

YOUR 2023 GOVERNMENT SHUTDOWN PLAYBOOK: AN ESSENTIAL GUIDE FOR EMPLOYERS

Insights
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If Congress cannot approve a budget by October 1, the federal government will shut down. What will this mean for employers across the country? A look back at the most recent government shutdown will provide lessons on what you can expect. **[Ed. Note: Although the shutdown was averted when Congress struck a deal late in the evening on September 30, the stopgap funding bill only funds the government through November 17. Employers will want to stay alert to the discussion below given this fluid situation.]**

A Brief History Of Shutdowns

Under federal law, the government cannot spend money without Congressional approval. When Congress fails to enact the 12 annual appropriation bills, federal agencies must cease all non-essential functions – also known as a shutdown.

There have been several federal government shutdowns since 1981, when the Attorney General first interpreted budgetary law to allow them. Most have been brief: the first 10 were under five days in length, and four of those lasted just one day.

But the 1995-96 shutdown endured for 21 days, the October 2013 event lasted 16 days, and the 2018-2019 shutdown was the longest in history, lasting 35 days.

Complicating negotiations over the current potential shutdown are some unique political dynamics. This dispute

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is not merely between Democrats and Republicans, as is typically the case. Speaker Kevin McCarthy (whose Republicans cling to a razor-thin majority in the House) also faces significant pressures from more conservative members of this own party, who are pushing for deep spending cuts. This three-way political dynamic is leading some commentators to speculate that we could be looking at a government shutdown that lasts weeks and not days.

What If A Shutdown Is Averted At The Last Minute?

Congressional leaders are negotiating to try to avoid a shutdown, and perhaps may even implement temporary measures to postpone a possible closure (as has been the case several times in the past few years). However, even if a shutdown is completely dodged or provisionally delayed, the threat of a stoppage is already impacting federal services.

All federal agencies are currently dedicating their resources to preparing for a possible shutdown, which means that jobs that should be getting their full attention are getting something less or even completely shelved for the time being. You can expect delays in working with any federal agency on any matter right now, so plan accordingly.

What Will Be Shut Down?

If no solution can be found and the shutdown proceeds, you will see most federal services completely halted during the shutdown. Only those workers whose services are deemed “essential” to the operation of our country – air traffic controllers, FBI agents, TSA personnel, military, and similar positions – will be on the job. But the vast majority of federal workers will be sitting at home until a budget is agreed upon.

Because budget battles frequently result in temporary funding bills, it is difficult to determine exactly what services will be suspended. You can, however, look to past history to determine what to expect. Here is your playbook for what we expect to happen in the coming days and weeks.

Employment Discrimination Law

The Equal Employment Opportunity Commission (EEOC) is the primary agency charged with the enforcement of federal discrimination laws. Employees often turn to the EEOC as their first option when they believe they have suffered a workplace wrong. During past shutdowns, individuals were

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counseled to continue to file charges during the agency's closure in order to ensure that statutes of limitation were not blown. The EEOC received thousands of charges of discrimination during the last shutdowns, but no investigations could start. That led to backlogs that took months to work through.

Employers who had questions about pending or closed charges were unable to receive information during this blackout period. All mediations and hearings were cancelled, and any litigation directly involving the EEOC as a party was suspended unless the relevant court did not grant a requested continuance. Expect the same if a 2023 shutdown occurs.

EEO-1 Forms

[As we summarized here](#), you soon need to submit workforce demographic data to the EEOC thanks to the annual tradition of filing EEO-1 reports – if you are a private employer with at least 100 employees or a federal contractor with at least 50 employees, that is. This year, the EEO-1 reports must be filed between October 31 and December 5. If the shutdown bleeds on for a month, or even lingers on for a few weeks close to the beginning of the reporting period, what can employers expect?

