

**Questions and Answers for
Administering the Unemployment Insurance Program During a Lapse in Federal
Appropriations**

A. General

1. Question: What is a furlough?

Answer: A furlough occurs when a Federal employee is placed in a temporary non-duty, non-pay status because of lack of work, lack of funds, or other non-disciplinary reasons.

2. Question: What is a shutdown?

Answer: Every year Congress appropriates funds for Federal agencies to operate in the upcoming fiscal year. In the absence of either an enacted appropriation or a Continuing Resolution (a Congressional action to provide short-term funding for Federal agencies and programs to continue in operation until regular appropriations are enacted), Federal agencies must “shut down” (cease spending) due to the lapse in appropriations, with limited exceptions as discussed below.

3. Question: Why is a furlough necessary during a Federal government shutdown?

Answer: A furlough is necessary because an agency no longer has the necessary funds to operate and must cease activities that are not *excepted* pursuant to the Antideficiency Act (31 U.S.C. §§ 1341-1342).

4. Question: What are excepted employees?

Answer: Pursuant to Office of Personnel Management guidance outlined in the Guidance for Shutdown Furloughs, dated October 11, 2013, “excepted” employees in the context of a shutdown furlough are defined as—

employees who are funded through annual appropriations who are nonetheless excepted from the furlough because they are performing work that, by law, may continue to be performed during a lapse in appropriations. Excepted employees include employees who are performing emergency work involving the safety of human life or the protection of property or performing certain other types of excepted work. Each Federal agency’s legal counsels, working with senior agency managers, determine which employees are designated to be handling “excepted” and “non-excepted” functions.

See <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance?url=Shutdown-Furlough> for copies of Office of Management and Budget and

Department of Justice issuances, which provide guidance on the application of these criteria.

5. Question: Who is NOT subject to a furlough during a Federal government shutdown?

Answer: The following employees are not subject to a furlough during a Federal government shutdown:

- Excepted employees. Employees performing excepted activities (*see* Question 4 above). These employees are excepted from the furlough because they are performing work that, by law, may legally continue to be performed during a lapse in appropriations.
- Presidential appointees who are not covered by the leave system in 5 U.S.C. chapter 63. These employees are not “excepted” as discussed above; however, they are not subject to furlough because their salary is an obligation incurred by the year, without consideration of hours of duty required, so they may not be placed in a non-duty, non-pay status.
- Exempt employees. Federal employees are “exempt” from furlough if they are not affected by a lapse in appropriations. This includes employees who are not funded by annually appropriated funds. Employees performing these functions, as determined by each Federal agency, will generally continue to be governed by the normal pay, leave, and other civil service rules.
- Federal employees carrying out functions that are funded through other than the Federal appropriation process.

6. Question: Are employees who do not fall into one of the categories described in Q.5, above, subject to a furlough during a shutdown?

Answer: Yes. Federal employees who are not designated as excepted and whose salaries are funded through annual appropriations are barred from working during a shutdown, except to perform minimal activities as necessary to execute an orderly suspension of agency operations related to non-excepted activities. These employees will be furloughed and may be eligible for UCFE (although as explained elsewhere in this UIPL, any UCFE paid may be subject to an overpayment determination).

7. Question: When establishing the UCFE claim, should the state flag or uniquely identify claims by individuals who are subject to the furlough?

Answer: Yes. The Department of Labor (Department) recommends that states include an indicator on the UCFE claim to identify claims filed by furloughed Federal workers. This will ensure states can identify UCFE claims filed by furloughed Federal workers when establishing overpayments. States will also be able to monitor any activity that may occur after the shutdown ends and identify potential fraudulent activity.

8. Question: How should states proceed when the shutdown has ended and furloughed claimants have not returned to work?

Answer: If an individual identified by the state as a furloughed Federal worker continues to certify for UCFE after an announcement is made that the shutdown has ended and Federal workers may return to work, the state must investigate and determine why the claimant has not returned to work and whether there is continuing UCFE eligibility.

B. Furloughed Federal Employees Residing Outside the United States

Question: Are furloughed Federal employees, who are working outside the U.S. at the time of the furlough, eligible for UCFE benefits if they are unable to be physically present to file an unemployment claim in one of the 50 states, the District of Columbia, Puerto Rico, or the U.S. Virgin Islands?

