

President Trump's Executive Orders: Guidelines for NFFE Locals

On July 16, 2019, the U.S. Appeals Court for the D.C. Circuit struck down the lower court ruling by Judge Ketanji Brown-Jackson in the Trump executive order (EO) case. With limited legal routes available to further extend the lower court's injunction, the Trump administration's EOs 13836, 13837, and 13839 will likely go into effect in the coming weeks.

In responding to this possibility, NFFE recommends a general strategy of "obey and grieve." When an agency gives official orders, it is paramount to avoid accusations of insubordination. If an agency hands down a policy that you believe is contrary to the CBA or the Statute, obey the order and file a grievance or an unfair labor practice as soon as possible. This memo aims to address different scenarios that a local may find itself in when an agency takes steps to implement the EOs. Beyond this general strategy, this is how NFFE recommends you prepare for what is coming:

1. Plan Ahead

- **Assess your relationship with local Labor Relations.** If you have a good relationship, management may give you an advanced warning of any potential changes that may occur. In that case, try and work that relationship to delay implementation of the EOs.
- **Start planning now.** Think about your situation:
 - **Have a plan for office space.** If you are suddenly kicked out of your union office, is there an IAM Local or District Office nearby where you could store equipment, books, and records? If so, contact them and see if you can do that if needed. Can your local afford to rent office space, storage space, a safety deposit box, etc. if needed? Contact your Business Representative if you are unsure of what to do.
 - **Have a plan for protecting Local financial records and other sensitive information.** Locals have reporting obligations under labor laws. Do you need to move electronic records from a government computer to a personal computer? Such records must be kept in a secure location. Contact your Business Representative if you are unsure what to do.
 - **Have a plan for protecting representational materials.** Again, secure any sensitive information. Do you have any open grievances or Unfair Labor Practices (ULPs)? Start getting organized and keep a list of upcoming deadlines in each case. Just because you no longer have access to your office does not mean your representational duties and obligations have ceased.
 - **Be prepared to bargain.** If your contract is currently expired, management may propose immediate implementation of the EOs. If they do, this still gives rise to an obligation to bargain over impact and implementation. Submit a request to bargain. Some examples of impact and implementation proposals are:
 - Time (e.g. 30-60 days to transition out of the union office);
 - Research whether the agency charges other groups for office space. Ask for any GSA regulations that govern rentals of office space;

- Retraining of union officials who were on official time before resuming their government job.

2. Assess the Status of Your CBA

- **If your CBA is already in effect** – Once a bargaining agreement becomes effective, subsequently issued government-wide rules or regulations cannot nullify its terms. Attempts to implement a rule or regulation which conflicts with a collective bargaining agreement already in effect is unlawful and subject to an unfair labor practice charge.
- **If you are currently in negotiations on a CBA** – Whether you are in a favorable position regarding the implementation of the EOs depends on where you are in the bargaining process. Management cannot engage in regressive bargaining; to do so would be evidence of a breach of their good-faith bargaining obligation.

Generally, NFFE advises Locals to go slowly and wait for the agency to make a move first. Do what you can to slow the implementation for these EOs. If your contract allows for it, look to negotiate separate ground rules before going to bargain.

The exception to acting slowly is when you are faced with a Last Best Offer (LBO) situation. It is important to keep the bargaining process moving to keep management from implementing their LBO. In the first instance, you must make timely proposals. Failure to stay in communication regarding bargaining may be deemed “inaction” and constitute a waiver of the union’s right to bargain. If the union fails to request to bargain within a reasonable period of time after being notified of proposed changes, fails to submit bargaining proposals within a contractually or otherwise agreed upon time limit, fails to bargain, or fails to timely invoke the services of the Federal Services Impasse Panel after the parties have reached impasse, management’s last best offer can be implemented.

Generally, management can implement its LBO once bargaining reaches an impasse. As bargaining approaches impasse, you must immediately seek resolution with the Federal Mediation Conciliation Service (FMCS) or the Federal Service Impasse Panel (FSIP) depending on where you are in the process. To avoid an LBO trap, unions must be proactive about seeking a resolution to potential impasses. The process for doing so involves first invoking the services of a neutral party like FMCS. Then, if the mediation fails to result in a compromise, we must move our dispute to the FSIP. Union leaders must be deliberate and specific when invoking the services of FSIP. After bargaining reaches impasse, management can implement their LBO if you leave a window of time, even a few days, between when FMCS mediation ends and when you file for impasse resolution with FSIP.

If your negotiations appear to be ending, NFFE advises that you call FMCS at the end of the last bargaining session, get a mediator, and tell management that you have invoked

mediation. If mediation is coming to an end, NFFE recommends that you immediately invoke the services of FSIP. It is important to close the window between mediation and invoking the services of FSIP to avoid giving the agency the opportunity to invoke their LBO. Invoking the services of FSIP generally results in the maintenance of the *status quo* regarding any provision in question. This means that the agency generally may not make a planned change until the impasse is resolved.

- **If your CBA is subject to a re-opener** – If you are working under an expired CBA, considering President Trump’s EOs, NFFE is generally advising all its bargaining units not to re-open negotiations. If management re-opens negotiations, please see the section above. If your contract is subject to immediate reopening upon a given date or within an annual window, calculate that date or window and prepare. Each EO mandates all agencies to re-open expired and expiring contracts for re-negotiations. The VA and Forest Service are such examples.

NFFE has differing recommendations based on the terms of your contract. If the terms of your contract specify that they continue until there is a new contract in place, the agency cannot implement the EOs until a new agreement has been reached. The VA and Forest Service are examples of such contracts.

If your contract contains a roll-over provision, it is important to not allow the agency to re-open the contract before or after their allowed window of opportunity. If the agency fails to re-open within their window of opportunity, your current contract may be extended 1-3 years depending on the precise terms of the contract.

If your members are working under an expired CBA, provisions that are considered “mandatory subjects of bargaining” remain in effect while renegotiation occurs. Provisions of the contract that are considered “permissive subjects of bargaining” are subject to discontinuation of bargaining after reasonable notice. The Statute makes conditions of employment mandatory subjects of bargaining. This includes, “personnel policies, practices, and matters affecting working conditions.” Permissive subjects, by contrast, are those over which the parties have no obligation to bargain, either because they do not involve “conditions of employment” or because they involve “proposals that a party negotiates to limit a right granted by the statute.” Most often, permissive subjects of bargaining include “the number, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or . . . the technology, methods, and means of performing work.” 5 U.S.C. § 7106(b)(1).

The Administration has indicated in OPM guidance that they consider these EOs to be government-wide rules. This means agencies will likely implement them once the contract has expired. This could include a 25% cap on official time and eviction from office space.

These are likely to be difficult times for federal unions. However, NFFE and its members have made it through worse and we will make it through this as well. As always, if you have any questions, be sure to consult with your Business Representative and with NFFE's Office of the General Counsel.