CHAPTER 1

Overview of the Legal Framework of Grievance-Arbitration in the Federal Sector

I. OVERVIEW

Arbitration is a voluntary dispute resolution where parties agree to accept a jointly chosen third party's decision. Labor arbitration comes in two forms: interest arbitration, where an arbitrator sets contract terms when parties can't agree through bargaining, and grievance arbitration, which deals with interpreting and enforcing existing labor agreements. This book focuses on how to advocate grievance arbitration cases.

This chapter provides a background of the development of private sector labor law and the outgrowth of arbitration as a viable forum for resolving employment disputes. It also addresses recent developments affecting federal and private sector labor-management relations.

A. PRIVATE SECTOR LABOR LAWS: A VERY SHORT HISTORY

Federal sector grievance-arbitration has its roots in private sector labor arbitration. At the federal level, private sector labor relations are governed by section 301 of the Labor Management Relations Act (LMRA), 29 USC § 185. Section 301 grants federal courts jurisdiction over contract disputes between an employer and a labor organization. Because collective bargaining agreements were previously subject to state law, section 301 was Congress' effort to federalize labor management collective bargaining. *See* Theodore J. St. Antoine, "The Legal Framework of Labor Arbitration in the Private Sector," *Labor Arbitration: A Practical Guide for Advocates*, p. 20-21 (BNA Books 1990).

The congressional initiative to broaden the authority of federal courts was upheld by the Supreme Court in the case of *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 923, 1 L. Ed. 2d 972 (1957). The Supreme Court, countering a limited view held by certain lower federal courts, concluded that section 301 provided more than mere jurisdiction to federal courts regarding collective bargaining agreements. It also empowered these courts to develop a framework of federal substantive law aimed at enforcing collective bargaining agreements, which encompasses commitments to arbitrate disputes.

The Supreme Court outsourced much of the heavy lifting to labor arbitrators. In a series of decisions that would come to be known as the *Steelworkers Trilogy,* the Supreme Court established a strong presumption in the federal courts favoring grievance-arbitration. The Court found that: (1) an issue in dispute may be arbitrated if it is covered by the language of a collectively bargained arbitration clause, absent clear and unequivocal exclusion; (2) in a suit to enforce an agreement to arbitrate, courts should resolve all doubts in favor of arbitration; and (3) a court reviewing an arbitrator's award is to enforce the award, whether or not it agrees with the award, as long as the award draws its essence from the collective bargaining agreement. *See Steelworkers v. American Mfg. Co*., 363 U.S. 564, 80 S. Ct. 1343 (1960); *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 781–82, 80 S. Ct. 1347 (1960); *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 80 S. Ct. 1358 (1960).

The Supreme Court established the preference for arbitration over litigation based on the arbitrator's superior knowledge of the shop. As stated in *Steelworker's v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 581–82, 80 S. Ct. 1347 (1960):

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the

> agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

The Supreme Court approved the role of arbitrators as interpreters of the collective bargaining agreement in *United Steelworkers v. Enterprise Wheel & Car Company*, 363 U.S. 593, 599, 80 S. Ct. 1358 (1960), in the following language:

> The question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different than his.

Since the *Steelworkers Trilogy*, the Supreme Court has allowed arbitration to be used not just for collective bargaining agreement disputes but also for employment issues involving statutory rights like discrimination based on age, color, disability, national origin, religion, and sex. It's been a bit of a rollercoaster in this area of law. Here are some key cases that dive into how arbitration, collective bargaining, and statutory rights interact.

In *Alexander v. Gardner-Denver, Co.*, 415 U.S. 36 (1974), the Supreme Court unanimously held that a union member who lost an arbitration over race discrimination could still file a Title VII lawsuit. The Court ruled that a union's agreement to arbitrate over race discrimination could not override an individual's right to sue, noting potential conflicts between union and member interests. The Court observed:

> [T]here can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights conferred on employees collectively to foster the process of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits of union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

The Court went on to express its mistrust of arbitration as an adequate forum to address statutory claims, *id*. at 56–58:

> Arbitrator procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. The conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement…. Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.
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> Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; the rights and procedures common to civil trials, such as discovery, compulsory process, cross examination, and testimony under oath, are often severely limited or unavailable. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. These same characteristics, however, make arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.