Answer: Yes. The UCFE statute does not require Federal employees to be physically present in the state where the claim is filed to be eligible for benefits. Rather, under the statute at 5 U.S.C. § 8502, eligibility is determined based on state law requirements for regular UC. In UIPL No. 31-13, the Department interpreted 20 CFR 609.8(b)(ii) to require individuals to be physically present in a state in order to file a UCFE claim. However, the statutory provision that 20 CFR 609.8(b)(ii) interprets, 5 U.S.C. § 8504, is merely an assignment of wages provision; it does not contain requirements for eligibility. Eligibility requirements are in the regulations at 20 CFR 609.3. Nothing in the statute nor in the regulations requires that a Federal employee, to be eligible for UCFE, be physically present in the state of residence to file a UCFE claim. Thus, states must allow Federal employees who are working outside the U.S. at the time of the furlough to file in the same manner as other applicants under state law.

C. Excepted Federal Employees

1. Question: Are excepted employees, who continue to work full-time during a shutdown, but who will not be compensated until the end of the lapse in appropriations, eligible for UCFE?

Answer: No. Pursuant to Federal and state UI requirements, and as explained in this UIPL, because these individuals continue to provide full-time services, excepted employees are not unemployed. Therefore, they are not eligible for UCFE.

2. Question: Are *excepted intermittent* employees, who continue to work during a shutdown, eligible for UCFE?

Answer: Individuals classified as “excepted intermittent” employees may be working less than full-time and, therefore, may be eligible for partial UCFE during the Federal government shutdown depending on the hours of work or the amount of wages earned.

Excepted intermittent employees who continue to work full-time will not be eligible for UCFE.

3. Question: May a state pass a law or create a policy that would allow full-time excepted workers to receive UCFE or state UC while working full-time during the furlough?

Answer: No. Because excepted employees who continue to work full-time during a shutdown are not unemployed, states are prohibited from paying these individuals UCFE during the furlough using Federal funds, or paying state UC because that would be out of conformity with the Federal law “withdrawal standard” as discussed elsewhere in this UIPL. States who wish to provide these individuals with some type of payment during a shutdown must ensure that the payments are funded from a source other than the state’s unemployment fund. Further, states are cautioned that no funding from any account in the unemployment trust fund may be used to reimburse the state for any such payments, and no part of the Federal administrative grant under SSA Title III may be used to pay for the administrative costs associated with any such payments.

D. Furloughed Federal Employees

Question: In FY 2019, Congress enacted a provision indicating that Federal employees furloughed as a result of a lapse in appropriation will be paid back pay as soon as a new appropriation is enacted. Does this language make furloughed employees ineligible to apply for UI benefits?

Answer: No. Furloughed Federal employees have a loss of hours and a loss of wages. While the provision indicates that furloughed employees will be paid upon the enactment of a new appropriation, until a new appropriation is in place, which provides for such payments, they still have a loss of wages, and thus are still unemployed during the furlough. However, the later provision of back pay to furloughed Federal employees who received UCFE may result in overpayments under state law.

E. Required Documentation for UCFE Claims

1. Question: What documentation is acceptable from furloughed Federal employees as proof of employment and wages for a UCFE claim?

Answer: Normally, furloughed Federal employees should provide copies of the Standard Form-8 (SF-8) or the Standard Form-50 (SF-50) when filing for UCFE; however, due to the circumstances involved with a Federal government shutdown, many of these employees may not have been issued either form. Further, given the very limited Federal government human resources staff working during the shutdown, the processing of the states’ *Request for Wage and Separation Information*, ETA-931, may be delayed. Therefore, states are encouraged to have claimants complete an affidavit to establish their employment and wages using earnings and leave statement(s), W-2 forms, and/or other types of documentation that can establish that the individual is a current Federal employee and has worked and earned sufficient base period wages to qualify for UCFE.

The UCFE claim should be filed using the affidavit if the state has not received a response to the ETA-931 within 12 days of submission.

2. Question: Is there a specific affidavit form that states must use in taking these UCFE claims?

Answer: No. States may use the Form ETA-935, *Claimant's Affidavit of Federal Civilian Service, Wages and Reason for Separation*, or states may use their own affidavit form(s) in taking UCFE claims.

