Implications of a Partial Government Shutdown on Federal Contractors

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Unless Congress approves funding for the Department of Homeland Security (DHS) before midnight on Friday, February 27, 2015, many operations at DHS will shut down, leaving affected employers with DHS contracts unable to allow their employees to continue to work under those contracts.

Some background: In November 2014, President Barack Obama took several executive actions related to immigration, including one that would prevent millions of unauthorized immigrants from being deported. Unhappy with President's actions, House Republicans added provisions to a DHS funding bill that would block President Obama's recent actions on immigration. The bill passed in the House, but so far, the Senate has refused to pass this bill, or any of the previous three versions the House proposed that contained similar provisions.

For government contractors that hold contracts (or subcontracts) with DHS, the partial government shutdown gives rise to a host of employment and labor law concerns related to wage and hour law, employee benefits, immigration status, the Worker Adjustment and Retraining Notification ("WARN") Act, labor unions, and collective bargaining agreements. All employers should be prepared to guide their employees regarding the impact of a DHS shutdown.

Wage and Hour Issues

Many employers will consider mandatory use of paid leave and furloughs, temporary shutdowns or reduced-hours plans as alternatives to layoffs. They should be cautious about jeopardizing the status of employees who are exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) and analogous state laws, by inadvertently violating the salary basis requirement of the exemption. Furloughing or reducing the hours of non-exempt workers is typically straightforward. Absent a contract or collective bargaining agreement providing otherwise, hourly workers need be paid only for actual hours worked. However, employers should check state laws for minimum hours pay requirements.

Under the FLSA and many state laws, to meet the "salary basis" test, an exempt employee must receive, for each pay period, a "predetermined amount" constituting all or part of the employee's compensation. This amount is not subject to reduction because of variations in the quality or quantity of work performed. With few exceptions, an exempt employee must receive his or her full salary (no less than $455 a week, although certain states require more) for any week in which the employee performs any work, regardless of the number of days or hours worked in that week. Salary deductions cannot be made for a full- or partial-day's absence due to lack of work as "occasioned by the employer or by the operating requirements of the business."

Use of Paid Time Off (PTO)

Under the FLSA, employers may make mandatory deductions from an exempt employee's accrued paid time off for a full- or partial-day's absence during a shutdown, furlough or reduced-hours plan, without affecting FLSA-exempt status, as long as the employee receives his or her full salary. Use of leave is governed largely by state law, so employers should check such laws before mandating leave.

Mandating the use of PTO during furloughs or shutdowns may be particularly problematic in states where PTO is considered a "wage" under state wage payment and collection laws. Employers should review their PTO policies, paying particular attention to whether they have reserved discretion to require or prohibit the use of leave based on business needs.

Shutdowns, Furloughs of a Full Week

If the shutdown or furlough will last for a whole workweek, then the employer need not pay affected exempt employees any salary. However, employers must ensure that these employees do not perform any

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work (including work that can be done from home, such as checking emails or calling clients or customers) during the workweek. An exempt employee on furlough may be considered to have performed work if, for example, he or she checks or responds to business email, corresponds with other employees about work issues, or engages in administrative work. If this were to occur, the employee would have worked during the week and would be entitled to a full week of pay. Therefore, employers should give clear, written instructions that employees may not perform work during the furlough workweek. Employers also may consider "impounding" work items, such as smartphones and laptops, or disabling company email and network access for the week to reduce the risk of violation. Finally, employers should ensure that all work responsibilities of a furloughed employee be covered by another employee at work for the week.

Shutdowns, Furloughs of Less Than a Full Week or Reduced Hours, Pay

If an exempt employee works any part of a workweek, employers may not reduce that employee's salary due to a reduction of hours worked, because the reduced hours are "occasioned by the employer or by the operating requirements of the business." However, as discussed above, employers generally can require the use of paid leave in such situations.

Reducing an exempt employee's salary because of a "permanent change" in the employee's schedule due to economic conditions (e.g., changing from 52 five-day workweeks to 40 five-day workweeks and 12 four-day workweeks over the course of a year) will not jeopardize an exempt employee's status, as long as the employee still receives at least $455 per week. However, this practice gives rise to two concerns. First, the prorated salary following any reduction must still equal at least $455 per week to meet the FLSA exemption requirement. Some state laws may require a higher amount. This salary threshold applies regardless of whether the employee is full-time or part-time. Second, the employer must consider carefully the duration of the reduced schedule and avoid making frequent changes in schedule and corresponding salary. Courts have suggested that frequent changes to the employee's salary may render the salary illusory, particularly if the changes appear to correspond to fluctuations in workload, so that the salary becomes a proxy for hourly wages. However, courts have approved adjustments to the salary as frequently as once per quarter. Employers also should consult state laws also before instituting a pay reduction, as many state laws require employers to give employees advance notice of changes in pay.

