



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT  
Washington, DC 20415

The Director

Thursday, July 5, 2018

**MEMORANDUM FOR: HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES**

FROM: DR. JEFF T.H. PON, DIRECTOR

Subject: Guidance for Implementation of Executive Order 13839 - Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles

*Note: The guidance within the memorandum below has been rescinded by Executive Order; please refer to OPM's March 5, 2021 memorandum: 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

**Introduction**

Merit system principles provide a framework for responsible behavior. These underlying values promote efficient and effective use of the workforce and establish that Federal employees should be held accountable for performance and conduct. In keeping with merit system principles, the President's Management Agenda (PMA) recognizes that Federal employees underpin nearly all the operations of the Government, ensuring the smooth functioning of our democracy. The Federal personnel system needs to keep pace with changing workplace needs and return to its root principles. Notably, a majority of both employees and managers appear to agree that the performance management system fails to reward the best and address the worst employees.\* Finally, the PMA calls for agencies to establish processes that help agencies retain top employees and efficiently remove those who fail to perform or to uphold the public's trust. Consistent with the vision of the PMA, Executive Order (EO) 13839, signed by the President on May 25, 2018, requires executive agencies (as defined in section 105 of title 5, U.S. Code, excluding the Government Accountability Office (agencies)) to further facilitate a Federal supervisor's ability to promote civil servant accountability while simultaneously recognizing each employee's procedural rights and protections. Agencies should recognize and reward good performers, while unacceptable performers should be separated if they do not improve. Misconduct should be dealt with promptly in the Federal workforce. This guidance summarizes key requirements of EO 13839.

**Implementation and Renegotiation of Collective Bargaining Agreements**

The EO directs agencies, at the earliest moment the law permits, to renegotiate any collective bargaining agreement (CBA) provision that is inconsistent with the EO or with any final Office of Personnel Management (OPM) regulations promulgated pursuant to the EO subject to applicable law. EOs possess the force of government-wide rules. Therefore, provisions of the EO are effective on the date the CBA expires or rolls over, whether or not the CBA is reopened

for negotiations. Nonetheless, agencies are encouraged to consult with legal counsel and offices of labor relations on questions relating to appropriate implementation of the EO. This consultation would include questions about how to implement the provisions of the EO that conflict with a CBA.

Section 7 of EO 13839 requires OPM to examine whether existing OPM regulations effectuate the principles articulated in Section 2 of the EO and the requirements of Sections 3, 4, 5, and 6 of the EO. If they do not, OPM is directed to propose for notice and public comment, as soon as practicable, regulations to effectuate these principles and requirements. Section 8 requires all actions implementing the EO, including OPM's regulations, to be consistent with applicable law. OPM has started this review process and will propose regulatory changes as appropriate.

If OPM ultimately makes any regulatory changes, the EO requires agencies to revise agency policies within 45 days of the issuance of any final OPM regulations implementing the requirements of the EO.

The EO requires OPM to submit a report to the President, through OMB, within 15 months of any final rules issued pursuant to the EO. This report will evaluate the effect of these rules, including their effect on a supervisor's ability to hold employees accountable for their performance. We anticipate working closely with agencies through the Chief Human Capital Officers (CHCO) Council in assessing the effect of these rules and developing this report.

Finally, the EO requires OPM to work with the CHCO Council to undertake a government-wide initiative to educate Federal supervisors about how to hold employees accountable for unacceptable performance or misconduct under any new rules issued by OPM. While this education process will not start until after any new rules are issued by OPM, agencies are reminded of the requirements in OMB Memorandum M-17-22 to ensure managers and supporting human resources staff are appropriately trained on current rules.

We have included the attached table summarizing agency deadlines for implementation of key requirements of this EO. Please consult the EO for more information on general provisions.

### **Principles for Accountability in the Federal Workforce**

Section 2 of EO 13839 sets forth ten principles for accountability in the Federal workforce. These principles are intended to address implementation challenges, misconceptions, and practices related to addressing Federal employee performance and conduct which present obstacles to taking swift and appropriate action. Included are the following principles:

- To the extent practicable, agencies should issue decisions on proposed removals taken under chapter 75 of title 5, United States Code, within 15 business days of the end of the employee reply period following a notice of proposed removal.
- To the extent practicable, agencies should limit the written notice of adverse action to the 30 days prescribed in section 7513(b)(1) of title 5, United States Code.
- The removal procedures set forth in chapter 75 of title 5, United States Code (Chapter 75 procedures), should be used in appropriate cases to address instances of unacceptable performance.

Section 7(b) of EO 13839 requires each agency to take steps to conform, to the extent permitted by law, internal agency discipline and unacceptable performance policies to these principles within 45 days of the issuance of the EO, in areas where issuance of final OPM regulations is not required. Section 7(b) also requires agencies to renegotiate, as applicable, any collective bargaining agreement inconsistent with any provisions of the EO on the earliest practical date permitted by law. Please refer to the attached EO for complete details on these ten principles and implementation requirements. As terms of collective bargaining agreements and other agreements may differ widely, agencies are encouraged to consult with agency legal counsel and agency labor relations offices on questions relating to appropriate implementation of the EO.

