

**JUSTICE MANAGEMENT DIVISION
LAPSE IN APPROPRIATIONS REFERENCE GUIDE**

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ACTIVITIES THAT CAN CONTINUE DURING LAPSE (“EXCEPTED” ACTIVITIES)

The Antideficiency Act restricts the Federal Government’s ability to obligate funds in advance of appropriations or beyond appropriated levels. If the Department is faced with a lapse in appropriations, it will only continue the following categories of activities:

1. Those funded by a funding source that has not lapsed, such as permanent indefinite appropriations and carryover of no-year funds appropriated in a prior year;
2. Those that are expressly authorized by law to continue during an appropriations lapse;
3. Those for which authority to continue during an appropriations lapse arises by necessary implication;
4. Those related to the discharge of the President’s constitutional duties and powers; and
5. Those related to “emergencies involving the safety of human life or the protection of property,” *i.e.*, where there is a reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question.

**** Only employees deemed by their management to fit into one of these five categories will be excepted from furlough. The default rule is that an unfunded employee should NOT work unless he or she falls under one of the exceptions above. When in doubt, or in borderline cases, the employee should NOT work.**

FREQUENTLY ASKED QUESTIONS

A. FUNDED AND UNFUNDED ACTIVITIES

1. What happens with respect to activities that are funded by revolving funds, such as the Working Capital Fund, JPATS, and Federal Prison Industries?

- During a lapse in appropriations, revolving funds are subject to the same considerations as other accounts. Component Heads need to consider the source of appropriations for the revolving fund.
- If the revolving fund receives resources from a multi-year or permanent source, the fund activities can continue (and employees whose salaries are paid from that fund will be excepted).
- If the revolving fund receives resources from annually appropriated accounts, then the fund activities (and employees) can only continue if they fall within another exception above (for example, if they support emergency activities).
- Practically, this means that many of the Working Capital Fund activities will be suspended, unless they are necessary to support excepted (including emergency) activities. JPATS activities will likely continue because most of their activities will fall within the emergency exception.
- Federal Prison Industries is a self-sustaining government corporation whose activities may continue since it does not rely on annual appropriations.

2. What about activities funded by fees?

- Whether the activities of fee-funded accounts will continue during a lapse of appropriations will depend upon the source of their funding authority.
- For example, U.S. Trustees and Antitrust activities are funded entirely, or in large part by fee collections; however, both components receive annual appropriations to operate. Therefore, these activities (and employees) are not excepted by virtue of being fee-funded.
- On the other hand, activities funded by the 3% Fund are not annually appropriated, so these activities (and employees) are excepted during a lapse.

3. In some cases, funding for an activity comes from multi-year or permanent appropriations that are not affected by a lapse in annual appropriations, but the support for that activity (including the salaries and expenses of employees who administer that activity) is funded by annual appropriations. Are such employees excepted during the lapse?

- The support activity may continue if the suspension of the support would prevent or significantly damage the execution of the terms of the funded activity's statutory authorization or appropriation. It is important to look to the terms of the statutory provision – not the terms of the funded contract or grant itself – to determine if it would be significantly damaged in the absence of the immediate performance of the unfunded, related activity. This exception may only be used in very limited circumstances.
- Component Heads should be conservative in deciding what unfunded activities need to be excepted in order to ensure the execution of the funded activity and only except those that are absolutely necessary. Furthermore, Component Heads should consider whether the funded activity can be reduced or suspended during the lapse without harming U.S. Government interests in order to limit the amount of unfunded activity required.
- Components should also avoid starting any non-emergency new projects within their funded activities in order to further limit the amount of unfunded activity required for support.
- An example of a funded activity that is supported by annual appropriations is the Radiation Exposure Compensation Act (RECA) program. RECA claims are funded by mandatory, no-year funds, while the employees who support the program are funded by annual appropriations. The RECA program should be staffed to allow enough claims to continue to be processed to avoid default claims on the RECA fund. This would constitute a substantial reduction in the staffing of the RECA program, and will allow only for the minimal operations necessary to avoid default.

4. What will happen with respect to activities that receive some of their funding from funded sources (no-year funds) but other sources of their funding are one-year?

- Unique situations such as this will require individual determinations based on the judgment of the Component Head.
- In general, unfunded activities may only continue if they fall within one of the exceptions described in the previous answer. Even if stopping the unfunded activity would prevent the funded activity from occurring, it should typically be stopped.

5. During the lapse, does the Department have legal authority to obligate annual funds that were appropriated in the prior fiscal year and remain unobligated?

- No. The Department will no longer have the legal authority to obligate prior fiscal year annual funding once it expires on September 30.

6. If the Department may not legally obligate prior fiscal year annual funds, then with what funds may we continue our excepted activities?

- If we are in an appropriations lapse then we may only obligate funds for excepted activities, which by definition we have the authority to obligate for in advance of appropriations. Therefore, obligations may continue to be made as always for excepted activities, but will not be paid out until the funds actually become available.

B. EMPLOYEES – EXCEPTED AND NON-EXCEPTED STATUS

1. What is the proper terminology?

- **“Excepted” employees** are those employees who are required to work.
- **“Non-excepted” employees** are furloughed. (A furlough is the placing of an employee in a temporary nonduty, nonpay status because of lack of work or funds, or other nondisciplinary reasons.)
- **“Emergency” employees** are the subset of excepted employees who are required to work under the emergency exception.