In 1991, the Supreme Court addressed arbitration of statutory employment discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 111 S. Ct. 1647 (1991). Gilmer, a stockbroker, had signed a mandatory NYSE registration form agreeing to arbitrate employment controversies. Unlike *Alexander*, Gilmer was not a bargaining unit member and signed in his individual capacity. When discharged, he filed an age discrimination claim under the Age Discrimination in Employment Act (ADEA) in federal court. The trial court allowed his lawsuit based on *Alexander*, but the Fourth Circuit reversed, noting no congressional intent to prevent ADEA arbitration agreements. The Supreme Court distinguished *Alexander*, highlighting two key differences: *Alexander* involved the "tension between collective representation and individual statutory rights" absent in Gilmer's case, and *Alexander* concerned an arbitration award's preclusive effect on subsequent litigation, while *Gilmer* addressed the enforceability of an individual agreement to arbitrate statutory claims.

In *Wright v. Universal Maritime Serv. Corp*., 525 U.S. 70, 72, 119 S. Ct. 391 (1998), the Supreme Court addressed whether a general arbitration clause in a collective bargaining agreement compelled employees to arbitrate disability discrimination claims under the Americans with Disabilities Act (ADA). The CBA required all "matters under dispute" to be processed through the grievance process ending in arbitration. Wright filed EEOC charges and a federal lawsuit for disability discrimination. The Court unanimously held that the general arbitration clause didn't require arbitration of Wright's ADA claim. Acknowledging tension between its *Alexander* and *Gilmer* decisions, the Court established that any union waiver of members' rights to judicial forums for discrimination claims must be "clear and unmistakable." *Id*. at 79–80. In *Wright*, the Court found that the general arbitration clause in the CBA at issue did not set forth a "clear and unmistakable" waiver of member statutory rights.

In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 129 S. Ct. 1456 (2009), the Supreme Court was presented with a CBA that explicitly required union members to arbitrate all employment discrimination claims, including applicable federal statutory claims, through a specified grievance and arbitration procedure. 129 S. Ct. at 1461. The case involved claims of age discrimination as a result of the reassignment of three employees performing night watchman duties to service as night porters and cleaners. The union initially grieved the reassignment alleging age discrimination, as well as violation of seniority and overtime rules. The union subsequently withdrew from arbitrating the age discrimination claims although it offered the employees the opportunity to continue to arbitrate those claims at their own expense. Instead, the employees elected to file complaints of age discrimination with the EEOC and, subsequently, file an ADEA lawsuit in federal court. The employer moved to compel arbitration. Relying on *Alexander*, the district court denied the employer's motion to compel, and the U.S. Court of Appeals for the Second Circuit affirmed. A divided (5-4) Supreme Court reversed.

The Supreme Court decided that an arbitration agreement in a negotiated CBA that "clearly and unmistakably" waives employees' right to bring statutory discrimination claims in court is enforceable unless the statutory right itself precludes employee or union waiver—which was not the case in *Pyett*. 129 S. Ct. at 1465–66, 1474. The Court reasoned that Section 9(a) of the National Labor Relations Act (NLRA), which governs federal labor-relations law, broadly affords unions and employers the right to bargain collectively regarding the terms and conditions of employment of bargaining unit members, including statutory claims. 129. S. Ct. at 1463. Neither the NLRA nor the ADEA exempt statutory age claims from arbitration. 129 S. Ct. at 1466. The Court distinguished *Alexander* because the CBA did not expressly cover statutory claims and addressed a different issue: whether an employee waived the right to a judicial forum for the statutory claims by arbitrating contractual claims arising out of the same nucleus of operative facts. 129 S. Ct. at 1463.

Significantly, the Supreme Court in *Pyett* revised its previous skepticism regarding arbitration as a sufficient venue for resolving individual statutory employment rights, which it had expressed in *Alexander*. The Court described its earlier skepticism toward arbitration in *Alexander* as "broad *dicta*," indicating that its previous concerns regarding arbitration had been adequately addressed. 129 S. Ct. at 1469–70. The Court clarified that later rulings have shown arbitration to be just as effective as federal courts in enforcing statutory discrimination laws, as arbitrators can effectively manage the legal and factual intricacies of antitrust matters, and there is no justification to assume that they will disregard the law. 129 S. Ct. at 1471. The Court determined that the NLRA's requirement for unions to provide fair representation shields employees from capricious actions by unions that may override the individual statutory rights of the employees in favor of collective interests.