- Although the EEOC's online portal for EEO-1 reporting might remain accessible, the support staff responsible for assisting employers with their queries about the report could be furloughed. This could lead to potential delays and complications for businesses attempting to comply.
- The standard deadlines for EEO-1 reporting may or may not be extended due to a shutdown. In past instances, the EEOC has sometimes provided extensions, but this is not guaranteed.
- Once reports are submitted, the processing and review by the EEOC might be slower than usual due to the backlog created by the shutdown.

Because you can anticipate that delays might occur, you might want to begin the process of gathering and analyzing the required data for the EEO-1 report earlier than usual to account for any unforeseen complications. Ensure you maintain thorough documentation of all your attempts to file, any correspondence with the EEOC, and any technical



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issues you encounter. This could be vital if there are post-shutdown inquiries or if you need to explain a delayed submission.

Labor Relations

The National Labor Relations Board (NLRB), the agency that governs union-employer relations and union organizing drives, was decimated by the 2018 shutdown. Its contingency plan called for all but 9 of its 1,435 employees to be sent home for the duration of the impasse. It stopped handling all of its cases, which impacted union elections, unfair labor practice investigations, and the issuance of case decisions.

During the most recent shutdowns, the Board handled due dates for filings by placing the cases in a state of temporary suspended animation. Any party that needed to file a document with the Board during this blackout period was automatically granted an extension of time equal to the number of days the shutdown lasted, and any due dates created prior to the shutdown were “tolled” by the same number of days even if the due date fell outside the dates of the closure. We would expect a similar measure to be put into place before the last NLRB employee turns off the lights and locks the door should we have a 2023 shutdown, although the agency’s recent decision to modify the process for responding to union recognition demands could complicate matters when it comes to union elections.

As expected, a backlog of union petitions piled up during the past shutdowns, as the NLRB could not timely process them. Employers who file or receive representation petitions during a 2023 shutdown could once again be given a head-start to develop a response to the situation without an immediate pressing deadline looming, although we anticipate the Board will work hard to ramp back up to speed once the shutdown ends. Don’t postpone action on the petition even if no election date is yet on the calendar.

As with other agencies, we would expect any NLRB hearings scheduled during the shutdown period to be postponed for some time. Just as air traffic gets backed up during a storm, there will be a considerable backlog to work through, and it would not be surprising for some hearings to be delayed by a matter of weeks once the government gets back on its feet.

Service Focus

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Wage And Hour Compliance

The Department of Labor's Wage and Hour Division (WHD) was essentially stopped in its tracks during the last government shutdowns. In a typical week, WHD concludes more than 600 investigations and compliance actions to enforce minimum wage, overtime, child labor safeguards, and other workplace protections. During recent impasses, it placed thousands of ongoing investigations on hold.

We expect that a 2023 shutdown could look very similar in nature. Prepare for wage and hour investigations to be put on ice for the duration of the shutdown, and most pending compliance actions could be similarly halted. However, don't count on automatic extensions, as the personnel working on any ongoing matter may be deemed "essential" and may decide to carry on with your matter. Even if you receive an extension, don't count on it being the same period in length as any shutdown. You should use your time wisely during any break in the action. Finally, don't expect a reprieve from battle if you are in the midst of a WHD investigation or litigation with the Solicitor's Office.

Immigration

Employers will feel the sting of any government shutdown when it comes to immigration-related matters in a number of different ways:

- The Department of Homeland Security (DHS) and its sub-agencies generally stay open during government shutdowns. 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 in 2023.
- Although USCIS may function, it will not be operating at full capacity because several of its services depend on other agencies. Most critically for employers, the U.S. Department of Labor (USDOL) will stop processing Labor Condition Applications, which are essential prerequisites for filing I-129 H-1B cap, H-1B extension, H-1B transfer, and E-3 applications. USCIS has accepted late I-129 petitions in the past once the government reopened, as long as the petition was submitted with evidence that the primary reason for failing to timely file an extension or

change of status request was due to the government shutdown.

