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Legal Sidebar

# *OPM v. AFGE* and Related Litigation: Supreme Court Stays Order Reinstating Federal Probationary Employees

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On April 8, 2025, the Supreme Court in *U.S. Office of Personnel Management (OPM) v. American Federation of Government Employees (AFGE)* granted the government's application to stay a preliminary injunction and order of the U.S. District Court for the Northern District of California. The district court had required the government to reinstate probationary employees at six federal agencies on behalf of nine nonprofit organizations that constituted a subset of the plaintiffs in that case. In an unsigned order, the Court determined that the nonprofit organizations lacked standing to sue. This Sidebar provides some background on the executive branch actions removing probationary employees from federal employment, discusses the litigation in *OPM v. AFGE* and a related case, *Maryland v. U.S. Department of Agriculture*, and offers considerations for Congress.

## Executive Branch Removals of Probationary Employees

In the federal civil service, probationary employees are those serving a probationary or trial period, typically for one or two years. During that period, probationary employees lack the notice and appeal rights from adverse actions, such as removals, that are generally available to federal civil service employees. Probationary employees in some circumstances may appeal removals motivated by "partisan political reasons or marital status," or removals effectuated via improper procedures, to the Merit Systems Protection Board (MSPB).

As recounted in the district court's orders in *OPM v. AFGE*, OPM used various ways to direct federal agencies to terminate their probationary employees. For example, on January 20, 2025, OPM issued a memorandum, which was later revised, requiring agency and department heads to provide a list of employees serving probationary periods and to "promptly determine whether those employees should be retained at the agency." On February 14, OPM emailed federal agencies' chief human capital officers: "We have asked that you separate probationary employees that you have not identified as mission-critical no later than end of the day Monday, 2/17. We have attached a template letter. The separation date should be as soon as possible that is consistent with applicable agency policies (including those in [collective bargaining agreements])." AFGE alleged that OPM directed agencies to use template language stating that

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the probationary employees were terminated due to individual performance rather than their status as probationary employees.

While some of these employees have since been given notices of reinstatement and placed on administrative leave in response to lower court orders staying the removals, the total number of probationary employees removed subsequent to the Supreme Court's order is unclear. Probationary employees have challenged their removals in federal court—including in two cases discussed herein—as well as in proceedings before the MSPB.

## *OPM v. AFGE*

In *OPM v. AFGE*, nonprofit organizations and labor union plaintiffs representing terminated probationary employees at the Departments of Veterans Affairs, Agriculture, Defense, Energy, Interior, and Treasury challenged the removals in the U.S. District Court for the Northern District of California. With respect to only the nine nonprofit plaintiffs, the district court found jurisdiction and granted a temporary restraining order, and on March 13 issued a preliminary injunction from the bench ordering the reinstatement of probationary employees at the six federal agencies. In granting the preliminary injunction, the court held that the nonprofit plaintiffs showed irreparable harm resulting from the immediate impairment of public services, and reasoned that plaintiffs were likely to succeed on the merits based on its finding that OPM's directive to agencies to terminate probationary employees constituted an *ultra vires act* that "violated its and all impacted agencies' statutory authority."

The U.S. Court of Appeals for the Ninth Circuit denied an emergency motion to stay the district court order, and the government appealed to the Supreme Court. In its appeal, the government argued, among other things, that the plaintiff nonprofit organizations lacked standing, or a legal right to challenge the removals of the probationary employees. In general, for a party to establish standing, it must allege that it has or will suffer (1) a concrete and particularized injury (2) that is fairly traceable to the allegedly unlawful actions of the opposing party and (3) that is redressable by a judicial decision. The government claimed that the district court improperly relied on speculative injuries: disruptions of government services caused by mass firings. The nonprofit organizations responded that the alleged harms were not speculative, stating, for example, that the removal of employees from the Department of Veterans Affairs "has already had and will imminently continue to have serious negative consequences for members [plaintiff veterans organizations], including delays in receiving prosthetic limbs, mental health counseling, and other vital services"; and that the removals at the Forest Service (Department of Agriculture) and Bureau of Land Management (Department of the Interior) "have already harmed and will continue to harm the ability of [plaintiff] environmental and outdoor organizations to enjoy and protect a wide range of federal lands and resources," among other disruptions to government services.

