



April 7, 2011

MEMORANDUM FOR THE DEPUTY SECRETARY

FROM: M. PATRICIA SMITH *MPS*
SOLICITOR

RE: CONTINUATION OF CERTAIN LIMITED DEPARTMENTAL
AND SOLICITOR'S OFFICE ACTIVITIES DURING A LAPSE
IN APPROPRIATIONS

The Office of the Solicitor (SOL) has completed its legal review of agency proposals to continue certain "excepted" activities¹ during a lapse in Departmental appropriations. This memorandum includes 1) agency plans that SOL has approved as meeting the legal criteria and principles for performance of excepted activities during such a lapse; 2) documentation from the heads of other DOL agencies acknowledging that their agencies will not continue to operate during a shutdown because they do not meet any of these legal criteria; and 3) the Office of the Solicitor's plan for continuing a minimal level of activities sufficient to support the excepted activities of the Department under applicable legal standards. As we have discussed, this legal review does not constitute final approval of the Department's overall plans in the event of a lapse in appropriations.

We will revise our approvals if and when new facts arise that change our legal analysis. In addition, agencies understand that SOL must approve any changes they wish to make to this version of their plans.

As this memo and the accompanying individual agency plans reveal, DOL's primary activities in the event of a lapse in funding will be the provision of benefits to workers under entitlement programs and the protection of life in cases of imminent threat.

1. OMB Circular No. A-11

OMB Circular No. A-11 (Circular) "provides policy guidance and instructions" for Executive Branch agencies in their development of shutdown plans. Circular, Section 124.1(b). This guidance is based on two opinions issued by the Attorney General in the early 1980s, affirmed and updated by the Department of Justice's Office of Legal Counsel in 1995. As Circular No. A-11 states, those opinions conclude that "the language and legislative history of the Antideficiency Act unambiguously prohibit

¹ "Excepted activities" are authorized by law to continue during a lapse in appropriations. Generally, such limited activities are authorized to continue when, despite such lapse, funds remain legally available; when authority to undertake minimal obligations is necessarily inferable from other statutes; or when necessary to address imminent threats to the safety of human life or the protection of property. One additional exception that may come into play is activities necessary to the discharge of the President's constitutional obligations.

agency officials from incurring obligations in the absence of appropriations” Id. Section 124.(a).

The following information responds to the guidance provided in Section 124.2 of the Circular:

Unless otherwise noted in specific agency plans, the Department estimates that it will take one half day to complete the shutdown. Before implementation of DOL’s shutdown plan, the Department estimates that it will have 16,099 employees on board. DOL will retain approximately 1650 employees under the plan for the following reasons²:

- They are engaged in law enforcement: 53 employees (including 10 individuals on call for Office of Labor Management Standards);
- Their compensation is financed by a resource other than annual appropriations: 463 (including 1 individual on call for the Office of Workers’ Compensation Programs)³;
- They are not otherwise exempt, but will be retained to protect life and property: 1285.

The Circular also asks agencies to determine whether the number of employees DOL will retain to protect life and property exceeds five percent of the number of employees on board at the beginning of a hiatus in funding (minus employees who are exempt). We have determined that it does.⁴ These individuals are employees of DOL’s worker protection agencies, including The Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), the Wage and Hour Division, and the Employee Benefits Security Administration (EBSA). These agencies protect the safety and health of workers in the American workplace (including mines), detect and prevent child labor violations, and protect workers’ pensions and health benefits. They have identified the number of employees who are necessary to protect life and property, and who must therefore remain at work in the event of a lapse in funding. Individual agency shutdown plans further elaborate on the continuation of these functions.

2. Comparison with 1995 Plans

² Circular A-11 does not ask for information on the number of employees who will be retained under all of the Antideficiency Act’s prohibitions on performing work during a funding lapse. We have included a chart in Section 5, below, with a complete count of on-board and excepted employees for each of DOL’s agencies.

³ An additional 234 employees will be retained under the EEOICPA Part B program with funding that, although not subject to lapse, will run out after two days. After that time, they will be retained by necessary implication to carry out the program.

⁴ We made this calculation by subtracting the number of employees exempt because they are engaged in criminal law enforcement and the number of employees exempt because they are financed by a resource other than annual appropriations from the number of employees on-board with before implementation of the plans, and then determining whether the number of employees retained to protect life or property is at least five percent of that total. See OMB Circular A-11 Section 124.2

In addition, as you know, the Department developed and implemented similar shutdown plans in 1995 that were reviewed and approved for legal sufficiency by then-Solicitor Thomas Williamson. Agencies consulted their 1995 plans, where available, in developing their current plans, and SOL carefully compared these two sets of plans when making decisions to approve or require modifications in current plans. While some current plans are not identical to earlier ones, comparisons have provided useful in assuring that agencies provided adequate justifications for their proposals under allowable exceptions to the general prohibition on performance of work during a lapse in appropriations. In some cases, current plans diverge from those of 1995 because of recent changes in funding sources that affect activities subject to a funding lapse. In other cases, plans diverge because of activities that did not exist in 1995 or because the Department now performs those activities differently, relying for example, on information technology that we did not utilize previously.

3. Synopsis of Excepted and non-Excepted Activities

As reported to OMB, the major activities conducted by the Department that will continue during a lapse in funding are the following:

NAME OF SERVICE/PROGRAM	REASON
Employee Benefits Security Administration – criminal investigations, response to imminent threats to covered employee plan assets and response to medical plan coverage denials in life threatening situations	Necessary for the safety of life and the protection of property
Employment and Training Administration (ETA) – federal aspects of Unemployment Insurance benefit administration	Other funding source (by necessary implication)
ETA – maintaining support for Job Corps Centers training and housing approximately 44,000 students	Necessary for the safety of life and Other funding source (by necessary implication)
Mine Safety and Health Administration – mine inspections for known and potential serious and imminent safety problems	Necessary for the safety of life
Occupational Safety and Health Administration – workplace safety inspections for serious and imminent risks to life and health	Necessary for the safety of life
Office of Workers Compensation Programs – Black Lung Benefits, EEOICPA, FECA, and Long Shore benefit payments processing	Other funding source
Wage and Hour Division – response to incidents involving serious injury or death of a minor while employed (child labor violations) or of a farm worker	Necessary for the safety of life

As indicated in Section 4, below, the Mine Safety and Health Administration and the Office of Workers' Compensation Programs account for the bulk of the employees who will be performing these activities.

4. Agency-by Agency Employee Census

Our review focused primarily on activities, rather than specific numbers of positions. However, we also sought assurance from departmental agencies that the number of excepted positions bears a reasonable relationship to the activity proposed. Agency officials have the responsibility for determining the appropriate number of positions for each excepted activity, because they are in the best position to evaluate their resource needs. From a legal standpoint, adhering to such a standard will minimize the risk of a violation of the Antideficiency Act, which prohibits, except as authorized by law, the use of employee services in the absence of available appropriations.

Below is a chart that reflects the number of employees "on board" in each DOL agency as of April 1, 2011 and the number of employees who will remain at work during a funding lapse, based on figures provided to SOL by the agencies. These numbers

Agency Name	On Board ⁵	During Shut-Down ⁶
Office of the Secretary (Immediate Office, Deputy Secretary, Executive Secretariat)	59	10
Benefits Review Board	63	4
Bureau of Labor Statistics	2473	3
Employee Benefits Security Administration	925	49
Employment and Training Administration	1120	26
International Labor Affairs Bureau	95	5
Mine Safety and Health Administration	2304	1002
Office of Administrative Law Judges	128	0
Office of Assistant Secretary for Administration and Management	680	47
Office of Chief Financial Officer	86	7
Office of Congressional and Intergovernmental Affairs	26	3
Office of EEO/CPA Ombudsman	4	4
Office of Inspector General	417	26

⁵ "On Board" numbers represent the DOL workforce as of 4/1/11.

⁶ "During Shut-down" numbers are based on plans as of 4/3/11. These numbers do not reflect employees who may be called back to work on an "as needed" or "intermittent" basis because of unanticipated events, such as a serious, industrial accident that would require DOL to deploy a large number of investigators. It may also be necessary to call back to work on-call employees in the event of a prolonged shutdown to meet court-imposed or statutory deadlines that cannot be postponed.

Office of Labor Management Standards	244	2
Office of Public Affairs	64	8
Office of the Solicitor	710	138
Occupational Safety and Health Administration	2275	228
Office of Workers Compensation Programs	1617	1332
Wage and Hour Division	1660	6
Administrative Review Board	13	0
Employee Compensation Review Board	37	0
Office of Assistant Secretary for Policy	25	1
Office of Federal Contract Compliance Programs	763	0
Office of Disability Employment Policy	50	1
Office of Faith-Based and Neighborhood Partnerships	2	0
Office of Public Engagement	4	0
Office of Recovery for Auto Workers and Communities	6	0
Veterans Employment and Training Administration	217	1
Women's Bureau	56	1
TOTAL	16116	2904

6. Agency Proposals to Continue Activities

The Office of the Solicitor reviewed and approved proposals for excepted activities for the following DOL agencies or offices (the date in parentheses is the date on which the latest version of the agency's plan was approved):

- Office of the Secretary (includes Immediate Office, Office of the Deputy Secretary, Executive Secretariat (3/1/11)
- Benefits Review Board (3/7/11)
- Bureau of Labor Statistics (4/6/11)
- Employee Benefits Security Administration (3/2/11)
- Employment and Training Administration (4/6/11)
- International Labor Affairs Bureau (3/30/11)
- Mine Safety and Health Administration (4/6/11)
- Office of Administrative Law Judges (3/29/11)
- Office of Assistant Secretary for Administration and Management (3/2/11)
- Office of Chief Financial Officer (3/2/11)
- Office of Congressional and Intergovernmental Affairs (3/1/11)
- Office of EEOICPA Ombudsman (4/6/11)
- Office of Inspector General (3/3/11)
- Office of Labor Management Standards (3/7/11)
- Office of Public Affairs (3/3/11)

- Office of the Solicitor (4/6/11)⁷
- Occupational Safety and Health Administration (4/6/11)
- Office of Workers Compensation Programs (3/9/11)
- Wage and Hour Division (3/1/11)

SOL-approved plans for each of the above agencies are included in this memorandum.⁸

Pursuant to its legal analysis, SOL also determined that the following agencies have no functions that would continue during a funding lapse. We have indicated in parentheses the date on which the agency head confirmed to SOL his or her understanding that the agency would shut down during a lapse in funding:

- Administrative Review Board (3/4/11)
- Employee Compensation Review Board (3/4/11)
- Office of Assistant Secretary for Policy (3/3/11)*⁹
- Office of Federal Contract Compliance Programs (3/8/11)
- Office of Disability Employment Policy (3/3/11)*
- Office of Faith-Based and Neighborhood Partnerships (3/3/11)
- Office of Public Engagement (3/3/11)
- Office of Recovery for Auto Workers and Communities (3/4/11)
- Veterans Employment and Training Administration (3/3/11)*
- Women's Bureau (3/3/11)*

Email exchanges demonstrating agency head acknowledgment of the need to shut the agency down are attached to this memorandum.

