UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

OCT 17 2013

MEMORANDUM FOR CHIEF HUMAN CAPITAL OFFICERS

From: Elaine Kaplan
Acting Director

Subject: Pay and Benefits for Employees Affected by the Lapse in Appropriations

The President has signed legislation restoring annual appropriations and allowing the immediate return to duty in a pay status of all Federal civilian employees who have been affected by the lapse in appropriations that began on October 1, 2013. In addition, the legislation provides retroactive compensation for furloughed Federal employees covering the period of the lapse in appropriations. The purpose of this portion of the legislation is to make furloughed Federal employees whole by ensuring that they receive their "standard rate of compensation" for the entire period of the lapse in appropriations as soon as practicable after the lapse in appropriations ends.

The attached guidance has been prepared by the U.S. Office of Personnel Management (OPM) in consultation with the Office of Management and Budget (OMB). It is intended to assist agencies in administering pay and benefits for employees affected by the lapse in appropriations. This includes employees who were furloughed and employees designated as "excepted" from the furlough pursuant to the applicable legal requirements—e.g., employees required to respond to emergencies involving the safety of human life or the protection of property or employees performing functions related to the orderly suspension of agency operations.

For additional guidance, agency Chief Human Capital Officers and Human Resources Directors may contact the OPM contacts listed in the attachment. Employees should contact their agency human resources offices for assistance.

Attachment

cc: Human Resources Directors

Attachment

2013 Furlough and Pay and Leave Benefits

Pay

An excepted employee who performed work during the lapse in appropriations may now be paid for that work. For periods of time during which an employee was furloughed due to the lapse in appropriations that began on October 1, 2013, the employee must receive the same pay he or she would have received for an equivalent amount of work performed for the agency. Therefore—

- An employee is entitled to receive his or her rate of basic pay for all periods of time from October 1, 2013, until the end of the lapse in appropriations, during which he or she would have been in a pay status but for the lapse of appropriations;

- In the case of a General Schedule within-grade increase that was delayed because of time in a non-pay status, the within-grade increase must be made effective on the date it was originally due (assuming all statutory and regulatory requirements for within-grade advancement have been satisfied);

- An employee who was regularly scheduled to perform overtime work or to perform work at night or during a period for which any other form of premium pay would otherwise be payable is entitled to receive overtime pay, night pay, or other premium pay as if the work had been performed;

- Allowances, differentials, and other payments otherwise payable on a regular basis (e.g., administrative uncontrollable overtime pay and law enforcement availability pay) must be paid as if the employee actually continued to work; and

- All periods of time from October 1, 2013, until the end of the lapse in appropriations, during which an employee would, but for the lapse in appropriations, have been in a pay status (including regularly scheduled overtime hours and standby duty) must be considered "hours of work" for pay administration purposes under the Fair Labor Standards Act.

Leave Accrual for Furloughed Employee

An employee furloughed during the lapse in appropriations that began on October 1, 2013, must now be considered to have been in a pay status from October 1, 2013, until the end of the lapse in appropriations. As a result, agencies must adjust the employee's leave account for proper recredit of any lost accrual of annual and sick leave due to being in a nonpay status. Since the employee is retroactively placed in a pay status, annual and sick leave will accrue in accordance with the normal rules.

Excused Absences

Except as provided below, for furloughed employees who would otherwise be in pay status but for the lapse in appropriations, absences from October 1, 2013, until the end of the lapse in appropriations, are considered excused absences and may not be charged to any other form of paid leave (i.e., annual leave, sick leave, or other paid leave), compensatory time off in lieu of overtime, compensatory time off for travel, religious compensatory time off, or credit hours under a flexible work schedule.

> NOTE: While employees are considered to be in an excused absence status when being paid retroactively for furlough periods, employees should follow the guidance of their respective Shared Service Payroll Provider for the recording of time and attendance to ensure that all employees are paid at their standard rate of compensation. Employees may be required to code furlough time as regular duty instead of excused absence to ensure that they are paid properly and promptly.

Preapproved Leave Without Pay (LWOP)

In the case of an employee who was on preapproved LWOP during the lapse in appropriations, absences from October 1, 2013, until the end of the lapse in appropriations, must continue to be charged to LWOP for the duration of the period of approved LWOP.

Family and Medical Leave Act (FMLA)

Under FMLA an employee is entitled to 12 weeks of unpaid leave during any 12-month period and may elect to substitute paid leave (including annual leave, sick leave, or any other form of paid time off), consistent with current laws and OPM's regulations. During the lapse in appropriations, affected employees who would otherwise be in pay status must be (1) at work performing excepted activities, or (2) furloughed. Agencies were instructed to cancel any paid leave (including FMLA paid leave) during the furlough period. Under the recent legislation, furloughed Federal employees are made whole by ensuring that they receive their "standard rate of compensation" for the entire period of the lapse in appropriations. For employees who were otherwise scheduled to be in nonpay status, the standard rate of compensation is zero. Accordingly, employees on FMLA leave during the furlough period, should be treated as follows:

- **FMLA LWOP Throughout Furlough Period.** An employee scheduled and preapproved to take LWOP under FMLA throughout the furlough period continues to be charged LWOP. The employee is not entitled to receive excused absence.