2. Who are “excepted” employees?

- **Employees needed to engage in shutdown activities** for a brief time in order to ensure the orderly shutdown of those functions that will not continue during the lapse.
- **Employees whose salaries are funded by sources that have not lapsed** – for example, employees paid from permanent indefinite appropriations or from available carryover of multi-year or no-year appropriations. These employees are sometimes referred to as “exempt” employees.

- **Employees whose functions have express legal authority to continue during a lapse** - for example, if the activity is required to continue by a court order.
- **Employees whose functions may continue by necessary implication** - for example, the continuation of activities necessary to protect life or property (see “Emergency employees” exception, below) may necessarily imply the continuation of a limited amount of administrative support personnel, such as IT support, without which the excepted activities could not continue. Also, where Congress funds an activity but does not fund those functions that support or administer the primary activity, the supportive or administrative function may continue if suspending that support would significantly damage the execution of the terms of the statutory provision underlying the funded activity.
- **Employees whose function is related to the discharge of the President’s constitutional duties and powers** – (does not apply to DOJ with the possible exception of the U.S. Parole Commission)
- **Emergency employees** - those whose work may not be suspended without threatening the safety of human life or the protection of property. First, there must be some reasonable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question. Employees who support emergency functions may also be excepted to the extent that suspending their work would threaten the safety of human life or the protection of property (these employees would be excepted under the “Employees whose functions may continue by necessary implication” exception, as described above).

3. Are Presidential Appointees subject to furlough?

- No, Presidential Appointees (with or without Senate confirmation) are not subject to furlough.¹ However, Schedule C employees and non-career SES are subject to furlough.

4. If an employee is on detail, who decides if the person is excepted or not?

- The office where the detailee is working decides if the person is performing an excepted function and, if so, informs the parent office that the detailee is excepted. The excepted detailee is counted against the parent office’s excepted personnel totals.

¹ Former career Senior Executives Service (SES) appointees who receive a Presidential appointment that would normally convey an exemption from the leave system may be eligible to elect to retain SES leave benefits under 5 U.S.C. 3392(c). If SES leave benefits are so elected, such a Presidential appointee would be subject to furlough under 5 CFR part 359, subpart H.

5. Will interns and uncompensated employees who are not performing excepted functions be furloughed?

- Paid interns who are not performing excepted functions will be furloughed. As a general rule, uncompensated employees and interns should also not be permitted to work if they are not performing excepted functions. However, if an uncompensated employee or intern is supporting an excepted employee and supervision of the uncompensated employee or intern will not require the excepted employee to perform non-excepted work, the uncompensated employee or intern may be permitted to work.

6. Are all non-excepted employees required to come to work on the first day of a lapse to engage in orderly shutdown activities?

- Components have the discretion to decide which non-excepted employees should come in (or work from home) on the first day of a lapse to engage in orderly shutdown activities. There is no requirement that all non-excepted employees be asked to come in or engage in shutdown activities from home, and it is the Department's preference that non-excepted employees *not* be brought in unless necessary to perform shutdown activities beyond receiving a formal furlough notice. To the extent that non-excepted employees are asked to work on the first day (either at the office or at home) they will be considered excepted for the period that they are engaged in orderly shutdown activities.

7. May a supervisor change the status of an employee from non-excepted to excepted and *vice versa*, as needs change?

- Yes, supervisors may change the status of employees as needs change. Employees may not change their own status without supervisory approval. Components should keep track of such changes and the justifications for them, especially to the extent that such changes cause the component to deviate from the numbers of excepted personnel provided in the contingency plan. Prior Department-level approval is not required for such deviations. Components should use their judgment when making such deviations, consistent with the guidance provided.

8. For those employees who are excepted, what are the expectations for hours worked, including alternative work schedules (AWS)?

- Components and supervisors have discretion to instruct employees to adjust their work schedules as necessary to perform excepted functions during the lapse. For example, supervisors may need to change an employee's schedule from an AWS to 8 hours per day/5 days per week to ensure adequate coverage of excepted functions.

9. Will employees who are not excepted be given furlough notices?

- Any reasonable advance notice of a furlough is permissible, including oral or telephonic notice. A formal written notice of furlough is not required to be given prior to implementing the furlough if it is not feasible.

10. May an excepted employee perform non-excepted work?

- To the extent that an employee is working because they are needed to perform activities that are excepted from furlough pursuant to the Antideficiency Act, as a general rule the employee should only be performing excepted work.
- If the non-furlough (excepted) function of the employee can be performed in less than an entire day, the employee is required to resume furlough status after completing the function.
- However, there may be cases in which an employee is required to perform this excepted support function intermittently throughout the course of the day, and the intervals in between are too short to enable the employee to be furloughed and then recalled in time to perform the function. In such cases, the employee may remain at work, and may perform non-excepted functions during these intervals. In such situations, components must minimize the number of employees who are performing excepted functions on an intermittent basis, by consolidating the excepted functions, to the extent possible, for performance by a smaller number of employees (e.g., components should not except from furlough multiple employees in order to perform intermittent excepted work, when instead the agency could have fewer employees perform the excepted work on more of a full-time basis).
- Excepted employees should manually track the hours they work during the lapse.
- If an employee is working because appropriations remain available to support their activities, the employee does not generally need to be concerned about whether his or her activities are excepted or non-excepted. However, it is important that such employees are aware that their colleagues (including at other agencies) may not have funding and thus are at work for the purpose of carrying out excepted activities. Funded employees should remain cognizant of this and not ask such excepted employees to assist them in non-excepted activities.