⁷ SOL's finalized its plan after reviewing and approving DOL agency plans to assure provision of necessary legal support for excepted activities.

⁸ Some SOL-approved plans are marked "Draft" in recognition of the fact that revisions might occur before or during a shutdown, depending on circumstances. Plans that are not marked draft are also subject to revision.

⁹ An asterisk denotes agency head is a Senate-confirmed Presidential appointee not subject to furlough who would continue to report to work during a shutdown.

MEMORANDUM FOR PATRICIA SMITH,
SOLICITOR OF LABOR

FROM: KATHERINE ARCHULETA 

DATE: March 1, 2011

SUBJECT: Proposed "Excepted" Activities In the Office of the Secretary During a Lapse in Appropriations

The Secretary of Labor, as the principal advisor to the President on labor matters and the senior advisor to the President on economic matters, performs statutory duties and fundamental responsibilities for, and on behalf of, the President. Under normal conditions, the staff in the immediate office of the Secretary serves the Secretary in execution of all of her statutorily mandated obligations. Without the support of this staff, the ability of the Secretary to fulfill her obligations to the President would be seriously impeded, if not obstructed.

During a shutdown, the Secretary remains responsible for carrying out all of her duties to and for the President and as prescribed by law, including all activities related to the Department's "excepted" activities. Within the boundaries of applicable law, it is imperative that the Secretary have at least a core of staff support necessary to carry out her responsibilities with regard to the "excepted" activities described below. To this end, I request approval of our designation of the following excepted activities, each of which, in our view, is authorized by necessary implication to oversee and consummate all of the activities otherwise "excepted" in the Department.

During a suspension of Departmental activities, the bulk of the Secretary's time can be expected to relate to excepted departmental functions, departmental activities arising from the fact that the funding lapse has occurred, and executive branch efforts to resolve the impasse with Congress. A core staff is required to advise and assist the Secretary in addressing these matters and performing these roles. Also in furtherance of these activities, minimal staff is necessary for gatekeeping functions: the screening of visitors and incoming telephone calls for the Secretary, the structure and maintenance of the Secretary's schedule, and providing advice and counsel to the Secretary.

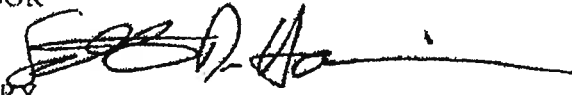
To perform these functions, 4 full-time positions would represent the minimal staffing requirements of this office for a limited duration government shutdown. Additional individuals will be available to either telework as necessary, or to rotate as necessary. Of course, the occurrence of a serious emergency or a major initiative, e.g., legislative, legal, or programmatic, subsequently authorized as an excepted activity, approval of this request, this office will identify to the Assistant Secretary for Administration and Management the individuals who would provide the authorized services.

Thank you for your review of this request.

U.S. DEPARTMENT OF LABOR
DEPUTY SECRETARY OF LABOR
WASHINGTON, D.C.
20210

February 28, 2011

MEMORANDUM FOR M. PATRICIA SMITH
SOLICITOR OF LABOR

FROM: SETH D. HARRIS 
DEPUTY SECRETARY

SUBJECT: Proposed "Excepted" Activities During a Lapse in
Appropriations

During a lapse in appropriations, my immediate office will suspend all operations and all of my employees will be furloughed, except as described below. Upon your approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the name of the individuals performing the activities set forth below. I envision job rotation for some activities.

Excepted staff in this office will limit their activities to activities in support of the Secretary and Deputy Secretary in the performance of "excepted" activities so identified in the Department. This would include departmental excepted activities, activities arising from the fact that the funding lapse has occurred, and executive branch efforts to resolve the impasse with Congress.

In the absence of special needs during such a lapse in appropriations, one staff assistant would be utilized to perform excepted activities, including, for example, screening callers, reviewing mail and other requests, and structuring my schedule and coordinating it with the needs of the Secretary. Other staff could be recalled should the volume of my duties with respect to the shutdown or other excepted activities rise to warrant additional staffing. This would include the occurrence of a serious emergency or a major initiative, e.g., legislative, legal or programmatic, subsequently authorized as an excepted activity.

Thank you for your review of this request.

MEMORANDUM FOR PATRICIA SMITH,
SOLICITOR OF LABOR

FROM: BETSY KIM 
DIRECTOR, EXECUTIVE SECRETARIAT

DATE: March 1, 2011

SUBJECT: Proposed "Excepted" Activities in the Office of the Executive Secretariat
During a Lapse in Appropriations

The Office of the Executive Secretariat is charged with managing and implementing the Secretary's internal communication process, and providing logistical support to the Secretary, who performs statutory duties and fundamental responsibilities for, and on behalf of, the President. The Secretary's ability to perform these duties requires staff support from the Office of Executive Secretariat.

During a lapse in appropriations, this office remains the Secretary's communications nerve center for (1) performing triage of correspondence and other communication for the appropriate Secretarial, PAS and staff attention, and (2) assuring quality control and correspondence management for all written communications relating to the authorized functioning of the Department.

In addition, the Office of the Executive Secretariat manages controlled information intended for the Secretary and Deputy Secretary, and performs logistical support required to assure that the Secretary's daily agenda, both within and outside the departmental headquarters, is carried out in an effective manner, as free as possible from undue security risk.

In the event of a lapse in appropriations, I believe a minimum of three staff are necessary to assure that these minimal activities are performed. In the event that circumstances require additional staff, or require the rotating of staff, alternates may be utilized.

Individuals who would provide the authorized services:

- Director, Executive Secretariat
- Director, Management Support Services
- Secretary Driver Day Shift

OFFICE OF THE EXECUTIVE SECRETARIAT

Exempt Personnel:

Name

Title

Director, Executive Secretariat
Director, Management Support Services
Secretary Driver Day Shift

Alternate Personnel:

Name

Title

Agency Liaison Officer
Secretary Driver Evening Shift, Event Coordinator
Supervisor for Operations

March 8, 2011

MEMORANDUM TO: PATRICIA SMITH
 Solicitor

FROM: ROY P. SMITH
 Acting, Chairman of the Board
 Benefits Review Board

RE: AGENCY SHUTDOWN

During a lapse in appropriations, the Benefits Review Board will suspend all operations, and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occur, additional employees would be identified to work during the duration of the emergency.

Exception for Processing Motions for Stays of Payments:

The Benefits Review Board references the exception from a required shutdown of government activities due to lapse in appropriations that is permitted for obligations that are necessary for the protection of property. The narrow category of activities described below will permit the protection of property interests that would otherwise be lost.

Pursuant to 33 U.S.C. §914(f), an employer must pay an award ordered by the administrative law judge within 10 days after it becomes "due." If employer does not pay, it is liable for an additional assessment of 20 % of the amount due. *See also* 20 C.F.R. §702.350.

An award becomes "due" at the time it becomes "effective" pursuant to 33 U.S.C. §919(e), which is when the administrative law judge's compensation order is "filed" in the office of the district director. *See also* 33 U.S.C. §921(a); 20 C.F.R. §702.350.

The last clause of 33 U.S.C. §921(b)(3) provides that compensation required by an award must be paid even while a case is on appeal, unless a stay of payments is granted by the Board. Section 921(b)(3) states that a stay of payments shall not be issued unless the employer/carrier can establish "irreparable injury" will ensue if it is required to pay the award. *See also* 20 C.F.R. §802.105. If the Board grants a stay of payments, its order must contain a specific finding regarding the nature and extent of the irreparable injury that would ensue to the employer/carrier. 20 C.F.R. §802.105(a).

April 6, 2011

Memorandum For: M. Patricia Smith, Solicitor
Deborah Greenfield, Deputy Solicitor

From: Keith Hall, Commissioner

Subject: Contingency Plan for Excepted Functions in the Absence of Appropriations

During a lapse in appropriations the Bureau of Labor Statistics will suspend all operations and its staff will be furloughed, except as described below. Upon approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotations in some instances. If unforeseen emergencies occur, additional employees would be identified to work for the duration of the emergency.

We are assuming that all survey and other program operations will cease and that the public website will not be updated. In addition, for command and control purposes, we are assuming that blackberry service and email service will have to be maintained for those in work status. If this is not the case, our requirements for excepted staff will be reduced somewhat, as indicated on the attached document. Minimum timekeeping functions for excepted personnel will continue, though most administrative functions will cease during a shutdown.

