

December 22, 2018

## MEMORANDUM FOR NON-ESSENTIAL EXCEPTED EMPLOYEES

FROM: IRS Human Capital Officer

SUBJECT: Notice of Furlough during Holiday to Excepted Employee due to a Lapse of Appropriations

In the absence of either a Fiscal Year (FY) 2019 appropriation, or a continuing resolution for the Department of the Treasury, Internal Revenue Service, no new financial obligations may be incurred by the Agency for functions funded through annual appropriations, except with respect to certain personnel who are otherwise authorized to continue to work.

As you are aware, as an employee who has been excepted from furlough and authorized to continue to work during the shutdown, you are required to work on those days you would normally be scheduled to work. The upcoming **Christmas Eve and Christmas** holidays on **December 24 and December 25, 2018**, are not days you would normally be scheduled to work, and we are not requiring you to work on those days. The shutdown furlough rules require us to place you in a furlough status for the **Christmas Eve and Christmas** holidays. As an excepted employee, you are expected to return to work on your next regularly scheduled workday following the **Christmas Eve and Christmas** holidays. For the vast majority of you, this means you would return to work on Wednesday, December 26, 2018.

If you have a work schedule that does not include Monday, December 24 and Tuesday, December 25, 2018, as workdays, you will follow the normal holiday rules for an “in lieu of” holiday. All full-time employees, including those on flexible or compressed work schedules, are entitled to an “in lieu of” holiday when a holiday falls on a non-workday. For example, if you have a Monday through Friday alternative work schedule (AWS), and Christmas is your regularly scheduled AWS day off, you will do as you have generally done for previous holidays and take your “in lieu of” holiday the work day immediately preceding your AWS day, which would be Friday. Because the shutdown furlough rules require that you be in furlough status for the Christmas Eve and Christmas holidays, you will be furloughed on Monday and Tuesday. Because your regular day off is on Monday, December 24 and Tuesday, December 25, 2018, you should return to work on Wednesday, December 26, 2018.

If you have any questions regarding this procedure, please consult with your supervisor. In the event your supervisor is unavailable, please contact: [Shutdown Question Submittal](#).

This furlough for the Christmas Eve and Christmas holidays is being initiated under the authority of 5 CFR Part 752, Subpart D (non-SES and Schedule C employees) and 5

CFR Part 359, Subpart H (career SES appointees), because the IRS does not have a current appropriation for FY 2019. The absence of continued funding is an emergency under these regulations. As a result, the thirty-day advance notice is not provided under 5 CFR Part 752, Subpart D (non-SES and Schedule C employees) and 5 CFR 359, Subpart H (career SES appointees).

As discussed above, as an excepted employee, you are placed in a furlough status for the Christmas Eve and Christmas holidays, whether this holiday falls on Monday, December 24, 2018 or Tuesday, December 25, 2018. While you are on furlough, you will be in a non-duty, non-pay status. You must remain away from your workplace or other alternative worksite. You are prohibited by law from working, even on a voluntary basis. Paid leave, such as annual, sick, court, or military leave, which has been approved for this period is cancelled.

You may appeal this action to the Merit Systems Protection Board (MSPB) if your employment status meets any of the following criteria:

1. You have completed a probationary trial period or one year of current continuous employment in the competitive service under other than a temporary appointment.
2. You are a preference eligible employee in an excepted service appointment and have completed one year of current continuous service in the same position or positions similar to the one you now hold.
3. You are in an excepted service appointment and have completed two years of current continuous service in the same or similar position under other than a temporary appointment limited to two years or less.
4. You are a Career SES appointee (except reemployed annuitants) who believes the requirements of 5 CFR Part 359, Subpart H, or the agency's procedures have not been correctly applied.

Non-SES and Schedule C employees with the right to appeal to the MSPB have the right to request review of the material the agency relied on to support this action. Career SES appointees may inspect the regulations and records pertinent to this action at the following location: [IRS Shutdown/Recall site](#).

If you have the right of appeal and wish to appeal this action to the MSPB, you must file your appeal during the period beginning the day after the effective date of your furlough and ending on the 30<sup>th</sup> day after the effective date, or 30 days after the date of your receipt of this decision notice whichever is later. You have the right to be represented in this matter by an attorney or other person you may choose. You may obtain a copy of the appeal form, review the MSPB regulations, and ascertain the location of the appropriate MSPB Regional Office through the web address: <http://www.mspb.gov/>.