Benefits Issues

Employers should examine the terms of their group health plan to determine whether a reduction in hours due to furloughs or terminations will trigger a loss of coverage and entitlement to continued health care coverage under COBRA. In addition, employers who alter employee work schedules may see a rise in applications for loans or hardship distributions (from furloughs) and full distributions (from employment terminations) from 401(k) plans to replace lost wages. While reducing costs associated with employee benefit plans may appear suitable to reducing overall expenses, employers should consider carefully the long-term impact of any such reductions in terms of public relations and increased internal administration.

Unemployment Issues

Employees who are furloughed for full or partial weeks may be eligible for unemployment benefits. State laws govern unemployment eligibility and benefits, but many states provide benefits for a reduction in hours or temporary layoff even where employment is not terminated. Employers should consult state law to determine eligibility, waiting periods and benefits calculations.

Immigration Issues

State and federal wage and hour requirements aside, H-1B, H-2B and E-3 employees who are placed on a non-productive status or reduced work schedules nevertheless must continue to be paid at the full rate specified on their visa documentation. Implementation of salary reduction, reduced work schedules or furloughs likely will trigger the need to file amended Labor Condition Applications and H-1B/H-2B/E-3 visa petitions with the U.S. Department of Labor and the U.S. Citizenship and Immigration Service, respectively.

In addition, E-Verify, the government's web-based system to verify employee work authorization, may be inaccessible during the shutdown, as it was during the 2013 shutdown. Employers must continue to complete the Form I-9 for all new hires, but employers who are current E-Verify users may be unable to verify new employees, run reports or perform any functions requiring access to the E-Verify system. Similarly, employees may be unable to resolve Tentative Non-Confirmations during this period. Employers may not take any adverse action against an employee because of an E-Verify interim case status, including while the employee's case is in an extended interim case status due to a DHS partial shutdown. Employers who intend to sign up for E-Verify may be unable to do so during the shutdown. Federal contractors who are required to use E-Verify should contact counsel or their contracting official to determine how best to proceed during this period.

WARN Act Issues

Under the federal WARN Act, an employer with at least 100 employees ordering a mass layoff or plant closing must provide 60 days' written notice to affected non-union employees, union representatives, and certain government officials. A mass layoff is defined in terms of the number of workers at a single site of

employment who suffer an employment loss (including a layoff for more than six months or a reduction in hours of more than 50 percent in each month of a six-month period). An employer that fails to provide appropriate notice faces steep penalties. An exception exists for "unforeseeable business circumstances." This exception allows an employer to order a mass layoff or a plant closing without giving the full 60 days' notice if the layoff or closing is caused by business circumstances not reasonably foreseeable at the time that notice would have been required. Notice must be given as soon as the triggering event is foreseeable. When notices should be issued in the case of a government shutdown, when the period of work disruption may be unknown, requires analysis on a case-by-case basis.

In addition to the federal WARN Act, employers should consider applicable state mini-WARN laws that often contain requirements that are different and more stringent than the federal law.

Union Issues

Employers may have to enter into mid-contract negotiations with unions, if immediate layoffs and exceptions to layoff and other collective bargaining agreement provisions are required. Unilateral implementation of layoffs or reductions in wages, forced shutdowns and vacations could constitute unfair labor practices and lead to National Labor Relations Board proceedings. These proceedings could result in substantial back pay awards.

Communications with Employees

Both the threat of a shutdown and an actual shutdown pose significant challenges to employee morale. Distraction wreaks havoc on employee productivity. At times like these, effective employee relations skills matter most. If employers do not provide information, employees may misinform themselves. They also may seek guidance from government customers, thereby compromising their employer's business relationship.

Employers should share their plans with employees promptly and clearly. If employers are in a "wait and see" mode, employees should be told their employers are monitoring the situation, but recognize their anxiety, and have designated management personnel to answer questions and concerns. Monitor information and correct misinformation. Make sure managers are informed about employer plans and communication strategies. This is an opportunity to engender loyalty from employees during a trying time.

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If you have any questions, please contact the Jackson Lewis attorney with whom you regularly work.