The timing of any shutdown is critical. In 1995, the shutdown occurred after the Consumer Price Index estimates had been prepared, but before they were released to the public. While the release of economic data was not classified by OMB to be an excepted activity, the risk of disclosure of the CPI data during a shutdown was deemed to be unacceptable and releasing the CPI report was deemed to be part of the orderly cessation of activities. As such, OMB authorized a minimal staff to come in during the shutdown to release the CPI data. Should such an exigency occur again and OMB authorizes the release of some Principal Federal Economic Indicator (PFEI), BLS would need a small staff from the program, publications, and IT offices to handle the release. Those individuals are not named in the attached list, as they would vary depending on the timing of the shutdown and, hence, the particular release that would be affected. This will NOT be an issue if the last day of operations is March 4. After that date, no PFEI is scheduled to be released until the week of March 14.

Operating our website and maintaining communications and IT security will require the IT staff named in the attachment. In addition, in order to maintain program operations as long as possible leading up to a shutdown, we would then need to backup our systems, verify successful backup, and then shut them down. We consider this a necessary part of the orderly cessation of operations. This process will take up to 3 days, and will vary by program.

While GSA manages physical security in the building, it is possible that any incidents that might pose a risk to the security of protected data will require staff to report to work on an as-needed basis. The mail function needs to be maintained because confidential respondent data will continue to come into our building despite the shutdown, and by law the BLS is responsible for protecting those data.

The total number of people required to perform the functions identified in this memo is 50. Two, _____, are the only full-time exempt employees. Part-time, or on-call functions account for the remainder. Twenty-four individuals will be required for systematic shutdown and backup of all of our many data collection and processing systems. As indicated above, this will take as much as 3 days in some cases, often less. Eighteen IT staff will be on-call to deal with issues related to our IT and communications infrastructure, including ensuring the physical and systems security for our IT equipment and maintaining necessary communications equipment for those who are working. Six staff from the Office of Administration will be on call related to mail handling (including mail with confidential information from our survey operations), building security, and payroll processing for those who work.

A list of our proposed excepted activities and individuals associated with those activities is attached. Also indicated is whether individuals are likely to be work continuously (only the agency leadership), whether they would work only as-needed (labeled "intermittent"), or whether they would be only required for a short period of system backup and shutdown operations. As mentioned, some staff not listed may be required depending on the timing of a shutdown in relation to the release of a PFEI. Others may not be needed if our assumptions about excepted services are incorrect.

Attachment



MAR 2011

MEMORANDUM FOR Patricia Smith
Solicitor of Labor

FROM: Alan D. Lebowitz *ALD*
Deputy Assistant Secretary
For Program Operations

SUBJECT: Suspension of Operation Plans

Based upon an analysis of EBSA's responsibilities, we believe that 49 of our field and National Office staff should be declared "exempt". In FY1995, we received approval from the Solicitor's Office for these same activities. This limited number of staff is needed in order to continue to perform excepted and "by necessary implication" activities arising from the Secretary's criminal authority under ERISA and to otherwise respond to situations which require immediate action under the statutory civil remedies provided to the Secretary to prevent an imminent threat to property as well as to address imminent threats to human life when medical benefits are denied in life threatening situations.

During a lapse in appropriations the Employee Benefit Security Administration will suspend all operations and its staff will be furloughed, except as described in the attached. Upon approval of this request a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individual performing the exempt and or exempt by "necessary implication" activities set forth above. I anticipate the possibility that additional or intermittent employees may be required to in some instances. If unforeseen emergencies occur, these additional employees would be identified and a request for their exemption requested.

If you have any questions or further clarification is necessary please contact me at your earliest convenience.

April 6, 2011

MEMORANDUM FOR: M. PATRICIA SMITH
Solicitor

FROM: JANE OATES
Assistant Secretary for Employment and Training

SUBJECT: Funding Interruptions – Designation of Excepted Activities and
Personnel

The purpose of this memo is to identify certain Employment and Training Administration (ETA) activities that could be maintained throughout any extended shutdown. During a lapse in appropriations, ETA will suspend all operations and its staff will be furloughed, except as described below. ETA's plan meets the Department of Justice tests for the continuation of UI benefits that don't lapse and the protection of life and property. It is based upon the following assumptions:

- No foreign labor certifications will be processed.
- No Trade Adjustment Assistance determinations will be made.
- Because there is no lapse in the payment of Unemployment Insurance (UI) benefits to unemployed workers, it will be necessary to cover the following UI functions: (1) Program direction and technical assistance to states and Federal agencies for processing UI benefits for Federal & Military personnel (UCFE & UCX); (2) Disaster Unemployment Assistance; (3) Ensuring money transfers to states and to the various trust fund accounts are managed; and (4) Information technology functions. These functions remain essential if a government shutdown were to occur.
- To protect life and property, Job Corps will continue to operate with a minimum number of excepted employees.
- Electronic systems will be maintained to process any Job Corps, National Emergency Grants for FEMA declared disasters, or other items.
- Non-excepted personnel may be called to work upon request – for example, in the case of a FEMA-declared disaster to help process a NEG grant application or to process Job Corp shopping carts.

Attachment A describes in more detail ETA's excepted functions and activities; Attachment B identifies the minimum number of excepted employees who will be required to carry out these functions and activities. Attachment C provides summary comparison between the proposed excepted personnel and those approved as excepted for the 1995 shutdown. Attachment D describes the support status of various IT infrastructure and business system applications needed to satisfy operation of ETA approved excepted work and workforce projections.

Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occur, additional employees would be identified to work for the duration of the emergency.

Attachments

Attachment A – Excepted Functions and Activities

ETA functions and activities that would be maintained throughout a shutdown are summarized below:

Job Corps: Protecting Life and Property – ETA administers the Job Corps program, a network of 124 Centers nationwide. At any point in time, about 44,000 of Job Corps students reside at these Centers, attending academic and occupational training. While mostly contractors are responsible for the day to day operations of the Centers (28 are operated by the U.S. Forest Service under an agreement between the Departments of Labor and Agriculture), ETA retains responsibility for the safety and upkeep of these activities. Should emergency repairs be necessary to protect the students or properties, ETA must arrange and contract for the repairs or authorize contractors to incur necessary costs. Excepted personnel in the national and regional offices will provide minimum acceptable oversight of the Centers, perform financial and procurement and related administrative duties to insure the Centers protect student safety and health as well as facilities; and monitor electronic systems to prevent failure or malfunction and insure system availability.

Unemployment Insurance: Continuing Functions Not Funded with Expiring Annual Appropriations – ETA, similar to the shutdown in 1995, will continue to provide essential functions. These include direction to federal agencies and administration of UI benefits for federal and military personnel (UCFE & UCX). ETA also will continue to process Disaster Unemployment Assistance approved by the Federal Emergency Management Agency for declared disasters. UI benefits will continue to be paid since funds are available. Current circumstances are different from 1995 when we were not paying EUC or EB and states were not borrowing significant funds (30 plus states now are borrowing funds). We need to (1) respond to states about what is permissible and not under UI programs; (2) ensure money transfers to states and to the various trust fund accounts are managed, and (3) maintain essential UI information technology functions.

Excepted personnel in the national and regional offices will oversee UI activities related to the fiscal and financial aspects of administering the UI program; and interface with Treasury and the states should there be issues that surface with regard to states drawing down trust fund dollars to pay benefits or with trust fund borrowing. In addition, excepted personnel will interface between the states and the Department of Homeland Security, Federal Emergency Management Agency, to facilitate funds flowing to states to pay disaster unemployment benefits; oversee operations of the UCFE and UCX programs; and provide information and guidance to federal agencies and furloughed workers as well as states responsible for administering the program.

National Emergency Grants: Protecting Life and Property – A small group of national and regional office personnel will assist states in completing NEG applications to address declared disasters under the Stafford Act. These activities are critical to help states and localities address unexpected labor market dislocations caused by natural or man-made disasters.

Financial and Technology Support – A small number of ETA personnel who perform a range of procurement, grant, and financial functions such as authorizing and obligating necessary federal funds, processing necessary procurement actions, and overseeing draw downs will be

retained on a full and intermittent basis. In addition, ETA will provide minimal support for its electronic systems to assure they are protected from physical harm or cyber attack. Support for ETA's user applications will be limited to only those systems that are determined to be necessary to support authorized "excepted" activities.

Attachment C – Comparison of ETA’s 2011 and 1995 Excepted Personnel

ETA’s list of excepted personnel is comprised of 46 personnel – primarily Job Corps and UI related. 22 of the individuals listed would be full time; 24 of the individuals on the list or about 52 percent represent staff who only would report to work on an as-needed or intermittent basis on excepted activities.

The number of proposed ETA excepted personnel is a dramatic decrease in staffing levels from the 1995 shutdown when ETA had a total of 145 excepted staff, and did not consider the option of calling on non-excepted personnel on an as needed basis. With advances in technology and automated systems, we believe that these staff can satisfactorily perform the necessary excepted activities.

Below is a summary that displays the difference in staffing levels:

	<u>1995</u>	<u>2011</u>
OAS	4	2
Job Corps	26	15 (2 on call as needed)
OA	11	0
OFAM	19	12 (9 on call as needed)
OWI	13	0
UI	10	5 (2 on call as needed)
OPDR	4	0
OCM		5 (4 on call as needed)
ONR		1 (1 on call as needed)
REGIONS	52	6 (all on call as needed)
NSSB*	3	
STW*	3	
TOTAL	145	45

* The National Skills Standard Board and School to Work offices no longer exist.

Attachment D – ETA Office of Information Systems and Technology Excepted Services Plan

Common Infrastructure	Limited Access to "Excepted"	Available & supported	Available & Not Supported	Ready & Not Accessible	Shut Down
¹ NCFMS (OASAM)			X		
¹ EPS (OASAM)			X		
¹ SHIMS (OASAM)			X		
² PMS (HHS)		X			
² IPAC (Treasury)		X			
² Grants.GOV (HHS)		X			
³ ETA BlackBerry	X				
³ Remote access	X				
MS Office Suite		X			
ETA Internal Email		X			
External Email (OASAM)			X		
Intra-net		X			
Internet		X			
Network Drives		X			
ETA Help Desk	X				
DOLETA.GOV		X			
J-FAS		X			
ESCIS (Hosted at Arlington Center)		X			
UIDBMS				X	
NEG Systems				X	
E-Grants				X	
RADD				X	
OUI public website				X	
ICON (OUI State network)			X		
Manual Applications for TAA (Doleta.gov)		X			
TAA Online Application System				X	
TAPR Internal (EBSS)				X	
Development Environment					X
Test Environment					X
ETA Webmail					X

¹ System is controlled by an external DOL agency and is presumed to be operating during the shutdown.