The *Pyett* decision permits employers and unions to bargain away individual employees' rights to pursue the resolution of statutory discrimination claims in federal court, leaving employees to prosecute their discrimination claims in arbitration. To avoid the high cost of litigation, the uncertainty of jury trials, and to maintain the confidentiality of hearing determinations, employers will likely insist that unions bargain on this mandatory subject of collective bargaining. Of course, unions are not required to agree to the arbitration of statutory discrimination claims.

When considering whether an employee waived his or her statutory rights through a CBA, a court must consider whether "(1) the arbitration provision clearly and unmistakably waives the employee's ability to vindicate his or her statutory right in a court; and (2) the federal statute does not exclude arbitration as an appropriate forum." *Jones v. Does*, 857 F.3d 508, 512 (3d Cir. 2017). The clear-and-unmistakable-waiver standard ensures that "very general" arbitration clauses cannot waive a judicial forum for vindication of statutory rights. *Darrington v. Milton Hershey Schools*, 958 F.3d 188, 193 (3d Cir. 2020). Rather, a clear and unmistakable waiver of a judicial forum for "statutory antidiscrimination claims must be 'explicitly stated' in the collective bargaining agreement." *Pyett*, 556 U.S. at 258.

A CBA can waive employees' rights to bring statutory claims in court only if, applying general tools of contract interpretation, the wavier is "clear and unmistakable." In other words, an agreement to arbitrate employees' statutory claims must be explicit. *Forbush v. City of Sparks* (9th Cir. No. 22-15079 2023 NP).

In *Darrington v. Milton Hershey Schools*, 958 F.3d 188, 195 (3d Cir. 2020), the court found that the CBA language was a "clear and unmistakable" waiver of the right of a bargaining unit member to seek relief for employment discrimination in court:

> MHS and the Union agreed "that the Union, on behalf of itself and the alleged aggrieved [Union members], waives, releases [,] and discharges any right to institute or maintain any private lawsuit alleging employment discrimination in any state or federal court regarding the matters encompassed within this grievance procedure." *Id*. at 93. The CBA "sets forth the exclusive procedure for resolution of disputes arising out of the terms and conditions of [the CBA] or the discipline or discharge of" a Union member.
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> In short, if aggrieved Union members are unsatisfied with the resolution of their disputes after discussions with MHS officials, "the Union [may seek] further consideration of the grievance" by submitted the grievance to arbitration on their behalf.

In *Nealy v. Shelly & Sands, Inc*. (6th Cir. No. 20-3854 2021 NP), the court found that the inclusion of specific language in the CBA that any equal opportunity claim arising from either the CBA or any federal state or local law was subject to the contract's grievance-arbitration procedures was a clear and unmistakable waiver of the right of a bargaining unit employee to seek relief for employment discrimination in a judicial forum.

The Fourth Circuit in *Gilbert v. Donaho*e, 751 F.3d 303, 309–10 (4th Cir. 2014), *cert. denied*, 574 U.S. 873, 135 S. Ct. 251 (2014), found a clear and unmistakable waiver of the judicial forum in the CBA for Rehabilitation Act claims. While the CBA did not expressly waive statutory rights, the court found a waiver based on language in the CBA that prohibited disability discrimination in violation of the Rehabilitation Act. Separately, the court declined to find a specific waiver of Family and Medical Leave Act claims, which were not referenced in the CBA but in separate employer rules.

In *Rattler-Bryceland v. Boutchantharaj Corp*. (W.D. Okla. No. CIV-22-0106-R 2022), the court found that general language in the arbitration provision was not a clear and unmistakable waiver as it did not specifically reference FLSA claims. *Accord Mack v. Six Flags Great Adventure, LLC* (D.N.J. No. 23-3813 (MAS) (TJB) 2024).

