

Key Employment Considerations for Government Contractors Navigating a US Government Shutdown

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Federal contractors may face a variety of workforce compliance challenges during the current US federal government shutdown. These challenges include understanding and meeting obligations under federal and state wage and hour laws, the federal Worker Adjustment and Retraining Notification (WARN) Act and state counterparts, as well as addressing issues related to employee benefits, unemployment benefits and union matters. Below are key considerations to help contractors manage these challenges during the shutdown.

Wage and hour considerations

A furlough temporarily stops employees from working, with the expectation that they will return to work later. This approach allows contractors to reduce labor costs in the short term without terminating employees. When furloughing employees, contractors must comply with federal and state wage and hour laws. For nonexempt employees, employers are only required to pay for hours actually worked. However, exempt employees must receive their full salary for any week in which they perform any work, regardless of the number of days or hours worked (such that even a small amount of work would require payment of salary for the full week). Exempt employees do not need to be paid for any week in which they perform no work. Therefore, exempt employees should be furloughed in full-week increments, while nonexempt employees can be furloughed for partial weeks. Failing to follow these guidelines may jeopardize the exempt status of employees and result in wage claims.

Contractors may require exempt employees to use accrued paid time off (PTO) for full or partial day absences during a shutdown, furlough or reduced-hours plan, as long as the employee receives their full salary. Before doing so, contractors should ensure compliance with state wage and hour laws, internal PTO policies and any applicable collective bargaining agreements (CBAs). Contractors may also implement a reduced work week for exempt employees. According to Department of Labor (DOL) Opinion Letter FLSA 2009-18, a fixed salary reduction during a period of reduced operations due to economic conditions is permissible, provided the employee still meets the minimum salary and other exemption requirements. Before reducing an employee's schedule, contractors should assess whether a reduction impacts any other obligations – including, for instance, under an employment contract.

All furloughed employees should be clearly instructed not to perform any work during the furlough period to avoid potential wage claims and related penalties. Contractors should consider measures such as restricting remote IT access and collecting company-issued laptops and phones to prevent unauthorized work and protect company property and trade secrets, though it is critical that contractors have up-to-date personal contact information for their employees. Contractors should also be careful not to email employees with questions or requests – even if minor (or should assume that such communications are requests for employees to perform compensable work).

WARN compliance

Furloughs or temporary shutdowns lasting six months or more may trigger the federal WARN Act, which requires employers to provide employees (and other entities) with 60 days' advance notice (or pay in lieu of notice) in the event of a "plant closing" or "mass layoff." Under the WARN Act, an "employment loss" includes: termination, a temporary layoff exceeding six months or a reduction in work hours by more than 50% in each month over a six-month period. Although the current government shutdown is not expected to last more than six months, contractors should closely monitor timing and assess whether WARN notice requirements apply.

In addition, many states have their own "mini-WARN" laws, which may impose more onerous requirements than the federal WARN Act. For example, the California equivalent to the WARN Act can be triggered by furloughs of less than six months. Because federal and state WARN laws are complex, contractors should carefully review

their obligations before implementing furloughs or layoffs.

Employee benefits

Furloughs and reduced working hours can impact employees' eligibility under certain benefit plans, including, but not limited to, group health insurance benefits (medical, dental and vision), life insurance, disability insurance and retirement benefits. Contractors should review their benefit plan documents and consult with carriers to determine how eligibility and coverage may be affected, including when benefits may be terminated due to a COBRA-qualifying event. If a qualifying event occurs, employees are eligible to elect COBRA (Consolidated Omnibus Budget Reconciliation Act) continuation coverage, and employers must provide notice of COBRA rights. Contractors should also decide how to handle employee premium contributions during furloughs.

Unemployment benefits

Furloughed employees may be eligible for unemployment benefits, even though they have not been terminated. Contractors should consult state law eligibility requirements for unemployment benefits. Contractors should avoid making assurances about eligibility and direct employees to their state unemployment office for specific questions, given that the state agencies (not contractors) make eligibility determinations.

E-Verify

The E-Verify system, maintained by US Citizenship and Immigration Services (USCIS), is currently unavailable – and is expected to remain unavailable during the shutdown. During this time, contractors can continue to onboard new hires, so long as they continue to comply with the I-9 verification process and the new hire satisfies the I-9 criteria for work authorization. When the E-Verify system is available again, contractors must promptly submit backlogged E-Verify cases. Contractors may not take adverse action on Tentative Nonconfirmations while the E-Verify system is not operational.

Union issues

Contractors with unionized workforces should review any applicable CBA before implementing layoffs, furloughs or wage reductions, or requiring employees to use PTO. The CBA may address procedures for layoffs, seniority rights, bumping, severance and other benefits. Failing to follow the CBA can lead to unfair labor practice charges before the National Labor Relations Board. Even if the CBA does not address layoffs and furloughs, contractors may have an obligation to bargain with the union to implement them.

Next steps

Federal contractors should keep the above considerations in mind and seek guidance from employment counsel before implementing workforce changes in response to the government shutdown to avoid inadvertently creating legal risks.

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