11. May an employee volunteer to work for no salary during a lapse?

- No. Employees deemed non-excepted may not volunteer their services and continue working on Department business during a government shutdown.

12. Is union bargaining regarding a furlough required?

- Because a shutdown is a legal requirement and not a matter of agency discretion, agencies do not need to bargain with unions over what activities may continue or what employees are excepted during a shutdown.
- If a union requests bargaining, the bargaining does not need to be completed before the shutdown.

- The agency may be required to provide certain information to a union if requested, in accordance with 5 U.S.C. § 7114.

13. May union officials perform representational work on “official time” during an appropriations lapse?

- Employees who are excepted because they are paid from funding sources that remain available during the lapse and who are serving as union officials may continue to be granted official time to the same extent and in the same manner as they would under non-shutdown conditions.
- Other employees serving as union officials may work on official time during a shutdown if such activities fall within the Antideficiency Act’s exceptions. The exercise of a union’s statutory and/or contractual rights triggered by an excepted management action taken during a shutdown would constitute an excepted activity. Therefore, if an agency has determined that a management action taken during a shutdown is permissible because it is an excepted activity, and such action triggers union representational rights under a collective bargaining agreement or 5 U.S.C. chapter 71 (e.g., a formal discussion, a Weingarten interview, or the representation of an employee in connection with an adverse personnel action), official time should be granted to employees to perform representational duties related to that action.
- With this in mind, agency officials should consult with their General Counsel to evaluate whether contemplated management actions will trigger statutorily or contractually guaranteed representation rights, and should consider delaying, if possible, such excepted management actions that may trigger union representational rights until agency funding is restored.

14. Will union officials have access to their union offices if they are in furlough status?

- Generally, access to facilities during a furlough may be restricted based on funding, security or other issues, and a particular facility, or portions of a facility, may be fully or partially operational. Access to a union office during a period of furlough should not be prevented solely on the basis that a union official seeking access is not in a duty status. Access for representational purposes would be subject to each facility’s requirements at the time, including provisions in collective bargaining agreements.

C. EMPLOYEES – PAY

1. Will pay accrue to an excepted employee who performs work during a furlough?

- The Government is required to pay an excepted employee who performs work during the lapse according to the normal rules governing pay. However, the timing of when an excepted employee is paid may be impacted, and he or she may not be paid until an appropriations act or a continuing resolution is enacted.

- 2. Will employees furloughed due to a lapse in appropriations be paid for the time they are on furlough?**
 - Employees on furlough during a lapse in appropriations will only be retroactively paid if there is an Act of Congress authorizing such payments.
- 3. Will employees excepted from furlough because their compensation is directly financed by a resource that has not lapsed have to wait until an appropriation is enacted before they are paid?**
 - Employees excepted from furlough because they are paid directly from appropriations that have not lapsed will be paid for their work and do not have to wait until an appropriation is enacted, although they may be paid late if personnel needed to process payroll transactions are furloughed.
- 4. How do we handle excepted employees whose pay comes from an appropriation that has lapsed but that appropriation is reimbursed from a source that is not affected by the lapse?**
 - There are several funding sources not appropriated annually that pay for the salaries of DOJ employees (e.g., 3% Percent Fund, Assets Forfeiture Fund, Health Care Fraud, and some State Department funding). Such funding is typically provided for these salaries through a reimbursable agreement, which means that the component receiving the funds must first pay the salary of the employee from its own annually appropriated funds and then be reimbursed for the salary costs. During the appropriations lapse, because funds may not be disbursed from annually appropriated accounts, the initial salary payment cannot occur even though the reimbursable funding source is available.
- 5. May an excepted employee take previously approved paid time off or be granted new requests for paid time off during a shutdown furlough?**
 - An excepted employee paid directly out of non-lapsing funds may take leave as usual.
 - With respect to all other excepted employees, when the employee is not working or not performing excepted activities in compliance with the Antideficiency Act, he or she cannot be in a pay status. Excepted employees must be either performing excepted activities or furloughed during any absence from work. If an excepted employee refuses to report for work after being ordered to do so, he or she may be considered to be absent without leave (AWOL) and may be subject to any consequences that may follow from being AWOL.

6. If a lapse in appropriations begins in the middle of a pay period, will employees who are paid from lapsed appropriations get paid for the days/hours they worked prior to the lapse?

- Employees paid from a funding source that has lapsed, regardless of whether they are furloughed (non-excepted) or working (excepted) during the lapse period, will be paid in the normal course for the time they worked up until the lapse begins. For the portion of the pay period during the lapse, all such employees, whether working or not, will be in “furlough” status on their T&As and thus will not receive payment for that period.
- The normal “Order of Precedence” for withholding deductions will be followed (*see* <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=1477>) with respect to a partial paycheck. Therefore employees are encouraged to consider contacting institutions regarding the fact that their existing allotments may not be honored. If the full amount of the voluntary allotment cannot be honored from an employee’s pay, it will not be deducted. When the shutdown ends, in those cases where allotments could not be deducted, it will be the employee’s responsibility to ensure that the allotment is caught up.