In *Reed v. Girard Coll*. (E.D. Pa. No. 20-2325 2020), the court found that the CBA language did not constitute a "clear and unmistakable waiver" of bargaining member rights to vindicate federal and state statutory claims of employment discrimination in court. In relevant part, the CBA provided:

> If the action in Step 3 or Step 4 above fails to resolve the grievance to the satisfaction of the [Union], the grievance may be referred by an authorized representative of the Association to binding arbitration provided in Section 903 of the Act, providing such referral is made within twenty (20) working days following the date of the decision referred to in Step 3 or 4.

Article XVIII, titled "Non-Discrimination," states, in relevant part:

> In the administration of this Agreement, the College shall not discriminate against any employee because of that employee's race, color, sex, religion, national origin, age or union membership, or against qualified individuals with a disability. Any employee who claims a violation of this Article shall, I the first instance, invoke the Grievance and Arbitration Article of this Agreement. If the grievance is not resolved within ninety (90) work days, the employee shall have the right to pursue additional remedies.

The court found that the Grievance and Arbitration Procedure and the Non-Discrimination provisions of the CBA "do not meet the standard for a clear and unmistakable waiver. According to the court, "Article XVIII simply is a general provision prohibiting Girard College from discriminating against its employees on the basis of race, sex, religion, or disability, among other grounds. Nowhere in the relevant sections of the CBA is there any mention of an employee waiving his or her statutory right to pursue a lawsuit alleging discrimination in state or federal courts."

In *Croom v. Elkhart Prods. Corp*. (N.D. Ind. No. 3:15-CV-288 RLM-MGG 2016), the plaintiff sued his employer in federal court for FMLA retaliation and Title VII race discrimination. The employer sought a declaratory judgment that an arbitrator's decision upholding the termination resolved these claims. The court noted that statutory claims aren't precluded by arbitration unless the collective bargaining agreement expressly covers both statutory and contractual discrimination claims and mandates arbitration for such claims. The CBA in Croom only permitted arbitration for grievances concerning "interpretation and application" of the agreement. The court found this language didn't mandate arbitration, didn't clearly require union members to arbitrate federal discrimination claims, and limited the arbitrator's authority to contract interpretation. Consequently, the arbitrator's decision didn't bar the plaintiff from pursuing Title VII or FMLA claims, regardless of any overlap between contractual and statutory rights.

In the federal sector, *Pyett* is primarily limited to Postal employees whose labor relations are governed by the LMRA. As addressed below, federal employees whose labor relations are governed by the Federal Service Labor-Management Relations Statute (FSLMRS) and Civil Service Reform Act of 1978 (CSRA) have the option to have their discrimination claims heard by an arbitrator or by the Equal Employment Opportunity Commission. 5 USC 7121(d).

B. INFLUENCE OF PRIVATE SECTOR LABOR LAW ON THE DEVELOPMENT OF FEDERAL SECTOR LABOR RELATIONS

1. Federal Sector Collective Bargaining Arbitration Provisions Introduced by Executive Order

With the exception of the U.S. Postal Service and perhaps a small minority of other federal sector entities, section 301 of the LMRA does not govern federal sector labor-management relations. The right of federal employees to engage in collective bargaining was first recognized in 1962, with President Kennedy's issuance of Executive Order 10988 (Jan. 17, 1962), which granted federal employees the right to form, join, and assist a labor organization. It directed agencies to recognize labor organizations as the exclusive representative of bargaining unit members and permitted labor and management to negotiate collective bargaining agreements. It also allowed collective bargaining agreements to include provisions for the arbitration of grievances. Arbitrations, however, were merely advisory.

2. Executive Order Allowed Federal Sector to Mimic Private Sector

In 1969, President Nixon expanded federal employee collective bargaining rights through Executive Order 11491 (Oct. 29, 1969). EO 11491 sought to bring federal labor management relations in line with practices in the private sector. Incorporating six major changes into the federal labor management program, the new order:

- Established the Federal Labor Relations Council as the central authority to administer the program and make final decisions on policy;
- Established the Federal Services Impasses Panel to resolve negotiation impasses;
- Provided an election system for handling unit determinations and majority representation cases;
- Offered a binding third-party arbitration process to resolve unfair labor practices, grievances, and standards of conduct;
- Clarified the status of "supervisor" within the federal service; and
- Established government unions, election, bonding and financial reporting and disclosure requirements.