² System is controlled by a non-DOL agency and is presumed to be operating during the shutdown.

³ System or application limited to only to approve "excepted" users.



MEMORANDUM FOR THE SOLICITOR

FROM: Sandra Polaski
Deputy Undersecretary

APP for

SUBJECT: Excepted Functions in the Event of Lapse in Appropriations

DATE: March 30, 2011

In the event of a lapse in appropriations the Bureau of International Labor Affairs (ILAB) would perform only those functions that are obligations necessary to discharge the President's constitutional duties and powers, and that are necessary by implication to support those functions. Specifically, the functions are necessary to the President's responsibility to receive Ambassadors and other public Ministers and to conduct foreign relations.

Fulfilling these functions would require a minimum number of staff to attend any international meetings and/or negotiations taking place during such lapse where the Department of Labor/ILAB serves as the sole or lead USG representative on labor at the meeting. This will be determined on a case by case basis considering the importance of the meeting but would involve the minimum number of staff necessary to address the most crucial meetings and issues. In addition, ILAB staff may be called upon to support the President's travel and/or initiatives.

The titles of those ILAB staff that could be called upon depending on the meeting or event are:

Deputy Undersecretary
Associate Deputy Undersecretary
Chief of Staff
Director, Office of Trade and Labor Affairs (OTLA), or subject matter expert designated from OTLA staff
Director, Office of International Relations (OIR), or subject matter expert designated from OIR staff
Director, Office of Child Labor, Forced Labor and Human Trafficking (OCFT), or subject matter expert designated from OCFT staff

U.S. Department of Labor

Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, Virginia 22209-3939



MEMORANDUM FOR M. PATRICIA SMITH
Solicitor of Labor

FROM: JOSEPH A. MAIN 
Assistant Secretary of Labor for
Mine Safety and Health

SUBJECT: Fourth Revision - Contingency Plan for Excepted Functions
In the Absence of Appropriations

If there is no FY 2011 appropriations bill for the Department of Labor or FY 2011 Continuing Resolution, the Mine Safety and Health Administration (MSHA) would continue key functions which directly involve protecting against imminent threats to human life in the Nation's mines, and which are necessary for the protection of government property. In our opinion, these excepted functions meet the Department of Justice test that there be a reasonable likelihood that safety of life and property would be compromised if the functions are not performed. The entire staff whose pay and benefits are provided directly from the FY 2010 Supplemental Appropriation, and who are engaged in the activities included in the Federal Mine Safety and Health Review Commission Case Backlog Reduction Project Operating Plan and the Upper Big Branch (UBB) mine disaster accident investigation, are not being furloughed.

The attachment describes these functions, and identifies the minimum number of excepted employees who will be required to carry out these functions.

If unforeseen emergencies, such as a mine disaster occurred, additional employees would be identified to work for the duration of the emergency. During a lapse in funding, MSHA would cease all other continuing, regular functions.

Attachment

cc: Deborah Greenfield

MINE SAFETY AND HEALTH ADMINISTRATION
EXCEPTED ACTIVITIES AND EMPLOYEES

April 6, 2011

During a lapse in appropriations the Mine Safety and Health Administration will suspend all operations and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occurred, additional employees would be identified to work for the duration of the emergency.

Excepted Activities:

I. Inspections of targeted mines and specific hazards; investigations of accidents and miners' complaints, and sample analysis.

During a funding lapse, MSHA will perform certain activities which, if not performed, would significantly compromise the safety of human life in the Nation's mines. MSHA will perform targeted inspections at mines which have been prioritized based on the mine's history of the hazards that put miners' lives at risk. Hazard-specific inspections will also be conducted across the Nation to address those conditions and practices which have been recent key causes of death and serious injury. Additionally, investigations of accidents and miners' safety complaints and select sample analysis will continue because they represent potentially serious and imminent safety problems.

Number of Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Subtotal	768	--	768

II. Executive/managerial/supervisory direction; staff support.

MSHA will designate program officials in each geographical location where employees are performing the excepted activities described in Section one above, to provide executive/managerial/supervisory direction. This direction will ensure that the excepted activities being performed are in targeted mines and address targeted issues. Additionally, a limited number of excepted employees will provide clerical duties in support of excepted activities; and perform system and computer hardware monitoring duties to prevent failure or malfunction and ensure system availability. The excepted positions below represent the minimum numbers needed to adequately support the functions described in Section one.

MINE SAFETY AND HEALTH ADMINISTRATION
EXCEPTED ACTIVITIES AND EMPLOYEES

April 6, 2011

- o Senior management staff (51 positions)
- o Field office supervisors (87 positions)
- o Support staff (1 position)

Number of Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Subtotal	126	13	139

III. Building security activities.

To ensure the protection of the two MSHA-owned properties and proprietary product documentation housed at one of the facilities, twelve excepted employees will provide 24 hour security services at these locations. The number below represents six staff for Mine Academy security and six staff to secure the Triadelphia, WV, facility.

Number of Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Subtotal	12	--	12

IV. Information Technology Support.

MSHA will designate information technology support personnel at MSHA headquarters in Arlington and assign similar responsibility at MSHA's devolution sites in Denver, CO, and Beckley, WV, to maintain network infrastructure and connectivity required for continuity of emergency operations and continuing targeted enforcement.

Number of Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Subtotal	2	1	3

MINE SAFETY AND HEALTH ADMINISTRATION
EXCEPTED ACTIVITIES AND EMPLOYEES

April 6, 2011

V. Mine Plan Approvals.

MSHA performs certain plan review and approval activities which have a direct impact on miner health and safety. Plan revisions, as well as new plans dictated by changes in the mine conditions and mining practices, must be reviewed and approved for operators to continue safe operations:

Number of Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Subtotal:	40	--	40

VI. Mine Emergency Operations Readiness.

MSHA's quick response to a mine emergency situation is critical in order to protect the safety and health of our Nation's miners. Excepted personnel are needed in order to ensure that vehicles and equipment are ready for deployment in the event of a mine emergency.

Number of Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Subtotal:	3	--	3

Grand Total, MSHA Excepted Employees:

	<u>Regional</u>	<u>National</u>	<u>Total</u>
Total	951	14	965



DATE: March 25, 2011

MEMORANDUM TO: M. PATRICIA SMITH
Solicitor

FROM: STEPHEN L. PURCELL
Chief Judge

A handwritten signature in black ink, appearing to read "Stephen L. Purcell", written over the printed name and title.

SUBJECT: Suspension of Operations Plan

During a lapse in appropriations, the Office of Administrative Law Judges (OALJ) will suspend all non-essential operations. All staff will be furloughed until such time as appropriations are authorized, except as provided below and approved by your office.

Upon the approval of OALJ's plan, a member of my staff will notify the Assistant Secretary for Administration and Management (ASAM) of the names of the individuals who are needed to perform the activities set forth below. I anticipate the possibility of intermittent work and job rotation for all of these activities. If unforeseen emergencies occur during any suspension of operations, additional employees would be identified to work solely for the duration of the emergency.

The OALJ adjudicates approximately 6,000 cases each fiscal year and in doing so holds hearings in many of these cases. Hearings are typically scheduled 60 to 120 days in advance, and they are generally held within 75 miles of a claimant's residence. For each week that the government suspends operations, the agency must cancel the hearings scheduled for that week. OALJ needs access to its case tracking system to determine where and when hearings are scheduled. Only an administrative law judge can order a hearing cancelled, and the files which contain the information needed to cancel these hearings reside in the National Office and seven District Offices. The National Office, due to its workload, needs the Chief Judge and Associate Chief Judges to handle the task of cancelling hearings, and the District Chief Judges would perform the same duties for each District Office.

Support staff is also needed to contact the parties in these cases, and those duties will be handled by Special Assistants in each office. These activities will constitute weekly intermittent work.

In addition, administrative functions, such as time and attendance submissions or responding to emergency phone calls, will be handled on an intermittent basis by the Director of Program Operations and the Administrative Officer.

In the National Office, which is located in leased space, OALJ receives its mail through the post office, and mail must be picked up daily, even though it cannot be processed. This activity will require the Chief Docket Clerk to work approximately 1-2 hours every day.

OALJ is one of nine agencies within the Department which has its own network and data center. This data center must remain operational to allow email, case tracking, and keeping website access operational for technical reasons. Keeping the data center operational during any government shutdown will require that the IT Division Chief spend 1-2 hours each day checking emails for security and accessibility issues and identifying work that may require additional employees be called in to perform.

In the August 1995 OALJ Suspension of Operations Plan the number of approved exempt positions for OALJ was 22 and this is the same number being requested by OALJ. Both plans identify 22 positions as essential during the suspension of operations in light of the fact that each of the seven District Offices operates independently from the National Office with respect to the cases assigned to those offices. The only change in exempt personnel identified in the current plan is that, instead of a secretary position being requested for the National Office, an additional Associate Chief Judge has been substituted since OALJ now has two Associate Chief Judges.

The plan devised by OALJ is intended to comply with our obligation to furlough all non-essential personnel during any suspension of functions caused by a lapse in appropriations. Should you need clarification or additional information with regard to any elements of the plan, please let me know. Thank you for your consideration.

cc: Deborah Greenfield,
Deputy Solicitor of Labor

MEMORANDUM FOR M. PATRICIA SMITH
Solicitor of Labor

FROM: T. MICHAEL KERR
Assistant Secretary for
Administration and Management

SUBJECT: OASAM Excepted Employees

In November 1995 OASAM submitted to the Office of the Solicitor a shutdown plan memorandum that made reference to 138 "excepted" employees. Later that year, OASAM submitted a more detailed list that included only 96 "excepted" staff. In light of the current budget uncertainty, OASAM has thoroughly reviewed both plans. The 1995-1996 detailed shutdown plan will serve as the starting point for our revised listing of required personnel in the event of a budgetary shutdown. Taking into consideration new efficiencies and the addition and removal of various functions since that time, the plan described below fully supports the actions of excepted staff performing Departmental activities.

