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Legal Sidebar

Deferred Resignation or "Fork in the Road": Selected Relevant Legal Challenges and Considerations for Congress

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On January 28, 2025, federal employees received an email communicating an option to resign from their positions effective September 30, 2025, by replying to the email. This new program—referred to as "deferred resignation" or "Fork in the Road"—pledged that an employee who declared future resignation would "retain all pay and benefits regardless of [] daily workload and [] be exempted from all applicable in-person work requirements" in the interim. Since the initial email, the U.S. Office of Personnel Management (OPM) has released a series of guidance documents to clarify certain aspects of the program, such as that employees would generally be placed on administrative leave until the resignation date. Federal labor unions have challenged this deferred resignation program in federal district court, which temporarily stayed the program before ultimately dismissing the case on standing and jurisdictional grounds. This Legal Sidebar provides an overview of the deferred resignation program and related authorities, such as the Administrative Leave Act (the Act); analyzes recent relevant legal actions; and provides considerations for Congress.

Deferred Resignation Program

On January 20, 2025, President Trump issued a memorandum, "Return to In-Person Work," requiring executive departments and agencies to "take all necessary steps to terminate remote work arrangements and require employees to return to work in-person at their respective duty stations on a full-time basis, provided that the department and agency heads shall make exemptions they deem necessary." Citing that presidential memorandum as well as other recent civil service reforms, OPM sent an email to federal workers with the subject line "Fork in the Road"; the email presented executive branch employees with an offer to resign on a deferred basis, with pay and benefits and exemption from in-person work.

Eight days later, OPM issued a memorandum, "Guidance Regarding Deferred Resignation Program," to heads of executive departments and agencies—stating that "employees who accept deferred resignation should promptly have their duties re-assigned or eliminated and be placed on paid administrative leave" until September 30, with some exceptions.

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On February 4, 2025, OPM provided an additional memorandum, "Legality of Deferred Resignation Program." In the memorandum, OPM stated that "[t]he decision to grant administrative leave, and for how long, lies largely within the agency's discretion" and cited an OPM regulation interpreting the Administrative Leave Act as its authority to place employees on extended administrative leave, discussed in more detail below. The memorandum also addressed potential concerns raised by some federal employees and Members of Congress related to the program, such as ethical concerns presented by OPM's suggestion that federal employees could "find a job in the private sector" while on administrative leave and potential issues stemming from appropriations laws.

Additionally, the memorandum included a "Template Deferred Resignation Agreement." Among its provisions, the template contract states that an employee "forever waives, and will not pursue through any judicial, administrative, or other process, any action against [the agency] that is based on, arising from, or related to Employee's employment at [the agency] or the deferred resignation offer, including any and all claims that were or could have been brought concerning said matters." The template contract further indicates that the agreement cannot be rescinded, except in an agency head's sole discretion. The waiver provision appears to be aimed at anticipating and preventing potential lawsuits by employees who accept the deferred resignation offer; however, the memorandum emphasizes that the deferred resignation offer's "assurances are binding the government."

Administrative Leave Act and 2024 OPM Final Rule

OPM guidance after the initial Fork in the Road email stated the Trump Administration's general intent to place participants in the deferred resignation program on extended administrative leave until September 30, 2025. Administrative leave is a paid excused absence from government work that does not draw from other leave categories. The concept of administrative leave for civil servants was codified by Congress in the Administrative Leave Act in section 6329a of Title 5, U.S. Code. As summarized in the preamble to the final rule implementing the Act in December 2024, "[p]rior to passage of the Administrative Leave Act, there was no specific statutory authority for the use of administrative leave." Agencies utilized administrative leave pursuant to their general authority to prescribe regulations governing their employees. Congress observed that variations existed among agency administrative leave policies and cited concerns that agencies were placing employees under investigation for misconduct on administrative leave for long periods of time. In passing the Act, Congress expressed its sense that administrative leave exceeding reasonable amounts is a "significant cost to the Federal Government" and "should be used sparingly."

Accordingly, the Act set statutory requirements and deadlines for placing employees on administrative leave and other distinct categories of leave, such as investigative leave and notice leave. The Act's cap on administrative leave, codified in subsection (b) of 5 U.S.C. § 6329a, states, "[d]uring any calendar year, an agency may place an employee in administrative leave for a period of not more than a total of 10 work days." The Biden Administration issued a final rule in December 2024 in accordance with the Act's requirement to prescribe regulations. In that rule, OPM interpreted the 10-workday cap in section 6329a to "not apply to general uses of administrative leave," but to only apply to administrative leave "for the purpose of investigating an employee's conduct, performance, or other reasons prompting an investigation." This interpretation appears in OPM regulations at 5 C.F.R. § 630.1404, which states that the 10-day cap exists only "for the purpose of conducting an investigation" and not for "administrative leave for other purposes." Despite OPM's interpretation regarding the inapplicability of the 10-day cap to the category of "administrative leave," 5 C.F.R. § 630.1403 states, "[a]dministrative leave is appropriately used for brief or short periods of time—usually for not more than 1 workday." Given the different categories of leave in the statute and the plain language regarding administrative leave, legal commentators have argued that the regulations "comport with neither the text nor the spirit of the law." Unions representing United States Agency for International Development (USAID) employees also

emphasized the statutory 10-day cap in a case challenging the Trump Administration's placement of more than 2,000 employees on administrative leave. In that case, the U.S. District Court for the District of Columbia denied the unions' request for an injunction—finding that plaintiffs failed to, among other things, demonstrate irreparable harm and a likelihood of success on the merits to justify the injunction—but the litigation is ongoing and the court observed that a union representative or USAID employee could potentially object to the agency's administrative leave placements under either the Civil Service Reform Act (CSRA) or Federal Service Labor-Management Relations Statute (FSLMRS).

