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The Impact of the Federal Government Shutdown on Private Employers

By Vincent T. Norwillo

The partial government shutdown has now entered its second week. To date, media coverage has focused upon shuttered national parks and attractions as well as the plight of the family members of furloughed federal workers. While these are legitimate concerns, the closure of the largest employer in the country - the federal government - also has immediate, although much less publicized effects upon the operations of private employers. Indeed, the extent to which private employers deal with federal agencies and regulations in daily operations is highlighted by the closure of various federal agencies and programs responsible for the administration and enforcement of the compliance requirements of private employers.

The ultimate duration of the current shutdown is unknown. Until Congress reaches a funding agreement, only "essential" federal positions - those necessary to prevent an imminent threat to the safety of human life or the protection of property - will remain functional. All of the other "nonessential" functions will continue on hiatus. These "nonessential" functions include many key government agencies upon which employers regularly rely. However, during this hiatus, employers are generally still obligated to meet statutory deadlines and compliance requirements related to these programs and agencies. An overview of the impact of the shutdown on these critical agency operations is as follows:

NATIONAL LABOR RELATIONS BOARD ("NLRB")

The NLRB resolves unfair labor practices filed by employees, labor unions, and employers. The NLRB has furloughed 1,600 of its 1,611 employees as a result of the shutdown. Since October 1, 2013, the NLRB has been notifying parties in pending matters that all proceedings, including unfair labor practice hearings, scheduled through October 11, 2013, have been postponed.

Similarly, the NLRB conducts representational elections requested by labor organizations, and those elections scheduled on or before October 11, 2013, have been postponed. The NLRB has notified parties with hearings and elections after October 11, 2013, that they will be notified on the Tuesday preceding the scheduled event whether their proceeding will take place. For example, if a representational election is scheduled for October 21, 2013, the NLRB will inform the parties on October 15, 2013, whether their election will take place or be postponed, assuming that non-essential NLRB personnel have returned to the workplace by October 15, 2013. The NLRB has directed employers to post election notices at least 3 days before any scheduled election, regardless of whether it will actually occur, unless the employer has received notice from the NLRB that the election will be postponed.

Because the NLRB's webpage is now unavailable, electronic filing is impossible. Therefore, as explained in a [notice](#) published in the *Federal Register*, the NLRB is granting an extension of time to file or serve any document "for which the grant of an extension is permitted by law." Accordingly, the filing deadlines will be extended a day for each day or portion thereof the shutdown continues and NLRB offices are closed. The NLRB emphasizes, however, that the six-month statute of limitations remains in effect for the filing of unfair labor practice charges.

The NLRB will, however, consider the phrase "Saturday, Sunday, or a legal holiday" in its rules pertaining to filing and service "to encompass any day on which the Agency's offices are closed for all or any portion of the day due to lack of appropriated funds." The NLRB further advises that:

Persons wishing to file a charge pursuant to Section 10(b) of the Act, and for whom the 6-month period of Section 10(b) may expire during the interruption in the [NLRB's] normal operations, are cautioned that the operation of Section 10(b) during an interruption in the [NLRB's] normal operations is uncertain. Consequently, it would be prudent to file the charge during the interruption in the [NLRB's] operations by faxing a copy of the charge to the appropriate Regional Office.

Moreover, while NLRB Regional Directors "ordinarily serve a copy of the charge on a person against whom the charge is made as a matter of courtesy," it is not the NLRB's responsibility to do so, and this courtesy will not likely be carried out during the shutdown.

The NLRB has said it will take action regarding "emergency situations," but with only 11 employees actively working, including the five NLRB members, the scope of such emergency efforts will likely be limited. The NLRB has notified parties that it will not docket or investigate unfair labor practice charges, that it will not conduct elections, and that Administrative Law Judges will not render recommended decisions during the course of the government shutdown.

If you have active litigation or an election pending before the National Labor Relations Board at this time, you should seek the advice of counsel regarding specific questions associated with the impact of the ongoing partial government shutdown on the National Labor Relations Board.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC")

During the shutdown the EEOC will continue to accept administrative charges of discrimination and retaliation filed by claimants. The filings will be accepted in order to allow claimants to meet their filing deadlines under the applicable statutes of limitations. However, the EEOC will not conduct any investigations of these charges, nor will the EEOC be pursuing complaints into federal court in connection with pending investigations. In addition, scheduled EEOC mediation sessions will not be held, presumably to be rescheduled once Congress provides the requisite budget authority. Likewise, the EEOC will not process requests under the Freedom of Information Act, and all outreach and education events will be indefinitely postponed.

DEPARTMENT OF LABOR ("DOL")

The vast majority of DOL employees are furloughed during the shutdown, resulting in most of the DOL's services and programs being impacted. Essentially, the shutdown temporarily ceases all non-emergency occupational safety and health inspections, wage and hour audits, and hearings and appeals regularly conducted by the DOL. The following administrations and offices have been affected:

- **The Occupational Safety and Health Administration ("OSHA")**

OSHA has furloughed most of its employees, except for two senior compliance officers in each area office. According to

OSHA's website, workplace fatalities, hospitalizations, or imminent danger situations may still be reported to the agency during the shutdown.

