MEMORANDUM

TO: Heads and Acting Heads of Departments and Agencies

FROM: Scott Kupor, Director, U.S. Office of Personnel Management

DATE: July 24, 2026

RE: Collective Bargaining Guidance Concerning the Final Rule on Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees

---

I. Purpose

This memorandum provides guidance to executive departments and agencies regarding the interaction between the Office of Personnel Management's (OPM) final rule amending 5 CFR parts 351, 430, and 537 (the "Final Rule") and obligations under chapter 71 of title 5, United States Code (the Federal Service Labor-Management Relations Statute or FSLMRS). It addresses (1) the scope of negotiable subjects following issuance of the Final Rule; (2) the legal framework governing conflicts between governmentwide regulations and collective bargaining agreements (CBAs); and (3) when agencies may implement the Final Rule notwithstanding a conflicting CBA provision. Agencies should consult their Office of General Counsel and labor relations specialists before taking action under this guidance.

II. Background

The final rule makes several changes to the performance appraisal framework for non-Senior Executive Service (SES)/Senior Professional (SP) employees covered under 5 U.S.C. Chapter 43, including:

- authorizing OPM to establish and maintain a standardized distribution of some or all rating levels;
- eliminating summary level patterns that include a Level 2 ("Minimally Successful") rating and patterns in which Level 4 is the highest summary level;
- eliminating mandatory higher-level review of Level 1 ("Unacceptable") ratings of record;
- prohibiting challenges to ratings of record through negotiated grievance procedures established under 5 U.S.C. 7121;
- requiring a supervisory critical element in the performance plans of covered supervisors; and
- requiring OPM to conduct biennial certifications of agency appraisal systems.

Several of these changes affect matters that have historically been addressed in CBAs or have been the subject of bargaining proposals. This memorandum is intended to help agencies meet their statutory bargaining obligations while ensuring timely and lawful implementation of the final rule.

III. Governmentwide Regulations and the Duty to Bargain

In implementing the changes under the final rule, agencies will need to evaluate the extent of their duty to bargain and whether existing CBA provisions conflict with these changes. Under the FSLMRS, agencies are obligated to bargain with labor unions over proposals concerning bargaining unit employees' conditions of employment. However, proposals that are inconsistent with law, government-wide regulation, or an agency rule for which there is a compelling need, are outside the duty to bargain.[1] The FLRA has held that OPM's regulations at 5 CFR part 430, subpart B, are government-wide regulations within the meaning of section 7117(a)(1).[2] However, it is an unfair labor practice for an agency to enforce a rule or regulation that conflicts with a CBA provision that was in effect before the date the rule or regulation was prescribed.[3] This protection applies only for the duration of the existing agreement.

Therefore, agencies should evaluate and determine whether provisions within CBAs existing at the time the final rule was prescribed conflict with the changes to 5 CFR part 430, subpart B. Such conflicts may arise where CBA provisions, for example, prohibit the distribution of summary rating levels or authorize grievances over ratings of record. Agencies may not effectuate those changes in the final rule where they conflict with specific provisions of a CBA. Once the term of the CBA expires, the conflicting provision no longer shields the parties from the governmentwide regulation, and the regulation applies in full.

Note that if an agency CBA rolls over without being renegotiated the rolled-over CBA is considered a new agreement that does not bar the implementation of previously issued government-wide regulations. In such cases government-wide regulations take effect by operation of law on the date the term of the prior agreement concluded and the rolled-over CBA took effect.[4]

IV. Negotiating Procedures and Appropriate Arrangements

Once agencies evaluate the extent to which they have a duty to bargain, they will need to prepare for impact and implementation bargaining with their labor unions. Many subjects addressed by the final rule fall within reserved management rights under 5 U.S.C. 7106(a), including the right to direct employees and to assign work. Procedures and appropriate arrangements under 5 U.S.C. 7106(b)(2) and (3) remain negotiable to the extent they are not inconsistent with the final rule or other applicable law.

The following guidance describes how the Final Rule affects the negotiability of common bargaining subjects related to performance appraisal. This list is illustrative, not exhaustive.

