

The Wage and Hour and Immigration Consequences of a Government Shutdown: What Federal Contractors Need to Know

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As of December 20, 2018, media reports indicate that President Trump does not intend to sign the stopgap funding bill that the U.S. Senate recently passed. If it is left unsigned, the risk of a partial government shutdown increases dramatically. Below are answers to some frequently asked questions regarding the consequences of a shutdown on federal employers and contractors.

Q: What are the wage and hour considerations for federal employees and federal contractor employees during a government shutdown? Are federal contractors' obligations different depending on whether the furlough is for a full week or less than a full week?

AL ROBINSON (AR): The wage and hour considerations under the Fair Labor Standards Act (FLSA) and prevailing wage statutes during a partial federal government shutdown are virtually the same. So here are a few rules. Nonexempt employees must be paid at least the minimum wage, or applicable prevailing wage rate, on any hours worked in a workweek of and during a partial federal government shutdown. When such an employee works more than 40 hours in a workweek, he or she is entitled to overtime compensation. Also, these nonexempt employees must be paid for their hours worked on their usually scheduled payday. If a nonexempt employee of either the federal government or a federal contractor does not work during a partial government shutdown, he or she is not entitled to be paid for hours or days of work missed due to a partial government shutdown.

Exempt employees, on the other hand, are entitled to their regular salary for any workweek in which they perform any work or if they work a partial workweek due to the partial federal government shutdown. Also, section 541.710 of the regulations defining exempt employees addresses the propriety of deductions from a public-sector employee's salary when he or she is absent from work due to a government shutdown resulting from the absence of a budget.

Finally, employees who are deemed essential or critical by an agency and who work during a partial government shutdown are entitled to be paid as they were before the shutdown.

Q: Must employers pay H-1B employees placed on a nonproductive status or reduced work schedule at the full rate specified on their visa documentation?

LEIGH GANCHAN (LG): To protect U.S. workers, employers must complete and sign a certified LCA as part of the H-1B petition. It is in the LCA that the employer makes certain attestations regarding its responsibilities, including the wages, working conditions, and benefits it will provide to H-1B foreign workers. By completing and signing an LCA, an employer attests to the U.S. Department of Labor (DOL) that it will pay the higher of the actual or prevailing wage rate, compensate these employees for nonproductive time, and offer benefits on the same basis as offered to U.S. workers.

In LCAs, employers also attest that:

- they will provide working conditions that will not adversely affect similarly situated U.S. workers;
- there is no strike, lockout, or other work stoppage in the occupational classification at the place of employment;
- they will notify the bargaining representative, if any, or post a notice that an LCA is being filed; and
- they will provide the H-1B worker with a copy of the certified LCA.

Q: Will the DOL continue to handle amended LCAs during a partial shutdown?

LG: The DOL reviews and certifies the LCA request within five to seven business days of the filing date.

During a full shutdown, the part of the DOL that handles the LCA requests, the Office of Foreign Labor Certification (OFLC), typically ceases processing all applications because its staff is not available to respond to inquiries. The OFLC's web-based application filing systems, such as iCERT, which is used to file and process LCAs, are inaccessible as well. If an employer needed to file an amended LCA for any reason (change in work location, material change in duties, etc.) during a shutdown, it would not be able to do so.

However, if a shutdown were to occur, because the DOL has already been funded through October 2019, it would continue to operate in the event of a partial shutdown.

Q: Would employers still have obligations to confirm employment eligibility in the event of a shutdown—even if E-Verify is inaccessible?

LG: I-9 compliance is related but separate from E-verify. Every employer will be expected to continue to complete the I-9 verification process when required during any government shutdown. Employers may complete hard copies of the relevant forms or electronic versions of those forms on software that employers can obtain from non-government vendors.

During past shutdowns, E-Verify was not available. Thus, E-verify participants would not be able to access E-verify during a government shutdown, and employers would not be able to access their E-Verify accounts or:

- enroll in E-Verify;
- create E-Verify cases;

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- view or take action on any case via E-Verify;
 - add, delete, or edit any user account;
 - reset passwords;
 - edit company information;
 - terminate accounts; and
 - run reports or view any information about an account.

Additionally, E-Verify customer support is usually closed during a shutdown.

Recognizing the unique compliance challenges caused by a shutdown, U.S. Citizenship and Immigration Services (USCIS) typically implements temporary policies to lessen the burden on employers and employees. These policies may include the following:

- As noted above, employers must still complete Form I-9 no later than the third business day after an employee starts work for pay and comply with all other Form I-9 requirements. In the event of a shutdown, USCIS may suspend the “three-day rule” for E-Verify cases affected by the unavailability of E-Verify.
- USCIS may extend the time period during which employees may resolve Tentative Non-Confirmations (TNCs).
- USCIS may instruct federal contractors covered by the E-Verify federal contractor rule to contact contracting officers to inquire about extending federal contractor deadlines.
- USCIS temporary policies may prohibit employers from taking any adverse action against an employee while the employee’s case is in an extended interim case status due to the unavailability of E-Verify.

Q: What obligations do employers have under the Worker Adjustment and Retraining Notification (WARN) Act in the event of a government shutdown?

AR: Essentially, the WARN Act requires employers with 100 or more full-time employees to provide 60 days’ advance notice before a plant closing or a mass layoff. The WARN statute defines a “plant closing” as a “shutdown of a single site of employment” that results in the employment loss for 50 or more employees at that single site of employment. It also defines the term “mass layoff” to constitute a reduction in force resulting in a loss of employment for at least 33 percent of certain active employees and at least 50 employees from a “single site of employment” in any 30-day period. Generally, any business entity that has 100 or more employees, not including part-time employees, qualifies as an employer subject to the WARN Act. Failure to provide the required notice of the WARN Act could expose an employer to damages, civil penalties, and an award of attorneys’ fees.

Federal, state, and local governments generally are not covered by the WARN Act. The statute recognizes the existence of certain limited circumstances in which the required 60-day notice period may be reduced. One is the “unforeseeable business circumstances” exception, which includes a “[a] government ordered closing of an employment site that occurs without prior notice.”

Q: The scale of this partial shutdown is expected to be different from those in years past because many agencies already are funded through the federal fiscal year ending September 30, 2019, and only some agencies are expected to be shut down. Would a smaller-scale shutdown affect federal contractors?

AR: The prospect of a federal government shutdown, regardless of the scale, is a disruptive and

costly exercise. Agencies and departments that are impacted expend many resources on planning for a shutdown and then actually implementing their plans. It is a time-consuming, costly process also to identify critical or essential employees who must continue to work through a shutdown. A partial federal government shutdown also causes confusion for contractors and their employees in assessing whether they are impacted. A direct impact of the partial shutdown should be felt by contractors and their employees who work with agencies that close under the partial federal government shutdown, but there could be ripple effects for contractors and agencies that are funded.

To the chagrin of many taxpayers, a shutdown of the federal government does not result in any savings to the taxpayers since Congress usually agrees to compensate all employees for their missed work time during the shutdown. The DOL's Wage and Hour Division (WHD) has issued a [frequently asked questions document on furloughs](#) to address these issues.

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