- **Scheduled Use of Both Unpaid and Paid FMLA Leave Intermittently.** For any days during the lapse in appropriations on which an employee was previously scheduled to be in LWOP status under FMLA, the employee will remain in that status. For any days during the lapse in appropriations on which the employee was scheduled to be in FMLA paid leave status, the employee will be provided excused absence, consistent with the treatment of other employees who had

previously scheduled paid leave that was cancelled due to the lapse in appropriations.

- **12-week Entitlement.** Since the legislation provided for retroactive application of the employee's "standard rate of compensation," the employee will continue to receive any previously invoked FMLA coverage during the furlough period and covered time (paid or unpaid) counts toward the 12-week entitlement.

"Use or Lose" Annual Leave

Both employees and agencies should make every effort to schedule, within the time limits specified by regulation, any additional "use or lose" annual leave made available to an employee whose previously approved annual leave was canceled during the lapse in appropriations. If, however, the employee is unable to reschedule such annual leave and it is forfeited at the end of the leave year, the amount of annual leave that was canceled during the lapse in appropriations may be considered for restoration under 5 CFR 630.308 (56 Comp. Gen. 393 (1977)).

Donated Annual Leave

Under the voluntary leave transfer program (VLTP) and voluntary leave bank program (VLBP), an employee may be entitled to receive donated annual leave if he or she is experiencing a medical emergency that would place him or her in a leave without pay (LWOP) status for a 24-hour period. During the lapse in appropriations, the use of donated annual leave was cancelled, and the leave recipient remained in a leave without pay status.

- Since the leave recipient was officially in a LWOP status, the employee is not entitled to excused absence.

- A leave recipient can retroactively substitute donated annual leave for any period of LWOP that began on or after the date fixed by the agency as the beginning of the medical emergency under 5 CFR 630.909(d) and 5 CFR 630.1009(d).

- Agencies should provide an employee who qualifies for VLTP or VLBP an opportunity to make any adjustments in accordance with applicable law and regulation.

Holidays

- Except as provided below, an employee affected by the lapse in appropriations will receive his or her regular holiday pay for the Columbus Day holiday (including the "in lieu of" holiday, if applicable) and, if applicable, holiday premium pay for work performed by an employee during his or her normal hours of duty on the holiday, plus overtime pay for work in excess of the normal hours of duty on the holiday). Also, if an employee was regularly scheduled to work on the Columbus Day holiday and was

instead furloughed, the employee is now entitled to holiday premium pay, as discussed in the "Pay" section above.

- An employee who was on preapproved LWOP from October 1, 2013, until the end in the lapse of appropriations, must continue to be charged LWOP for the duration of the period approved as LWOP. If such an employee was on LWOP on both the last workday before the Columbus Day holiday and the first workday after the holiday, he or she will not be paid for the holiday. This is consistent with our longstanding guidance and a Comptroller General decision (56 Comp. Gen. 393 (1977)).

Alternative Work Schedules (AWS)

- Each agency should have a policy specifying when flexible work schedules must be established and when they may be changed. Normally, such schedules are established in advance of the pay period involved. Under such a policy, an AWS nonworkday cannot be changed after the pay period begins.

Retirement Deductions and Actions

- Retirement deductions under the Civil Service Retirement System or the Federal Employees Retirement System must be deducted from the employee's retroactive basic pay for the period from October 1, 2013, until the end of the lapse in appropriations. The employing agency must also contribute to the Retirement Fund its corresponding share for the retroactive payment. The total retirement deductions and agency contributions for each employee should equal the amount that would have been withheld and contributed had the employee not been affected by the lapse in appropriations. These amounts should be remitted to OPM using the normal procedures for retroactive adjustments.

- The period of retroactive pay is fully creditable for retirement purposes and is not considered LWOP.

- Agencies should process retirement actions effective during the period from October 1, 2013, until the end of the lapse in appropriations, as follows:

    - For employees who, on or before the requested retirement date, submitted some notice of their desire to retire, agencies should make the retirement effective as of the date requested. The retirement request may be informal (such as a letter requesting retirement and can be either mailed or personally submitted to the agency (even if put under the door). Any additional required paperwork, such as the formal retirement application form, may be completed after the date of enactment. No time periods after the effective date of the retirement may be considered as duty time, since the individual would no longer be an employee of the agency.

