

EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM U.S. DEPARTMENT OF LABOR Washington, D.C. 20210	CLASSIFICATION Unemployment Insurance
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ADVISORY: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 3-22

TO: STATE WORKFORCE AGENCIES

FROM: ANGELA HANKS /s/
Acting Assistant Secretary

SUBJECT: Impacts of Lapses in Federal Appropriations on State Administration of Unemployment Insurance (UI) Programs and Federal Agencies

1. **Purpose.** To inform state and Federal agencies of their responsibilities during a lapse in Federal appropriations that leads to a full or partial Federal government shutdown.
2. **Action Requested.** The Employment and Training Administration (ETA) requests that State Administrators provide the information contained in this Unemployment Insurance Program Letter (UIPL) to appropriate staff.
3. **Summary and Background.**
 - a. Summary – This UIPL provides guidance to states on the treatment of excepted Federal employees who work full time during a full or partial Federal government shutdown and provides answers to commonly asked questions regarding procedures States and Federal agencies should use to administer UI programs effectively in the event of a Federal government shutdown. This UIPL supersedes UIPL No. 31-13 and its changes, although much of the guidance in UIPL No. 31-13 remains unchanged here.
 - b. Background – A Federal government shutdown occurs when there is a full or partial lapse in annual appropriations to Federal agencies, which causes the agencies to furlough Federal employees. During a shutdown, an affected agency is generally required to stop performing any activities funded by annual appropriations that are not excepted by law unless there are other funding sources available that can legally support ongoing work.

Federal employees who are furloughed from work during a lapse in appropriations are considered unemployed and may be eligible for unemployment compensation (UC), including Unemployment Compensation for Federal Employees (UCFE), while they are on furlough. Excepted employees are individuals who are not furloughed and who are required to continue working their regular hours, but who are not paid during the shutdown for their work due to the lapse in appropriations. Excepted workers may be either full-time or intermittent. Intermittent workers, who work only as necessary, may work full-time in some weeks, part-time in some weeks, or not work at all. Excepted

RESCISSIONS UIPL No. 31-13 and its changes	EXPIRATION DATE Continuing
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workers working full-time are not considered unemployed for purposes of receiving UC under the regular Federal-state program or the UCFE program. In contrast, intermittent workers may be eligible for benefits for weeks in which they do not work full-time. A more complete discussion follows in Section 4 of this UIPL.

Public Law 116-1 was enacted on January 16, 2019, and requires that “[e]ach employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee’s standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates.” 31 U.S.C. § 1341(c)(2). While this legislation requires payment of excepted employees who work during a lapse in appropriations, Congress must still enact appropriations to pay for work performed during a shutdown. Until Congress does so, there is no guarantee that employees will be paid.

In the most recent Federal government shutdown, in December 2018-January 2019, a number of states attempted to pass laws and/or regulations to support payment of excepted employees. States, however, may not use Federal funds for compensating these employees for any week in which full-time excepted work was performed and should not expect Federal reimbursement or assistance with regard to recovering any UC payments made to them for excepted work when the lapse in appropriations ends.

This UIPL also explains Federal law with regard to treatment of excepted workers during a Federal government shutdown for both the regular Federal-state UI program and the UCFE program.

In addition, the attachment to this UIPL provides states and Federal agencies with answers to questions commonly asked about the administration of the UCFE program during a Federal government shutdown. States and Federal agencies should reference the information in this UIPL during a shutdown to ensure effective and efficient operation of the UI program and to prevent UI claims processing delays.

4. **“Excepted” Federal Employees may not be considered “unemployed” under state law as applied to the federal/state UI program and to the UCFE program.**

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.

A requirement in Federal UI law commonly referred to as the “withdrawal standard” provides that “all money withdrawn from the unemployment fund of the state shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund...” Social Security Act (SSA) § 303(a)(5) (42 U.S.C. § 503(a)(5)); Federal Unemployment Tax Act (FUTA) § 3304(a)(4) (26 U.S.C. § 3304(a)(4)). Section 3306(h) of FUTA defines “compensation” as “cash benefits payable to individuals with respect to their unemployment.” This means that states may pay individuals UC only if they are experiencing “unemployment.”

