Longest Government Shutdown In History Is Impacting Workplace Law

Insights
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As of Saturday, the current federal government shutdown became the longest in our nation's history—and employers are starting to feel the sting. While the peculiarities of the federal budget process meant that this shutdown started out by not hitting the nation's employers as hard as prior shutdown events, the lingering nature of the event has started to take its toll, and things could get much more difficult in just a few short days. Read on to get a better understanding of how employers are being impacted and what to expect in the coming days (or weeks).

What Is Shut Down?
Let's start out by acknowledging that things could be worse for employers—much worse. The current shutdown has not hit many of the same functions of the federal government (including many that intersect with workplace law) as previous shutdowns. That's because this event is only a "partial" shutdown. When the president signed a September "minibus" funding bill, a number of federal agencies became fully funded through October 1, 2019. The U.S. Department of Labor (USDOL) and the National Labor Relations Board (NLRB), among others, are therefore fully staffed and have thus far remained operational during the shutdown.

That means that wage and hour compliance matters (handled by the USDOL), workplace safety matters (handled by the Occupational Safety and Health Administration, an offshoot of the USDOL), and all labor relations matters—including union elections, unfair labor practice charges, litigation, and similar events handled by the NLRB—have continued as usual. In fact, federal contract compliance (handled by the Office of Federal Contract Compliance Programs, another part of the USDOL) seems to have picked up steam in recent weeks. Now that the OFCCP has a full-time Director and not simply an Acting Director, the recent directives issued by the agency seem to be garnering more attention by agency field compliance personnel.

However, because Department of Justice (DOJ) lawyers are furloughed during this shutdown, any litigation involving the federal government has impacted. On the first day of business after the shutdown began, DOJ lawyers requested that their civil cases be stayed and all deadlines postponed for the duration of the shutdown.

Impending Nightmare: Federal Court System About To Run Out Of Money
Before we examine the current state of play, let's take a look at what could soon befall employers as

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it relates to litigation in federal court. The federal judiciary recently announced that its funding will expire on January 18, leading to some potentially drastic consequences for workplace law matters. The federal courts have been operating with a reserve source of money since the start of the shutdown, funded through court fees and excess money collected in prior years and held by the Administrative Office of U.S. Courts. But that money is dwindling and about to run out.

[Editor's Note (1/16/19): The Administrative Office of U.S. Courts just announced a revised estimate and now believes it has enough money to sustain paid operations for all federal court personnel through Friday, January 25.]

[UPDATE (1/23/19): The AO announced yesterday that it can maintain normal operations through January 31, but that "no further extensions beyond February 1 will be possible."]
Once the bank runs dry, the Anti-Deficiency Act will kick in, meaning that the federal judiciary can only retain those employees who perform "essential work." The remainder of the employees will be sent home, and the mission-critical workers who stay on the job will be working without pay. It will be up to each court to determine which workers are essential and which are not, so employers in each jurisdiction will experience a unique impact.

You can generally expect, however, that criminal cases will take priority, and the average piece of civil litigation will take a backseat. In fact, some cases have already been stayed, and we expect that an increasing number of additional employment law cases will be put on ice in the coming days. The ones that might get somewhat of a reprieve include ones that involve matters of injunctive relief where time is of the essence (trade secrets cases, non-competition disputes, and other cases involving restrictive covenants)—but even those will probably not be fully litigated during the shutdown.

For those employers who have upcoming trials scheduled, there is a chance that the case could be indefinitely postponed at the last minute. For those cases that proceed to trial, there is a chance that the jurors may not be receiving pay, which might lead to some interesting courtroom dynamics.

A Mixed Bag: Employment Discrimination Law
While other workplace law agencies such as the USDOL and NLRB are humming along like usual, the Equal Employment Opportunity Commission (EEOC) has been ravaged by this shutdown because the minibus funding package did not include any money for the civil rights agency. In accordance with its contingency plan released last month, its workforce of over 2,000 employees has been dramatically scaled back to only 103 staffers—some of whom are working on a part-time basis. Because of this, only a limited number of EEOC services are currently available.