On April 8, the Supreme Court granted the government's application to stay the preliminary injunction. The Court stated in an unsigned order that the lower court's injunction "was based solely on the allegations of the nine non-profit-organization plaintiffs in this case. But under established law, those allegations are presently insufficient to support the organizations' standing." The Court cited to *Clapper v. Amnesty Int'l USA*, a 2013 decision where the Court addressed how likely the threat of future harm to the plaintiff must be in order for that harm to qualify as an imminent injury. The Court also clarified that it was not ruling on whether the other plaintiffs would have standing, nor was the Court ruling on the legality of the probationary employee removals. Justices Sotomayor and Jackson dissented—with Justice Jackson writing that the Court should have declined to reach the standing question since the government had not demonstrated irreparable harm necessitating emergency relief in its application to stay.

Originally, the district court in *OPM v. AFGE*, following other recent district court findings of lack of jurisdiction on similar grounds, denied jurisdiction with respect to the labor union plaintiffs' claims. The

court explained that the court likely lacked subject-matter jurisdiction over the union plaintiffs' claims, since Congress has set forth statutory schemes for reviewing personnel actions taken against federal employees before the MSPB and labor disputes before the Federal Labor Relations Authority (FLRA). After further briefing, the district court later held that the court did have subject-matter jurisdiction over these claims and issued an April 18 preliminary injunction, which the government has now appealed to the Ninth Circuit.

## *Maryland v. U.S. Department of Agriculture* and Other Challenges

A day after the Supreme Court's order in *OPM v. AFGE*, a divided U.S. Court of Appeals for the Fourth Circuit panel stayed a district court injunction in another case challenging the removal of probationary employees, *State of Maryland v. U.S. Department of Agriculture*. The District Court for the District of Maryland had initially granted a preliminary injunction on behalf of nineteen States and the District of Columbia and had ordered the reinstatement of probationary employees who were terminated at eighteen federal agencies. The district court had agreed with the plaintiff states' argument that the mass removals constituted a reduction in force, which has a specific statutory process, including notice requirements to the states. The district court had also agreed with the states' argument regarding their standing—finding that they would likely suffer adverse financial effects from the terminations, including an increase in unemployment benefits applications, an increase in the resources required to investigate and process benefits applications, loss of support from federal employee partnerships with state agencies, and loss of tax revenue.

In a brief order staying the district court's injunction, the Fourth Circuit stated that "[t]he Government is likely to succeed in showing that the district court lacked jurisdiction over Plaintiffs' claims, and the Government is unlikely to recover the funds disbursed to reinstated probationary employees." The Fourth Circuit majority did not directly address in its order whether the state plaintiffs had standing to challenge the removals, although it did note that "[t]he Supreme Court has stayed a similar preliminary injunction issued by the United States District Court for the Northern District of California."

In addition to legal challenges in federal courts by unions, states, and nonprofits, some probationary employees have appealed their terminations with the MSPB. Some employees have asked to have their removals investigated by the U.S. Office of Special Counsel (OSC) and in some cases were granted a temporary stay of their terminations by the MSPB so that the OSC could investigate. While the OSC had initially requested these stays, the interim head of the OSC has since reportedly stated that mass firings of probationary employees are not reviewable by the OSC because such terminations "in the context of the government-wide effort to reduce the federal service through probationary terminations, [were] more likely effected in accordance with the new administration's priorities than a decision personal to [the employee]." The status of these cases is unclear.

## Considerations for Congress

Congress has delegated a substantial amount of authority to the executive branch to regulate the civil service. 5 U.S.C. § 3321 authorizes the President "to take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a *period of probation*" (emphasis added). Congress may consider adopting new standards for probationary employment. For example, H.R. 1989 (119th Congress), the Protect Our Probationary Employees Act, would allow recently terminated probationary employees to resume their probation or trial period progress upon reinstatement. H.R. 3094 (119th Congress), the Probationary Reduction for Employee Protections Act, would standardize a one-year probationary period for new federal employees and a six-month probation period for employees who are promoted into or transfer to a new position.

On April 24, 2025, President Trump issued an Executive Order, "Strengthening Probationary Periods in the Civil Service," which amends civil service regulations in various ways, including requiring that agencies certify within 30 days before the end of the probationary period that finalizing an employee's appointment advances the public interest, or the probationer will be terminated. If Congress chooses to codify such civil service reforms in statute, those reforms may have a more lasting effect when compared to an executive order that could be repealed by future administrations. Congress may also refrain from action.

As previously mentioned, some probationary employees are challenging removals before the MSPB. Congress may examine the authorities underlying agencies like the OSC, MSPB, and FLRA. Congress may also consider legislative options addressing the lack of quorum at the MSPB that delays final decisions by the agency. Congress could, for example, codify the reforms in the MSPB's 2024 interim final rule or increase the number of appointees to the MSPB. Congress may also consider providing that cases pending at the MSPB for a certain amount of time be appealable to federal court.

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