F. Claims Processing

1. Question: What responsibilities do Federal agencies have to respond to states' request for wage and separation information in the context of a Federal government shutdown?

Answer: Under 20 CFR 609.21(a), Federal agencies must respond to requests from state agencies "[w]ithin four workdays after receipt from a state agency of a request for Federal findings on a form furnished by the state agency, and prescribed by the Department, a Federal agency shall make such Federal findings, complete all copies of the form, and transmit the completed copies to the state agency." This information is necessary for states to appropriately set up and collect overpayments of UCFE paid to these individuals. However, if the Federal agency does not respond within 12 days of the date the state sent the request, the state will follow normal operating procedures using an affidavit process to determine both monetary and non-monetary eligibility. See ETA Handbook 391, Chapter IV for instructions on processing affidavits.

2. Question: Should states advise applicants who were furloughed that any UCFE paid will be required to be repaid once they receive back pay?

Answer: As mentioned in the body of this UIPL, Congress passed Public Law 116-1 on January 16, 2019, that requires payment of back pay to all employees of the United States Government and of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations. The back pay must cover the period of the lapse in appropriations. Therefore, all furloughed Federal workers and District of Columbia public employees will be paid once the furlough ends. States are encouraged to advise these applicants that they may be required to repay all UCFE received, and if state law allows wage garnishment as a means of recovery, applicants should be advised also that their wages may be garnished to repay the UCFE received.

G. Work Search Requirements

Question: What work search requirements apply to Federal furloughed workers determined to be eligible for UCFE?

Answer: States should apply the work search provisions in state law, including waivers of the work search requirements that may apply when a claimant remains work-attached, but is only temporarily furloughed.

The Office of Personnel Management provided the following information to Federal employees in its *Guidance for Shutdown Furloughs* (see Question and Answer under *Working during a Furlough* - question C.3 in the *Guidance for Shutdown Furloughs*).

May employees take other jobs while on furlough?

A. While on furlough, an individual remains an employee of the Federal Government. Therefore, executive branch-wide standards of ethical conduct and rules regarding outside employment continue to apply when an individual is furloughed (specifically, the executive branch-wide standards of ethical conduct (the standards), at 5 CFR part 2635). In addition, there are specific statutes, which prohibit certain outside activities, and agency-specific supplemental rules that require prior approval of, and sometimes prohibit, outside employment. Therefore, before engaging in outside employment, employees should review these regulations and then consult their agency ethics official to learn if there are any agency-specific supplemental rules governing the employee.

H. Claim Cancellation/Withdrawal

1. Question: May states offer claimants the opportunity to withdraw their claim(s) in order to avoid an overpayment(s); for example, on claims that have not yet been established (e.g., claims for which states have not issued a monetary determination)?

Answer: Yes, the state may allow claimants the opportunity to withdraw claims that have not yet been established if: (1) the claimants request that their applications be withdrawn; and (2) such withdrawal is not prohibited under state law.

2. Question: May states cancel claims that have already been established (i.e., claims for which states have issued a monetary determination) but for which they have not yet issued payments(s)?

Answer: States may take appropriate action in accordance with their respective state laws on the cancellation of any UCFE claims. Cancellation of a claim may be initiated only by the claimant.

I. Overpayments

1. Question: May states require a Federal agency to recover a benefit overpayment through wage garnishment for employees with UCFE overpayments?

Answer. Yes. After providing claimants the opportunity for appeal and voluntary reimbursement, if state law requires employers to recover overpayments the state may require that a Federal agency garnish wages to recoup any overpayments. In these cases, the state should notify the Federal agency, in writing, of its responsibility to collect from the employee the amount overpaid (see UCFE Handbook No. 391, page V-6).

2. Question: May states waive the recovery of UCFE overpayments caused by the compensation (reimbursement) that furloughed employees will receive for the period that they were furloughed?

Answer: There are no special UCFE provisions that would allow for a waiver of the recovery of UCFE overpayments caused by the compensation of furloughed Federal employees after the shutdown. Therefore, states must apply to UCFE overpayments the same waiver of the recovery of UCFE overpayment provisions they would apply to other UI program overpayments.

J. Back Pay

Question: How does a state process furloughed Federal workers' UCFE claims once back pay has been received?