- **Office of Administrative Law Judges ("OALJ")**

The Department of Labor's OALJ has issued a general order on the status of hearings and case-related deadlines during the federal shutdown. In general, the OALJ will be unable to perform any case-related activities during this period. In addition, "hearings that have been previously scheduled will therefore be cancelled prior to the date of the hearing, and they will not be rescheduled for hearing until an appropriations bill or continuing resolution takes effect." The [Order](#) further explains:

Any deadlines occurring during the period of a government shutdown which involve case-related activities, such as responses to discovery requests, scheduled depositions, or responses to orders, will be suspended. Due dates for these events must therefore be recalculated by the parties based on the number of days of any government shutdown, e.g., if the government experiences a lapse in funding for 5 days, responses to discovery requests, orders and the like will be due five days later than the original due date. Any disputes regarding due dates should be resolved by the parties themselves and should not require the intervention of the presiding administrative law judge. If disputes remain unresolved thereafter, any motions regarding such matters must attest to the fact that the parties have engaged in a good faith effort to resolve the dispute but were unable to do so.

- **Employment and Training Administration ("ETA")**

The Department of Labor's ETA issued a notice explaining how the shutdown will affect the ETA's funded programs and activities. With respect to unemployment compensation, the ETA notes that state agencies are responsible for paying unemployment compensation and will therefore continue to do so for current recipients and new claimants. Funding for Emergency Unemployment Compensation will continue as well.

- **The iCERT Visa Portal System And Permanent Labor Certification Program ("PERM")**

The DOL's iCERT system is currently unavailable due to the suspension of federal government services. iCERT provides a single point-of-entry for employers, attorneys, and agents to file and track their employment-based visa applications. The iCERT

system processes labor condition applications ("LCA"), which are required for H-1B visa petitions and PERM prevailing wage requests. During the shutdown, the DOL's Office of Foreign Labor Certification web sites, including the iCERT Visa Portal System (which processes the LCAs), will not act upon any requests for LCA processing or allow authorized users to access their online accounts.

The unavailability of iCert can be detrimental to companies whose employees' H-1B visas are expiring and do not yet have a certified LCA. It can also result in the inability to hire new workers or extend the work authorization of current employees until their LCAs can be processed. Further, the suspension of iCert can affect the processing of E-3 and H-1B1 filings at U.S. Citizenship and Immigration Services ("USCIS") Service Centers and U.S. consulates because these applications must be supported by a certified LCA.

The PERM system is likewise unavailable due to the shutdown. The inability to file LCAs or prevailing wage requests at the PERM website will likely affect employers that are facing imminent deadlines, including recruitment expiration dates, relative to their PERM applications. Further, employers who filed PERM applications prior to the shutdown, and received DOL's standard sponsorship questionnaire emails, will not be able to complete the questionnaires until operations resume after the shutdown.

THE DEPARTMENT OF HOMELAND SECURITY ("DHS")

DHS has announced that E-Verify will be unavailable during the federal government shutdown. Accordingly, employers will be unable to access their E-Verify accounts, and E-Verify customer support and related services will be closed. As a result, employers will be unable to open new cases for new hires or take any other action in E-Verify so long as the government shutdown continues.

During the shutdown, DHS is suspending the requirement that employers must verify all new hires within three days of hire. However, E-Verify's unavailability does not affect employers' obligation to complete Form I-9 for all new hires within three days of hire. Employers must continue to abide by their obligations with respect to Form I-9. E-Verify should become available once the shutdown is resolved, and employers should take steps at that time to timely run all new hires through E-Verify. It is also recommended that employers make note in the I-9 files of any employees that the company was unable to process through E-Verify on account of the government shutdown. In the event of an audit in the future, a notation of this kind will help explain the otherwise impermissible delay.

Also, employees will be unable to resolve any tentative non-confirmations (TNCs) received from E-Verify during the government shutdown. DHS has confirmed that the time period during which employees may resolve TNCs will be extended. Any days the federal government is closed will not count toward the eight business days the employee has to go to DHS or the Social Security Administration to resolve the TNC.

DHS has also advised any companies with federal contractors to contact the company's contracting officer to inquire further about extending deadlines. However, employers may not take any adverse employment action against an employee because of an E-Verify interim case status due to the federal government shutdown. In the interim, employers must continue to employ any employees who have TNC's pending in E-Verify.

DEPARTMENT OF THE TREASURY

The Treasury Department will continue disbursement of Social Security benefits, automated revenue collections, daily cash management for the government, and payment of interest on the federal debt. The department's largest component, the Internal Revenue Service (IRS), however, will cease functions such as audits, examinations of returns, processing of paper returns, and call-center options for taxpayers. While IRS operations are limited, the underlying tax law remains in effect.

Finally, other federal agencies will operate in various states ranging from fully operational to total closure during the course of the government shutdown and may directly impact your operations depending on your particular industry. To learn more about the federal agencies with which you work directly, please visit the appropriate website and review the statement and/or contingency plan announcement for that agency. Many of these federal agencies, including the Department of Labor, EEOC, and NLRB released their contingency plans before October 1, 2013. The specific web links to the updated contingency plans for these and other federal agencies have been compiled at:

<http://www.whitehouse.gov/omb/contingency-plans>.

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