

AFGE Guidance

Government Shutdown and Official Time

A government shutdown that occurs due to a lapse in annual appropriations typically causes federal employees to fall into three broad categories. *See* 31 U.S.C. § 1341, *et seq.* (the “Antideficiency Act”). The first category is employees who are not allowed to work and are furloughed for the duration of the shutdown. These employees are commonly referred to as “non-excepted” employees.

The second category is employees who are required to work during all or part of the shutdown, even though funding has lapsed for their positions. These employees are commonly referred to as “excepted” employees.¹ Agencies are given wide latitude to determine which positions will be designated as “non-excepted” and which positions will be designated as “excepted,” although they may not make a designation for reasons that would violate existing law. *See* 31 U.S.C. §§ 1341, 1342; *see also* 5 U.S.C. § 7106(a).

The third category is employees who are not affected by the shutdown because their positions do not rely on annual appropriations for funding. Employees whose funding is not affected by a lapse in appropriations are referred to as “exempted” employees.

Union representatives, like other federal employees, may fall into any one of these three categories. And like other employees, union representatives do not lose their statutory rights to be represented or to provide representation during a shutdown. AFGE’s long-held position is thus that the union’s statutory rights and its collective bargaining agreements are not eliminated during a shutdown.

Impact of a Shutdown on Official Time for Union Representatives

Official time for exempted AFGE representatives, i.e., representatives who are not funded by annual appropriations or who are paid through preexisting advance appropriations, should be unaffected by a shutdown.

Official time for AFGE representatives who are funded by annual appropriations, however, is likely to be negatively affected by a shutdown. For example, AFGE representatives who are normally paid from appropriated funds and who are furloughed during a shutdown, i.e., non-excepted union representatives, may not be able to use block official time while they are furloughed because official time is a paid work status. *See* 5 U.S.C. § 7131(a); *AFGE Local 1770 and Dep’t of Defense*, 64 F.L.R.A. 953, 958 (2010) (official time is considered hours of work). Similarly, the use of block official time by AFGE representatives who are funded through annual

¹ The terms “non-excepted” and “non-essential” are interchangeable. They both refer to employees furloughed during a shutdown. The terms “excepted” and “essential” are also interchangeable. They both refer to employees who are required to work during a shutdown even though funding may have lapsed for their positions. This guidance uses “non-excepted” and “excepted” because these are the terms most recently used by the Office of Personnel Management (OPM) and the Office of Management and Budget (OMB). It should also be noted that “excepted” employees are not necessarily the same as “emergency” employees.

appropriations but who are not furloughed, i.e., excepted union representatives, may be restricted. Prior approvals of travel while on official time may also be rescinded for excepted and non-excepted representatives alike.

But union representatives should remain entitled to official time on a case-by-case basis in order to perform statutorily-mandated union functions, such as providing representation in response to agency-initiated investigations or personnel actions occurring during a shutdown. As stated by OPM:

If an agency official who is excepted (i.e., an individual paid by annual appropriations who is excepted from furlough because he or she is performing work that may continue to be performed during a lapse in appropriations—see Question B.1. explaining “excepted” employees) has determined, for example, that an investigation or the initiation of a personnel action is necessary to protect life and property, and must be undertaken prior to the enactment of appropriations, such an action could also fall within excepted activity.

If this excepted activity triggers union representational rights under 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), a union’s representational function would be required in order for the Agency to move forward with such an action and would, itself, in that narrow circumstance, constitute excepted activity. In such a case, therefore, official time should be granted to employees to serve in this representational function.

OPM Guidance for Shutdown Furloughs, December 2021, pgs. 38-39 (emphasis added), available at <https://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/guidance-for-shutdown-furloughs.pdf> (“*OPM 2021 Shutdown Guidance*”).

Performing Representational Activities During a Government Shutdown

Union representatives should be permitted to perform representational activities on a voluntary basis during a government shutdown, although they may wish to do so during what would otherwise be non-duty time. This is because the Antideficiency Act does not apply to AFGE and thus does not prevent representatives from performing voluntary representational functions for the union.

Union representatives who perform voluntary representational functions, however, may have limited access to a union office located on agency-controlled premises if access to agency facilities is restricted during the shutdown. *See OPM 2021 Shutdown Guidance*, p. 39. This likely means that union officers who seek to voluntarily perform representational duties for the union but who are denied access to a union office may need to provide representation remotely, e.g., via phone or email.

Suggested Actions You May Consider Taking

- **FILE A GRIEVANCE** if you are improperly denied official time to which you are entitled.²
- **DEMAND TO BARGAIN** over the impact of the changes to the administration of official time; to the extent a shutdown is not already covered by an existing collective bargaining agreement or memorandum of understanding. Agencies must provide notice and opportunity to bargain over procedures and appropriate arrangements. 5 U.S.C. § 7106(b); *OPM 2021 Shutdown Guidance*, p. 32 (“[A]gencies with bargaining unit employees are reminded that they must provide notice and opportunity to bargain over negotiable procedures and appropriate arrangements to any unions representing their employees.”).³
- **FILE A ULP** if, for example, you are denied access to an accessible union office to perform work in connection with an excepted matter, or if you are denied attendance at a meeting for which the union is entitled to be present or the employee is entitled to union representation (e.g., *Weingarten* meetings, formal discussions, etc.).

In closing, AFGE urges that union representatives continue to provide representation and assist with union issues during any government shutdown despite the obstacles being erected against them. Union representatives should also consult with their agencies for case-specific issues and should remember the general rule to follow agency directives and grieve later if needed.

NOTICE: This guidance is general in nature. It is not a substitute for individualized legal advice, nor does it guarantee a particular result or create an attorney-client relationship. The law is also subject to change, sometimes with little or no notice. **Anyone seeking fact-specific advice should contact the AFGE General Counsel’s Office directly.**

² Note that the United States Court of Appeals for the Federal Circuit has held that the OPM regulation which allows the immediate furlough of an employee due to unforeseen circumstances, 5 C.F.R. § 752.404(d)(2), is valid. *Horner v. Andrzejewski*, 811 F.2d 571, 577 (Fed. Cir. 1987) (violation of the Antideficiency Act “is a legitimate ground for invoking the emergency furlough regulation.”).

³ *But see NAIL, L. 7 and Dep’t of the Air Force, Seymour Johnson AFB*, 67 F.L.R.A. 654, 660-61 (2014) (bargaining proposal that would require advance notice of emergency furlough found to be non-negotiable).