

Wednesday, January 23, 2019

CPM 2019-04



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

MEMORANDUM FOR: HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

From: MARGARET M. WEICHERT, ACTING DIRECTOR

Subject: Government Employee Fair Treatment Act of 2019

On January 16, 2019, President Trump signed the Government Employee Fair Treatment Act of 2019 (S. 24). This Act amends section 1341 of title 31, United States Code, to provide retroactive pay for Federal employees affected by a lapse in appropriations that begins on or after December 22, 2018, as soon as possible after the lapse in appropriations ends, regardless of scheduled pay dates. This amendment covers employees affected by the current and any future lapse in appropriations.

New section 1341(c) addresses Federal employees who are furloughed as a result of a lapse in appropriations, as well as Federal employees who are required to perform excepted work activities during a lapse. Retroactive pay will be paid at the employee's standard rate of pay.

The attachment to this memorandum provides guidance to assist agencies in implementing the Act. We will provide conforming updates to other U.S. Office of Personnel Management (OPM) shutdown furlough guidance documents as soon as possible.

### Questions

Agency headquarters-level human resources offices may contact OPM at [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov). Employees should contact their agency human resources offices for assistance.

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, and Human Resources Directors

Attachment: **Guidance on Implementation of S. 24, the "Government Employee Fair Treatment Act of 2019"**

## **Legislation**

On January 16, 2019, President Trump signed the “Government Employee Fair Treatment Act of 2019” (S. 24). This Act can be found at <https://www.congress.gov/bill/116th-congress/senate-bill/24>. The Act amends the Antideficiency Act provision codified in 31 U.S.C. 1341 to authorize retroactive pay for Federal employees affected by a lapse in appropriations.

## **Scope**

The section 1341 amendments apply to any lapse in appropriations that begins on or after December 22, 2018. Thus, the section 1341 amendments apply to the current lapse that began on December 22, 2018, and any future lapse.

The section 1341 amendments apply to each employee of the United States Government or of a District of Columbia public employer. This guidance deals with application of the section 1341 amendments to employees of the United States Government. The term “employee” in this guidance refers to an employee of the United States Government.

The section 1341 amendments do not apply to “exempt” employees or work activities—i.e., employees or work activities that are not affected by a lapse in appropriations because they are paid through an independent funding source.

## **Definition of “Excepted Employee”**

Under section 1341(c)(1)(D), an “excepted employee” is defined as “an excepted employee or an employee performing emergency work, as such terms are defined by the Office of Personnel Management” (OPM).

In this guidance, the term “excepted employee” includes “an employee performing emergency work.” OPM understands the reference to “an employee performing emergency work” to be a reference to an employee performing work in connection with “emergencies involving the safety of human life or the protection of property” as described in 31 U.S.C. 1342.

OPM is defining “excepted employee” to mean any employee who is authorized to perform work during a lapse in appropriations as “authorized by law” (including, but not limited to, 31 U.S.C. 1342), as provided under 31 U.S.C. 1341(a)(1)(B) and under guidance concerning lapses in appropriations issued by the Office of Legal Counsel of the U.S. Department of Justice (DOJ OLC) and the Office of Management and Budget (OMB) implementing that provision of law. (See the “References” section at the end of this memorandum.)

Employees are considered to be “excepted” from a shutdown furlough when they are performing “excepted work activities” as defined in DOJ and OMB guidance, or when they are approved to use paid leave under section 1341(c)(3). (See “Treatment of Excepted Employee” section below.) An employee may be excepted during certain lapse periods and furloughed during other lapse periods.

For the purposes of this guidance, we consider work performed “by necessary implication” as described in DOJ OLC guidance to be “excepted” from the furlough. For example, for the purpose of this guidance, an employee performing authorized orderly shutdown activities (as described in OMB and DOJ guidance) is considered to be an “excepted employee” while performing those activities. Similarly, another example could be an employee who supports work related to the protection of life or property (e.g., cutting the checks for a benefit program that is itself fully funded and necessary to preservation of life) would be considered to be performing excepted work.

### **Treatment of Furloughed Employees**

Under section 1341(c)(2), an employee who is furloughed as the result of a lapse in appropriations must be paid for furlough periods that occurred during the lapse. After the lapse ends, retroactive pay is provided at the employee’s “standard rate of pay.” If the pay cannot be provided on the normal pay date for the given pay period, it must be provided at the earliest date possible after the lapse ends.