7. Will DOJ issue letters to creditors on behalf of DOJ employees who are furloughed?

- The Department is sympathetic to the financial concerns raised by employees because of the lapse in appropriations, but the Department is not in a position to issue letters to creditors on behalf of DOJ employees who are furloughed. However, OPM has provided a template for employees to use when approaching creditors. It can be accessed here: www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/sample-letters-for-creditors-mortgage-companies-and-landlords.doc.

8. Are furloughed employees eligible for unemployment compensation?

- It is possible that furloughed employees may become eligible for unemployment compensation. DOJ employees can find information on unemployment compensation at www.justice.gov/employees/index.html.
- State unemployment compensation requirements differ. Some states require a 1-week waiting period before an individual qualifies for payments. In general, the law of the state in which an employee’s last official duty station in federal civilian service was located will be the state law that determines eligibility for unemployment insurance benefits. (See the Department of Labor website “Unemployment Compensation for Federal Employees” <http://workforcesecurity.doleta.gov/unemploy/unemcomp.asp>).
- Agencies or employees should submit questions to the appropriate state (or District of Columbia) office.

D. EMPLOYEES – ONBOARDING NEW EMPLOYEES

1. What happens to new employees who are scheduled to report to work for the first time during a shutdown furlough?

- By law, individuals do not become federal employees until they report for work and are sworn in. As a general rule, components should delay the enter-on-duty date for new employees who are scheduled during a lapse in appropriations. The only exceptions are as follows:
 - Funded activities: To the extent that the funding to pay the new employees has not lapsed, and funding necessary to pay employees and activities required to on-board and swear in the new employees is available, the new employee may begin work.
 - Emergency activities: Where the component is funded by an appropriation that has lapsed, new employees may be brought on and begin work specifically to perform emergency activities, the delay of which will compromise the safety of human life or the protection of property. Components must ensure that a duly authorized employee is available to swear in the new employee. The paperwork necessary to bring the employee on-board may be conducted by excepted human resources employees. (NOTE: As a general matter the on-board process is not an excepted function. Components bringing on new employees to perform emergency activities should perform only those minimal on-boarding procedures deemed reasonably necessary until funding is restored.)

E. EMPLOYEES – COMMUNICATION

1. How will employees be notified whether or not they should come to work? How will they be notified to return?

- Components will identify those employees who will be excepted from furlough during a lapse in appropriations, and employees will be notified by their supervisor as to whether or not they will be furloughed.
- During a lapse, employees should monitor the Department of Justice “For Employees” webpage (www.justice.gov/employees) for information specific to the Department. Employees should also monitor news reports, the Office of Personnel Management web site (www.opm.gov), and similar sources for the Federal Government’s operational status.
- Once an appropriation for the Department has been enacted (either a continuing resolution or other type of appropriation), all employees are required to return to work on their next scheduled work day. If an appropriation is enacted in the middle of the day, an employee should typically return to work on the employee’s next scheduled work day unless directed to return at a different time.

2. May employees use government issued communication devices (Smartphones), laptops, and other equipment during the lapse?

- Excepted employees may continue to use government issued communication devices (Smartphones), desktop computers, laptops, and other equipment during a lapse.
- Non-excepted employees should be advised not to use their government issued communication devices (Smartphones), desktop computers, laptops, and other equipment provided by the Department during a lapse, except in the following limited circumstances:
 - Non-excepted employees may briefly check their email remotely on the first day they would otherwise be working in order to check their status, receive a furlough notice, and/or update an out-of-office message. Employees will be considered excepted for this brief period (up to 15 minutes) and should manually track their time. This activity should only occur on the first workday following the lapse.
 - Non-excepted litigators with active cases should be instructed to check their incoming emails once per day for electronic court notices and forward any such notices to an appropriate excepted litigator. This activity should typically take no longer than 15 minutes per day. Litigators who are otherwise non-excepted will be considered excepted employees during the time they are performing this activity, and they should manually track this time.

3. May supervisors use personal email addresses to communicate with non-excepted employees while they are furloughed?

- Supervisors may use personal email addresses of their own furloughed employees to send furlough notices or return-to-work notices. Absent consent by employees, when sending such messages supervisors must ensure that the recipient cannot see the personal email addresses of other employees. Personal email addresses should not be used for any official work purpose beyond orderly shutdown communications (such as a furlough notice and/or a return-to-work notice).

4. May excepted DOJ employees communicate with employees in other agencies using personal email addresses?

- Excepted DOJ employees should not seek or use the personal contact information of their counterparts in other agencies to conduct government business. Those excepted DOJ employees who need to contact employees in other agencies during a lapse should do so through the excepted designees at those agencies.

5. Will web services be available?

- Parts of Justice.gov and DOJNet will remain up. Content changes will be limited to those necessary pursuant to an excepted activity. A notice will be posted that content may be out of date due to the lapse. Limited web services staff will be available to manage content of an emergency nature.

6. Where can employees go for more information on how a lapse in appropriations will affect them?

- Refer to the “For Employees” webpage on the Department of Justice website (www.justice.gov/employees).
- Refer to the Office of Personnel Management’s website (www.opm.gov).
- Subscribe to email updates when new information becomes available on the Justice Employee Information link. Visit www.justice.gov/govdelivery/subscribe.html to start your subscription. Select “For Employees” under the Department of Justice category. Be sure to subscribe with a non-DOJ email address.