OASAM's plan identifies 54 Federal employees and 4 contract staff as "excepted," for a total of 58¹. Of those 58 employees, 45 are funded through the Working Capital Fund (WCF). The remaining 13 employees are funded by the Departmental Management Salaries and Expenses (S&E) Account. Overall, this represents only eight percent of OASAM's total federal workforce (6.6 percent in the National Office, 11 percent in the Regional Offices). A detailed list of these employees is attached.

The following is OASAM's justification for its staffing level. As you know, OASAM's mission requires it to provide support services to Department of Labor (DOL) agencies. In the event of a government-wide shutdown, excepted personnel from DOL agencies will need basic support services in order to perform their duties. In general, the services OASAM will provide include Human Resources (HR), Information Technology (IT), Facilities Management (including minimal mail services), Procurement, Security, and Budget Planning. Please note that it is expected that an undetermined number of OASAM employees will remain on standby during the shutdown, ready to be recalled as necessary to support excepted work.

Human Resources

National Office: 5 employees (2 S&E; 3 WCF)

Regional Offices: 7 employees (7 WCF)

¹ This number does not include a skeletal guard force and janitorial staff. OASAM will maintain a minimal contract guard force of three shifts per day with 11 guards on duty. OASAM will maintain a minimal janitorial staff of 5 contract employees.

By maintaining a small staff of HR managers in the National Office and an HR specialist in each regional office, OASAM will provide basic HR services to support excepted personnel from other agencies. This includes labor-management relations services and HR systems services for excepted activities.

Information Technology

National Office: 6 employees (2 S&E; 4 WCF contractors)

Regional Offices: 6 employees (6 WCF)

OASAM has identified a minimal IT staff in the National Office who will ensure DOL's technology services, including e-mail, local area network framework, and various IT systems (financial, procurement), operate without disruption to support excepted staff from other DOL agencies. An IT manager in each regional office will coordinate the IT services for excepted staff in the field.

Facilities Management

National Office: 6 employees (6 WCF) (5 janitorial contractors - WCF)

Regional Offices: 7 employees (7 WCF)

In order to ensure the Department's Frances Perkins Building is operational for excepted employees from other agencies, two building engineers will alternate shifts to monitor building operations, including heat, air conditioning, electricity, and sanitation services provided by contract staff. Additionally, two mail clerks would provide limited mail collection and delivery during a shutdown. One employee from each of OASAM's regional offices will coordinate these functions in the field. This will involve coordinating with GSA or the building manager to ensure operations of excepted staff from other agencies is unimpeded.

Procurement / Finance (Region)

National Office: 1 employee (1 WCF)

Regional Offices: 5 employees (5 WCF)

One Contracting Officer will be maintained at the National Office in order to provide contracting/procurement services as necessary in support of excepted staff. If, for example, an agency needs to modify a contract during the shutdown because of excepted activities, the Contracting Officer will execute that process. In the field, a Finance Manager will continue providing payroll services in support of excepted employees.

Security

National Office: 11 Contract Security Staff (11 WCF)

In the event of a shutdown, maintaining the safety and security of the Department's excepted personnel and the Department's property will remain a high priority. A skeletal staff of contract security guards – rotating 11 guards, three shifts per day – will provide basic coverage in the South Garage for parking and adequate coverage at the main employee entrance in the National Office.

Appropriations Guidance

2 employees (2 S&E)

Two managers in the Departmental Budget Center will provide expertise for all budget matters for the Department, including monitoring and providing guidance on the appropriate use of funds during the shutdown and excepted work during the shutdown. They will ensure senior excepted staff are kept apprised of budget developments.

We believe we have appropriately identified the staff we would need to facilitate an orderly shutdown of OASAM and still be able to adequately support excepted personnel from other DOL agencies.

If you have any questions, please contact Ed Hugler, Deputy Assistant Secretary for Operations, at (202) 693-4040.

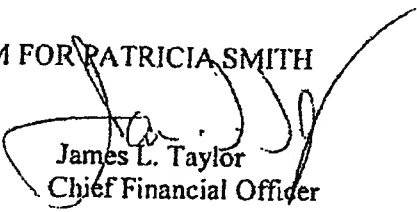
Attachment



MAR - 2 2011

MEMORANDUM FOR PATRICIA SMITH

FROM:


James L. Taylor
Chief Financial Officer

SUBJECT: Exempt Personnel in the Event of a Lapse in Appropriations

During a lapse in appropriations the Office of the Chief Financial Officer (OCFO) will suspend all operations and its staff will be furloughed, except as described in Exhibit A. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth in Exhibit A. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occur, additional employees would be identified to work for the duration of the emergency.

The individuals identified in Exhibit A are the minimum staff by necessary implication required to support exempt Agency activities. The Office of the Chief Financial Officer provides administrative support for activities throughout the Department, therefore a complete list of staff that may be needed to fulfill that role is derivative of what the Department determines as "exempt" programmatic activities and therefore may be adjusted based upon the programmatic activities that are ultimately determined to continue in the event of a funding lapse. We have considered the activities/employees necessary to the lawful continuation of other activities, including minimal obligations necessary for suspension of operations. The exception for activities that must occur by "necessary implication" applies to all OCFO "exempt" staff listed.

The staff recommended as "exempt" on the attached Exhibit A will ensure that the integrity of the Department's financial information is not compromised.

Attachment: Exhibit A

cc: Deborah Greenfield, Deputy Solicitor



MEMORANDUM FOR M. PATRICIA SMITH, SOLICITOR OF LABOR

FROM: BRIAN KENNEDY *BK*

DATE: March 1, 2011

SUBJECT: OCIA "Excepted" Activities During a Shutdown

During a lapse in appropriations, the Office of Congressional and Intergovernmental Affairs (OCIA) will suspend all operations and its staff will be furloughed, except as described below. Upon approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occurred, additional employees would be identified to work for the duration of the emergency.

The mission of OCIA is to advise the Secretary on all matters relating to Congress. Included among these responsibilities is the management of the legislative responsibilities of Secretary as principal advisor to the President on labor matters. OCIA also serves as the Secretary's liaison with Members of Congress, the Committees, and the House and Senate leadership. This office is the voice of the Secretary of Labor in all matters relating to and affecting Congress, as well as with respect to the enactment of the President's labor legislative agenda.

I understand that this Department's activities must be significantly curtailed during a funding lapse. I further understand that even this office's support for the Secretary's core functions must be curtailed to conform with applicable legal requirements. This office has reviewed its shutdown plan in the context of a prolonged lapse in appropriations and has identified certain activities for which we believe exists both the need and the authority to continue, for the duration of a shutdown.

In the event of a government shutdown during an appropriations impasse, our office's functions are critical in serving the Secretary who, in turn, is advising the President during the budget debate with Congress. To serve the Secretary during this time, OCIA would require at least a core number of staff from this office. As a part of the Office of the Secretary, we believe that our continued core functions must be performed to support the Secretary's work with the legislative branch.

I request your approval of our designation of a minimum of three "excepted positions" to provide that core legislative support to the Secretary. All of the activities we identify

below would be justified as implicitly necessary to assure adequate effectuation of authorized Secretarial activities deemed "excepted."

We propose to continue all legislative activities on behalf of the Secretary with respect to the actual suspension of Departmental activities. We would maintain contact with the relevant Member and Committee offices and provide them with information on the Departmental and office functions that are continuing during a shutdown and those that are suspended. We also propose to continue all legislative activities on behalf of the Secretary with respect to legislation as appropriations and continuing resolutions, budget/budget reconciliation, debt ceiling, and other legislation with a close nexus to the suspension of funding. In addition, this office would continue its involvement with respect to any other legislation, when directed by the Office of Management and Budget (OMB).

The minimal staffing for these activities would be 3 FTE (3 professional staff). In the event of significant emergency involving one of the Department's excepted activities, such as a major mine disaster, this office might utilize the minimum level of additional staff, if the need arose for enhanced consultations with Congress. In addition, in the event of substantial progress, during a shutdown, in Congressional consideration of significant legislation, this office might also, upon the request of OMB, recall the minimum level of additional staff necessary to assure proper effectuation of the Secretary's legal role as principal labor advisor to the President.

Upon your approval of this request, we will identify to the Assistant Secretary for Administration and Management the individuals who would provide these approved services. Thank you for your review of this request.



April 6, 2011

MEMORANDUM

TO: M. PATRICIA SMITH, SOLICITOR
UNITED STATES DEPARTMENT OF LABOR

FROM: MALCOLM D. NELSON, OMBUDSMAN 
ENERGY EMPLOYEES COMPENSATION PROGRAM

RE: CONTINGENCY PLANNING IN EVENT OF LAPSE IN
DOL ANNUAL APPROPRIATIONS

The Office of the Ombudsman for the Energy Employees Occupational Illness Compensation Program provides services to claimants and potential claimants under both Part B and Part E of the Energy Employees Occupational Illness Compensation Program Act (EEOICPA). We are currently funded through two EEOICPA administrative funding streams that will not be subject to any lapse in the Department's Fiscal Year (FY) 2011 appropriations:

- (1) Our primary funding is allocated from the Department's permanent indefinite appropriation for Part E administrative expenses (see 42 USC 7385s-13), which is not subject to annual appropriation or to a lapse in the Department's annual appropriation.
- (2) We also receive a small amount of Part B administrative expense funding from the Department's FY10 appropriation. These funds are "no year" funds and we expect to have sufficient carryover funding to continue operating despite any lapse in FY11 appropriations.¹

Because this Office's sources of funding will continue to be available even if there is a lapse in the Department's FY11 appropriations, we fully expect to be able to address all

¹ The Department has not allocated any of the Part B funding available under the existing FY11 continuing resolution to this Office.

of our Part B and Part E operations during any lapse in the Department's annual appropriation.