- The USDOL will also stop processing Prevailing Wage Determinations, which are needed to proceed with PERM Labor Certification Applications, H-2Bs, and Schedule A immigrant petitions.
- Moreover, the USDOL will stop processing PERM/Labor Certification Applications, which are the first step in the majority of the permanent residence/green card processes and are the most common basis for immigrant visa processing and seasonal worker applications. The USDOL is considering issuing guidance for employers with filing deadlines.
- In addition, the State Department also could be 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. Consular posts will generally only handle services for U.S. citizens, diplomats, and life or death emergencies.
- Finally, E-Verify became temporarily unavailable during previous shutdowns. This means employers were unable to verify employee identities, enroll in the program, or take any action on cases in progress. If E-Verify is unavailable in 2023, USCIS will likely provide guidance to employers to reduce your liabilities. [USCIS has confirmed that qualifying employers](#) may continue to use the new alternate document review process for remote Form I-9 document verification if E-Verify is temporarily unavailable due to a government shutdown.

Workplace Safety

We expect the Occupational Safety and Health Administration (OSHA) to be severely impacted by a 2023 shutdown. In years past, the agency was forced to suspend thousands of federal workplace inspections during shutdowns, many of which were never fully made up. The agency's limited appropriations prevented it from doing any inspection work except for workplace fatalities,

catastrophes, and imminent danger situations involving a high risk of serious harm.

We have seen approximately 90% of OSHA's employees furloughed in past shutdowns, with area directors or assistant area directors shouldering much of the remaining burden. We'd expect to see OSHA only opening up between 15-20% of the number of inspections that would normally occur during any shutdown if history is any guide.

Meanwhile, OSHA requirements, including contest and abatement periods, will continue during any shutdown, although OSHA personnel would not be present. State OSHA plans should continue to perform limited work, but because they receive substantial funding from Federal OSHA, they will be forced to curtail their operations.

For example, OSHA runs a Consultation Program through State OSHA plans, which provides employers with free on-site safety and health assistance. Over 1,000 businesses requested consultation services during the previous two shutdowns, all of whom were turned away.

Federal Contractors

Businesses that contract with the federal government will be especially impacted by a shutdown. Tens of thousands of stop-work orders for contracts were issued during the previous shutdowns, which impacted the federal contractor community to a great extent.

For example, in 2013, contracts with the Department of Defense fell by almost one-third, and spending dropped 40% during the cessation of business. Payments to federal contractors were delayed during the shutdown, which led to widespread reports of contractors being forced to temporarily lay off employees, and also led to similar impacts on subcontractors who support the federal contract work.

2023 could be worse—much worse, in fact. The federal government has ramped up its contractor program by funneling more work through outsourcing in the past few years, leading to more and more private companies relying on the federal government for their business. Federal contractors should consider the following:

- How much of your work is considered “essential?” If your business supports essential operations, you may still be in business during a shutdown.
- How much of your work is pursuant to a multi-year appropriation or no-year appropriation? Any such work may remain open during a shutdown.
- Did you receive a stop-work order? If not, you should consider it to be business as usual, and recognize that you will be held accountable to continue your contracted assignment despite what you might hear on the news.

For now, we recommend you keep in close contact with your contracting official, who should be in the best position to update you about your work status leading up to and during any shutdown. If you do receive a stop-work order, make sure to document all of your work and expenses accrued during the shutdown, as the government might reimburse you for certain items once normal service is resumed.

Finally, federal contractors currently undergoing an audit should expect their audits to be placed on pause. The Office of Federal Contract Compliance Programs (OFCCP) is a Division of the USDOL. As predicted above, the USDOL’s investigatory arms are likely to be placed on “ice” during a shutdown. Federal contractors who recently learned they will be audited might experience a delay in receiving their Scheduling Letter.

Conclusion

These are just some of the ways we anticipate employers will be impacted by any federal government shutdown. If you have additional questions or concerns, be sure to consult with your Fisher Phillips attorney, [any attorney in our Government Relations Practice Group](#), or the authors of this Insight to fully understand how your business can be best positioned during this temporary closure. Make sure to sign up for [Fisher Phillips Insights](#) to stay up to speed on the latest developments.