C. ENACTMENT OF THE CIVIL SERVICE REFORM ACT OF 1978 AND THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

At the urging of President Carter to reform the civil service system, Congress passed the Civil Service Reform Act of 1978 (CSRA). Title VII of the CSRA is the Federal Service Labor-Management Relations Statute (FSLMRS), 5 USC 7101 *et seq*., which governs most federal-sector labor management relations. The CSRA replaced the Federal Labor Relations Council with the Federal Labor Relations Authority, which administers the FSLMRS. The FLRA, much like the NLRB in the private sector, was given broad authority to make rules, investigate, and remedy unfair labor practices, as well as address negotiability disputes. FLRA's decisions are subject to judicial review.

The CSRA requires that collective bargaining agreements contain negotiated grievance procedures terminating in binding arbitration. 5 USC 7121. The statute broadly defines a grievance as any complaint concerning employment, the terms of a collective bargaining agreement, or the interpretation of any law, rule, or regulation affecting conditions of employment. 5 USC 7103(a)(9). Grievance procedures (5 USC 7121(a)–(c)) must:

- Be fair and simple;
- Provide for expeditious processing;
- Provide procedures for the settlement of grievances;

- Assure collective bargaining representatives the right to present a grievance on its own behalf or on behalf of a bargaining unit employee;
- Assure bargaining unit employees the right to present their own grievance provided the labor organization is afforded the right to be present at the proceeding; and
- Assure binding arbitration at the election of the agency or exclusive bargaining representative in the event the grievance is not settled.

The CSRA, 5 USC 7121(c), mandates the exclusion of the following five subjects from coverage by a negotiated grievance-arbitration procedure:

- Claimed violations regarding the prohibition on political activities;
- Retirement, life insurance, or health insurance;
- National security suspensions or removals under 5 USC 7532;
- Any examination, certification, or appointment; or
- The classification of any position which does not result in the reduction in grade or pay of an employee.

Parties are allowed to exclude any other matter from coverage by the grievance-arbitration procedure. 5 USC 7121(a)(2).

Federal-sector arbitration differs significantly from private sector arbitration. Private sector grievance procedures primarily enforce CBA terms, while federal sector processes can enforce CBAs, laws, regulations, and agency policies. For discrimination claims, bargaining unit employees may file either a grievance or an EEO complaint (5 USC 7121(d)). When grieving discrimination claims, the process follows standard procedures, though employees may request EEOC review of arbitration awards and retain the right to file civil actions in U.S. District Court (29 CFR Part 1614).

With the exception of cases involving adverse and performance-based actions that, if not adjudicated in arbitration, can be appealed to the Merit Systems Protection Board, the CSRA allows a party dissatisfied with an arbitrator's award to file exceptions with the FLRA. 5 USC 7122(a). Exceptions may be filed where the award is deficient because it is contrary to a law, rule, or regulations or on other grounds similar to those applied in the federal courts in private sector labor management relations. The FLRA is empowered to take necessary action that is consistent with applicable law, rules, or regulations. 5 USC 7122(a). If no exceptions are filed, the award becomes final and binding. 5 USC 7122(b). Exceptions to arbitration awards are addressed in Chapter 17.

The CSRA does not apply to all federal employees. Labor management relations in the U.S. Postal Service, for example, are covered by the LMRA. Labor management relations for members of the U.S. Foreign Service are governed by the Foreign Service Act of 1980. CSRA coverage has also been modified to exclude various other federal employees. While it is certainly easier to overturn an arbitrator's award in the federal sector than in the private sector, it remains a difficult undertaking.

D. TRUMP/BIDEN EXECUTIVE ORDERS AND ACTIONS

The first Trump administration, the Biden administration, and the second Trump administration issued executive orders (EOs) and other executive actions addressing private sector and federal sector labor and employment law generally, and labor-management relations specifically. Generally, the labor-management relations executive orders issued by President Trump during his first term were largely revoked by President Biden during his term. President Biden also issued many executive orders affecting federal and private sector labor-management relations. Not surprisingly, on his return to the White House, President Trump has revoked many of President Biden's EOs, reissued those that President Trump had put in place during his first term (and that President Biden had revoked), and promulgated may new EOs and executive actions affecting private, public, and federal sector labor-management relations.