The Office of the Ombudsman currently includes the following positions:

1. Ombudsman
2. Policy Analyst
3. Policy Analyst
4. Writer/Editor

The attached list provides the names of the employees currently employed by the Office of the Ombudsman.


U.S. Department of Labor

Office of Inspector General
Washington, D.C. 20210



April 06, 2011

MEMORANDUM FOR: PATRICIA SMITH
Solicitor of Labor

FROM: 
NANCY RUIZ DE GAMBOA
Assistant Inspector General
for Management and Policy

SUBJECT: OIG Listing of Excepted Personnel

Attached is an updated listing of OIG's excepted personnel. If you have any questions concerning the plan, please contact me on (202) 693-5224, or [redacted], OIG Human Resources Officer, on (202) 693-5160.

Attachment

**Office of Inspector General
Listing of Excepted Personnel
April 06, 2011**

Number of Excepted Employees:

<u>National</u>	<u>Regional</u>	<u>Total</u>
21	08	29

The following Office of Inspector General (OIG) Senior Executive Service members will be in charge of all excepted activities, including but not limited to the orderly shutdown of operations, law enforcement activities associated with emergencies involving the safety of human life or the protection of property, any activity associated with multi-year appropriations, and the Secretary's protection detail:

Acting Inspector General
Counsel to the Inspector General
Assistant Inspector General for
Management and Policy
Assistant Inspector General for Labor
Racketeering and Fraud Investigations
Deputy Assistant Inspector General for Labor
Racketeering and Fraud Investigations

The OIG carries out human resources activities independently from the Department, therefore the following employees are excepted to support the orderly shutdown of operations, and may also be called back as needed to support any excepted activities:

Human Resources Officer
Human Resources Specialist – Payroll

The following employees will support the orderly shutdown of operations, and the subsequent continuation of excepted law enforcement activities and Secretarial physical protection. This includes providing information technology services, since the OIG maintains IT systems independent from the Department of Labor:

Chief - Branch of Information Technology
Executive Assistant

The following employees will support excepted law enforcement activities within the OIG's Office of Labor Racketeering and Fraud Investigations:

Director of the Division of Special Operations
Director of Administrative Operations
Investigative Analyst (DOJ International
Organized Crime task force)

Regional Special Agents-in-Charge:

New York
Washington
Philadelphia
Atlanta
Chicago
Dallas
Los Angeles

The following OIG Criminal Investigators who work on the Secretary of Labor's security detail are also excepted. Some of these employees may be placed in on-call status or rotated as needed in response to Secretarial protection needs:

Also excepted are the following OIG employees who are funded through ARRA and will be able to continue their excepted activities:

The following Senior Executives and General Schedule employees oversee or support the audit, investigative, management and legal counsel functions of the OIG, and may be called back to work as needed:

*Assistant Inspector General for
Inspections and Special Investigations
Assistant Inspector General for Audit
Deputy Assistant Inspector General for Audit
Deputy Assistant Inspector General
for Management and Policy
Budget Officer/Congressional and Media Liaison
Director of Audit Operations
Director of Intelligence
Assistant Special Agent-in-Charge for the
Computer Evidence Recovery Unit
Assistant Counsel to the Inspector General
Assistant Counsel to the Inspector General
Director of Technology and Administrative Services
Director of Procurement
Chief of the Branch of Personnel Operations*

Chief of the Branch of Employee Relations

OIG criminal investigators may also be called back on a case by case basis to augment the Secretary's protection detail, testify in judicial proceedings, perform investigative operations involving public safety, or to respond to emergencies to protect life or property.

U.S. Department of Labor

**Office of Labor-Management Standards
Washington, DC 20210
(202) 693-0202**



**MEMORANDUM FOR: M. PATRICIA SMITH
Solicitor of Labor**

**DEBORAH GREENFIELD
Deputy Solicitor**

**FROM: JOHN LUND, Ph.D.
Director, Office of Labor-Management Standards**

**SUBJECT: Contingency Plan for Excepted Functions
in the Absence of Appropriations**

During a lapse in appropriations the Office of Labor-Management Standards will suspend all operations and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occurred, additional employees would be identified to work for the duration of the emergency.

In comparison to the plan laid out in the November 7, 1995, memorandum to Thomas S. Williamson, J., Solicitor of Labor, from Charles L. Smith, Deputy Assistant Secretary, Office of Labor-Management Standards, this plan adds exceptions not found in the 1995 memo. First, OLMS would conduct investigations in criminal cases under the LMRDA that have statutory deadlines that cannot be tolled or waived, and that would be jeopardized if the investigation did not continue. Second, OLMS would propose carry out election investigations under the LMRDA where the 60-day statutory limit for filing a complaint cannot be waived or extended, and that would be jeopardized if the investigation did not continue. Third, we also seek approval to continue supervising an election where postponement of the election would cause a violation of the statutory requirement with respect to the maximum time period for holding union officer elections or would result in a failure to meet a court-ordered deadline, absent an extension.

Consistent with the 1995 plan, OLMS continues to include the following exceptions: (1) OLMS investigators subpoenaed to testify before a federal or state court would be excepted only for the period of time required to prepare and present testimony and travel to the court and (2) coordination and management of the above-described activities as they are or become necessary. The OLMS Director will fulfill the coordination and management role in the current plan. Other employees may be called upon on an as-needed basis.

Enclosure

U.S. DEPARTMENT OF LABOR

LIST OF EXCEPTED ACTIVITIES/ EMPLOYEES

Agency/Office/Organizational Unit: **Office of Labor-Management Standards Date: 04/06/2011**

Total Number of Employees on-board prior to implementation: **244**

	Number of Excepted Employees	Exception Code⁽¹⁾	Regional	National	Total
Investigators (number to be determined, see below)		3	TBD	TBD	TBD
OLMS Director	3		0	1	1
Chief, Division of Planning, Mgmt. & Technology (OLMS Administrative Officer)	3		0	1	1

Total: 2 and TBD investigators

In the event of government shutdown, OLMS would need exceptions for some investigative staff that would have to be determined at the time of the shutdown for the following purposes:

- 1) Investigators subpoenaed to testify before a federal or state court only for the period of time required to prepare and present testimony and travel to the court.
- 2) Investigators performing criminal investigations in jeopardy of being lost due to the statute of limitations.
- 3) Investigators performing election investigations required by statute to be conducted within 60 days, absent a mutual agreement between the labor union and OLMS extending the 60 day filing deadline.
- 4) Investigators performing activities associated with a supervised election where postponement of the election would cause a violation of the statutory requirement with respect to the maximum time period for holding union officer elections or would result in a failure to meet a court-ordered deadline, absent an extension.

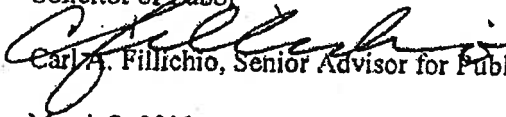
List of Excepted Activities:

1. Obligations for employees/activities funded through multi-year, no-year and indefinite appropriations;
2. Obligations for employees/activities funded through express authorizations in the form of contracting authority or authority to borrow;
3. Obligations for employees/activities necessary to the lawful continuation of other activities, including the minimal obligations necessary for suspension of operations;
4. Obligations for employees/activities necessary to the discharge of the President's constitutional duties and powers; and
5. Obligations for employees/activities for emergencies involving the safety of human life or the protection of property.

These are the general guidelines to be applied when identifying excepted activities under the Anti-deficiency Act, however, the Solicitor of Labor will make the final determination, based on information and justifications contained in agency requests, on excepted activities within the Department



MEMORANDUM TO: M. Patricia Smith
Solicitor of Labor

FROM: 
Carl A. Fillichio, Senior Advisor for Public Affairs

DATE: March 2, 2011

During a lapse in appropriations, the Office of Public Affairs will suspend all operations and its staff will be furloughed, except as described below.

Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occurred, additional employees would be identified to work for the duration of the emergency.

This office normally provides a full range of public information (including the National Call Center), media, social media, internal communications and technical communications support services to the Secretary and to agencies throughout the Department, employing a small staff of approximately 100, of which approximately 16 are located in regional offices.

At the outset, I would note the mission of this office is to assure the American people access to information about the Department of Labor, a component of their Government. It is critical that the public and Department of Labor employees get timely and accurate information about the status of our operations and permissible activities during a shutdown period. Our office will be expected to play a central role in such communications, both through traditional and electronic means. Having made this essential point, I would emphasize that this office has made a diligent effort to suspend and curtail its activities in conformity with applicable legal requirements.

The purpose of this memorandum is to request your approval of our designation of eight "excepted positions", solely in the national office, to serve as a minimal cadre during a lapse in appropriations. We believe that a narrow range of our proposed activities would be authorized under the recognized exception relating to the protection of life and property. In addition, we believe that all of the activities we identify below would be justified, as well, as implicitly necessary and essential to assure adequate effectuation of certain authorized Secretarial activities and certain other agency activities otherwise deemed "excepted".

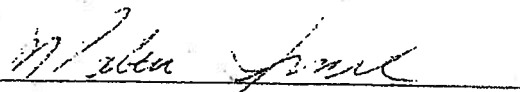
We propose, first, to minimally provide a narrow range of public information services to the Department during a shutdown, where such services would significantly further the Department's excepted activities relating to the protection of life and property. We believe such activities are authorized where the dissemination of public information can be expected (1) to expeditiously inform employers/workers of a potentially life-threatening or maiming workplace hazard or risk to property or (2) to have the effect of deterring violations and enhancing compliance, during the period of shutdown, when public apprehensions about the continuity of life-protecting enforcement mechanisms is the greatest and when the credibility of such enforcement is most significantly undermined.