There is a skeleton crew of 61 staff members working in field offices across the country receiving charges of discrimination, but they do not have the time or resources to begin or continue any investigations. If the 2013 shutdown is any indication, this backlog will present the agency with challenges once the government reopens its doors. During that 16-day shutdown, the EEOC received over 3,100 charges of discrimination, and the resulting logjam took over a month to work through. We have no indication of how many charges have been filed during the past few weeks (because

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those who would be doing the counting are not able to do their jobs), but no doubt there will be a significant workload awaiting agency staffers when they finally return.

Meanwhile, employers who have questions about pending or closed charges are unable to receive information during this blackout period, with the electronic portal blocked for all those attempting to access it. All mediations and hearings scheduled to take place during the shutdown have been cancelled, and any litigation directly involving the EEOC as a party is suspended unless the relevant court does not grant a requested continuance.

However, according to the EEOC website, individuals who believe they were subjected to discrimination in the workplace are being counseled to continue to file charges during the agency's closure in order to ensure that statutes of limitation are not blown. The agency specifically says that time limits may not be extended because of the shutdown.

Immigration Not As Hard Hit, But E-Verify Shutdown Presents Challenges

On the one hand, employers might not be feeling as bad of a sting when it comes to immigration-related matters as compared to the 2013 shutdown. First off, the Department of Homeland Security (DHS) and its sub-agencies generally stay open during a shutdown. 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 have not been impacted.

With respect to how this shutdown differs from 2013's event, remember that many other federal agencies are fully funded and remain open. Immigration officials interact with their counterparts at several other federal agencies in order to get their work done, and whereas these counterparts were not at work in 2013, many are this time around.

For example, during the 2013 shutdown, USCIS was not operating at full capacity because the USDOL stopped processing Labor Condition Applications, which are essential prerequisites for H-1B, H-2 and E-3 applications. Moreover, the USDOL also ceased 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.

However, the State Department—not fully funded by September's minibus bill—is 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. Foreign nationals needing to apply for a new visa stamp at the Consulates abroad are advised to submit an application and make a visa appointment as soon as possible. Delaying plans to travel abroad is recommended, if possible.

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The main way in which employers' immigration practices have been impacted by this shutdown is the unavailability of the E-Verify system. During this event, employers are not be able to access their E-Verify accounts to:

- Enroll in E-Verify;
- Create an E-Verify case;
- View or take action on any case;
- Add, delete, or edit any user account;
- Reset passwords;
- Edit company information;
- Terminate accounts; and
- Run reports.

Moreover, employees are unable to resolve E-Verify Tentative Nonconfirmations (TNCs) during this period. Despite these roadblocks, it is important to remember that employers remain subject to Form I-9 Employment Eligibility Verification obligations during the pendency of the shutdown.

We understand that E-Verify's unavailability may have a significant impact on employer operations. To minimize the burden on both employers and employees, the following policies have been implemented by USCIS:

- The "three-day rule" for creating E-Verify cases is suspended for cases affected by the unavailability of E-Verify.
- The time period during which employees may resolve TNCs will be extended. The number of days E-Verify is not available will not count toward the days the employee has to begin the process of resolving their TNCs.
- USCIS will provide additional guidance regarding "three-day rule" and time period to resolve TNCs deadlines once operations resume.
- Employers may not take adverse action against an employee because the E-Verify case is in an interim case status, including while the employee's case is in an extended interim case status due to the unavailability of E-Verify.
- Federal contractors with the Federal Acquisition Regulation (FAR) E-Verify clause should contact their contracting officer to inquire about extending federal contractor deadlines.

Conclusion

These are just some of the ways employers are being impacted by this particular 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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temporary closure.

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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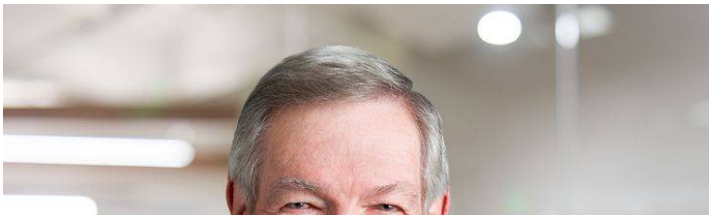

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