



OSHA Is Essential Regardless of the Congressional Impasse, So What's Happening?

Insights

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Under OSHA's Contingency Plan, all but approximately 10% of its employees are furloughed. If one calls an Area Office, you'll encounter an Area Director and perhaps an Assistant Area Director, who respond to workplace fatalities or complaints of situations threatening a high risk of death or serious injury. In some cases, senior compliance officers may be involved. Similarly, the five or six top managers in each region are working. This skeleton crew not only respond to workplace fatalities, but they must also somehow issue citations within the six months of commencing an inspection. Despite the unusual circumstances, as recently as last year, the powerful D.C. Court of Appeals upheld the six-month requirement in *AKM v. Secretary of Labor*.

OSHA is determined to get citations out within the six month period. Our clients have received citations this week. On Monday, one hardworking Area Director scrupulously even carried out a telephonic "Closing Conference" before mailing out the citations. Hats off to these guys.

One consequence is that more complex cases may be issued with less attention to detail. Employers may benefit from this scenario because OSHA may be forced to issue less expansive citations because the Agency does not have the resources to adequately complete the file. On the other hand, the disruption may cause the issuance of unfounded or flawed citations because Compliance Officers had less time to complete the analysis or because the days away from the office cause Officers to forget facts or make understandable errors. If such citations are issued, we will almost certainly need to use Informal Conferences to try to correct factual and legal errors. Once the government creaks back to work, put more time into your preparation for the Informals.

Informal Conferences

And what about "*Informal Conferences*" after citations are issued? OSHA simply does not have the resources to hold the Informal Conferences. Informal Conferences in the federal-OSHA system must occur within 15 working days of receipt, and the employer must accept or "contest" the citation at the end of the period. Employers who miss the 15 day period almost never obtain excuse for missing this deadline. Various Area Directors have emphasized to employers that they should timely file their contests regardless of the shut-down. We suggest that the employer include a statement that "the employer was unable to schedule an Informal Conference due to the shut-down, but that the employer remains interested in meeting with OSHA at the direction of OSHA's counsel (the Solicitors Office). One assumes that OSHA will try to clear its backed up case load after business

resumes and that the Solicitors will encourage some sort of informal meeting with employers before the Solicitors ramp up litigation.

OSHA Litigation

The Occupational Safety & Health Review Commission (OSHRC) is shutdown and almost all of the Solicitors for OSHA have been sent home. We cannot guarantee that the OSHRC and its Judges will provide extensions for actions due for cases before the Commission but we assume that the OSHRC will do so. The Federal Solicitors are by and large solid professionals, and we expect that we'll be scrambling to work with them on discovery and motion issues. Frustrating to both the Solicitors and employers, but with the solicitors forbidden to work, there's not much that we can do about settlement negotiations or moving cases along. At least until October 15, Federal Courts are continuing work, but we don't know if any OSHA appeal cases will move forward.

Abatement Efforts

Employers should continue abatement efforts for both legal and practical reasons. Hazards do not disappear during a shut down unless of course the workplace shuts down due to the effects of the government impasse. Moreover, OSHA is unlikely to be able to respond to a petition to modify abatement. If one needs more time than provided for abatement, contact your counsel.

State OSHA Plans

Twenty seven states or territories run state OSHA-plans with Federal OSHA financial support or plans covering public employees. Outwardly, those agencies are conducting business as usual, but what happens if the shut down drags on? How long can the State Plans continue normal operations without Federal funding? The answer seems to depend upon how well the state has been financing its share of the plan's operation.

An excellent BNA article this morning and various inquiries have provided the following information. The current chair of the Occupational Health & Safety Plan Association stated that Iowa OSHA began some furloughs on October 4, and that Michigan OSHA may have to start furloughs as soon as October 14. New Mexico has limited programmed inspections due to travel restrictions but is otherwise normally functioning. Nevada OSHA said that it is good for 90 to 120 days. So far, it's business as usual for Tennessee, Kentucky, California, Washington State, Indiana, Maryland, North Carolina, Arizona, and Oregon. We haven't heard any negative reports from plans such as Virginia, South Carolina, Minnesota, Stay tuned.

Howard