While neither the Social Security Act (SSA) nor FUTA, nor any Federal regulations, define “unemployment,” the Department originally provided a definition of the term in 1950 in its model for state legislation to meet the requirements of Federal UI law. The model defined the term “week of unemployment” as “any week during which [an individual] performs less than full-time work for any employing unit if the wages payable to [the individual] with respect to such week are less than the weekly benefit amount.” *Manual of State Employment Security Legislation* (1950), Section 2(t), p. 22. The Department further explained the term “unemployment” in UIPL No. 08-98, stating that “Federal law has authorized withdrawals from a state’s unemployment fund only with respect to an individual’s unemployment,” and that “Federal law limits the payment of UC to periods in which an individual has experienced unemployment, that is, an actual reduction in hours worked.” This UIPL cited, among other things, a January 31, 1939, Social Security Board statement that explained, “since under [specified provisions of the governing Federal statute that were later reorganized], any benefits paid under a state law must be paid with respect to unemployment, a state’s plan for the payment of partial benefits must safeguard against the payment for reduced earnings without accompanying unemployment.” Thus, the Department has a longstanding legal interpretation dating to nearly the inception of the Federal-state Unemployment Insurance system, providing that “unemployment” must include a reduction in work hours, and not merely a reduction in earnings.

Federal law governing UCFE, in 5 U.S.C. § 8502(b), requires states to pay compensation “to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State” As used in 5 U.S.C. § 8502(b), a state’s “unemployment compensation law” refers to its law implementing the regular UC program. In addition, the regulation in 20 CFR 609.2(r) provides that the definition of a “week of unemployment” for UCFE purposes means a week of unemployment as defined in the applicable state law. Therefore, the definition of a “week of unemployment” in a state’s regular UC law applies to the UCFE program, as do FUTA’s and the SSA’s requirements (except where Federal law provides otherwise).

Excepted Federal employees working full-time during a Federal government shutdown are not “unemployed” for UC purposes, and are thus ineligible to receive UC. However,

intermittent excepted workers who work only part-time may be eligible for UC for the period for which they are not working.

5. **Inquiries.** Please direct inquiries to the appropriate ETA Regional Office.

6. **References.**

- 5 U.S.C. Section 8501, et seq.;
- 26 U.S.C. Sections 3304 and 3306;
- 42 U.S.C. Section 503;
- Public Law 116-1, Government Employee Fair Treatment Act of 2019, codified at 31 U.S.C. Section 1341;
- 20 C.F.R. Part 609, Unemployment Compensation for Federal Employees;
- ET Handbook No. 391, Unemployment Compensation for Federal Employees (UCFE) Instructions for State Agencies;
- ET Handbook No. 301, UI PERFORMS: Benefits Timeliness & Quality Nonmonetary Determinations Quality Review;
- ET Handbook No. 384, Unemployment Compensation for Ex-Servicemembers (UCX);
- Manual of State Employment Security Legislation (1950), Section 2(t), p. 22;
- Office of Personnel Management, *Guidance for Shutdown and Furloughs*, <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf>;
- UIPL No. 08-98, *Unemployment Compensation (UC) - Payment Only for Periods of Unemployment*, issued January 12, 1998, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=1840;
- UIPL No. 31-13, *Impacts of the Federal Government Shutdown and Unemployment Compensation for Federal Employees and State Administrative Funding for State UI Programs*, issued October 11, 2013, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7589;
- UIPL No. 31-13, Change 1, *Impacts of the Federal Government Shutdown and Unemployment Compensation for Federal Employees (UCFE) and State Administrative Funding for State Unemployment Insurance (UI) Programs*, issued October 24, 2013, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6475; and
- UIPL No. 31-13, Change 2, *Impacts of the Federal Government Shutdown and Unemployment Compensation for Federal Employees (UCFE) and State Administrative Funding for State Unemployment Insurance (UI) Programs*, issued November 22, 2013, https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8790.

7. **Attachment.**

- Attachment I: Questions and Answers for Administering the Unemployment Insurance Program During a Lapse in Federal Appropriations