

WHAT DOES THE GOVERNMENT SHUTDOWN MEAN FOR EMPLOYERS? ANSWERS TO YOUR TOP QUESTIONS

Insights
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Now that the federal government is officially in shutdown mode, employers will need to assess the impact it will have on their operations. Notably, various government services that you rely on will be disrupted, including regulatory approvals, contract awards, and workforce support programs. You can also expect delays in working with essentially any federal agency on any matter for the time being, so you should plan accordingly. Here's what employers need to know about the shutdown and the answers to your top questions.

Why is the Government Shutting Down?

Under federal law, the government cannot spend money without Congressional approval. When Congress fails to enact the annual appropriation bills that fund federal agencies all non-essential functions of the agencies must halt until new funding is provided.

The federal fiscal year ended at midnight on September 30. Lawmakers in Congress are at an impasse on how to keep the government temporarily funded through a continuing resolution (CR), which is also known as a stopgap bill. The disagreement among lawmakers mostly centers around Affordable Care Act subsidies. When Congress failed to come to agreement by the deadline, government funding for most operations ceased and the government had to partially shut down.

How Long Will the Shutdown Last?

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It's hard to say. There have been numerous government shutdowns in the past, and the average event lasts less than a week. But three of the past four shutdowns have lasted considerably longer. 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 at 35 days.

How Will This Impact Employers?

In a typical shutdown, workers whose services are deemed "essential" to federal operations (such as air traffic controllers, FBI agents, TSA personnel, border patrol agents, and the military) will be on the job, as will federal workers whose missions are funded from non-appropriated sources, like fees (including the Patent and Trademark Office and certain USDA inspection programs).

However, a large number of federal workers would stay at home until a budget is agreed upon. Thus, employers should be prepared for the economic impact a lapse in government funding could have on businesses large and small, from delays in obtaining business loans to staffing shortages. Here are the key areas that will affect the workplace:

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 counseled to continue to file charges during the agency's closure in order to ensure that statutes of limitation were not exceeded. The EEOC received thousands of charges of discrimination during the past 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 canceled, 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 this time around.

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The National Labor Relations Board (NLRB), the agency that governs private sector union-employer relations and union organizing drives, has been operating without a quorum for most of the year, which has stymied reversal of several controversial Biden-era decisions.

Despite the lack of quorum, day-to-day case-handling and union elections have largely continued unabated at the regional level. In contrast, the NLRB was decimated by the 2018 shutdown, and we expect the same this time around. Its 2018 contingency plan called for all but nine of its 1,435 employees to be sent home for the duration of the impasse. It stopped handling all cases, which impacted union elections, unfair labor practice investigations, and case decisions.

What does this mean for pending matters? 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 this time around.

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 this 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.

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The Department of Labor's Wage and Hour Division (WHD) conducts investigations and compliance actions in the areas of minimum wage, overtime, child labor safeguards, and other workplace laws.

During recent government shutdowns, ongoing investigations essentially were stopped in their tracks. We expect this shutdown to look very similar in nature, so prepare for wage and hour investigations and compliance actions to be put on ice for the duration of the shutdown.

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 length as the shutdown. You should use your time wisely during any break in the action.

Finally, don't count on a reprieve from battle if you are in the midst of a WHD investigation or litigation with the Solicitor's Office. But delays in ongoing litigation – both with the government and in private litigation – are expected if the shutdown lasts more than two or three weeks, since judiciary funding will be impacted. While the court system has reserve funds to operate for a few weeks, civil litigation could be significantly delayed thereafter.

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 US 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, most services are not expected to be impacted.
- 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 US 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,



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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. 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 US citizens, diplomats, and life or death emergencies.
- Notably, 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 this time, USCIS will likely provide guidance to employers to reduce your liabilities. USCIS previously confirmed that employers may continue to use the new alternate review process for remote I-9 document verification if E-Verify is temporarily unavailable due to a government shutdown. It is expected that this will continue to be the case.
- Additionally, ICE worksite enforcement actions, including raids and I-9 Notices of Inspection, are expected to continue.

Workplace Safety

We expect the Occupational Safety and Health Administration (OSHA) to be heavily impacted by the shutdown. In years past, the agency was forced to suspend

Resource Hubs

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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 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 a prior shutdown, payments to federal contractors were delayed, 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.

The impact of this shutdown could be even more widespread. 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.

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 during the 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.

Conclusion

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