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Practical Employment Law Issues Facing Government Contractors in the Wake of the Federal Government Shutdown

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On October 1, 2013, the federal government shut down for the first time in seventeen years. The last government shutdowns in 1995 and 1996 lasted a total of 28 days.

Government contractors are already feeling the bite of the shutdown. Within hours of the shutdown, government agencies and departments issued stop-work orders, grinding work on government projects to a halt. As such, government contractors are facing immediate issues regarding how to handle impacted workers while the shutdown continues and their work is on hold.

Preparation for the recent sequester familiarized government contractors with some of the questions they now face. However, the shutdown implicates issues different from the sequester and solutions for one do not necessarily apply to the other. With respect to the sequester, government contractors faced the possibility of canceled contracts. In contrast, the shutdown should only result in a temporary suspension of government contracts that, hopefully, will be fully restored once the federal government reopens.

Contractors have been asking for input regarding how to handle employees impacted by the federal shutdown. Although the discussion below is not comprehensive, it discusses many of the most significant employment-related issues.

Wage and Hour Considerations

While employees are furloughed, government contractors need to be mindful of restrictions imposed by federal and state wage and hour laws. For example, a government contractor that begins a furlough mid-week may consider not paying its employees for the days during that week the employees are on furlough. However, doing so for employees exempt from overtime under federal and state laws would place their exempt status in jeopardy. As a general matter, in order to be exempt from overtime under the federal Fair Labor Standards Act ("FLSA"), the employee needs to be paid on a salary basis of at least $455 per week, regardless of the amount of work performed. Accordingly, while an employer can withhold payment for any ***full week*** in which the employee does not work, it cannot do so for any ***part of a week*** in which the employee does not work due to a furlough.

Many contractors are requiring exempt employees to use vacation pay to cover pay for non-working days during partial furlough weeks as a way to comply with the FLSA's salary basis test. While such a practice would comport with the FLSA's exemption requirements, contractors must ensure that this approach does not violate state law. Many states, such as North Carolina, do not require employers to provide paid time off, but if such leave is provided, the employer must comply with its published policies. Therefore, in such states, employers should review their paid time off policies before mandating the use of vacation time.

As noted above, employers do not have to pay exempt employees anything when they are on furlough for an entire week. However, employers should instruct employees not to perform any work while on furlough. If an exempt employee performs work during the week (such as checking and responding to emails), he or she must be paid his or her salary for the entire week. If a non-exempt employee performs work, he or she must be paid for all work performed. For this reason, employers should clearly communicate to supervisors and employees that work may not be performed while they are on furlough. Some contractors are confiscating company-issued smartphones and computing devices during furloughs to ensure no work is performed.

The WARN Act

From their experience with sequestration, government contractors understand that the prospect of furloughing large numbers of employees brings with it potential application of the federal Worker Adjustment and Retraining Notification ("WARN") Act. The WARN Act requires, with some exceptions, that employers provide 60 days' notice to employees affected by a "plant closing" or "mass layoff." However, depending on what a government contractor plans to do in response to the shutdown, the WARN Act may not apply.

Most contractors are planning to furlough workers on suspended projects until those projects are restarted. The Act only applies if there is an "employment loss," which is defined as: (1) an employment termination; (2) a layoff exceeding six months; or (3) a reduction in an employee's hours of work of more than 50 percent in each month of a six-month period. Because it is not anticipated that the government shutdown will exceed six months, for most government contractors the WARN Act will not apply. In the unlikely event that the government shutdown continues for more than four months, contractors will have to consider whether to provide the notices required under the WARN Act.

However, even if the WARN Act does not apply to a government contractor's furlough program, contractors should be aware that analogous state laws may be triggered by their furloughs.

E-Verify

Federal government contractors must utilize the Internet-based employment verification system called E-Verify to confirm the employment eligibility of their new hires and current employees. The Department of Homeland Security has announced that the E-Verify program will be unavailable for the duration of the shutdown.

Government contractors should continue to complete I-9 paperwork in an accurate and timely fashion while E-Verify is unavailable. In addition, if an employee has received a "Tentative Non-Confirmation" notice from E-Verify, he or she cannot resolve the issue during the shutdown. The deadline for responding to the Tentative Non-Confirmation will be extended for the duration of the shutdown. During this period of time, the employer should not take any adverse action against the employee as a result of the notice.

OFCCP

The Department of Labor has announced that no Office of Federal Contract Compliance Programs ("OFCCP") employees will work during the shutdown. As such, government contractors with pending matters before the OFCCP should not expect any further action until the federal government reopens. However, we recommend that contractors respond to any audit inquiries or requests that they received prior to the shutdown.

Other Furlough Considerations

Government contractors also should be aware that furloughing their employees may have other consequences. In some states, even a short furlough can make the employee eligible for unemployment benefits. If furloughed employees are working in the United States on worker visas, the employer may be required to file amended applications or petitions. Moreover, contractors need to mindful of their benefits plans and policies in implementing furloughs. Depending on the length of the furlough and the contractor's plans and policies, the furlough could impact employees' right to health and welfare benefits and participation in retirement and retirement savings plans, and/or trigger severance or termination benefits.

Conclusion

The government shutdown will require many government contractors to make difficult choices. Government contractors should consult with employment counsel familiar with government contracting requirements to ensure that short-term solutions to the shutdown do not result in costly legal liabilities.

Related Professionals

- **Guy Brenner**
  Partner