7. Should employees use a standard out-of-office email and phone message?

- Employees should use the following standard message:

“The appropriation that funds my salary has lapsed, and as a result I have been furloughed and am currently out of the office. If your matter is urgent, please call XXX at (xxx) xxx-xxxx. Otherwise, I will respond after funding has been restored.”

F. TIME AND ATTENDANCE

1. What is expected of timekeepers just before a lapse in appropriations?

- If a lapse in appropriations is expected to occur at the end of a pay period, timekeepers should begin preparing T&As a few days before the lapse and release the T&As to the National Finance Center (NFC) by close of business on the last day before the lapse.
- If a lapse in appropriations is expected to occur in the middle of a time period, timekeepers should key in the time worked up to the day of the lapse for the given pay period on the day before the lapse. They should indicate that all employees are on furlough status for the rest of the time period. This can be changed if the lapse does not occur. (**NOTE:** even excepted employees are listed in furlough status on the T&As; the T&As are amended when an appropriation is enacted).

2. How are T&As reported for employees paid by annually appropriated funding sources during a lapse in appropriations?

- No T&As should be submitted until there is an enacted appropriation or CR and employees return to work.
- Excepted, non-furloughed employees should track their time. Once timekeepers return to work they should submit new and/or corrected T&As indicating when the non-furloughed employees were working.
- If a special act of Congress is enacted and signed by the President that authorizes pay for non-excepted, furloughed employees, corrected T&As should be submitted for those employees so they receive pay.

3. How are T&A reports handled for employees paid by permanent indefinite appropriations, or by multi-year appropriations with sufficient carry-over funding?

- Employees whose funding is not affected by the lapse in appropriations and whose salaries are fully funded should have their T&A reports prepared in the usual manner reflecting the appropriate transaction code (TC) and associated accounting.

(NOTE: Specific guidance will be provided to timekeepers as necessary should a lapse in appropriations occur.)

G. TRAVEL

1. Is official travel for excepted employees permitted during a furlough?

- Official travel is permitted for excepted employees during a furlough period on a case-by-case basis if necessary to carry out an emergency function, funding for the travel is available in spite of the lapse (*e.g.*, it is funded by a permanent indefinite appropriation or carryover in no-year funds), or the travel falls within one of the other excepted categories. Travel is not permitted for non-excepted employees.

2. Is official travel for Presidential Appointees permitted during a furlough?

- While Presidential Appointees (with or without Senate confirmation) are excepted from furlough because of how their salaries are paid, their expenses are not subject to the same exception. Therefore, a PA or PAS may only travel during a lapse if the travel falls within one of the excepted activities, such as an emergency activity or the funding source for the travel remains available in spite of the lapse.

3. What happens if an employee is at a temporary duty station (TDY) when the lapse of appropriations begins?

- If an employee is in TDY status when the lapse of appropriations begins, management should consider whether the work the employee is doing in the TDY location is excepted (for example, because it involves an emergency function); if not, the component should request that the employee make arrangements to return to the permanent duty station.

4. What happens when an employee is on extended TDY status when the lapse of appropriations begins?

- The determination to continue or terminate extended TDY should be made on a case-by-case basis considering cost and the anticipated time frame for the furlough period.

5. What should components do about employee travel scheduled in the near future?

- Components should evaluate all official travel scheduled in the 2 weeks after the beginning of the lapse. To the extent that the planned travel is to be conducted by an excepted employee to perform an excepted activity, the travel may continue.
- If the planned travel and employee are being paid for out of accounts that have funding, the travel may continue, but prudence should be exercised and the trip should be cancelled or delayed if possible.
- To the extent that the planned travel is to be performed by a non-excepted employee and/or for a non-excepted activity, components should consider canceling such travel, since it may not occur if the Department's funding remains lapsed when the travel is scheduled. In making determinations about when to cancel such travel, components must consider whether canceling such travel now will save the Department fines and penalties that might accrue if they wait until a later date to cancel the travel.

6. How can employees make official travel changes or cancellations?

- Employees may make reservation changes or cancellations using the on-line booking tool E2 (if applicable), www.cwtsatotravel.com (if not using E2), or by calling the appropriate phone number listed below.

7. Will the Department's Travel Management Center remain operational during the furlough period?

- Yes. CWTSato, the Department's Travel Management Center, will remain operational during the furlough period. Employees may continue to change, cancel, or make travel reservations using the on-line booking tool E2 (if applicable), www.cwtsatotravel.com (if not using E2), or by phone using the

telephone numbers listed below. Limited on-site services will be available for the offices, boards, and divisions using the CWTsato office located in the RFK Main Justice Building.

<u>COMPONENT</u>	<u>CALL CENTER NUMBER</u>	<u>COLLECT CALL CENTER NUMBER (FOREIGN LOCATIONS)</u>
ATF	800-273-1989	210-877-3341
BOP	866-530-0062	210-877-3342
DEA	800-719-8988	210-877-3373
FBI	800-696-7286	210-877-3362
FPI	800-817-1837	210-877-3338
OBD	877-905-9644	210-877-3337
OBD FACT WITNESS	800-718-8836	
OJP	888-972-8527	210-877-3323
USMS	888-318-3296	210-877-3327

8. May excepted employees use their government travel cards while performing officially authorized travel during a lapse in appropriations?

