

## **FILING AN APPEAL; FILING AN ANSWER**

---

Properly filing the initial appeal is critically important. First and foremost, a complaint must be timely filed. An untimely complaint, no matter how well drafted, and no matter how good the underlying merits of the case are, will likely result in a dismissal of the claim. Complaints or appeals that fail to meet statutory or regulatory filing requirements may result in dismissals, or at a minimum, delays in the processing of a case. Issues framed in appeals may lock-in issues to be litigated or direct the course of discovery. The initial appeal or complaint informs the administrative judge or arbitrator and the opposing side what you think your case is about and the legal and factual issues you believe are present. First impressions can be lasting impressions.

Before filing initial claims, whether an MSPB appeal, EEO complaint, EEOC request for hearing, ULP complaint, grievance or arbitration request, you must know the filing deadlines and filing requirements. Most time deadlines are easily determined by looking at the statutes or regulations involved. Other times, determinations of whether an appeal, complaint, grievance or claim is timely, or whether a late filing can be excused, will depend on such factors as whether the filer was given correct information about filing deadlines, when the filer actually became aware of the action and whether the claim was on-going in nature. When issues of timeliness arise, it is necessary to review the case law of the forum to determine if, under the facts of the case, the case is timely filed or if there are reasons, i.e., "good cause," for a late filing.

### **I. FILING DEADLINES**

The most common filing deadline encountered in the Federal sector are discussed below.

#### **A. MSPB**

##### **1. Appeal**

The appeal must be filed 30 days from the effective date of the action. *See* 5 CFR § 1201.22(b)(1) (2001). No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

##### **2. Petition for Review**

The PFR must be filed within 35 days from the date of the administrative judge's initial decision. A cross petition is due within 25 days of the date of service of the PFR. Response to a petition for review or cross petition is due within 25 days after the date of service of the petition or cross petition. *See* 5 CFR § 1201.114(d) (2001). The representative should keep in mind that allegations of error seeking review cannot be raised in an answer to a PFR.

Pertinent MSPB regulations are:

(a) *Place of filing.* Appeals, and responses to those appeals, must be filed with the appropriate Board regional or field office. . . .

(b) *Time of filing.*

(1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. Where an appellant and an agency mutually agree in writing to attempt to resolve their dispute through an alternative dispute resolution process prior to the timely filing of an appeal, however, the time limit for filing the appeal is extended by an additional 30 days--for a total of 60 days. A response to an appeal must be filed within 20 days of the date of the Board's acknowledgment order. The time for filing a submission under this section is computed in accordance with 1201.23 of this part.

(2) The time limit prescribed by paragraph (b)(1) for filing an appeal does not apply where a law or regulation establishes a different time limit or where there is no applicable time limit. No time limit applies to appeals under the Uniformed Services Employment and Reemployment Rights Act (Public Law 103-353) as amended; see part 1208 of this title. See part 1208 of this title for the statutory filing time limits applicable to appeals under the Veterans Employment Opportunities Act (Public Law 105-339). See part 1209 of this title for the statutory filing time limits applicable to whistleblower appeals and stay requests.

(c) *Timeliness of appeals.* If a party does not submit an appeal within the time set by statute, regulation, or order of a judge, it will be dismissed as untimely filed unless a good reason for the delay is shown. The judge will provide the party an opportunity to show why the appeal should not be dismissed as untimely.

(d) *Method of Filing.* Filing must be made with the appropriate Board office by personal delivery, by facsimile, by mail, or by commercial overnight delivery.

## **B. EEOC**

### **1. Formal and Informal Complaints, Request for a Hearing**

A formal complaint must be filed 15 days after receipt of notice of a final counseling interview. *See* 29 CFR § 1614.106(b) (2001).

An informal complaint initiating counseling must be filed within 45 days of the date of the discriminatory act (or from last discriminatory act if a series or pattern of discriminatory acts are alleged). *See* 29 CFR § 1614.105(a)(1) (2001).

A request for a hearing must be filed 30 days from receipt of the Report of Investigation (or after 180 days from the filing of the formal complaint, whichever occurs first). *See* 29 CFR § 1614.108(f) (2001).

### **2. OFO Appeals from Final Action by the Agency After Decision by Administrative Judge**

The agency, assuming it does not fully implement the decision of the administrative judge, must file an appeal to OFO within 40 days of receipt of the hearing file and administrative judge's decision. *See* 29 CFR

§ 1614.402(a) (2001). The agency then has 20 days to file its brief to the OFO. *See* 29 CFR § 1614.403(d) (2001).