This section will give a brief overview of selected labor-management focused EOs and executive actions issued during the Trump first term, President Biden's repeal of the Trump EOs and issuance of his own labor-management focused EOs and executive actions during his term, and the labor-management focused EOs and executive actions issued in the first months of the second Trump Presidency. The highlighted EOs and executive actions are not an exhaustive exploration of all EOs and executive actions issued by the Trump and Biden administrations that could affect the workplace.

1. Trump Executive Orders: First Term (Jan. 2016–Jan. 2020)

a. EO 13812: *Revocation of Executive Orders Creating Labor-Management Forums* (Sept. 29, 2017)

On September 29, 2017, Trump Executive Order 13812 revoked the Obama-era Executive Orders 15522, which created Labor-Management Forums, and Executive Order 13708, which established the National Council on Federal Labor-Management Relations and implemented labor-management forums throughout the Executive Branch. President Trump's EO 13812 directed OPM and the heads of agencies to rescind any orders, rules, regulations, guidelines, programs or policies that created labor-management forums. If CBAs contained labor-management forums, however, those forums continued.

b. EOs 13836, 13837, and 13839

On May 25, 2018, the Trump administration issued three executive orders addressing federal sector collective bargaining, union official time, and federal employee due process rights. A summary of the Trump Executive Orders follows:

(i) Executive Order 13836: *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining* (May 25, 2018)

The EO aimed to enhance federal government effectiveness and efficiency in accordance with the Federal Service Labor-Management Relations Statute. The EO:

- Established a "Labor Relations Group" that coordinated the efforts of agencies across the federal government with "sample language" and "counter-proposals" for use in bargaining with unions.
- Set deadlines for agreeing to bargaining ground rules (six weeks) and term bargaining (four to six months) after which point agencies were directed to seek FMCS assistance.
- Required notification of the President through OPM of any negotiations that lasted longer than nine months in which the assistance of the FMCS had not been requested or had not resulted in agreement or advancement to FSIP.
- Required agencies to consider filing ULP charges against unions for bad faith bargaining if negotiations lasted too long, or unilaterally implement changes.
- Required agencies to continue bargaining during pendency of ULP.
- Written proposals during bargaining required.
- Agency heads were required to review all binding agreements with unions, including grievance settlements.
- Disallowed permissive bargaining across the entire federal government.
- Disallowed any bargaining over covered-by subjects, even at the agency's discretion.

(ii) Executive Order 13837: *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union-Time Use* (May 25, 2018)

EO 13836 purported to improve an effective and efficient government by accounting for federal sector union time on representational activities. The EO:

- Capped overall union official time to one hour for each bargaining unit employee per year.
- Limited union representative to 25% of their time for representative activities.
- Prohibited the use of official time to prepare and/or arbitrate grievances.
- Required advance written approval for unions to use official time.
- Subjected union representatives to disciplinary action for violating EO.
- Imposed reporting requirements for union use of official time, including names and compensation of union representatives.
- Required agencies to renegotiate CBAs on the earliest date permitted by law to bring them into compliance with the EO.

(iii) Executive Order 13839: *Promoting Accountability and Streamlining Removal Procedures Consistent With Merit Systems Principles* (May 25, 2018)

EO 13839 purported to hold federal employees accountable for performance and conduct in accord with Merit System principles. The EO:

- Sought to eliminate the use of progressive discipline.
- Limited the use of comparators.
- Gave agencies the discretion to consider an employee's entire past work record when taking disciplinary action.
- Limited advance written notice of adverse action period to 30 business days.
- Encouraged agencies to issue chapter 75 proposed removal within 15 business days of the employee reply period.
- Encouraged agencies to use chapter 75 procedures for unacceptable performance.
- Prioritized performance over seniority in a RIF.
- Called on agencies to exclude removal decisions for conduct or unacceptable performance from grievance procedures.
- Removed from grievance procedures disputes regarding any form of incentive pay.
- Prohibited agencies from negotiating a CBA that affords an employee more than a 30-day period to demonstrate acceptable performance.
- Prohibited "clean SF-50" grievance settlements.
- Imposed additional data reporting requirements on agencies.
- Required agencies to renegotiate their CBAs and reissue their policies in line with the EO.

c. EO 13845: *Establishing the President's National Council for the American Worker* (July 19, 2018)

The EO established a council co-chaired by key federal officials to develop a national worker empowerment strategy. Within 180 days, the council was directed to create recommendations for workforce development initiatives that coordinated government, industry, and nonprofit efforts. These programs were aimed to provide education and skills training that prepare both youth and adults for current and future employment opportunities.

