



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

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Memorandum for Heads of Executive Departments and Agencies

From: Dale Cabaniss
Director

Subject: Updated Guidance on Implementation of Executive Orders
13836, 13837, and 13839

Note: The guidance within the memorandum below has been rescinded by Executive Order; please refer to OPM's March 5, 2021 memorandum:
<https://www.chcoc.gov/content/guidance-implementation-executive-order-14003-protecting-federal-workforce>

Immediate Impact of Fully Effective Executive Orders

Executive Orders (EOs) 13836, 13837, and 13839 of May 25, 2018, are currently effective, as a matter of law and policy, and agencies should thereby take all necessary and appropriate steps to incorporate applicable provisions of these EOs as soon as possible, consistent with law. Agencies should adhere to the now-effective provisions of the EOs in ongoing negotiations and reopen collective bargaining agreements at the soonest possible opportunity in order to conform applicable provisions of collective bargaining agreements (CBAs) with the EOs' requirements.

The soonest possible opportunity will generally be at the conclusion of a current term of a CBA when all relevant provisions of the EOs become operative and enforceable.

Background

On October 3, 2019, the United States Court of Appeals for the District of Columbia Circuit issued a mandate vacating a district court's order that had enjoined portions of three Executive Orders issued on May 25, 2018: 13836 *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*; 13837 *Ensuring Transparency, Accountability, and Efficiency in Taxpayer Funded Union Time Use*; and 13839 *Promoting Accountability and Streamlining Removal Procedures Consistent with Merit Systems Principles*.

Accordingly, these three Executive Orders, including their previously enjoined provisions, are in full force and effect and should be implemented by agencies as soon as feasible consistent with the requirements and guidance contained in the EOs and consistent with law.

Key Provisions No Longer Enjoined

Key provisions no longer enjoined and therefore fully effective include those set forth below. Agencies should take steps to implement these and other EO provisions at the soonest possible opportunity consistent with law:

EO 13836

- Effective and efficient bargaining, pursuant to the policy goals of the EO (see EO, section 1), are ordinarily satisfied by having negotiating periods of 6 weeks or less for ground rules and between 4 and 6 months for a term collective bargaining agreement (CBA). Where negotiations last longer than the period established by ground rules, or, absent a pre-set deadline, a reasonable time, agencies should consider whether to expeditiously advance to mediation and, as necessary, to the Federal Service Impasses Panel (FSIP); section 5(a).
- In developing proposed ground rules, and during any negotiations, agency negotiators shall request the exchange of written proposals, so as to facilitate resolution of negotiability issues and assess the likely effect of specific proposals on agency operations and management rights. To the extent that an agency's CBAs, ground rules, or other agreements contain requirements for a bargaining approach that would not permit the exchange of written proposals addressing specific issues, the agency should, at the soonest opportunity, take steps to eliminate them; section 5(e).
- Agency heads may not negotiate over the substance of the subjects set forth in 5 U.S.C. §7106(b)(1) and shall instruct subordinate officials that they may not negotiate over those same subjects; section 6.

EO 13837

- No Agency shall agree to authorize official time (referred to in the EO 13837 as taxpayer-funded union time) under 5 U.S.C. § 7131(d) unless such time is reasonable, necessary, and in the public interest. Agreements authorizing official time under section 7131(d) that would cause the union time rate (number of duty hours in the FY used for official time divided by number of bargaining unit employees) in a bargaining unit to exceed 1 hour, taking into account the size of the bargaining unit and the amount of official time

anticipated to be granted under 5 U.S.C. §§ 7131(a) and 7131(c), should ordinarily not be considered reasonable, necessary, and in the public interest; section 3(a).

- Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee; section 4(a)(i).
- Employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training, except that employees who have spent one-quarter of their paid time in any FY performing non-agency business may continue to use official time in that FY for purposes covered by 5 U.S.C. §§ 7131(a) and (c), with excess time counting toward the next year's limitation; section 4(a)(ii).
- No employee, when acting on behalf of a Federal labor organization, may be permitted free or discounted use of government property or any other agency resources if such free or discounted use is not generally available for non-agency business by employees when acting on behalf of non-Federal organizations. Such property and resources include office or meeting space, reserved parking spaces, phones, computers, and computer systems, section 4(a)(iii). Each agency should evaluate its own situation and make an assessment based on the practice(s) within the agency in consultation with your Chief Financial Officers and facilities personnel, as appropriate.
- Employees may not use official time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to 5 U.S.C. § 7121, except where such use is otherwise authorized by law or regulation. But that prohibition does not apply to an employee using official time for a grievance brought on the employee's own behalf, to an employee appearing as a witness in any grievance proceeding, or to an employee challenging an adverse personnel action against the employee under certain whistleblower laws; section 4(a)(v).
- Employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation; section 4(a)(iv).
- Employees may not use official time without advance written authorization from their agency, except where obtaining prior approval is deemed impracticable under regulations or guidance adopted by OPM pursuant to the EO; section 4(b).

