

**U.S. Department of Labor**

Employment and Training Administration  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210



**FEB 26 2019**

Mr. George Copadis  
Commissioner  
New Hampshire Department of  
Employment Security  
32 South Main Street  
Concord, New Hampshire 03301

Dear Commissioner Copadis:

The U.S. Department of Labor's (USDOL) Office of Unemployment Insurance (OUI) has reviewed New Hampshire House amendment to Senate Bill (SB) 16 for conformity with Federal unemployment compensation (UC) law. OUI regularly reviews state legislation and law to ensure conformity with Federal UC law. When OUI finds legislation and law that is, or may be, contrary to Federal law, OUI informs states, generally through written communications, to enable the state to amend its legislation or other law or, if there has been an enactment, to request the state respond as to how it will bring its law into conformity.

The purpose of this letter is to make you aware that the proposed amendment to SB 16 conflicts with Federal law if New Hampshire plans to use Unemployment Compensation for Federal Employees (UCFE) program funds and/or funds from New Hampshire's unemployment insurance (UI) trust fund account to pay benefits and administrative costs. The amendment appears to raise issues with Federal law as a result of its lack of clarity regarding the funding source to be used to pay benefits to full time excepted Federal workers during a lapse in Federal appropriations. As USDOL indicated in long-standing guidance to states, most recently in 2013 and again in December 2018 and January 2019 (discussed in more detail below), under Federal law, excepted employees are not unemployed and therefore are not eligible for UCFE benefits. For the same reason, they are also not eligible for regular state UI benefits. This has been the case every year with the exception of 1996 when Congress passed P.L. 102-94 which expressly included excepted employees.

The amendment to SB 16 would provide that "an individual employed by the federal government who is required to work without wages or remuneration during a partial or total federal shutdown shall be eligible for benefits without meeting the requirements of RSA 282-A:31, I(c)-(d) or RSA 282-A:32, I(d), provided such individual reimburses the fund upon receipt of back pay within a reasonable time and consistent with the amount of back pay received and benefits paid. If no back pay is awarded, an individual receiving benefits under this subparagraph shall not be required to repay the department, and such benefits shall not be considered an overpayment under RSA 282-A:165." If the payments referred to in the amendment would be made with UCFE funds or the state UI fund, the amendment would be inconsistent with Federal law and regulations. In addition, if the source of the payments is the state unemployment fund, the amendment raises a conformity issue with the withdrawal standard requirement of Federal UC law. States will remain in conformity and compliance with Federal law regarding the issue of

source of funding if they use state funds outside of the UCFE, UCX, and regular state UI programs.

States may only pay UCFE pursuant to an agreement with USDOL and only as specified in Federal law and regulations. 5 USC 8502(b) requires that “[t]he agreement shall provide that compensation will be paid by the State to a Federal employee in the same amount, on the same terms, and subject to the same conditions as the compensation which would be payable to him under the unemployment compensation law of the State . . .” Implementing regulations for the UCFE program are at 20 CFR Part 609.

Individuals are eligible to receive UCFE if they have a “week of unemployment” and meet certain other eligibility requirements. 20 CFR 609.2(r) provides that a “[w]eek of unemployment means a week of total, part-total, or partial unemployment as defined in the applicable State law, which shall be applied in the same manner and to the same extent to all employment and earnings, and in the same manner and to the same extent for the purposes of the UCFE Program, as if the individual filing for UCFE were filing a claim for State unemployment compensation.” This does not allow a state to create a different definition of “unemployment” to be used solely for UCFE purposes. Thus, the state must determine if an individual has a “week of unemployment” as that term is defined in the state’s regular UC law.

The Social Security Act (SSA) and the Federal Unemployment Tax Act (FUTA) establish certain requirements for the state law governing the regular UC program which must be met. One of the most important requirements, the withdrawal standard, only permits withdrawal of funds from a state’s unemployment fund to pay “unemployment compensation.” Section 303(a)(5) of the SSA and section 3304(a)(4) of FUTA. Section 3306(h) of FUTA defines “compensation” as “cash benefits payable to individuals with respect to their unemployment.” As reaffirmed in the 1998 Unemployment Insurance Program Letter (UIPL) No. 08-98, Federal law limits the payment of UC to periods in which an individual has experienced an actual reduction in hours worked. Whether an individual is unemployed within the definition of Federal law depends on whether the individual has suffered a loss of work. It is not sufficient that the individual merely have reduced earnings.

As such, excepted employees are not unemployed and may not be considered as such in state UC law since they are performing service on a full-time basis and have not suffered a loss of work. Therefore, individuals who are performing full-time services as excepted employees cannot be considered unemployed for purposes of the UCFE program standard. The Employment and Training Administration recently reminded states of the longstanding 2013 guidance (UIPL No. 31-13). Below are links to this guidance:

UIPL No. 31-13 – [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=7589](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7589)

UIPL No. 31-13 Change 1 – [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=6475](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=6475)

UIPL No. 31-13 Change 2 – [https://wdr.doleta.gov/directives/corr\\_doc.cfm?DOCN=8790](https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=8790)

UIPL No. 31-13 provides that excepted employees are generally not eligible for UCFE payments because they are not unemployed. We note that the term “generally” in the UIPL was not meant to grant the state the option to pay such workers who remain fully employed, but to address

circumstances such as when there is a change in the status for an individual (from excepted to intermittent-excepted or furloughed) during the duration of the shutdown.

As explained above, under the UCFE law and regulations, the state law definition of “unemployed” applicable to payment of regular UC must apply to UCFE claims. Since the amendment to SB 16 would require the state UC agency to use a different definition of “unemployed” with respect to excepted employees, it is inconsistent with Federal law and regulations pertaining to the UCFE program. Federal UCFE funds may not be used to pay for the benefit payments or administrative costs associated with these payments, including the administrative costs associated with recovering any such benefit payments.

If the source of the payments proposed in the amendment to SB 16 is the state unemployment fund, which is used to pay regular UC, then the amendment raises a conformity issue with the withdrawal standard requirement of Federal UC law. Payments to excepted workers are not unemployment compensation payments and, therefore, violate the withdrawal standard.

No conformity issue would arise if the amendment to SB 16 were to provide that the state fund payments to excepted employees using a funding source other than the state unemployment fund or the UCFE account. However, Section 303(a)(8), SSA, limits the expenditure of UC grant funds to amounts necessary for the “the proper and efficient administration” of the state’s UC law. The state would also have to fund any administrative expenses for operating such a program from a source other than the grant for administering the state UC law or UCFE administrative payments.

In summary, and as discussed above and consistent with long standing guidance, it is not permissible under Federal law to use UCFE program funds and/or funds from your UI trust fund account to pay for benefits and administrative costs when paying benefits to full time excepted Federal workers during a lapse in Federal appropriations. We note that there are currently several proposals in Congress that may address the payment of UCFE benefits to excepted workers in the event of a lapse in Federal funding which, if enacted, may render this letter moot. Should that occur, the Department will provide additional guidance to states.

If you have any questions concerning this letter, please contact Jennifer Lavin, legislative liaison at your Regional Office, at (617) 788-0316 or [Lavin.Jennifer.a@dol.gov](mailto:Lavin.Jennifer.a@dol.gov).

Sincerely,



Gay M. Gilbert  
Administrator,  
Office of Unemployment Insurance

cc: Timothy Martin  
Acting Regional Administrator  
Boston