EO 13845 also established an American Workforce Policy Advisory Board composed of the Secretary of Commerce, the Advisor to the President overseeing the Office of Economic initiatives, and up to twenty-five other members appointed by the President to serve as representatives of the various sectors of the economy. The Board was charged with advising the Council on the workforce policy of the United States.

d. EO: 13931: *Continuing the President's National Council for the American Worker and the American Workforce Policy Board* (June 26, 2020)

EO 13931 extends the term of the President's Counsel for the American Worker and the American Workforce Policy Board to September 30, 2021.

e. EO 13957: *Creating Schedule F in the Federal Service* (October 21, 2020)

EO 13957 required federal agencies to conduct a preliminary review to determine which of their workforces' positions met criteria for placement into a newly created Schedule F category of federal positions. Schedule F was based on statutory language that exempted certain positions "of a confidential, policy-determining, or policy-advocating character." These positions would have had a streamlined hiring process. In addition, certain due process rights, such as notice of removal and the right to appeal removals to the Merit Systems Protection Board, would be unavailable to individuals in these positions.

In a September 2022 Report to Congress, the GAO found no agencies had placed positions into Schedule F by the time of the EO's revocation on January 22, 2021.

f. Presidential Memorandum for the Secretary of Defense: *Delegation of Certain Authority Under the Federal Service Labor-Management Relations Statute* (Jan. 29, 2020)

The Memorandum authorized the Secretary of Defense to exclude Defense agencies or subdivisions from the Federal Service Labor-Management Relations Statute where collective bargaining is incompatible with these organizations' missions.

Not surprisingly, federal labor unions were hostile to the Trump EOs. More than a dozen federal unions challenged the executive orders in federal court, asserting, among other claims, that President Trump did not have the authority to issue executive orders regarding federal labor relations. The United States District Court for the District of Columbia enjoined enforcement of nine key provisions of the three Trump Executive Orders. *See AFGE v. Trump*, 318 F. Supp.3d 370 (D.D.C. 2018). The Trump administration appealed the decision.

While the litigation was pending, on July 5, 2018, the OPM issued guidance to implement the three Trump Executive Orders. *See* OPM Memorandum: *Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839* (Oct. 4, 2019). OPM noted that, during the enjoined period, agencies retained the authority to draft proposals and take positions during bargaining consistent with the EOs. And some agencies did just that. By decision of July 16, 2019, the United States Court of Appeals for the District of Columbia held that the District Court lacked subject matter jurisdiction and vacated the injunction. The court found that the plaintiff unions should have gone to the Federal Labor Relations Authority rather than file suit in federal court. *See AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019).

With the injunctions lifted, OPM issued updated guidance telling agencies to implement the Trump Executive Orders. *See* OPM Memorandum: *Updated Guidance on Implementation of Executive Orders 13836, 13837, and 13839* (Oct. 4, 2019). The White House posted a similar notice in the Federal Register. *See* 84 FR 56095 (Oct. 21, 2019). Some agencies quickly complied with the Trump Executive orders, either signing or imposing new CBAs. Many agencies, however, took a wait-and-see approach saying they did not want to engage in full scale negotiations regarding the new executive orders pending further legal clarification.

2 Biden Executive Orders and Other Actions (Jan. 2021–Jan. 2025)

On January 20, 2021, Joseph R. Biden, Jr., was sworn in as the 46th President of the United States. During his term he revoked Trump administration labor-management EOs and issued his own EOs addressing federal and private sector labor-management relations.

a. Executive Orders

(i) EO 13985: *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (Jan. 20, 2021)

Issued on day one of the Biden administration, EO 13985 recognized that "entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied equal opportunity to individuals and communities." President Biden announced that it was the policy of his administration that the federal government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice and equal opportunity is the responsibility of the whole of our government.