The MSPB requires an appeal to be filed with the MSPB regional or field office serving the area where your duty station was located when the action was taken. Your appropriate field office can be found in **Attachment 1** of this document. The MSPB also offers the option of electronic filing at <https://eappeal.mspb.gov/>. You may wish to check the MSPB's website for its operating status during this time. Should you file an appeal with the MSPB, the MSPB should send a copy of the appeal and the Acknowledgment Order to the appropriate General Legal Services (GLS) Area Counsel office designated in **Attachment 2** of this document.

Bargaining unit employees, as an alternative to an appeal to the MSPB, may grieve this action in accordance with the negotiated grievance procedure in Article 41 of the 2019 National Agreement. With the consent of NTEU, bargaining unit employees may appeal the agency's decision to binding arbitration under Article 43 of the 2019 National Agreement. Under no condition may bargaining unit employees file both a grievance under the negotiated grievance procedure and an appeal to the MSPB regarding this action. (Filing in both forums will result in the dismissal of whichever is filed later.) To obtain information on filing a grievance under the negotiated grievance procedure, contact your local NTEU representative.

If you believe the Agency took this action against you in retaliation for making protected "whistleblowing" disclosures or other protected activity, as defined in 5 CFR § 1209.4, you have the right to file either an appeal to the MSPB (5 CFR § 1209.6), a complaint with the Office of Special Counsel with the option to file an Individual Right of Action appeal with the MSPB, or, with the consent of the Union, an appeal to binding arbitration in accordance with the 2019 National Agreement. Whichever is filed first shall be considered an election to proceed in that forum. If you choose to file a complaint with the Office of Special Counsel before filing an appeal with the MSPB, you will have elected an Independent Right of Action appeal and in any subsequent appeal to the MSPB your rights will be limited. Unlike a direct appeal to the MSPB, the agency will not be required to prove the charge, nexus, and the reasonableness of the penalty but will only be required to prove by clear and convincing evidence that it would have taken the same action in the absence of a protected disclosure or other protected activity.

If you believe this action was based in whole or in part on discrimination on the basis of race, color, religion, sex, age, national origin, or physical or mental disability, you may choose one of the following:

1. Include the discrimination allegations in an appeal to the MSPB.
2. File a complaint with the Equal Employment Opportunity Commission (EEOC) consistent with 29 CFR §§ 1614.301 and 1614.302.
3. Grieve the unlawful discrimination allegations consistent with the provisions of 5 USC § 7121(d) and Article 41 of the 2019 National Agreement. (**BARGAINING UNIT EMPLOYEES ONLY**)

To appeal under 29 CFR Part 1614, the allegations must be brought to the attention of an EEO counselor within 45 calendar days of the effective date of this action. For allegations of unlawful discrimination, you must choose only one of the above forums. (Whichever is filed first shall be considered an election to proceed in that forum and all later filings will be dismissed.) You can obtain information about appeal rights and procedures by contacting the IRS EEO Care Line at 1-866-743-5748 or TTY at 1-866-924-3578.

If you are a bargaining unit employee and choose to grieve allegations of unlawful discrimination and do not prevail at arbitration, you have the right to request MSPB review of the arbitrator's decision under 5 USC § 7702. The request for MSPB review must be filed with the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW, Washington, DC 20419, within 35 days of the issuance of a decision, or, if it can be shown that a decision was received more than 5 days after the date of issuance, within 30 days after the date the decision was received.

Any employee whose appeal of this action to the MSPB included allegations of unlawful discrimination has the right to petition the EEOC, within 30 days of the MSPB's decision, for consideration of the MSPB's decision, or to file a civil action in an appropriate United States District Court.

You may be entitled to unemployment benefits during the furlough period. The Standard Form 8 (SF-8), Notice to Federal Employee about Unemployment Insurance, is included as **Attachment 3** of this document. You may also wish to contact the State Unemployment Office in your jurisdiction to determine eligibility and procedures. Additional information about unemployment insurance is available at <http://www.servicelocator.org/OWSLinks.asp>.

We recognize the difficult financial implications of any furlough, no matter how limited its length. We will make every effort to keep you informed as additional information regarding the agency funding level becomes available. If you have questions pertaining to this letter you may submit them through our [IRS Q&A site](#) and a subject matter expert will respond timely.

[Attachments\(3\)](#)