EO 13839

- Whenever reasonable to do so, agency heads shall endeavor to exclude subjects from the application of any negotiated grievance procedures any disputes concerning decisions to remove any employee from Federal service for misconduct or unacceptable performance; section 3.

- Agencies shall not subject to grievance procedures or binding arbitration disputes involving subjects such as performance ratings and awards; section 4(a).
- Agencies generally should not afford employees more than a thirty (30) day period to demonstrate acceptable performance pursuant to 5 U.S.C. § 4302(c)(6), except when the agency determines that a longer period is necessary to provide sufficient time to evaluate an employee's performance; section 4(c).

Incorporating Fully Effective EOs into the Collective Bargaining Process

Impact of Full Reinstatement of EOs on Bargaining

Ongoing Bargaining

OPM guidance issued on October 4, 2019 emphasized that even for subjects that were previously enjoined, agencies retained the authority to draft proposals and take positions during bargaining that are consistent with law and arrived at using independent judgment, taking into account agency-specific circumstances (<https://chcoc.gov/content/updated-guidance-implementation-executive-orders-13836-13837-and-13839>). Whereas this principle remains in effect, agencies may also have additional impetus to pursue specific bargaining positions consistent with the goal-setting provisions and requirements of the EOs. This includes provisions relating

- to:
- Negotiated grievance procedure exclusions, including subjects such as removal of employees for misconduct or unacceptable performance
 - Preclusion of official time authorization without pre-approval and limitations on authorized hours of official time under section 7131(d) per fiscal year
 - Procedures for closely tracking and authorizing employee use of official time
 - Requirement to seek written submissions of proposals in ground rules and other bargaining and to establish a maximum period for bargaining
 - Limiting free or discounted use of government property or resources

If CBA negotiations are ongoing, the provisions of the Executive Orders should be incorporated into agency proposals to the extent required by the EOs and consistent with law, including the duty to negotiate in good faith. As an example, OPM guidance implementing EO 13837 provides the following direction to agencies:

Subject to section 5(b) and section 8 of EO 13837, agencies shall take steps to modify CBAs and other agreements at the soonest permissible opportunity to ensure that unrestricted grants of taxpayer-funded union time are eliminated and that agencies have mechanisms in place to ensure that employees request and

receive specific authorization prior to utilizing taxpayer-funded union time and to carefully monitor taxpayer-funded union time to ensure that it is used only for authorized purposes.

Accordingly, to the extent that CBA negotiations are ongoing and consistent with law, Agencies should pursue bargaining strategies and make proposals that incorporate provisions from all three EOs, including requirements relating to official time contained in EO 13837. Given the fluidity of the bargaining process and the broad executive authority which is foundational to the EOs, it is anticipated that Agencies will have broad discretion to make changes prior to the conclusion of bargaining pursuant to EO requirements. Agencies should consult with offices of human resources and general counsel to assess how these goals can be accomplished to the maximum extent feasible consistent with the duty to bargain in good faith.

Bargaining Held in Abeyance

Bargaining matters that were held in abeyance pending the outcome of the EO litigation should be resumed at the soonest possible opportunity. Agreements that were reached pursuant to the EOs, prior to the enjoinder of portions of the EO, should continue to be considered valid and enforceable.

Opportunity for Reopening CBAs and Enforcement Upon Conclusion of Current Term

Agencies that have an upcoming opportunity to reopen their CBAs should, pursuant to the terms of the EOs and at the earliest moment the law permits, reopen and seek to modify collective bargaining agreements or other agreements that contain at least one provision that is inconsistent with any part of the EO. Whether or not parties opt to reopen an agreement, however, all relevant provisions of the EOs become operative and enforceable at the conclusion of a current term of a CBA. *See generally U.S. Dep't of Commerce, PTO and NTEU, Chapter 245, 65 FLRA 817 (2011); see also Dep't of Defense, Defense Contract Audit Agency, Central Region and AFGE Local 3529, 37 FLRA 1218 (1990).* Accordingly, if the current term of a CBA expires and is *not* reopened (and thus “rolls over” for another term based on the terms of an individual CBA), because the provisions of the EOs would be enforceable, Agencies should still take steps to immediately apply their terms, consistent with law.

