



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT  
Washington, DC 20415

The Director

November 8, 2018

**Memorandum for Heads of Executive Departments and Agencies**

From: Margaret M. Weichert  
Acting Director

Subject: Additional Guidance Relating to 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**Note: The guidance within the memorandum below has been rescinded by Executive Order; please refer to OPM's March 5, 2021 memorandum: 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>**

On August 29, 2018, the Director of the U.S. Office of Personnel Management (OPM) issued [preliminary guidance](#) on the U.S. District Court's decision in *American Federation of Government Employees v. Trump*, committing OPM to comply fully with the District Court's August 24, 2018 order enjoining certain provisions of Executive Order Nos. 13836, 13837, and 13839. To reiterate, the enjoined provisions are Executive Order 13836 §§ 5(a), 5(e), 6; Executive Order 13837 §§ 3(a), 4(a), 4(b); and Executive Order 13839 §§ 3, 4(a), 4(c). All other provisions of the Orders remain in full effect.

As noted in OPM's preliminary guidance, the Court's decision does not limit or otherwise modify Agency or Union collective bargaining rights and obligations under the Federal Service Labor-Management Relations Statute. This includes the Agency's right to make proposals in the context of collective bargaining, including over subjects that were discussed in the Executive Orders, and to fashion those proposals in a manner that best reflects critical agency priorities.

Consistent with this principle, agencies should approach bargaining, including bargaining over those subjects covered by the currently enjoined provisions of the Executive Orders, as a party to the statutory collective-bargaining process -- that is to say, in a good-faith manner that best reflects agency mission needs. Agencies retain 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.

This additional guidance is intended to provide clarification surrounding the impacts of the Court's decision on ongoing and upcoming collective bargaining.

Although some provisions of Executive Order 13836 have been enjoined, that Order continues to provide important guidance to agencies engaged in collective bargaining, and those portions of the Order that are not currently enjoined remain in effect. This includes Section 1(b), which establishes the policy of the Federal Government that "agencies should secure collective

bargaining agreements (CBAs) that: promote an effective and efficient means of accomplishing agency missions; encourage the highest levels of employee performance and ethical conduct; ensure employees are accountable for their conduct and performance on the job; expand agency flexibility to address operational needs; reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not, by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United States Code (management rights)” and that agencies generally “should not take more than a year to renegotiate CBAs.” Section 5 of the Order, many subsections of which remain in effect, sets forth some ways that the President believed agencies could achieve the policies set forth in Section 1(b). Other sections of Executive Order 13836 that remain in effect include all of sections 3, 4, 7, and 8.

There are numerous examples of areas where Agencies enjoy discretion in the collective bargaining process consistent with law, arrived at using independent judgment, taking into account agency-specific circumstances. For example, the subjects of bargaining identified in section 7106(b)(1) remain subject to negotiation at the election of the agency. Another example would include an Agency’s decision to propose that CBA bargaining proposals be provided in writing prior to CBA negotiation meetings. Similarly, agencies remain empowered under the Statute to adopt positions on what they deem to be a reasonable length of time for their own CBA negotiations and to advance issues to mediation or to the Federal Service Impasses Panel when such time has been exceeded. In all events, however, agencies must exercise their discretion consistent with applicable law.

In crafting their bargaining proposals, agencies should also be mindful of the policies set forth in Executive Orders 13837 and 13839 with respect to the effective functioning of the executive branch. Among other things, these policies favor limiting opportunity periods to demonstrate acceptable performance under section 4302(c)(6), title 5, United States Code; not requiring supervisors to use progressive discipline; and ensuring that taxpayer-funded union time is authorized in amounts that are reasonable, necessary, and in the public interest. Agencies are encouraged to carefully review the still-operative provisions of Executive Orders 13837 and 13839 and to exercise their independent judgment in deciding how best to pursue these policies through collective bargaining.

Agencies must adhere to the obligation to negotiate in good faith. Agencies should also be mindful of their obligations under title 5, Code of Federal Regulations, as well as other regulations appearing elsewhere in law. These statutory obligations, as interpreted by the Federal Labor Relations Authority and federal courts, remain in force and should continue to govern agency collective bargaining activities. OPM encourages Agencies to consult with their general counsel’s office about their rights and obligations under the Statute, possible bargaining proposals, negotiation strategy, and any other questions they may have about complying with the Court’s decision.

cc: Chief Human Capital Officers, Deputy Chief Human Capital Officers, and Human Resources Directors