EO 13985 directed each agency to conduct an equity assessment to assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and befits to people of color and other underserved groups in order to better equip agencies to develop policies and programs that deliver resources and benefits equitably to all, and to allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities.

(ii) EO 19888: *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan. 20, 2021)

EO 19888 established the Biden administration's policy to combat discrimination based on gender identity or sexual orientation. Agency heads were directed to review all existing orders, regulations, guidance, policies, programs, or other agency actions under any statute that prohibits sex discrimination for inconsistencies with this policy and to take appropriate action to ensure full implementation.

(iii) EO 13991: *Protecting the Federal Workforce and Requiring Mask-Wearing* (Jan. 20, 2021)

This EO mandated masking-wearing and social distancing by all federal employees, contractors, and others while in federal buildings and on federal lands. It created the Safer Federal Workforce Task Force to coordinate COVID safety efforts, and tasked the Secretary of HHS to develop and submit a testing plan for the federal workforce.

(iv) EO 13999: *Protecting Worker Health and Safety* (Jan. 21, 2021)

A COVID-related EO intended to keep workers safe from COVID-19 exposure, it directed OSHA to issue revised guidance to employers on workplace safety during the COVID-19 pandemic.

(v) EO 14003: *Protecting the Federal Workforce* (January 22, 2021)

President Biden fulfilled a campaign pledge by issuing Executive Order 14003, revoking Trump-era orders 13836, 13837, 13839, and 13957 that his administration believed undermined civil service protections and union rights. The order directed agencies to reverse actions stemming from these revoked policies, required good-faith bargaining during contract negotiations, and tasked OPM with developing recommendations to raise federal employees' and contractors' minimum wage to $15 hourly.

OPM issued guidance to federal agencies to implement EO 14003:

- *Guidance for Implementation of Executive Order 14003—Protecting the Federal Workforce* (Mar. 5, 2021)
- *Guidance on Labor-Management Relations in the Executive Branch* (May 18, 2021)

(vi) EO 14018: *Revocation of Certain Presidential Actions* (Feb. 24, 2021)

The EO revoked the Trump Presidential Memorandum empowering the Secretary of Defense to exclude Defense agencies or subdivisions from the Federal Service Labor-Management Relations Statute (FSLMS).

(vii) EO 14025: *Worker Organizing and Empowerment* (April 26, 2021)

EO 14025 established a task force "to encourage worker organizing and collective bargaining." EO 14025 also revoked two Trump executive orders, EO 13845 and EO 13931 addressed above.

OPM issued guidance to implement EO 14025:

- *Guidance on Implementation of EO 14025: Highlighting Bargaining Unit Employee Rights in the Hiring and On-Boarding Process* (Oct. 20, 2021)
- *Guidance on Implementation of EO 14025: Highlighting Bargaining Unit Employee Rights to Join a Union and Other Rights* (Oct. 20, 2021)
- *Guidance on Implementation of EO 14025: Highlighting Requirement to Timely Process Requests for Payroll Deductions for Labor Organization Dues* (April 12, 2022)
- *Guidance on Implementation of EO 14025: Highlighting Requirements During Union Organizing* (April 12, 2022)
- *Guidance on the Implementation of EO 14025: Highlighting Union Rights to Access and Communicate with Bargaining Unit Employees* (April 12, 2022)
- *Guidance on Implementation of EO 14025: Addressing Whether Non-Bargaining Unit Positions Are Correctly Excluded from the Bargaining Unit* (January 26, 2023)

On February 7, 2022, the White House Task Force on Worker Organizing and Empowerment released its first report on its activities.

(viii) EO 14035: *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce* (June 25, 2021)

EO 14035 launched a government-wide initiative advancing diversity, equity, inclusion, and accessibility throughout the federal workforce. The order mandated data collection to assess agency DEIA status, established Chief Diversity Officers, expanded training, promoted paid internships and recruitment partnerships, supported LGBTQ+ employees and those with disabilities, advanced pay equity, and increased opportunities for formerly incarcerated individuals.