A. Non-negotiable subjects. Following the effective date of the Final Rule, proposals on the following subjects are inconsistent with a governmentwide regulation and therefore outside the duty to bargain under 5 U.S.C. 7117(a)(1):

- Proposals authorizing grievances over ratings of record under negotiated grievance procedures (5 CFR 430.208(k)).
- Proposals to use summary level patterns that include a Level 2 rating or in which Level 4 is the highest level (5 CFR 430.208(e), effective January 1, 2027).

---

[1] 5 U.S.C. 7117; *NFFE and Army*, 45 FLRA 603 (1992).
[2] *NTEU and Dep't of Treasury*, 55 FLRA 1005, n. 11 (1999); *IFPTE and Bureau of Reclamation*, 45 FLRA 597 (1992).
[3] 5 U.S.C. 7116(a)(7).
[4] *See U.S. Department of Defense, Defense Contract Audit Agency and American Federation of Government Employees, Local 3529*, 37 FLRA 1218 (1990).

- Proposals to use Pattern A (pass/fail) for employees other than seasonal employees, teachers, General Schedule grades 1–4, and Federal Wage System employees (5 CFR 430.208(e)(1)).
- Proposals that would prohibit, override, or modify any standardized distribution of rating levels established by OPM under 5 CFR 430.208(c).
- Proposals that would prohibit comparing, categorizing, or ranking employees or groups for purposes of assigning a summary level, where such methods are authorized under 5 CFR 430.208(d).
- Proposals that would exclude the required supervisory critical element from covered supervisors' performance plans (5 CFR 430.206(b)(9)).

B. Subjects that remain negotiable. Subject to applicable law, management rights under 5 U.S.C. 7106, and the requirements of the final rule, the following subjects generally remain within the duty to bargain:

- Procedures the agency will observe in administering the performance appraisal program, to the extent consistent with the final rule.
- Procedures for an employee to make an informal request for reconsideration of a rating of record.
- Procedures governing administrative grievances over ratings of record, where the agency authorizes the use of its administrative grievance system for such matters.
- Procedures for communication and feedback between supervisors and employees during the appraisal period, consistent with OPM guidance.
- Awards and recognition programs, including team-based awards, subject to applicable law and any spending limitations recommended by OPM under 5 CFR 430.210(b).
- Procedures for performance improvement plans (PIPs) and assistance to employees whose performance is unacceptable, consistent with 5 U.S.C. 4302(c)(5) and 5 CFR 430.207(c).

V. Pending Grievances and Arbitrations

Agencies will also need to evaluate whether pending grievances or arbitrations over ratings of record remain arbitrable consistent with the final rule. For those grievances or arbitrations that were initiated under a CBA that includes a provision in effect before the final rule that explicitly authorizes grievances over ratings of record, they may continue to proceed through grievance-arbitration up until the point the term of the CBA expires. Once the term of the CBA expires, agencies should assert that the dispute is no longer arbitrable and that any arbitrator lacks authority to adjudicate the matter. Where appropriate and consistent with the agency's internal administrative grievance policies, agencies should consider converting such grievances that are no longer arbitrable to administrative grievances.

VI. Practical Steps for Agencies

To facilitate timely and lawful implementation, OPM recommends that agencies take the following steps regarding their labor relations obligations:

- Inventory existing CBAs. Identify all CBAs covering bargaining unit employees subject to 5 CFR part 430, subpart B, and catalog provisions that may conflict with the final rule, including provisions on grievability of ratings of record.

- Track expiration dates. Maintain a schedule of CBA expiration dates and prepare to implement the final rule in full upon expiration of each conflicting agreement.

- Coordinate with agency counsel and human resources. Agency leadership should engage with their office of general counsel and human resources in determining the appropriate steps when engaging on labor relations matters, particularly before declining to bargain, declaring a proposal non-negotiable, or repudiating an existing CBA provision.

VII. Additional information

Agency labor relations staff should work with agency legal counsel on these issues. For additional information, agency-headquarters-level human resources offices may contact OPM at awr@opm.gov. Component-level human resources offices must contact their agency headquarters for assistance.

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, Human Resources Directors, and Chiefs of Staff.