

Employment Law Implications of Government Shutdown

There are a number of employment laws that government contractors must be mindful of in the event of a government shutdown.

WARN ACT

Under the federal Worker Adjustment and Retraining Notification Act (WARN Act), employers generally must provide 60 days' written notice to covered employees in advance of a "mass layoff" resulting in an "employment loss." Under the law, an "employment loss" is defined to include 1) a termination, 2) a temporary layoff lasting longer than six months or 3) a reduction of work hours by more than 50 percent in each month of any six-month period.

In a government shutdown, the period of work disruption is typically unknown. Under the WARN Act, there is an exception to the 60 days' notice requirement for "unforeseeable business circumstances." Nevertheless, for government contractors who expect to potentially furlough or layoff at least 50 employees in response to a government shutdown, a case-by-case analysis is still recommended.

Government contractors should also consider applicable state laws governing employer obligations in the event of a mass layoff.

Wage and Hour

Mandating Use of Accrued Paid Time Off (PTO): Under the Fair Labor Standards Act (FLSA), government contractors may make mandatory deductions from an exempt employee's PTO or other leave banks for a full or partial day's absence during a shutdown, furlough or reduced-hours plan, without affecting the employee's FLSA-exempt status, as long as the employee receives their full salary. However, government contractors should also consider applicable state law. In states where PTO is considered an accrued wage, mandating use of PTO can be problematic.

Unpaid Leave During a Full-Week Shutdown: So long as an employee does not perform any work, government contractors may treat an exempt employee's full-week furlough as unpaid leave. The burden is on the employer to ensure employees are not performing any work from home, even limited work such as checking email and minimally communicating with customers. Government contractors can help manage this by:

- giving clear written instructions to employees regarding the expectations for the employees to perform or not perform work
- temporarily collecting work computers and phones and/or disabling email and network access
- making sure all work responsibilities of furloughed employee are adequately covered by employees who are not furloughed and

This guidance was prepared for information purposes for clients of Holland & Knight LLP. If you need legal advice regarding employment law implications of the anticipated federal government shutdown, please contact Kara Ariail (703-720-8097, kara.ariail@hklaw.com) or the Holland & Knight Labor, Employment and Benefits attorney with whom you regularly work.

- scheduling furloughed time on a week on/week off basis or scheduling limited employees to work partial weeks/reduced hours during the shutdown.

Importantly, government contractors may not reduce the salary of an exempt employee who works any part of a workweek without violating the salary basis test as a reduction in salary due to a reduction of hours worked because the reduced hours are "occasioned by the employer or by the operating requirements of the business." However, as discussed above, employers generally can require the use of paid leave in such situations.

Reductions in salary because of a "permanent change" in an employee's schedule (e.g., changing from 52 five-day workweeks to 40 five-day workweeks and 12 four-day workweeks over the course of a year) due to economic conditions will not jeopardize an exempt employee's status as long as the employee is still paid on a salary basis and still receives at least \$684 per week. However, there are two main concerns with respect to these kinds of salary reductions. First, the pro-rated salary following any reduction still needs to equal at least \$684 per week to meet the FLSA exemption requirement. A higher amount may be required under some states' laws. The salary threshold applies regardless of whether the employee is full-time or part-time. Second, the employer must carefully consider the time period for the reduced schedule and not make frequent changes in schedule and corresponding salary. Courts have suggested that frequent changes to the salary may render the salary illusory, particularly if the changes appear to correspond to fluctuations in workload so that the salary becomes a proxy for hourly wages. State laws also should be consulted before instituting a pay reduction; many require advance notice of changes in pay.

Benefits Issues

Continued Employee Coverage under Employer Sponsored Insurance Plans: Government contractors should review benefit plan documents to confirm if, and under what circumstances, a furlough triggers a loss of coverage eligibility. In such case, an employer is required to provide affected employees with notice of their rights and responsibilities under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Benefit Premiums: Government contractors should also consider how they will handle the employee portion of insurance benefit premiums, which are typically deducted directly from employee pay, in the event of an extended shutdown. Government contractors may also see an increase in employee applications for 401k loans and distributions.

Unemployment Benefits

Depending on applicable state law, employees who are furloughed (full or partial week) due to a government shutdown may be eligible for unemployment insurance benefits. Employees should be directed to obtain more information from the applicable state offices, and government contractors should not make any representations to employees regarding eligibility for unemployment insurance benefits.

Immigration Issues

H-1B, H-2B and E-3 employees who are placed on a non-productive status or reduced work schedules must continue to be paid at the full rate specified on their visa documentation, unless filing an amended Labor Condition Applications with the U.S. Department of Labor and H-1B/H-2B/E-3 visa petitions with

the U.S. Citizenship and Immigration Services (USCIS). However, government processing won't occur, and web-based filing resources will be unavailable.

E-verify will be unavailable. Employers must continue to complete I-9s for new hires, but USCIS will likely suspend the 3-day completion rule. ; recommend against taking adverse action because of E-verify interim case status

Union Issues

Government contracts who are unionized may have to enter into mid-contract negotiations with unions if immediate layoffs and exceptions to layoff and other collective bargaining agreement provisions are required.

Unilateral implementation of layoffs or reductions in wages, forced shutdowns and vacations could constitute unfair labor practices and lead to National Labor Relations Board (NLRB) proceedings.

NLRB budgets for investigations and hearings might be curtailed, leading to issuance of complaints without investigations and shorter hearings without briefing.

Communications with Employees

Unpaid furloughs and/or being required to use accrued PTO as a result of a government shutdown will likely have a significant negative impact on employees. Government contractors should be mindful of communications that promote, rather than undermine, morale and productivity.

Government contractors should share their plans with employees promptly and clearly. If employers are in a "wait and see" mode, employees should be told their employers are monitoring the situation, but recognize their anxiety and have designated management personnel to answer questions, address concerns and correct misinformation. Make sure managers are informed about employer plans and communication strategies