Answer: Although state law provisions vary, most provide for disqualification or reduction in benefits for any week or part of a week during which a claimant receives income such as earnings; wages in lieu of notice; dismissal pay; workers' compensation; back pay; holiday or vacation pay; payments made under an employer's pension plan or Old-Age, Survivors, and Disability Insurance (OASDI); and UC under another state or Federal law. States should allocate the back pay Federal furloughed workers receive in accordance with state law.

K. Administrative Funding

1. Question: Can states still draw down administrative funding during a Federal government shutdown?

Answer: In the event of a Federal government shutdown, no additional UI administrative funding will be issued to state agencies. However, during past shutdowns, the Payment Management System has remained operational and is expected to remain operational during any future shutdowns, allowing states access to any administrative funding that had been made available to the state prior to the shutdown.

2. Question: May states continue to pay UC (including UCFE) if the state no longer has any administrative funding available?

Answer: Yes. States may use, and are encouraged to use, other state resources to pay for the administration of UI program operations to prevent the disruption of UC processing.

The Department will advise states as soon as possible about funding available for administrative costs associated with the Federal government shutdown. Additional guidance will be provided to states once the Federal government shutdown ends.

3. Question: If a state uses state resources to enable continued administration of the UI program after Federal administrative funding for the program is exhausted, will the state receive full-year funding once a Federal appropriation for the program is enacted?

Answer: In prior Federal government shutdowns, once a Federal appropriation was enacted, the appropriation provided for funding of the administration of the UI program to avoid a gap in funding (i.e., funding was provided from the point in the fiscal year when the shutdown began). While there is no guarantee that such funding will be provided in the future, Congress has in the past provided the funding for state UI administration as though a lapse in appropriation had not occurred.

4. Question: What Federal funding sources should states consider using to enable continued UI program operations in the event the state exhausts all available state UI administrative funding?

Answer: In the event that a state is approaching exhaustion of currently available state administrative funding, the state should immediately contact the Administrator for the Office of Unemployment Insurance, at (202) 693-3029.

States are encouraged to identify other available funding sources that may be used for administration of the state's UI program such as Reed Act funds, other special distributions that can be used for state administration of the program, and any remaining UI Modernization Act incentive funds. States are also encouraged to consider the use of UI penalty and interest funds for this purpose.

5. Question: If a state must stop paying benefits due to a lapse in administrative funding, what, if any, claimant notification is required?

Answer: States must make every effort to provide individual notification to claimants prior to stopping benefit payments. States are also strongly encouraged to ensure that notification is posted on state websites and in various statewide media announcements. If possible, states should accept claims and encourage claimants to continue to certify continued claims for benefits even if payments cannot be issued. This helps avoid work associated with backdating of claims once administrative funding is resolved.

6. Question: Will there be any restrictions on state transfers to their unemployment accounts in the Unemployment Trust Fund (UTF)?

Answer: No restrictions on state transfers to the UTF are anticipated should a Federal government shutdown occur.

7. Question: Will states still have access to funding for Disaster Unemployment Assistance (DUA) during a shutdown?

Answer: Yes. Excepted staff at the Department will be made available to process DUA funding authorizations from the Federal Emergency Management Agency (FEMA), and FEMA will have excepted personnel available to process disaster requests.

L. UI Cross-matches

1. Question: Will there be any impact on the cross-match with the Social Security Administration during a shutdown?

Answer: Historically, during shutdowns the cross-match has been operational for states' use as under normal conditions. If the Social Security Administration cross-match is not operational during a particular shutdown, states will be notified.

2. Question: Will there be any impact on the National Directory of New Hires (NDNH) operation during a shutdown?

Answer: Historically, the NDNH system has continued to be operational during shutdowns; however, there will be minimal or no technical support. If NDNH is not operational during any particular shutdown, states will be notified.

3. Question: Will the Systematic Alien Verification for Eligibility (SAVE) system be operational during a shutdown?

Answer: Historically, the SAVE system has been operational during a shutdown. If the SAVE system is not operational during a particular shutdown, states will be notified.

M. Reporting

1. Question: Should states continue to submit UI required reports?

Answer: Yes. States should continue to submit UI required reports during a shutdown, using the same process, software, and deadlines. Please be aware that no technical or operational support will be available until the shutdown ends and Department staff return to work.