Agencies should consult with offices of human resources and general counsel to assess to what extent union notice and other union engagement may be required when applying the EOs terms to a CBA that has rolled over. Agencies should also consult with offices of human resources and general counsel to assess whether an agency may have the ability, consistent with law, to fulfill any such requirements through post-implementation bargaining. *See Dep't of Homeland Security, ICE and AFGE National Council, 118-ICE, 70 FLRA 628 (2018).*

Agencies should also carefully review terms of individual CBAs, as some may provide the opportunity for renegotiation during the term of an agreement to the extent that the CBA may conflict with a new law, government-wide rule (to include the EOs) or regulation. To the extent that any such CBA provisions exist, Agencies should rely upon them to apply provisions of the EOs at the soonest opportunity consistent with law during the term of the agreement. Agencies should also pursue, in CBA bargaining, the addition of such provisions in order to create an ongoing mechanism for more expeditious incorporation of government-wide rules (including executive orders) and regulations into CBAs.

Immediate Implementation Pursuant to Management Discretion

Whereas incorporation of certain provisions of the EOs may require appropriate notice of changes and bargaining, the EOs may have more immediate effect when incorporated through the exercise of individual management discretion. As an example, EO 13836, Section 7 directs agency heads not to agree to negotiate over “permissive subjects” contained in 5 U.S.C. § 7106(b)(1) and requires Agency heads to issue that direction to subordinates. As Agency heads and their subordinates, to whom such decisions may be delegated, currently have the discretion, by law, to make determinations in response to “(b)(1)” requests to negotiate over permissive subjects, carrying out the President’s instruction would not constitute any type of change that would require notice and bargaining absent an agency policy or CBA requirement that would in some way constrain the exercise of this discretion.

Agency Management may also have the discretion, to the extent consistent with law and existing CBAs, to incorporate provisions of EO 13837 into determinations to approve or disapprove official time requested pursuant to 5 U.S.C. § 7131(d). As an example, agency management may have the ability to immediately incorporate the government-wide rule contained in section 4(a)(v)(1) of EO 13837, which precludes employee use of official time under certain circumstances related to grievances filed against the Agency, when responding to individual requests from unions and employees to use official time. The ability to incorporate such EO provisions will again depend, in part, on whether any agency policy or CBA would constrain the exercise of Management discretion. Accordingly, agencies should consult closely with their offices of human resources and general counsel prior to taking such action.

Impact of Full Reinstatement of EOs on Formal Actions

Agencies should also consult with offices of human resources and general counsel to assess the impact of the reinstatement of previously enjoined EO provisions on ongoing grievances and other formal administrative actions. As an example, Agencies should assess the feasibility of applying grievance exclusions to grievance matters that have been filed but not yet adjudicated,

including by incorporating the EOs into grievance decisions. Similarly, to the extent permissible by law and after appropriate consultation with offices of human resources and general counsel, agencies may seek to rely upon provisions of the EOs for persuasive weight in grievance matters which have advanced to arbitration but where a hearing has not yet been held or where a hearing has been held but a decision has not yet been rendered. To the extent consistent with law, the incorporation of the EOs to previously initiated formal actions may apply to grievances relating to removals of employees for misconduct or unacceptable performance as well as grievances relating to performance appraisals and awards.

Agencies may also rely upon the now fully-effective provisions of the EOs in connection with ongoing Federal Labor Relations Authority (FLRA) matters, such as unfair labor practices and bargaining disputes before the FSIP. An example of EO provisions that may have persuasive value in ongoing FLRA/FSIP proceedings are provisions in EO 13836 requiring agencies to request exchange of written proposals, seek limitations on bargaining to 6 weeks for ground rules and 4 to 6 months for CBAs, and seek expedited advancement of disputes to Federal Mediation and Conciliation Service (FMCS) and FSIP when these timeframes are exceeded. To the extent that any provision of the EOs may have persuasive value with regard to ongoing disputes, Agencies should also consider filing amended pleadings and otherwise supplement the administrative record in connection with any formal proceedings before arbitrators, the FLRA, and the FSIP.

Additional Information

Agencies should consult with offices of human resources and general counsel regarding any questions related to implementation of the EOs.

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, and Human Resources Directors