



Final Guidelines On Dealing With OSHA During and After the Shutdown

Insights

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Whatever you may think of this Administration, one has to admire how well OSHA returned to full operations after the government shut down, and the behind the scenes work that made the return seem so seamless. As I wrote earlier and as reported by BNA, EHS and others, a small cadre of OSHA Area and Regional Office personnel did far more than simply respond to fatalities during the shut down. As a result, immediately upon return, OSHA Area Office personnel started dialing employers and advising them that they would treat the shutdown days as Federal holidays and extend the contest period for those cases contested if the parties wanted an Informal Conference. Since the return, we have participated in Informal conferences in Georgia, Florida, Illinois, New Hampshire and elsewhere. I was pleased that in each case, the Area Office was well prepared. Few things more frustrate me than when I extol the virtues of an Informal Conference and then it is obvious that the Office did not even read the file before we arrived, which is a waste of everyone's time. Not once since the return to work have we had this experience. We'll probably try a couple of the cases on which we have met, but not for lack of a spirited and detailed exchange at the Informal. Talk to your counsel, but in most cases, you should take the opportunity for the belated Informal Conference.

The Solicitors attorneys seem more slammed because basically none of them were allowed to work during the shut down, and no cadre continued their case prep in their absence. The OSHRC Judges seem to be doing pretty well. Many of these judges have excellent staff and they are accustomed to wheeling and dealing to make schedules work.

Finally, our thanks to EHS Today and especially to BNA for providing useful information to interested parties during the shut down. I cannot overstate my high regard for both publishers, and the timeliness of their information. Their efforts prevented more confusion than occurred. We have pasted below some excerpts from BNA's last article yesterday which includes comments by my friend Eric Hobbs and by me

By Stephen Lee and Bruce Rolfsen

With the 16-day shutdown of the federal government over, the Occupational Safety and Health Administration came back to life Oct. 17, restarting its enforcement, standard-setting and other activities.

Office of Management and Budget Director Sylvia Mathews Burwell instructed furloughed federal employees Oct. 17 to reopen their offices in a prompt and orderly manner, upon President Barack Obama's signing of a continuing resolution that restored funding to the government.

OSHA's staffing level during the shutdown fell from 2,235 to 230, according to a Sept. 25 contingency plan from Solicitor of Labor Patricia Smith.

Shutdown Veterans Recall Smooth Return

The agency didn't respond to an interview request, but veterans of the last government shutdown in 1995 recalled that the return to work was largely uneventful.

"Everybody shows up to work, there's a lot of talk about the shutdown, and people are happy to see each other, so there's just that type of camaraderie," said Celeste Monforton, an OSHA policy analyst when the 1995 shutdown began, in an Oct. 18 interview with Bloomberg BNA.

During the 21-day shutdown, Monforton, now a lecturer at George Washington University, took a job at the assistant secretary's office of the Mine Safety and Health Administration.

Adam Finkel, who served as the head of OSHA's health standards division during the 1995 stoppage, said his group recovered quickly, easily resuming work on long-term projects such as rulemakings on methylene chloride and powered industrial trucks and revisions to the respiratory protection, confined space and grain handling standards.

OSHA May Be Strained

"Like anything else, there's diversity in the staff, so there were people who hit the ground running right away and there were people who took longer to get back in gear," said Finkel, now the executive director of the Penn Program on Regulation at the University of Pennsylvania.

Monforton recalled that some MSHA managers handled the extra paperwork that had built up during the shutdown by temporarily moving some staffers from one task to another.

OSHA might find itself particularly strained in the near term, Monforton said.

"They don't have a lot of extra people. They already are working at maximum capacity, so there's no flex in there. You're expecting a lot from individuals."

Employer Attorney Perspective

Howard Mavity, an attorney and co-chairman of Fisher Phillips' workplace safety practice group, told Bloomberg BNA Oct. 22 that from his perspective OSHA's enforcement activities were quickly back in place following the end of the shutdown.

"In the first hour they were back, I scheduled three informal conferences," Mavity said about on Oct. 17. "Two whistle-blower investigators called me by noon."

From his own experience and what he has heard from attorneys at the firm, Mavity said OSHA area offices are going ahead with informal conferences to discuss recently issued citations in cases where the 15-day response time expired during the shutdown.

The OSHA solicitor's office and the Occupational Safety and Health Review Commission seem to be taking longer to return to a normal schedule because the furlough of Labor Department attorneys and review commission administrative law judges meant case preparations stopped and hearings were canceled, Mavity said.

While the commission and administrative law judges are trying stay on schedule, Mavity said, they'll have to decide if hearings and trials set for the immediate future should be delayed because government attorneys could not work for 16 days.

Eric Hobbs, an attorney with Michael Best & Friedrich LLP in Milwaukee, said that during the shutdown OSHA field offices with cases he is handling stayed in contact with him. In one case involving a fatality, OSHA held a closing conference during the shutdown and then issued the citation the same day.

Now that the shutdown is over, the OSHA offices he deals with are taking calls on all matters, Hobbs said.

Associations Praise Private Sector

Dave Heidorn, manager of government affairs and policy at the American Society of Safety Engineers, said it would be helpful, though extremely difficult, for OSHA, the National Institute for Occupational Safety and Health and state plans to assess the impact of the shutdown on workplace safety and health.

"There's far too little information on the effectiveness of enforcement or voluntary programs," Heidorn said. "A period when nothing happened may be a small opportunity to get a glimpse of the impact. It's a big-picture issue all of occupational safety and health would benefit from knowing more about."

Similarly, Barbara Dawson, president of the American Industrial Hygiene Association, said in an Oct. 17 statement that it would be difficult to assess the impact the shutdown has had on worker safety and health.

The group also applauded the efforts of the private sector, industrial hygienists and safety officers who stepped forward during the shutdown to ensure worker safety.

[Please continue reading at BNA.]

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In the longer run, we will see repercussions of the shut down and especially within the already underfunded consultation efforts. The most positive fact to come out of the shut down is that in the absence of normal OSHA enforcement, the vast majority of employers did not lessen their safety efforts, and many employers consciously stepped up their efforts, such as in monitoring contractor efforts.

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