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More Practical Employment Law Issues Facing Government Contractors as the Federal Government Shutdown Continues

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The federal government shutdown is now entering its third week. Although there are some hopeful signs here in Washington that an agreement that will allow the federal government to reopen will be reached, it is unclear when a deal will be forged.

This political tug-of-war has left many government contractors in limbo. Already facing stop-work orders and lost revenue, many government contractors who had hoped short-term, stopgap measures would get them through a brief shutdown are facing the tough employment law realities arising from a protracted government shutdown with no definitive end in sight.

We have been helping government contractors navigate the difficult legal issues raised by the continued government shutdown. We published an alert, *Practical Employment Law Issues Facing Government Contractors in the Wake of the Federal Government Shutdown*, during the first week of the shutdown that addressed various issues that many contractors were facing during its initial phase. We believe that, as the shutdown continues into its third week, there are additional legal issues contractors should plan for and address.

Reduced Pay for Reduced-Hour Workweeks

As a result of reduced work and/or revenue, many government contractors are requiring exempt employees to work a reduced workweek. It is important for contractors to be mindful of the requirement that exempt employees be paid on a "salary basis" – i.e., a set amount not subject to reduction based on the amount or quality of the work performed. Because of this requirement, employers typically may not reduce an exempt employee's salary without placing the employee's exempt status in jeopardy.

Depending on the precise circumstances, however, it may be permissible to adopt a reduced work-hours program during a period of economic hardship. The Department of Labor has stated in various opinion letters that "a fixed reduction in salary effective during a period when a company operates a shortened workweek due to economic conditions would be a bona fide reduction not designed to circumvent the salary basis payment. Therefore the exemption would remain in effect as long as the employee receives the minimum salary required by the regulations and meets all the other requirements for the exemption." *Opinion Letter FLSA2009-18*.

Before instituting such a change, however, employers must consider a number of issues. For example, employers must be certain that none of the affected employees are contractually entitled to their current level of compensation. In addition, employers must notify their employees in advance of the new weekly salary. Some state laws have specific advance notice requirements. Employers also must ensure that the other requirements for the exemption from overtime are met – such as paying the employees at least $455 per week and not varying their salary based on the work performed.

Foreign Workers

Many government contractors have adopted generous paid leave policies whereby employees may use up accrued vacation leave – and even take advances on unaccrued vacation leave – to obtain compensation during their furloughs. Once employees exhaust these benefits, however, they receive no further compensation during the furlough.

Although this practice does not raise issues as a general matter for American workers, it can result in liability when applied to foreign citizens working in the United States on worker visas. When employers sponsor foreign workers under H-1B, H-2B and E-3 visas, they are required to pay the rate set forth in the labor condition applications certified by the Department of Labor.

Given that the government contractor's only alternative to paying furloughed foreign workers is to terminate their employment – resulting in the employees having to leave the United States – the employer is faced with two undesirable options: pay the furloughed foreign workers even though they are not paying their American counterparts, or terminate them and lose the knowledge and expertise that will be needed once work resumes on the contract. The option the government contractor chooses is ultimately a business decision that should be made after analyzing the specific legal requirements.

Benefits Issues

Many government contractors believed that the government shutdown would last for only a few days or one week. Now that the shutdown has continued for more than two weeks, employers need to consider the benefits implications of furloughing employees. If the reduction in employees' hours would cause them to lose coverage under the terms of the employer's COBRA-covered health plans, employers are required to send out qualifying event notices to the employees and dependents who would lose coverage. The employees and dependents must be offered the ability to continue coverage under these plans during the period of the furlough (up to the maximum COBRA continuation period) at their own expense. If a furloughed employee is later terminated, the termination generally will not be considered a second qualifying event that would entitle the employee to an extension of the COBRA continuation period.

In addition, because it is unclear when the government shutdown will end, employers should consider how to manage situations in which an employee elects COBRA, pays the premium, and is then recalled. Complicating this analysis is whether the employer will offer retroactive coverage to employees, or, if coverage will be reinstated, when it will become effective. All of these issues will need to be considered in the context of the employer's benefit structure, as well as the specific terms of each employee benefit plan.

Also, before placing an employee on furlough, leave without pay or otherwise changing his or her status, contractors should check all of their applicable retirement plans and policies to determine the impact of the change of status on contribution obligations and participation rights.

Conclusion

The government shutdown has forced government contractors to make difficult decisions with respect to their workforces. As the shutdown continues, government contractors must face additional challenges. Although we all hope that the government shutdown ends quickly, employers must be proactive in planning for the worst while hoping for the best. Failure to do so may result in liabilities that last long after the shutdown ends.

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