In addition, we propose to continue a minimal range of public information, web/social media and press support activities for the Secretary and for the Department with respect to the actual suspension of Departmental activities and its policy context. We would maintain minimal service in order to inform the public on which services the Department was continuing to provide and which services the Department had suspended. We would review the daily press, in order to identify misinformation to the public, and seek to obtain clarifications in the media. We further propose to maintain targeted, but minimal, public information services to the media through activities which are responsive to media requests and through other activities which organize forums for providing these services to groups of media representatives. These activities would be in support of otherwise authorized activities during the funding lapse, in connection with the impact of the shutdown; the policy context of the debate on budget and appropriations; and Departmental activities "excepted" and suspended.

The minimal staffing for these activities would be eight FTE: seven professional and one support, all located in the national office. This number has increased by one from the Office of Public Affairs' 1995 plan as a result of significant added responsibilities of the Office since that time, including website management, management of the National Call Center, internal communications, Open Government efforts and social media. In addition to the need to provide staffing to facilitate essential communications identified above during a shutdown through these means, an ongoing staffing presence for the website and other computer-based channels is necessary to monitor and guard against any possible hacking, malicious activity, or cyber terrorism. The occurrence of a government shutdown may be viewed as a vulnerable opportunity by those who want to do harm to those systems. A significant emergency involving one of the Department's excepted activities, such as a major mine disaster, might necessitate our additional professional staff member. Upon your approval of this request, we will identify to the Assistant Secretary for Administration and Management the individuals who would provide these services.

Thank you for your review of this request.

APPROVED by the Solicitor of Labor:





April 6, 2011

MEMORANDUM FOR SOLICITOR OF LABOR

FROM:

WILLIAM W. THOMPSON, II *Bill Thompson*
Associate Solicitor for MALS, and Administrative Officer

RE:

CONTINUATION OF CERTAIN LIMITED ACTIVITIES OF
THE OFFICE OF THE SOLICITOR DURING A LAPSE IN
APPROPRIATION

This memorandum supersedes prior memoranda regarding the identification of those activities and staff that are considered "excepted" from cessation and furlough during a lapse in appropriation for SOL, after the brief period of orderly shut down has been completed.

Pursuant to your directions about staffing of the Office of the Solicitor (SOL) during a lapse in appropriations, SOL will suspend all operations and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. We anticipate the possibility of job rotation in some instances. If unforeseen emergencies occur, additional employees would be identified to work for the duration of the emergency.

In order to provide core legal services in support of excepted activities of the Secretary and client agencies, and provide those legal services involving the safety of human life or the protection of property necessary during the period of a lapse in appropriation, the excepted staff are as follows:

- Front Office: The Solicitor (a Presidential Appointee); Deputy Solicitor; two Deputies on a rotating basis and one administrative/support staff person (performing these functions for the entire National Office (total 5 staff).
- Divisions: Office of Legal Counsel; Black Lung and Longshore Legal Services; Civil Rights and Labor Management; Employment and Training Legal Services; Fair Labor Standards; Occupational Safety and Health; Plan Benefits Security: One attorney each (total 7 attorneys).
- Federal Employees' and Energy Workers' Compensation Division: two attorneys, one supervisory paralegal, four paralegals, one legal assistant and one intern (all but one attorney are directly funded by the Employees' Compensation Fund).

- Mine Safety and Health Division: four attorneys.
- Management and Administrative Legal Services Division: one appropriations attorney, one employment law attorney/Administrative Officer and one contracts/procurement attorney (total 3). One IT staff.
- All Regions: three attorneys in each Regional Office and one attorney in each Sub-regional Office (total 30 attorneys), and one administrative/support staff person in each region (total 8 administrative/support staff).¹
- Detail to the Office of the United States Attorney
2 attorneys assisting in a criminal investigation.

Total excepted staff: (including the Solicitor) 69. In addition, there are a number of intermittent excepted staff who will be rotated or recalled, as necessary.

As mentioned above, in emergency situations that may develop during the period of a lapse in appropriation, other staff may be returned to paid status for the period necessary to meet the exigency.

This level of staffing will also permit SOL to respond to agency requests for legal assistance relating to shutdown issues during the pendency of shutdown itself, and for approval of additional requests for excepted functions or personnel. We will provide expedited approval of such requests in order for the Department to continue its operations within the boundaries of applicable law.

We do not know at this time whether, and to what extent the federal judiciary will continue to operate during a shutdown that affects the Department's funding. We plan to place additional SOL staff into excepted status to the extent that we are not able to adjust federal court litigation schedules or statutes of limitation. At this time, we cannot specify the number or location of such staff, since that would depend on the timing of a shutdown. We are monitoring carefully our deadlines on a nationwide basis and attorneys understand the need to try to obtain extensions as a shutdown becomes more likely.

In addition, all attorneys and other staff whose pay and benefits are provided directly from the FY 2010 Supplemental Appropriation, and who are engaged in the activities included in the FMSHRC Case Backlog Reduction Project Operating Plan, are not being furloughed.

¹ The number of administrative/support staff who were deemed excepted in the 1995-1996 Government shutdown has been reduced because of the change in the administrative/clerical workload configuration in the 15 years since that event.



APR - 6 2011

MEMORANDUM FOR: M. PATRICIA SMITH
Solicitor of Labor

FROM: 
DAVID MICHAELS, PhD, MPH

SUBJECT: Contingency Plan for Suspension of Agency Operations
after March 4, 2011

During a lapse in appropriations, OSHA will suspend all operations and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities below. I anticipate the possibility of job rotation in some instances. If unforeseen circumstances arise, additional employees could be identified to work for the duration of the emergency. .

OSHA is authorized to continue functions in advance of appropriations on matters "of emergencies involving the safety of human life or protection of property." We believe that OSHA employees involved in enforcing imminent danger situations under Section 13 of the Occupational Safety and Health Act, and those involved in responding to workplace fatalities and catastrophes, should be excepted from the suspension requirements. We also believe OSHA employees should be able to respond to complaints or other information coming to our attention that indicates that employees are exposed to hazardous conditions that present a high risk of death or serious physical harm in the near future. In addition, we believe that a minimum number of OSHA employees necessary to provide essential support for these operations may, by necessary implication, be excepted. In this manner, OSHA can maintain a force permitting it to respond to emergency situations.

For these excepted activities, OSHA proposes to retain in duty status the following staff:

- National Office: Four members of the Executive Staff; four Compliance staff; two engineers from the Office of Construction and Engineering; four Information Technology staff; and one support staff for the National Office Executive and Compliance staff. Executive Staff include:
Assistant Secretary;
Deputy Assistant Secretary;
Deputy Assistant Secretary;
Chief of Staff,
Director,
Administrative Programs. In addition to the Assistant Secretary,

, and Ms. will provide senior leadership and oversight of staff performing excepted activities. Ms. will perform administrative work related to performance of excepted activities. The four compliance staff to be retained are , Director of Enforcement Programs; Deputy Director of Enforcement Programs; Director of Construction; and Director of Health Compliance Programs. These four compliance executives/managers will provide key management and guidance for activities associated with excepted enforcement responsibilities and assist in processing cases citations for serious violations for which the shutdown may otherwise result in the running of the six month statute of limitations. the Agency's Emergency Manager, will be on-hand to handle national emergency response issues. Finally, in order to maintain minimal Information Technology support for systems that must be kept operational to support enforcement staff performing excepted activities during the shutdown period four IT staff will be retained.

- Regional Offices: Regional Administrators for all ten regions; and, an Assistant Regional Administrator for each of the following – Administrative Programs, Enforcement, and Federal State Operations; plus one support staff per Region.
- Area Offices: One senior safety compliance officer and one senior health compliance officer for each of the 92 field offices.
- Salt Lake City Technical Center: two senior chemists and two industrial hygienists from the Health Response Unit.

Additionally, certain situations falling within those excepted activities may arise which require the recall of additional staff to address particular emergencies.

Attachment

U.S. Department of Labor

Office of Workers' Compensation Programs
Washington, D.C. 20210



March 9, 2011

File Number:

MEMORANDUM FOR THE SOLICITOR

FROM:


GARY A. STEINBERG
Acting Director
Office of Workers' Compensation Programs

SUBJECT:

Contingency Plan for Excepted Activities and Functions

During a lapse in appropriations, the Office of Workers' Compensation Programs (OWCP) will suspend all operations and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary for Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occurred, additional employees would be identified to work for the duration of the emergency.

As detailed on the attachment, OWCP has some statutory authority to continue the payment of benefits for varying amounts of time during a lapse in annual appropriations in awarded claims under the Black Lung Benefits Act, the Energy Employees Occupational Illness Compensation Program Act, the Federal Employees' Compensation Act, the Longshore and Harbor Workers' Compensation Act and its extensions, and the War Hazards Compensation Act. In addition, it is expected that administrative activities that are not funded by annual appropriations would continue without change.

With respect to administrative expenses that are funded by annual appropriations, as long as benefit payments continue, OWCP also has the implied authority to incur obligations in advance of appropriations for administration of those benefits, including the authority to retain the staff, management and automated systems necessary to the check writing and distribution functions that are critical to the disbursement of the benefit payments themselves. In addition, OWCP is authorized by law to continue necessary claims management as a necessary implication of the continued funding for benefit payments and in order to protect the lives of the beneficiaries of the programs involved. These individuals potentially have suffered work-related injuries or illnesses that are compensable under one of the statutes within the agency's jurisdiction. Necessary claims management includes developing, adjudicating and administering new claims and new requests for benefits, as well as adjudicating requests for authorization of necessary medical procedures such as emergency medical care and other activities that are necessarily implied by continuation of the compensation programs involved.

The attachment outlines the parameters of OWCP's authority to continue paying benefits under these programs and describes the excepted administrative functions in greater detail. The minimum number of excepted employees required to carry out these functions is expected to be 1,335.

During a funding lapse, OWCP would cease all other continuing, regular functions.