2. Question: May states take a workload count on Form ETA 207, as described in ET Handbook No. 401, 5th Edition, page 1-1-10, for non-monetary determinations regarding the back payments?

Answer: Yes. Back pay is considered deductible income (see ET Handbook No. 301) and is a countable non-monetary determination.

N. Benefit Accuracy Measurement (BAM) Sampling

1. Question: What is the effect of UCFE payments to furloughed employees on the BAM sample when determining the accuracy of paid and denied claims?

Answer: Once the state agency issues any UCFE payment (to furloughed workers or workers separated for other reasons), there is a potential that the payment may be selected for the BAM sample, in accordance with ETA Handbook No. 395, 5th Edition. If sampled, state agency BAM units should treat these UCFE payments as normal BAM cases, and evaluate them based on all applicable eligibility criteria, even when the claimants returned the payments.

State BAM units should take into consideration that state agencies made UCFE payments based on all the facts of the status of furloughed Federal employees that existed at the time the UCFE was paid. Therefore, back pay that was provided after the UCFE was paid does not, in and of itself, result in an improper payment for BAM purposes. BAM investigators must conduct sufficient fact-finding to determine whether the claimant was furloughed or excepted or intermittent, or a reduced-hour employee, as a result of the Federal government shutdown.

2. Question: How should BAM investigators code the UCFE cases (where element (c1) program code equals '2 UI-UCFE', '4 UI-UCFE-UCX', '5 UCFE', or '6 UCFE-UCX') involving key week benefit payments which were paid to Federal employees who were furloughed as a result of the total or partial shutdown of the Federal government and who subsequently received back pay for the time they were in furlough status?

Answer: If the Federal employee received back pay, then BAM investigators must address the back payment in their coding of key week accuracy.

It is possible that some of the furloughed Federal employees who received back pay also received a key week benefit payment that was partially or totally funded taking into consideration UCFE base period wages.

If the Federal employees receiving back pay for the time they were in furlough status are considered ineligible for UCFE for the week in which the back payment is applied, under state law, the state's BAM unit must record the payment as being improper since the key week payment is "not due." State law determines the type of issue – back pay or employment status. However, since the improper payment is created as the direct result of an appropriation of funding that occurs after the time the individual was originally

determined eligible for benefits, BAM investigators must treat the payment as “technically proper.” If the BAM investigator finds that an error was made in allowing the original benefit payment or was due to other issues, then the case will be coded with a value of 10 or 11 in element (ei2) and must code the rest of the error elements consistent with the finding.

3. Question: How should BAM investigators code cases involving previously furloughed Federal employees to ensure these cases are treated as “technically proper?”

Answer: To support the coding of such cases as being classified as “technically proper.” BAM investigators are instructed to enter the following codes:

- a value of 15 in element (ei2). (This value indicates that “BAM determines payment was too large, although the payment is technically proper due to rules other than finality or formal warning rule.”)
- a cause code value of 620 in element (ei3) to reflect the back pay award;
- a responsibility code of 0004 into element (ei4) to represent the overpayment was caused by a third party;
- the (ei5) detection point element code of 40 to reflect verification of eligibility with third-parties; and
- a value of 10 for elements (ei6), (ei7), and (ei9) to indicate these parties acted in good faith.

4. Question: Are BAM units expected to reopen any closed UCFE cases impacted by Federal law that provides for back pay for a period of furlough?

Answer: Yes, state BAM units are expected to reopen any closed UCFE cases involving Federal employees furloughed and who subsequently received back pay. These cases must be reviewed to ensure that coding instructions described above are properly followed. BAM units should use reopen code ‘9’ to show that the “[d]ata of a closed case were changed or payment accuracy status updated as a result of additional information obtained through investigation methods other than crossmatch with new hire or wage records.” ET Handbook No. 395, 5th Edition, p. V-25 (2009).

5. Question: Will coding these UCFE cases as “technically proper” affect the state’s improper payment rate?

Answer: Selected UCFE cases coded following the instructions, provided above, will not negatively affect the state’s improper payment or operational rate (used for the Overpayment Detection Measure). Additionally, the Employment and Training Administration’s improper payment estimation program will exclude these “technically proper” payments in the computation of the state and national improper payment rates.