Consistent with longstanding policies in implementing similar laws, a furloughed employee is **not** entitled to retroactive pay for furlough periods if the employee had been previously (before the lapse) scheduled to be in nonpay status during those periods. For example, an employee may have scheduled leave without pay (LWOP) for an extended period or be in a suspension status (i.e., pay suspended based on an adverse action). In effect, those already-in-place periods of nonpay status override the furlough status. The “standard rate of pay” for such previously scheduled periods of nonpay status is zero. In addition, employees who were directed to perform excepted work during a lapse in appropriations but failed to report to duty may be placed in absent without leave (AWOL) status for missed work hours, in accordance with agency policy and procedures. For such an employee, the “standard rate of pay” for AWOL hours is also zero.

For furloughed employees, the “standard rate of pay” is the pay the employee would have received for the furlough hours had the lapse in appropriations not occurred and the employee had performed work. It includes the following types of payments:

- the employee’s rate of basic pay;
- overtime and other premium pay for regularly scheduled work;
- regular premium payments (such as law enforcement availability pay); and
- allowances and differentials payable on a regular basis.

Except for the nonpay status hours described in the second paragraph of this section, the nonpay status furlough periods are converted to pay status periods with the payment of retroactive pay for those periods. For the purpose of any pay, leave, or benefit entitlements, furlough hours for which retroactive pay is received are considered paid hours of work. Rules related to periods of nonpay status are not applicable. For example, furloughed employees will accrue annual and sick leave as if they had been in pay status during the furlough periods. The furlough hours will also be considered to be paid hours of work in applying overtime rules, including the Fair Labor Standards Act overtime rules.

In providing retroactive pay for furlough hours, employees may **not** be charged paid leave (e.g., annual leave and sick leave) or other paid time off (e.g., compensatory time off in lieu of overtime, for travel, or for religious purposes; credit hours under a flexible work schedule). All paid leave and other paid time off was automatically cancelled because of the lapse in appropriations. There is no legal authority to revoke those cancellations and charge employees for paid leave or other paid time off.

### **Treatment of Excepted Employees**

*Pay:* Under section 1341(c)(2), an excepted employee who is required to work during a lapse in appropriations must be paid for those work periods occurring during the lapse. After the lapse ends, retroactive pay is provided at the employee’s “standard rate of pay.” If the pay cannot be provided on the normal pay date for the given pay period, it must be provided at the earliest date possible after the lapse ends.

For excepted employees, the “standard rate of pay” for excepted hours of work is the pay the employee is entitled to for the actual hours of work under the normally applicable pay rules. For example, if an excepted employee performed additional overtime work beyond the normal requirements for his or her job, he/she would be paid for that actual overtime work.

*Leave:* Section 1341(c)(3) establishes a new requirement, providing that excepted employees who are required to perform work during a lapse in appropriations “shall be entitled to use leave” under 5 U.S.C. chapter 63, if applicable (or under other applicable law if chapter 63 is not applicable), but that compensation for the leave will be paid after the lapse ends. The use of such paid leave is subject to the normally applicable rules for the applicable leave program, including leave request and approval procedures. While excepted employees have the option to use their paid leave (i.e., establish entitlement to paid leave to be paid after the lapse ends), they are not required to use leave to cover periods of authorized absence from work. Instead, they may choose to remain in the default status of being furloughed during any such authorized absence during the lapse. We expect employees generally to choose to allow the default furlough status to be applied to any approved absence, since section 1341(c)(2) provides retroactive pay for furlough periods without charge to leave. (See “Treatment of Furloughed Employees” section for guidance on furlough hours.)

### **References**

- Letter to the President from Benjamin R. Civiletti, 5 U.S. Op. Off. Legal Counsel 1 (Jan. 16, 1981)—located at <https://www.justice.gov/file/22536/download>
- Government Operations in the Event of a Lapse in Appropriations, 1995 WL 17216091 (O.L.C. Aug. 16, 1995)—located at <https://www.justice.gov/opinion/file/844116/download>
- Office of Management Budget M-18-15, Revised (Jan. 19, 2018)—located at <https://www.whitehouse.gov/wp-content/uploads/2017/11/m-18-05-Final.pdf>
- OPM Funding Lapse Information Page—located at [www.opm.gov/ShutdownFurlough](http://www.opm.gov/ShutdownFurlough)