- Yes. Excepted employees may use their government travel cards during a lapse in appropriations if they are performing officially authorized travel. However, travel voucher processing is not an excepted function so travel vouchers will not be processed during the lapse of appropriations.

9. Are all employees required to pay their government travel card accounts during a lapse in appropriations?

- Yes. Employees, whether excepted or non-excepted, remain obligated to pay their government travel card accounts on time regardless of whether they have been reimbursed for their travel, in accordance with their cardholder agreement. (**NOTE:** processing travel vouchers is not an excepted function and therefore will not occur during the lapse.) However, JMD will attempt to work with the travel card bank to ensure financial hardships due to the lapse in appropriations are taken into consideration. That said, JMD will not intervene on behalf of individual cardholders. Cardholders need to contact the travel card bank to address their financial hardships associated with the lapse in appropriations.

10. If an employee's government travel card was already delinquent prior to the lapse in appropriations, is the employee excused from paying?

- No. Payment is due as required by the statement due date. If the account was delinquent prior to the lapse in appropriations, it will continue to be considered

delinquent until full payment is made. The number of days delinquent does not stop accruing in the event of a lapse in appropriations.

11. May payments be made for employee transit subsidies?

- Payments may not be made from an annual appropriation account that has lapsed. However, payments may be made from non-annual accounts as long as funding is available, and payments are typically made from that account. Excepted employees will be reimbursed once funding has been restored for costs normally paid for by the transit subsidy.

H. TRAINING

1. May we train new employees during a lapse?

- In order to ensure the proper execution of the Department's emergency functions, components may determine that the training of new employees in positions that have been designated as "emergency" is an excepted function.
- To the extent that the training of new "emergency" employees is in process or about to begin when a lapse occurs, components should consider whether a short delay (for example, over the weekend) in the training will compromise emergency functions. If such a delay will not compromise emergency functions, components should consider keeping the employees at the training center but delaying the training itself or not sending the employees to the training during the brief delay. If at any point the component determines that the delay in training might impact emergency functions the training should resume.
- New employees who are not in positions designated as "emergency" should not start work during the lapse and should not be trained.

2. May we continue training for current employees?

- Training of current employees, even those who are excepted for emergency reasons, should be cancelled or delayed, unless immediate training is necessary to protect human life or property.

3. May we continue training state and local law enforcement officers?

- No. Training of state and local officers should be cancelled during a lapse of appropriations.

4. May we train international law enforcement officers during a lapse in appropriations?

- As a general rule, training for international law enforcement officers occurring in the United States should be cancelled. However, with respect to training of

international law enforcement officers abroad (such as the training of officers who will be working in a combat zone), components should use their judgment to determine whether such training needs to occur immediately in order to protect human life or property. If so, such training may continue.

I. LITIGATION

1. Will the courts be open?

- During the most recent lapse, the federal courts remained open. We will keep the litigating components informed of any communications from the Administrative Office of United States Courts in any future lapse.

2. Will criminal litigation continue?

- To the extent that the courts are operational, criminal prosecutions will continue without interruption during a lapse since they are essential to the safety of human life and protection of property.
- All criminal investigations will also continue, including those investigations where a determination has not yet been made as to whether to proceed civilly or criminally and available evidence continues to suggest the possibility of criminal liability.

3. Will civil litigation continue?

- Civil litigation will be curtailed or postponed to the extent that this can be done without compromising to a significant degree the safety of human life or the protection of property.
- Litigators will need to approach the courts and request that active cases be postponed until funding is available, except for those cases in which postponement would compromise to a significant degree the safety of human life or the protection of property. Litigators should typically request a stay on the first business day following the lapse in appropriations. A sample stay motion will be provided to the litigating divisions if a lapse in appropriations occurs.
- If a court denies such a request and orders a case to continue, the government will comply with the court's order.
- Supervisors are reminded that they need to limit their staffing to the minimum level of essential activities to comply with the court's order and to protect life and property.

J. FOIA

1. Will FOIA requests be processed during a lapse?

- No.

K. CONTRACTS

1. What contractual services may be continued during a lapse in appropriations?

- In general, for purposes of a lapse in appropriations, contractual services are treated like other government activities. Therefore, the contractual services and personnel that may continue during a lapse in appropriations include:
 - Those needed for a brief time to ensure the orderly shutdown of functions that will not continue during the lapse;
 - Those funded through multi-year, permanent, or prior year appropriations (FY 2013 or earlier);
 - Those for which there is an express legal authority (e.g., a court order) to continue during an appropriations lapse;
 - Those for which authority to continue during an appropriations lapse arises by necessary implication;
 - Those related to the discharge of the President's constitutional duties and powers; and
 - Those related to "emergencies involving the safety of human life or the protection of property," *i.e.* where there is a reasonable likelihood that the safety of human life or the protection of property would be compromised, in some significant degree, by delay in the performance of the function in question;

2. In some cases funding for a contract comes from multi-year or permanent appropriations that are not affected by a lapse in annual appropriations, but the federal employees who oversee the contract are funded by annual appropriations. May those employees be excepted from furlough during the lapse?