### **3. OFO Appeals by the Appellant**

If the agency accepts the administrative judge's finding of no discrimination, the appellant must file the OFO appeal within 30 days of receiving the agency notice. *See* 29 CFR § 1614.402(a) (2001). Where the agency fails to fully implement an administrative judge's decision finding discrimination, the agency files the appeal as noted above. However, the employee may also appeal any aspect of the administrative judge's decision within 30 days after receiving the final agency decision. *See* 29 CFR § 1614.402(a) (2001).

The appellant's brief in support of the appeal is due 30 days after the filing of the appeal. *See* 29 CFR § 1614.403(d) (2001). Any statement or brief in opposition to an appeal to the Commission must be submitted to the Commission and served on the opposing party, within 30 days of receipt of the statement or brief in support of the appeal. If no statement or brief supporting the appeal was filed, the opposition statement must be filed within 60 days of receipt of the appeal. *See* 29 CFR § 1614.403(d).

EEOC regulations are, as pertinent, below, 29 CFR § 1614.106 (2001):

Individual complaints.

(a) A complaint must be filed with the agency that allegedly discriminated against the complainant.

(b) A complaint must be filed within 15 days of receipt of the notice [of final interview] required by 1614.105(d), (e) or (f).

(c) A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint. The complaint must also contain a telephone number and address where the complainant or the representative can be contacted.

## **C. FLRA**

### **1. Unfair Labor Practice, Appeal from Administrative Judge's ULP Decision**

Generally, the filing deadline is six months from the date of the ULP. *See* 5 USC 7118(a)(4)(A). This time may be extended where the FLRA's General Counsel finds that the person filing the ULP was prevented from timely filing because of the failure of the agency or labor organization to perform a duty owed to the filer, or because of any concealment which prevented the discovery of the ULP. *See* 5 USC § 7118(a)(4)(B).

Exceptions to an administrative judge's decision must be filed with the FLRA within 25 days after the date of service of the judge's decision. *See* 5 CFR § 2423.40(a) (2001).

## **2. Exceptions to Arbitration Award**

Exceptions to an arbitration award must be filed within 30 days after the date the award is served on the filing party. The date of service is the date the arbitration award is deposited in the U.S. mail or is delivered in person. If the award is served by mail, service occurs when the arbitrator mails the award; not the date the party receives it. See 5 CFR § 2429.21(a); 5 CFR 2424.1 (2001). If the award is served by mail, five days are added to the period for filing exceptions. 5 CFR 2429.22 (2001). The five-day allowance for service by mail does not extend the prescribed statutory period for filing documents; rather it is an allowance for mail service.

## **3. Negotiability Appeal**

Negotiability appeals must be filed within 15 days of receipt of the agency's written allegation that the proposal is not within the duty to bargain, or the agency head's disapproval of a provision bargained for. Until the union specifically asks for the written declaration of non-negotiability, the agency's declaration does not start the running of any time limits.

## **4. Grievance, Arbitrations**

Applicable time limits are found in the collective bargaining agreement. Each CBA sets its own deadlines and filing requirements.

### **D. OFFICE OF SPECIAL COUNSEL**

There is currently no deadline for filing a Prohibited Personnel Practice complaint, including a complaint of reprisal for protected whistleblowing. While there are "backend" time requirements for filing an appeal with the MSPB in an Individual Right of Action (IRA), there is no front-end requirement for going to OSC. An otherwise untimely appeal may resurface in the nature of a timely IRA.

## **II. THE CONTENTS OF THE APPEAL**

A properly documented and accurate complaint or appeal is of overriding importance. In a EEOC matter, the appeal goes all the way back to the informal and formal complaints. It is critical that the complainant have an experienced representative assist in drawing up the pertinent filings. While a basis can usually be added, additional incidents, unless like or related and timely, cannot be added. However, when the matter actually goes to EEOC, the complainant is limited to filing a fairly sterile request for hearing.

In an MSPB appeal, the matter is different, and the appellant's representative has clear advocacy opportunities to sell the appellant's position. The appeal is, after all, the first document filed with the administrative judge and, theoretically the administrative judge's first impression of the appeal. But, more often than not, this opportunity is wasted and goes by default to the agency. Not surprisingly, the agency, more often than not, wastes the opportunity. The opportunity of first getting to the administrative judge with a favorable first impression usually goes by default to the party making the best impression in a discovery dispute or in the prehearing filings or conference.

MSPB regulations on filing an appeal are:

5 CFR § 1201.24 (2001). Content of an appeal; right to hearing.