Attachment

cc: Deborah Greenfield

Office of Workers' Compensation Programs
EXCEPTED ACTIVITIES AND FUNCTIONS

I. Payment of benefits.

The Office of Workers' Compensation Programs (OWCP) is responsible for administering the Black Lung Benefits Act (BLBA), the Energy Employees Occupational Illness Compensation Program Act (EEOICPA), the Federal Employees' Compensation Act (FECA), the Longshore and Harbor Workers Compensation Act (LHWCA) and its extensions, and the War Hazards Compensation Act (WHCA). As detailed below, during a funding lapse, OWCP expects to have sufficient authority and funds to continue making benefit payments,¹ including monetary compensation and payment of medical benefits, under the above programs as detailed below:

A. BLBA:

1. Part B benefits are paid from annual appropriations; OWCP expects to be able to continue paying Part B benefits indefinitely, because OWCP's Fiscal Year 2010 appropriation appropriated \$45,000,000 for benefits payable during Fiscal Year 2011 and OWCP does not expect to exhaust this funding in the near future.

2. Part C benefits are paid from the Black Lung Disability Trust Fund (a non-annual appropriation that receives annual appropriations); use of the Trust Fund is subject to authority provided in appropriations laws. The legal issues surrounding continued payment of Part C benefits present complex issues. At this point, if there is a lapse in appropriations as of March 18, based upon advice from the Office of the Solicitor and informal consultation with OMB, OWCP expects to be able to make Part C payments due in April,² but payment of Part C benefits due in May (or later) may be problematic.

B. EEOICPA: OWCP expects to be able to continue paying all benefits due, whether under Part B or Part E, because benefits are paid from the Energy Employees Occupational Illness Compensation Fund, a permanent indefinite appropriation that is not dependent upon annual appropriations or authority provided in other appropriations laws.

C. FECA: OWCP expects to be able to continue paying all benefits as long as sufficient funds remain available in the Employees' Compensation Fund, a permanent appropriation. Although a

¹ This discussion applies only to benefits that are payable from funds controlled by the United States government. Under some programs, some benefits are paid directly by private parties (employers or their insurers). Those benefits should continue without interruption.

² This conclusion is based upon Section 111 of the Fiscal Year 2011 continuing resolution (Public Law 111-242, as amended by Public Law 112-4). Section 111 provides that "obligations for mandatory payments due on or about the first day of any month that begins after October 2010 but not later than 30 days after [the expiration date of the continuing resolution] may continue to be made, and funds shall be available for such payments." Part C benefits are mandatory payments within the meaning of Section 111 and -- if appropriations lapse when the existing continuing resolution expires on March 18 -- OWCP would have authority to continue paying benefits until April 17. We note that, under OWCP's regulations, benefits payable for any given month are "due" on the 15th of the following month (i.e. benefits payable for March are "due" on April 15). The Office of the Solicitor has advised that there would be legal support for OWCP to interpret its regulations to mean that April 15 is the deadline by which payment must be made, but that March Part C benefits become payable as of April 1 and, therefore, are "due on or about the first day of" April within the meaning of Section 111.

significant portion of the money deposited into the Fund is from annual appropriations³ received by employing agencies and transferred to the Fund pursuant to 5 U.S.C. § 8147(b), these funds do not expire and use of the funds to pay benefits is not dependent upon authority provided in annual appropriations. OWCP expects to have sufficient funding in the Fund to continue paying benefits through June 2011.

D. LHWCA: OWCP expects to be able to continue paying any benefits due from the LHWCA Special Fund, as long as the Special Fund contains sufficient funds to make payments. At this time, OWCP expects to have sufficient funding in the Special Fund to continue paying benefits through the end of FY11.

E. WHCA: WHCA claims are paid from the Employees' Compensation Fund, discussed in Section C above. As with FECA benefits, OWCP expects to be able to continue paying all benefits as long as sufficient funds remain available in the Employees' Compensation Fund, a permanent appropriation. OWCP expects to have sufficient funding in the Fund to continue paying benefits through June 2011.

II. Administrative Expenses

A. EEOICPA: OWCP has sufficient funds for all administrative activities under Part E of EEOICPA because those activities are funded by a permanent indefinite appropriation rather than OWCP's annual appropriation. In addition, although Part B administrative expenses are funded by annual appropriation, OWCP's FY10 appropriation for Part B expenses remains available until it is expended and these funds would continue to be available during a lapse in FY11 appropriations. If carryover FY10 funds are exhausted, however, a lapse in FY11 appropriations would affect Part B administration. As discussed in more detail in Section IIC (below), OWCP would be authorized to continue necessary Part B claims management in order to continue administration of Part B benefits to the extent that funding remains available to pay those benefits.

B. BLBA Part B: BLBA Part B administrative expenses are funded through DOL's annual appropriation, which remain available until expended. OWCP does have some limited "carryover" FY10 funding which would remain available (until expended) during a lapse in FY11 appropriations; however this funding is not expected to be sufficient to cover all Part B administrative costs. As discussed in more detail in Section IIC (below), however, OWCP would be authorized to continue necessary Part B claims management in order to continue administration of Part B benefits to the extent that funding remains available to pay those benefits.

C. BLBA, LHWCA, FECA, and WHCA

In general, OWCP uses annual appropriations to fund administrative activities for BLBA Part C, FECA, LHWCA and WHCA.⁴ A lapse in annual appropriations would affect these activities. In

³ Approximately 40% of the benefits paid from the Fund consists of payments made to employees of the United States Postal Service (USPS). USPS reimburses the Fund for those payments from a revolving fund which is not subject to a lapse in annual appropriations.

⁴ There are some limited exceptions to this general rule. Where the governing statute permits use of other funding to pay expenses that might otherwise be considered administrative expenses, the other source of funding may be used. For example, the Federal

addition, as discussed in Sections IIA and IIB, EEOICPA Part B and BLBA Part B administrative expenses are funded by annual appropriations that remain available until expended; if FY10 carryover funds are exhausted, a lapse in FY11 appropriations would affect these activities.

The Office of Legal Counsel (OLC) at the Department of Justice has opined that, "the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well." *Operations in the Event of a Lapse in Government Appropriations*, 1995 WL 17216091 (August 16, 1995) (citing 43 Op. Atty Gen. 293 (January 16, 1981)). In addition, OWCP expects certain necessary claims management activities under these statutes to fall within another exception to the Antideficiency Act "for emergencies involving the safety of human life or the protection of property." See 31 U.S.C. 1342. Individuals receiving benefits under the above programs have suffered work-related injuries or illnesses that are compensable under one of the statutes within the agency's jurisdiction. Under these exceptions, OWCP is authorized to continue necessary claims management in order to continue administration of claims for benefits that have been awarded under these statutes to the extent that funding remains available to pay those benefits. This includes the authority to retain the staff, management and automated systems necessary to the check writing and distribution functions that are critical to the disbursement of the benefit payments themselves.

The OLC has specifically referenced benefit payments under entitlement programs when the funds for the payments themselves do not lapse as an area where it infers authority to continue the administration of the program to the extent of the remaining benefit funding despite a lapse of appropriations. Each of these programs constitutes such an entitlement program. Thus, the necessary implication of the authority to continue to pay benefits under the BLBA, EEOICPA, FECA, LHWCA and WHCA is that OWCP is authorized by law to incur obligations in advance of appropriations to develop, adjudicate and administer new claims and new requests for benefits in order to allow payment of such benefits. In addition, in order to protect the life and health of covered workers requests relating to provision of medical services, such as authorizations required for certain medical treatments, services and supplies will have to continue to be reviewed and adjudicated. OWCP will continue to do so as required under each of the referenced statutory authorities. Necessary claims management includes the adjudication of requests for authorization of necessary medical procedures such as emergency medical care, as well as other activities that are necessarily implied by continuation of the compensation programs involved.

OWCP also will designate program officials in each geographical location where employees are performing the excepted activities described above to provide essential executive, managerial and supervisory direction and to provide information technology support to ongoing activities. This will ensure that the excepted activities as set forth above are provided appropriate supervision and technical support. Additionally, excepted employees will provide financial, contract management, and clerical duties in support of excepted activities; appear in court pursuant to lawful subpoenas served on them in their capacity as Federal employees, and perform all required technical support activities to ensure availability of the resources necessary to perform authorized functions.

Employees' Compensation Act generally prohibits use of the Employees' Compensation Fund to pay for administrative activities, but excludes legal services related to FECA subrogation from this prohibition.



February 28, 2011

MEMORANDUM FOR M. PATRICIA SMITH
Solicitor of Labor

FROM


NANCY J. LEPORE
Deputy Administrator

SUBJECT Excepted Personnel Plan

During a lapse in appropriations the Wage and Hour Division will suspend all operations and its staff will be furloughed, except as described below. Upon the approval of this request, a member of my staff will notify the Assistant Secretary of Administration and Management of the names of the individuals performing the activities set forth below. I anticipate the possibility of job rotation in some instances. If unforeseen emergencies occur, additional employees would be identified to work for the duration of the emergency.

For Wage and Hour, the basis for excepted personnel in DLMS 6-430 is the following criteria "Necessary to respond to emergencies involving the safety of human life or the protection of property." The requested exception would be used to employ Wage and Hour staff to conduct an immediate investigation of any incidents involving serious injury or death of a minor while employed or any transportation accident or any housing safety violation involving serious injury or death of a farm worker.

To accomplish such, we would designate the Acting Deputy Administrator and in her absence, the Deputy Administrator for Program Operations and the five Regional Administrators as excepted employees who would be continuously available to handle communications and coordinate responses to any emergency. We would also designate an individual in each of our District Offices as excepted-intermittent employees who would occasionally/intermittently visit the district office location to check mail and phone calls to determine whether an emergency situation has been reported which needs to be responded to, and then would respond directly to any such emergency. This category of employee would not report to work each day, but only on a pre-determined schedule or as needed to respond to an emergency.

Cc: Deborah Greenfield, Deputy Solicitor of Labor