



# What A Government Shutdown Would Mean For Employers

Insights

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If Congress cannot approve a budget by this Friday at midnight, 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.

## A Brief History Of Shutdowns

There have been 12 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. But the 1995-96 shutdown endured for 21 days, and in October 2013—the last such event—in our nation’s history, the government hung a “Sorry, We’re Closed” sign on its front door for 16 days. It’s this shutdown that we can look to in order to best predict what will happen during this 2018 go-round.

## 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, etc.—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.

## **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 the 2013 shutdown, individuals were 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 over 3,100 charges of discrimination during that time period, but no investigations could start. It led to a backlog that took over a month 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 2018 shutdown occurs.

## **Labor Relations**

The National Labor Relations Board (NLRB), the agency which governs union-employer relations and union organizing drives, was decimated by the 2013 shutdown. Its contingency plan called for all but 11 of its 1,611 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 this last shutdown, 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.

As expected, a backlog of union petitions developed in 2013, as the NLRB could not timely process them. Employers who receive petitions during a 2018 shutdown will likely 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.

The "quickie election" rule did not exist in 2013, so a 2018 shutdown will place employers facing election petitions over the next several weeks into uncharted territory. It will be interesting to see if the Board attempts to require the compressed time periods imposed by the new rule despite the complications caused by the shutdown and its aftermath.

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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## **Wage And Hour Compliance**

The Department of Labor's Wage and Hour Division (WHD) was essentially stopped in its tracks during the last government shutdown. 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 the October 2013 impasse, it opened up only one new investigation, and placed over 6,000 ongoing investigations on hold.

We expect that a 2018 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), and 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:

- During the 2013 shutdown, the Department of Homeland Security (DHS) and its sub-agencies generally stayed open. This included 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 were not generally impacted in 2013 and not expected to be impacted in 2018.
- 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 H-1B, H-2 and E-3 applications.
- The USDOL will also stop 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.
- 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.
- Finally, in the 2013 shutdown, E-Verify was temporarily unavailable. During the 16-day blackout, 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 2018, USCIS will likely provide guidance to employers to reduce your liabilities.

## **Workplace Safety**

If 2013 is any indication, the Occupational Safety and Health Administration (OSHA) will be severely impacted by a 2018 shutdown. Five years ago, the agency was forced to suspend 1,370 federal workplace inspections, many of which were never fully made up. During the 16-day impasse, 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. Approximately 90 percent of OSHA's employees were furloughed, with area directors or assistant area directors shouldering much of the remaining burden. During that period, OSHA only opened up 238 total inspections, which comprised 16 percent of the expected amount of work it would normally expect during a similar time period.

Meanwhile, OSHA requirements, including contest and abatement periods, continued during the shutdown, although OSHA personnel were not present. State OSHA plans continued to perform limited work, but because they received substantial funding from Federal OSHA, they were 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. Almost 500 businesses requested consultation services during the 2013 shutdown, all of whom were turned away.

## **Federal Contractors**

Businesses that contract with the federal government were especially impacted by the 2013 shutdown. Over 10,000 stop-work orders for contracts were issued, which impacted the federal contractor community to a great extent. For example, 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.

2018 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 five 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.

### **Small Businesses**

Small businesses will be hit very hard by a 2018 shutdown if 2013 is any example. Federal estimates concluded that 120,000 fewer jobs were created because of the problems associated with the 16-day impasse (delayed licensing and permitting, stalled projects, etc.), which stung smaller employers especially hard. The government reported that \$140 million in small business loans were deferred during that period. If you are a small business, now is the time to enact any emergency plan you created to deal with a possible interruption of business.

### **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 to fully understand how your business can be best positioned during this temporary closure.

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*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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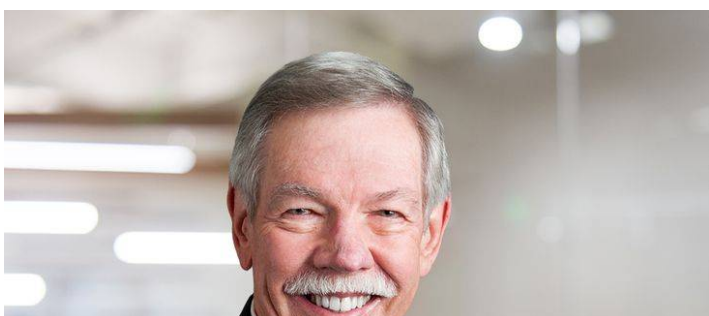


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