Special Report

Implications of a Government Shutdown on Federal Contractors

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A government shutdown looms at midnight on October 1 when the current government funding expires. Appropriations bills that fund government operations are not expected to pass before the start of the new fiscal year.

The employment and labor law concerns that a government shutdown raises for federal contractors include compliance issues with the Worker Adjustment and Retraining Notification (WARN) Act and wage and hour law, the impact on employee benefits and immigration status, and labor union and collective bargaining agreement issues. A plan for timely and effective communications with employees on these matters is equally important for employers.

WARN Act Issues

Under the federal WARN Act, a covered "employer" that orders a "mass layoff" or a "plant closing" must provide at least 60 days' advance written notice to affected non-union employees, union representatives, and certain government officials. Whether a "plant closing" or a "mass layoff" will occur depends on the work location and whether the requisite number of employees who work at that location will suffer "employment losses." Included in the definition of "employment loss" is a layoff exceeding six months or a reduction in work hours of 50 percent or more during a six-month period. An employer that fails to provide appropriate notice faces significant liability, including the possibility of a class action. While there are exceptions to WARN's notice requirements, such as the "unforeseeable business circumstances" exception (which permits an employer to provide fewer than 60 days of notice), these exceptions are fact-specific and any required notices must be provided as soon as practicable.

When notices should be issued in the case of a government shutdown, when the period of work disruption may be unknown, and whether "conditional" WARN notices may be appropriate requires analysis on a case-by-case basis. During the 2013 government shutdown, various agencies issued interpretation and guidance memoranda regarding these notification issues, but none had the force of law.

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's requirements. For example, at least one court held that California's mini-WARN statute requires advance notice of a temporary layoff or shutdown.

Wage and Hour Issues

Past government shutdowns have led to a temporary loss of income for federal workers and a permanent one for many federal government contractors. Agencies paid workers retroactively once the doors reopened, but many government contractor employers were not reimbursed for the days their workers were idled on government contract

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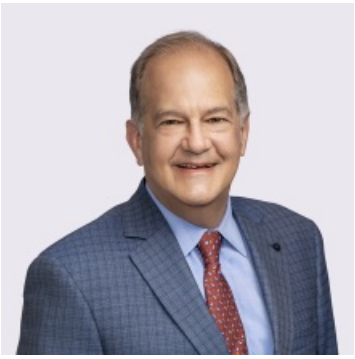

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projects. Whether agencies will have authority this time around to make retroactive adjustments to contracts for impacted employees is unclear.

Many employers will consider requiring mandatory use of paid leave and implementing furloughs, temporary shutdowns, or reduced-hours plans as alternatives to layoffs. Furloughing or reducing the hours of non-exempt workers typically is straightforward. Absent a contract or collective bargaining agreement providing otherwise, hourly workers need be paid only for actual hours worked. Employers should check state laws, however, for additional pay requirements.

Employees classified as exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) and applicable state laws carry additional risk. Under the FLSA and the laws of many states, 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, the amount of which is not subject to reduction because of variations in the quality or quantity of work performed. With few exceptions, an exempt employee must receive the full salary (no less than $684 a week, although certain states require more, and the Department of Labor has issued a proposed rule to increase the level on a federal basis) 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 paid time off or other leave banks for a full- or partial-day's absence during a shutdown, furlough, or reduced-hours plan, without affecting exempt status, as long as the employee receives the 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 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 the affected exempt employees any salary under the FLSA. However, employers must ensure that these employees do not perform any 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, the employee checks and responds to business email, corresponds with other employees about work issues, or engages in administrative work. If this were to occur, the exempt employee would have worked during the week and would be entitled to a full week of pay. Therefore, the employer should give clear, written instructions that employees may not perform work during the furlough workweek. The employer also may

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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, the employer should ensure that all work responsibilities of the furloughed employee be covered by another employee for the week.

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

Employers may not reduce the salary of an exempt employee who works any part of a workweek without violating the salary basis test as a reduction in 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.

Reductions in salary because of a "permanent change" in an 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 $684 per week.

There are two main concerns in doing this. First, the pro-rated salary following any reduction still needs to equal at least $684 per week to meet the FLSA exemption requirement. A higher amount may be required under some states' laws. The salary threshold applies regardless of whether the employee is full-time or part-time. Second, the employer must consider carefully the time period for the reduced schedule and not make frequent changes in schedule and corresponding salary. Courts have suggested that frequent changes to the salary may render the salary illusory, particularly if the changes appear to correspond to fluctuations in workload, so the salary becomes a proxy for hourly wages.

State laws also should be consulted before instituting a pay reduction; many require 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. Unemployment eligibility and benefits are determined by state law, 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 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.

Based on experience during the past shutdowns, the Department of Labor, Office of Foreign Labor Certification likely will not accept or process applications or responses it receives, including Labor Condition Applications, Applications for Prevailing Wage Determinations, Applications for Temporary Certification, or Applications for Permanent Employment Certification. Web-based resources including the Foreign Labor Access Gateway Portal (FLAG) likely also will be unavailable during shutdown.

In addition, E-Verify, the government's web-based system to verify employee work authorization, will be inaccessible during the shutdown. Employers must continue to complete the Form I-9 for all new hires, but employers who are current E-Verify users will be unable to verify new employees, run reports, or perform any functions requiring access to the E-Verify system. During the previous government shutdown, USCIS suspended the "three-day rule" for completion of E-Verify, and provided follow-up guidance once E-Verify came back on line. Similarly, for the duration of any shutdown, employees will be unable to resolve Tentative Non-Confirmations during this period. During the previous shutdown, U.S. Citizenship and Immigration Services specifically indicated that the time period for resolving Tentative Non-Confirmations will be extended and days the federal government was closed would not count toward the eight federal government workdays the employee has to go to the Social Security Administration or contact the Department of Homeland Security. Employers are advised that they 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 federal government shutdown. Employers who intend to sign up for E-Verify will 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.

Consistent with past practice, and subject to available funding sources, we anticipate that U.S. Embassies and Consulates will continue to operate, including providing visa services for work- and business-related travelers, but there may be additional delays.

Union Issues

Employers may be required to enter into mid-contract negotiations with unions if layoffs or exceptions to collective bargaining agreement provisions are required. Unilateral implementation of layoffs or reductions in wages, forced shutdowns, vacations, or furloughs may be bargainable and could lead to unfair labor practice proceedings if not executed correctly. Substantial back pay awards could result. The National Labor Relations Board will be shut down, with all hearings, elections, and investigative proceedings postponed.

Communications with Employees

Both the threat of a shutdown and an actual shutdown pose significant challenges to employee morale. Distraction also wreaks havoc on employee productivity. Effective

employee relations skills matter most at times like these. If their employers do not inform them, employees may misinform themselves. They also may seek guidance from government customers and compromise 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.