### **Standard for Negotiating Grievance Procedures**

Section 3 of EO 13839 requires an agency head, whenever reasonable in view of the circumstances, to endeavor to exclude from the negotiated grievance process any dispute concerning the decision to remove an employee from the Federal service for misconduct or unacceptable performance. The EO directs agencies to commit the time and resources necessary to endeavor to achieve this goal while also fulfilling their obligation to bargain in good faith. Agencies are required, to the extent permitted by law, to promptly seek aid from the Federal Mediation and Conciliation Service and, as needed, the Federal Service Impasses Panel in the resolution of disagreements when negotiating these exclusions. Section 3 also requires agencies to provide an explanation to the President, through the Director of OPM, within 30 days after the adoption of any collective bargaining agreement that fails to achieve this goal. This requirement commences on July 9, 2018. Such an explanation would not be required if the agreement was adopted pursuant to an order of the Federal Service Impasses Panel or an arbitrator engaging in interest arbitration, provided that the agency had proposed excluding from the negotiated grievance procedure the decision to remove an employee from the Federal service for misconduct or unacceptable performance.

### **Managing the Federal Workforce**

To promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service, Section 4 of EO 13839 establishes requirements for agencies regarding negotiated grievance procedures. For example, to the extent consistent with law, it requires agencies to exclude from grievance and binding arbitration procedures disputes over the assignment of ratings of record and awards of any form of incentive pay. Such matters may still be covered by internal agency administrative grievance procedures. It further precludes agencies from entering into any agreement that would purport to bind the agency to: limit agency discretion to utilize Chapter 75 procedures to address unacceptable performance; require an agency to use the procedures under Chapter 43 before removing an employee for unacceptable performance; require affording employees any additional performance assistance period (e.g. PAP, etc.) or similar informal period to demonstrate improved performance prior to the initiation of an opportunity period under 5 U.S.C. 4303(c)(6); use progressive discipline principles; or afford employees performance opportunity periods longer than 30 days (unless determined to be necessary by an agency in its sole and exclusive discretion) to address unacceptable performance. The EO directs agencies to renegotiate any CBA provision that is inconsistent with these requirements at the earliest opportunity permitted by law. For example,

at the soonest possible opportunity, agencies should take steps to modify CBAs and other agreements that would require utilization of progressive discipline principles in disciplinary procedures. Agencies should further take steps to include in agreements terms that clarify, consistent with the EO and in accordance with the management rights provision of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7106(a)(2), that consideration of progressive discipline is not required or permitted when administering disciplinary action, that disciplinary actions should be calibrated to specific facts and circumstances of each situation, and that suspensions are not required before proposing an employee's removal if facts and circumstances warrant the proposal of a removal.

These presidential requirements are intended to remove unnecessary barriers for timely and effectively addressing misconduct, unacceptable performance, and other matters. They further support the steps agencies should already be taking to support plans to maximize employee performance.\*\* They do not, however, abrogate provisions of existing collective bargaining agreements, as provided in section 8(b) of the EO to the extent that the current CBA is still in effect (having not expired or reached the end of a current term) or a CBA does not contain a reopener provision permitting the EO to be immediately effective during the term of an agreement. Please refer to the attached EO for complete details on these comprehensive requirements.

### **Ensuring Integrity of Personnel Files**

Section 5 of EO 13839 provides that agencies shall not agree to erase, remove, alter, or withhold from another agency any information about an employee's performance or conduct in that employee's official personnel records, including, an employee's Official Personnel Folder and Employee Performance File, as part of, or a condition to, resolving a formal or informal complaint by the employee or settling an administrative challenge to an adverse personnel action. Please consult with your agency legal counsel on appropriate application and implementation of Section 5 of the EO.

### **Data Collection of Adverse Actions**

Section 6 of EO 13839 outlines certain types of data for agencies to collect and report to OPM for fiscal year (FY) 2018, and for each fiscal year thereafter. To enhance public accountability of agencies for your management of the Federal workforce, OPM will publish the information received from agencies aggregated at a level necessary to protect personal privacy.

The first report will cover the FY 2018 period of October 1, 2017, through September 30, 2018. This report will be due to OPM no later than November 29, 2018. Due to the nature of the data outlined in Section 6, some of this information may need to be manually compiled. Agencies are strongly encouraged to begin assembling information required by Section 6 at the earliest opportunity in order to facilitate submission of your first report for this fiscal year. Each department or agency head must coordinate collection of this data from your components and compile one consolidated report for submission to OPM using the attached form. The report must be submitted electronically to OPM via email at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) no later than 60 days following the conclusion of each fiscal year. OPM will issue reminders of this requirement at the end of each fiscal year. Agencies must also observe all applicable laws,

including those governing privacy and data security, when compiling and submitting data pursuant to this reporting requirement.

### Questions

Agency headquarters-level human resources offices may contact OPM's Accountability and Workforce Relations office at [employeeaccountability@opm.gov](mailto:employeeaccountability@opm.gov) or 202-606-2930. Other agency employees should contact their agency human resources offices for assistance.

3 Attachments:

- [Executive Order 13839](#)
- Data Collection Form (See 508-conformant file below)
- Agency Deadlines (See 508-conformant file below)

cc: Chief Human Capital Officers and Human Resources Directors

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\* Federal Employee Viewpoint Survey, 2017

\*\* See OMB M-17-22 at [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/memoranda/2017/M-17-22.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2017/M-17-22.pdf).