- Even though the contract itself is funded, the employee support for the activity (such as oversight and maintenance) may only continue if the lawful continuation of the contract "necessarily implies" that the support activities will continue.
- A "necessary implication" that will allow the unfunded support employees to be excepted can arise when the contract qualifies as an "emergency" activity, or the contract is necessary to the discharge of the President's constitutional duties and powers.
- The support employees may also be excepted if their furlough would prevent or significantly damage the execution of the statutory function the contract is supporting. It is important to look to the terms of the statutory provision

underlying the function, as opposed to the terms of the funded contract itself – to determine if it would be significantly damaged in the absence of the immediate performance of the unfunded, related activity. This exception may only be used in very limited circumstances.

- Component Heads should be conservative in deciding what unfunded activities need to be excepted in order to ensure the execution of funded contracts and only except those that are absolutely necessary.
- For example, a component should suspend, in whole or in part, a contract that supports employees who are not working during a lapse in appropriations, rather than require any employees to come into work to oversee the contract.

3. In cases where a contract is excepted (for example, because it involves an emergency function or it is being funded by a no-year or multi-year funding source) can payments be made on the contract?

- Even though funding may be available to make the payments, the federal employees who process the payments typically are not excepted employees and, therefore, payments will not be made. The mere fact that there will be interest penalties incurred by the Department for late payments is *not* sufficient to except employees from furlough for the purpose of processing payments. Such employees may only be excepted if failure to process a payment will result in an imminent threat to life or property or will prevent or significantly damage the execution of the terms of the statute underlying the contractual activity.
- If payment personnel are furloughed, contractors/contract payments will not be paid and must await return of furloughed staff and resumption of ordinary payment processing.

4. Will contractors whose work will not continue during the lapse be given stop-work orders?

- Whether a stop-work order is required depends on the particular contract. In general, stop-work orders are not necessary if the contractor is already on notice of the consequences of a lapse in appropriations. For example, many DOJ service contracts and task orders (if under a GSA contract) include a clause providing that: “Contractor staff shall not work if the Government is closed, unless otherwise authorized by a fully executed Task Order or the Contracting Officer.” In all cases in which such or similar language is contained in a contract, task order, or purchase order, the CO should notify the contractor which, if any, contract employees, services, and/or deliveries are expected to continue.
- In the absence of such a provision in a contract, task order, or purchase order, a stop-work order likely is necessary. A reference in the contract to FAR clause 52.232-18 or 52.232-19 will not negate the need for a stop-work order.
- CO’s should consult with counsel where contract language is unclear or the circumstances are otherwise uncertain.

5. If an office's work meets the emergency standard, and employees performing the emergency work are excepted and report to work, may the office continue to obligate funds for contracts?

- The answer depends on what goods or services the contracts will provide. If the contracts directly support the office's current emergency work, then the office may obligate funds for them.
- For example, it would not be acceptable for the office to obligate funds for the development of a new surveillance system that will take 3 years to complete, given that this system would not accomplish current emergency work.
- Further, it would not be acceptable to obligate funds for non-emergency work, such as refurbishing office space.

6. If a contract for non-emergency work was awarded and funds were obligated prior to the lapse in appropriations, and the contract does not support a function that is statutorily required to continue during a lapse, may work related to that contract continue during a lapse in appropriations?

- If the contract was awarded and funds were obligated prior to the lapse in appropriations, then work related to the contract may continue as long as the work is not dependent upon federal employee supervision or new funding. That said, agencies should consider whether continued performance on such a contract would be wasteful, and if so, should suspend performance.
- If work related to the contract requires supervision by a federal employee or other type of interaction, then the activity may not be continued and a stop-work order must be issued.
- For example, a component affected by the lapse has a funded contract with a vendor to develop a new computer system application. The legacy system being replaced will operate under the lapse, but the work on the future application does not qualify as necessary to support an emergency function. Whether the contractor activities may continue depends on the need for federal employee supervision. If federal employees are not needed to supervise the contractor's activities, the work may continue. If federal employees are needed, the contractor may not continue its work because there is not a sufficient reason to except the federal employees from furlough for such a contract.

7. May expert witnesses continue working during a lapse in appropriations if their contract is funded from no-year appropriations (such as the Fees and Expenses of Witnesses appropriation)?

- The expert may continue working to the extent that the work does not require supervision by or coordination with a federal employee. If the work requires supervision by or coordination with an excepted federal employee, the expert may continue working if his/her work is a necessary part of an excepted activity, for example a criminal investigation or prosecution or a civil litigation in which the court has denied a motion for a stay. However, the expert should stop

working if the work would require supervision by or coordination with a non-excepted (furloughed) employee, or if it would require an excepted employee to perform non-excepted work.

L. ETHICS

1. Do the ethics rules apply to both excepted and non-excepted employees during a lapse in appropriations?

- Yes. Whether or not employees are excepted, their status as federal and Department of Justice (DOJ) employees does not change during a lapse, even though non-excepted employees are not reporting to work at their federal facilities. Therefore, all of the ethics rules continue to apply to all employees.

2. Where can employees seek guidance if they have an ethics-related question during a lapse in appropriations?

- (NOTE: unless excepted based on other duties, ethics officials are non-excepted; therefore they will not be available to answer questions during a lapse. If an employee is concerned that his or her action may violate the ethics statutes, standards of conduct, or DOJ supplemental regulations, it is best to refrain from that action until the employee is able to seek the necessary guidance or authorization.)
- However, below are questions and answers to assist employees with the most common ethics-related issues that may arise during a shutdown.