American Federation of Government Employees et al. v. Ezell

On February 4, 2025, four labor organizations that collectively represent more than 800,000 federal employees sued OPM and its acting director, arguing that the deferred resignation program violates the Administrative Procedure Act (APA). The lawsuit, filed in the U.S. District Court for the District of Massachusetts, sought declaratory and injunctive relief. On February 6, 2025, the court stayed the program's deadline to accept the deferred resignation offer until February 10, 2025. The court later extended that stay, but dissolved it on February 12, 2025, ruling that the unions did not have standing to challenge the program and that the court did not have subject matter jurisdiction over the APA claims.

The labor organizations argued that the deferred resignation program violates the APA, and they requested that the court "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The unions maintained that the program is arbitrary and capricious for several reasons, including that it fails to consider possible adverse consequences on the continued functioning of the federal government and that it runs counter to long-standing rules and requirements for federal employees.

The unions argued that the deferred resignation program also violates the APA because it is not in accordance with appropriations law. Under the Antideficiency Act, federal officials are generally prohibited from involving the government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." Nearly all federal agencies currently operate under continuing appropriations resolutions that are available until March 14, 2025. By purporting to involve the government in obligations under the program requiring payment after that date and until September 30, 2025, the unions contended that the program violates the Antideficiency Act and is not in accordance with law.

In *American Federation of Government Employees et al. v. Ezell*, the district court did not directly address the unions' APA claims, but instead ruled that the unions were not entitled to injunctive relief because they lacked standing to challenge the program and because the court did not have subject matter jurisdiction over the claims. Regarding standing, Article III of the Constitution has been interpreted to require that plaintiffs in federal court assert their own rights and not those of third parties. Citing the Supreme Court's 2024 decision in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, the district court maintained that a plaintiff must have a personal stake in a dispute to establish Article III standing and that the unions' arguments related to diversion of resources in helping their members and the potential loss of members was not sufficient. The court observed: "Just as the Court found that the plaintiffs in *Hippocratic Medicine* could not spend their way into standing, neither can the plaintiffs in this case establish standing by choosing to divert resources towards 'respond[ing] to tremendous uncertainty created by OPM's actions' and away from other union priorities."

The court also determined that it did not have subject matter jurisdiction over the unions' APA claims. Subject matter jurisdiction refers to the power of a court to adjudicate a particular type of case. The court maintained that the unions' APA claims are the type of challenges Congress intended for review under the FSLMRS, which establishes a framework for collective bargaining in the federal government, and the CSRA, which prescribes other employment standards for the federal workforce. The court indicated that

the FSLMRS and CSRA provide the exclusive procedures for resolving disputes involving federal agencies, federal employees, and the unions representing federal employees. Under the FSLMRS and CSRA, disputes must first be administratively exhausted before the employing agency and either the Federal Labor Relations Authority (for labor-management disputes) or the Merit Systems Protection Board (for employment disputes) before any further challenges may be heard in a federal court of appeals. The court found that judicial review of an aggrieved employee's claim is available, but only after the conclusion of the administrative review process.

Following the court's decision in *Ezell*, the U.S. District Court for the District of Columbia reached a similar conclusion in a case challenging the deferred resignation program and the removal of probationary employees at numerous federal agencies. In *National Treasury Employees Union (NTEU) v. Trump*, the court maintained that it did not have subject matter jurisdiction over the claims and that the union plaintiffs had to bring their claims pursuant to the FSLMRS.

As of the time of this writing, the unions have not appealed the decisions in *Ezell* or *NTEU v. Trump*. Any further legal challenge to the deferred resignation program itself may not occur until an employee who has chosen to resign under the program questions its legitimacy, perhaps after a breach of the agreement. The impact of the deferred resignation agreement's waiver provision on such a challenge is not entirely certain. Courts may also possibly consider a challenge to deferred resignation in the context of executive branch agencies' use of administrative leave, as referenced in the D.C. District Court's decision regarding the application of administrative leave at USAID.

Considerations for Congress

An OPM memorandum on the legality of the deferred resignation program declared, "[n]othing in the deferred resignation program requires congressional approval." OPM has cited various authorities passed by Congress as sources of authority for the deferred resignation program. In addition to the Administrative Leave Act discussed above, program guidance has frequently cited sections 1103, 1104, and 2951 of Title 5 of the U.S. Code—authorities related to the responsibilities and functions of OPM—as well as authorities related to telework, retirement, and general employment of the civil service in the executive branch.

Congress has delegated a substantial amount of authority to the executive branch to regulate the civil service, yet it may withdraw those delegations or substitute its own judgment regarding such matters through the legislative process. Congress also may refrain from action. If Congress chooses to address civil service reforms in statute, those reforms may have a more lasting effect when compared to an executive action that could be repealed by future administrations. For example, Congress could amend the Administrative Leave Act to explicitly apply the statutory 10-day cap to administrative leave for *any purpose*, thus limiting the ability of the executive branch to utilize administrative leave for deferred resignation in the future. Alternatively, Congress could codify OPM's current interpretation that the 10-day cap applies only to administrative leave for investigative purposes. Congress could also create a statutory authority specifically authorizing, clarifying, or prohibiting a deferred resignation program.

The committees with jurisdiction over the federal workforce—such as the House Committee on Oversight and Government Reform and the Senate Committee on Homeland Security and Governmental Affairs—could also conduct oversight of OPM's implementation of the deferred resignation program to include hearings or requests for information, which may inform future legislation governing agency authorities or reductions in force.

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