



How The Government Shutdown Is Affecting Your Workplace

Insights

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Because Congress and the president could not approve a stopgap funding bill by midnight on December 21, the federal government partially shut down, with no compromise in sight. What will this mean for employers across the country? Because of the peculiarities of the federal budget process, this shutdown has not hit the nation's employers as hard as prior shutdown events. Read on to get a better understanding of which federal agencies are impacted and what to expect in the coming days (or weeks).

A Brief History Of Shutdowns

Prior to this event, there had been 14 federal government shutdowns since 1981, when the Attorney General first interpreted budgetary law to permit such actions. Most have been brief: the first 10 were under five days in length, and four of those lasted just one day. There have already been two brief shutdowns in 2018, one that lasted three days in January, and a several-hour shutdown on the early morning of February 9.

But the 1995-96 shutdown endured for 21 days, and October 2013 saw the government hang a "Sorry, We're Closed" sign on its front door for 16 days. There's no telling how long this shutdown could last, especially given the dynamics at play with a lame-duck Congress and an incoming Democratic takeover of the House.

What Will Be Shut Down?

Once the shutdown took effect, many federal services came to a complete halt. In a typical shutdown, only those workers whose services are deemed "essential" to the operation of our country—air traffic controllers, FBI agents, TSA personnel, military, etc.—will be on the job, with the vast majority of federal workers sitting at home until a budget is agreed upon.

But this time around, things are different—especially from a workplace law perspective. When the president signed a September "minibus" funding bill, he fully funded a number of federal agencies through October 1, 2019. That means that the U.S. Department of Labor (USDOL) and the National Labor Relations Board (NLRB), among others, are fully staffed and operational during the duration of any impending shutdown.

As a result, we expect wage and hour compliance matters (handled by the USDOL), workplace safety matters (handled by the Occupational Safety and Health Administration, an offshoot of the USDOL), federal contract compliance (handled by the Office of Federal Contract Compliance Programs,

another part of the USDOL), and all labor relations matters—including union elections, unfair labor practice charges, litigation, and similar events handled by the NLRB—will continue as usual.

However, because Department of Justice (DOJ) lawyers are furloughed during this shutdown, any litigation involving the federal government is impacted. On the first day of business after the shutdown began, DOJ lawyers requested that their civil cases be stayed and all deadlines postponed for the duration of the shutdown.

Employment Discrimination Law

Another agency not spared: the Equal Employment Opportunity Commission (EEOC) has been ravaged by this federal government shutdown. The minibus funding package signed into law a few months ago did not include any funding for the civil rights agency. According to its contingency plan released last month, its workforce of over 2,000 employees has been dramatically scaled back to only 103 staffers—some of whom would be working on a part-time basis. Because of this, only a limited number of EEOC services are currently available.

There is a skeleton crew of 61 staff members working in field offices across the country ready to receive charges of discrimination, but they will almost certainly not have the time or resources to begin or continue any investigations. In 2013, the EEOC received over 3,100 charges of discrimination during the 16-day shutdown, but no new investigations started and existing investigations languished. The shutdown led to a backlog that took over a month to work through.

Employers who have questions about pending or closed charges will be unable to receive information during this blackout period. All mediations and hearings scheduled to take place during the shutdown have been cancelled, and any litigation directly involving the EEOC as a party is suspended unless the relevant court does not grant a requested continuance.

However, according to the EEOC website, individuals who believe they were subjected to discrimination in the workplace are being counseled to continue to file charges during the agency's closure in order to ensure that statutes of limitation are not blown. The agency specifically says that time limits may not be extended because of the shutdown.

Immigration

Employers might not feel as bad of a sting when it comes to immigration-related matters, and certainly not as badly as they did in 2013. First off, the Department of Homeland Security (DHS) and its sub-agencies generally stay open during a shutdown. This includes U.S. Citizenship and Immigration Services (USCIS), which adjudicates the vast majority of immigration processes. Because USCIS is a fee-based agency which requires petitions and applications be accompanied by filing fee checks, these services are not expected to be impacted.

With respect to how this shutdown differs from 2013's event, remember that many other federal agencies are fully funded and will remain open. Immigration officials interact with their

counterparts at several other federal agencies in order to get their work done, and whereas these counterparts were not at work in 2013, many are this time around.

For example, during the 2013 shutdown, USCIS was not operating at full capacity because the USDOL stopped processing Labor Condition Applications, which are essential prerequisites for H-1B, H-2 and E-3 applications. Moreover, the USDOL also ceased processing PERM/Labor Certification Applications, which are the first step in the majority of the permanent residence/green card process, and are the most common basis for immigrant visa processing and seasonal worker applications.

However, the State Department—not fully funded by September’s minibuss bill—are affected by the government shutdown. Consulates and embassies are responsible for the issuance of visas which allow foreign nationals to travel into the United States. Although this is a fee-based system, previous shutdowns saw delays and temporary stoppages of visa services because the State Department depends on other agencies for services such as calendaring appointments and background checks.

Finally, employers will not be able to use E-Verify while the government is shut down. During this time, employers will not be able to access their E-Verify accounts to:

- Enroll in E-Verify;
- Create an E-Verify case;
- View or take action on any case;
- Add, delete, or edit any user account;
- Reset passwords;
- Edit company information;
- Terminate accounts; and
- Run reports.

Moreover, employees will be unable to resolve E-Verify Tentative Nonconfirmations (TNCs) during this period.

We understand that E-Verify’s unavailability may have a significant impact on employer operations. To minimize the burden on both employers and employees, the following policies have been implemented by USCIS:

- The “three-day rule” for creating E-Verify cases is suspended for cases affected by the unavailability of E-Verify.
- The time period during which employees may resolve TNCs will be extended. The number of days E-Verify is not available will not count toward the days the employee has to begin the process of resolving their TNCs.

- USCIS will provide additional guidance regarding “three-day rule” and time period to resolve TNCs deadlines once operations resume.
- Employers may not take adverse action against an employee because the E-Verify case is in an interim case status, including while the employee’s case is in an extended interim case status due to the unavailability of E-Verify.
- Federal contractors with the Federal Acquisition Regulation (FAR) E-Verify clause should contact their contracting officer to inquire about extending federal contractor deadlines.

Conclusion

These are just some of the ways we anticipate employers will be impacted by this particular federal government shutdown. If you have additional questions or concerns, be sure to consult with your Fisher Phillips attorney to fully understand how your business can be best positioned during this temporary closure.

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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