OUTSIDE ACTIVITIES/OUTSIDE EMPLOYMENT

3. May employees seek and accept a non-federal job during the shutdown?

- It depends. See the answers to the questions below for the outside activities/outside employment that are prohibited or that require Component Head approval. However, because employees will not have access to their ethics officials or be able to obtain prior approval for the outside activity during a shutdown, they must evaluate the activity closely. If there is a risk that the outside activity/employment would not be approved, the employee should refrain from participating during the shutdown.

4. What outside activities/employment are strictly prohibited?

- Regardless of a government shutdown, the following outside activities are prohibited unless a waiver from the Deputy Attorney General is obtained prior to the shutdown: the paid practice of law, involvement in criminal or habeas corpus matters, and involvement in matters in which the Department is a party or represents a party.

5. What outside activities/employment are permissible but only after receiving prior Component Head approval?

- The uncompensated practice of law and activities that involve a subject matter, policy, or program that is in the employee component's area of responsibility (e.g., working for a DOJ contractor who provides products or services to a component) are permissible only after approval from the employee's Component Head. If there is a risk that the outside activity/employment would not be approved, the employee should refrain from participating during the shutdown.

6. Must employees seek review and approval of outside activities/employment that they began during the shutdown?

- Yes. Upon their return to work, employees must contact their ethics officials and seek a review and any necessary approvals for their outside activities/employment.

7. What outside activities/employment are permissible without prior approval?

- Generally, no prior approval is required for certain outside employment such as sales positions at a retail store or food service positions at restaurants. Positions such as these likely will not conflict with an employee's duties at DOJ.

8. May employees volunteer to continue to carry out their Department duties during a shutdown?

- No. Employees deemed non-excepted may not volunteer their services and continue working on Department business during a government shutdown.

9. May employees participate in pro bono legal work?

- No, unless it was approved prior to the shutdown. The Department's Pro Bono Coordinator provided the following guidance in a September 27, 2013, email to DOJ Pro Bono Committee and Interagency Representatives concerning preparations for a possible shutdown: "Attorneys may engage only in pro bono activity which was approved before the shutdown. Therefore, attorneys may not take on new pro bono projects during the shutdown. They cannot take a new case or work at a clinic unless they have cleared it before the shutdown. I know attorneys may want to use their free time in a positive way, but they cannot give legal advice (outside activity) without prior approval."

10. May employees volunteer for a partisan political campaign or candidate during the shutdown?

- It depends. Under the Hatch Act (5 U.S.C. §§ 7321–7326), employees have different restrictions on their political activities based upon their positions at DOJ. Refer to the Office of Special Counsel’s website (www.osc.gov) or the Departmental Ethics Office webpage (www.justice.gov/jmd/ethics), if active. If there is a risk that the contemplated activity violates the Act, employees should refrain from participating in the activity.

11. May employees use their official title or position in connection with their outside activity/employment?

- No. Employees must not use their official status in order to obtain outside employment, nor may they use their titles or positions to benefit the outside activities/employment.

GIFTS

12. Do the gift rules apply during a shutdown?

- Yes, all of the ethics rules continue to apply to federal employees during a government shutdown. The general rule concerning gifts from an outside source (versus gifts among employees) is that a federal employee may not accept a gift from a prohibited source or a gift that is given because of his official position. There are a few exceptions to this rule, addressed below.

13. May employees accept a discount offered by a bank or other commercial organization?

- Generally, yes, IF the discount is offered to ALL federal employees regardless of pay or agency. (For example, a local deli is offering free sandwiches to all federal government employees for the first 2 days of the shutdown.) Employees also may accept a discount offered to the public. (For example, a local pizza delivery shop offers large pizzas for \$7 every Monday.) A discount offered to all federal employees or to the public is not limited to \$20 per occurrence or \$50 per year.

14. May employees present their government identification badge to receive a permissible discount offered to all federal employees?

- Yes. Employees may show their government ID to prove they are eligible for an existing discount. Employees may not, however, use their government ID to solicit or encourage a gift or special treatment – this is a misuse of position.

15. May employees accept a gift that is either from a prohibited source or that is offered because of their federal position, if the gift is valued at \$20 or less?

- It depends. Although the letter of the gift rules may permit receipt of this gift, the spirit of the rules requires prudence when applying them. If receipt of a gift from an outside source would raise a concern about an employee's impartiality, it would be wise not to accept it. (For example, during the shutdown, Microsoft offers an upgrade to its suite of programming products to DOJ IT technicians for their personal computers; it is valued at \$19.99. A number of DOJ IT technicians are evaluating programming needs under a pending IT contract; Microsoft is one of the bidders under the pending contract. To avoid any appearance of a conflict of interest, the IT technicians working on the pending contract should decline Microsoft's offer.)

SOCIAL MEDIA

16. May employees comment/blog about the government shutdown on social media sites?

- Generally, yes, employees may comment about the shutdown in their personal capacity. However, be aware that if employees' official titles/positions are listed on the introduction page of their site, they must be careful not to make comments that would appear to be official Department statements. Also, remember that information that is not appropriate for disclosure by employees in work status continues to be inappropriate for disclosure when employees are in shutdown status.

17. May employees continue to conduct Department business during a shutdown using their personal email or social media sites?

- No, employees may not continue to work using their personal email or social media sites. This equates to employees volunteering their services to DOJ during the shutdown, which is prohibited. However, supervisors may use personal email addresses to send notices, particularly return-to-work notices.