concerned the supervisor attempting to oust the incumbent union, while the amended charges alleged that he unlawfully controlled the incumbent union as a supervisor.
- While the two types of conduct violated the same section of the statute – 7116(a)(3) – they were distinct activities which arose out of separate facts.

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Continuing Violations and Contract Violations

The ongoing maintenance and enforcement of an unlawful rule that restricts protected activity under the statute is a continuing violation.

- If the employing office promulgated the rule outside of the 180-day window, but continued to maintain and enforce it during the window, a charge filed within the window is timely.

Dep't of Def., Dep't of the Air Force, 13 F.L.R.A. 239, n. 8 (1983)

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Contract violations outside of the 180-day window can be evidence of a repudiation of the agreement that is timely filed later.

- Repeated failures to pay wage increases or benefit contributions outside of the statute of limitations rose to the level of a repudiation during the 180-day window.
- Evidence from outside of the window was admissible but cannot be the sole evidence of the repudiation.
- However, the statute of limitations limits the remedy: only unpaid wages or benefits from inside the window can be recovered.

Farmingdale Iron Works, Inc., 249 N.L.R.B. 98 (1980)

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Timeliness as a Defense

Timeliness of a charge is non-jurisdictional, which means:

- A charging party filing outside of the 180-day window can make arguments for equitable tolling – like those described in this presentation, and
- The defense must be raised in the answer to the complaint or, if facts arise showing untimeliness, before the closing of a hearing.

See OCWR Procedural Rules § 5.01(f)(3)-(4); *Harrow v. Dep't of Def.*, 601 U.S. 480 (2024); *Perez v. Off. of Rep. Sheila Jackson-Lee*, No. 04-HS-21 (CV, RP), 2005 WL 6236947 (OOC June 29, 2005).

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Questions?

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