    - Some employees may request retirement retroactive to a date prior to submission of the request. The Comptroller General has issued guidance

permitting retroactive personnel actions (including retirements) only under limited enumerated circumstances—i.e., "where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation." (See (3) has deprived the employee of a right granted by statute or regulation." (See 58 Comp. Gen. 51, at 53(1978.) It will be up to the employing agency to determine in each case whether the Comptroller General's criteria have been met.

- If any retirement application has been delayed because of the lapse in appropriations, it should be quickly processed and submitted to OPM so that OPM will be able to begin annuity payments as soon as possible.

Thrift Savings Plan (TSP)

Agencies and employees should refer to the TSP website (guidance specific to the impact of the lapse on TSP accounts is available here) or contact their agency representative for information. Agency representatives may contact the Federal Retirement Thrift Investment Board at (202) 942-1450 for additional information.

Federal Employee Health Benefits Program (FEHBP), Federal Employee's Dental and Vision Insurance Program (FEDVIP), Federal Long Term Care Insurance Program (FLTCIP), and Flexible Spending Accounts (FSAFEDS)

Some employees may be eligible to reenroll or change enrollment because of an event that occurred during the period from October 1, 2013, until the end in the lapse of appropriations. In cases where the effective date would normally be the first day of the first pay period following the day the employing office receives the enrollment form, agencies should be flexible about approving earlier effective dates (as if the employee had submitted the enrollment form immediately following the event).

- Deductions and contributions for FEHBP and each enrolled employee should equal the amount that would have been deducted and contributed had the employee not been affected by the lapse in appropriations. These amounts should be remitted to OPM using the normal procedures for any retroactive adjustments as necessary.

- Deductions for FEDVIP and FLTCIP should equal the amount that would have been deducted had the employee not been affected by the lapse in appropriations. These amounts should be remitted to BENEFEDS using the normal procedures for any retroactive adjustments as necessary.

- Deductions for FSAFEDS should equal the amount that would have been deducted had the employee not been affected by the lapse in appropriations. These amounts should be remitted to Automatic Data Processing, Inc., (ADP) using the normal procedures for any retroactive adjustments as necessary.

Life Insurance

Because all affected employees will be paid for the period from October 1, 2013, until the end in the lapse of appropriations, life insurance deductions and contributions for each enrolled employee should equal the amount that would have been deducted and contributed had the employee not been affected by the lapse in appropriations. These amounts should be remitted to OPM using the normal procedures for any retroactive adjustments as necessary.

Unemployment Compensation for Federal Employees (UCFE)

- The UCFE Instructions to Federal Agencies advise that whenever a retroactive payment is made, the Federal agency must check the agency file of Forms ES-931 received to determine if the recipient of the retroactive payment filed a claim for unemployment benefits within the last 52 weeks and, if so, the agency should inform the state unemployment insurance (UI) agency of the amount and period covered by the retroactive payment.

- The state UI agency will determine whether or not an overpayment exists and, generally, the recovery of the UCFE overpayment is a matter for state action under its law; however, some state UI laws require the employer to recover such overpayment by collecting the overpayment amount from the employee. The Federal and state agencies will need to coordinate to determine the required action in accordance with the individual state UI law. Federal agencies are encouraged to develop lists or spreadsheets that can be provided to the state(s) containing the employees' names, Social Security numbers, and the amounts and periods of time covered by the retroactive payment.

Documentation of Personnel Actions

- Prior to the shutdown furlough resulting from the lapse in appropriation on October 1, 2013, agencies were instructed not to prepare SF-50 documentation of the furlough at the outset and advised that further instructions on the appropriateness of preparing an SF-50 would be provided once an appropriation had been signed. Accordingly, agencies do not have to process an SF-50 to document the shutdown furlough that began on October 1, 2013, nor should the furlough be recorded with any document designated for long-term filing in the Official Personnel Folder (and if SF-50s were processed in error documenting the furlough such SF-50s must be cancelled citing 001/Cancellation with legal authority ATM/5 U.S.C. 302).

- Agencies need not provide a furlough notice to an employee who did not receive a notice during the lapse in appropriations.

OPM Contacts

Employees should contact their human resources office for additional information. Human Resources or Benefits Officers may contact the following OPM offices:

- Pay and Leave: pay-leave-policy@opm.gov
- Furlough Procedures and Labor Relations: plr@opm.gov
- Furlough of SES Appointees: sespolicy@opm.gov
- Documentation of Personnel Actions: persdoc@opm.gov
- Reduction in Force, Details, Outside Employment: employ@opm.gov
- Retirement: benefits@opm.gov
- Federal Employees' Group Life Insurance Program: fegli@opm.gov
- Federal Employees Health Benefits Program: fehb@opm.gov
- Federal Long Term Care Insurance Program: ltc@opm.gov
- Flexible Spending Accounts for Federal Employees: fsa@opm.gov
- Federal Employees Dental and Vision Insurance Program: fedvip@opm.gov