

Legislate[®]

Key Legislative Developments Affecting Your Human Resources

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Government Shutdown Looming — Potential Impact for Employers with (and without) Federal Contracts

Last week Congress was in session for less than a week, with one full day dedicated to Pope Francis and his visit. This week, there is the possibility of a government shutdown. In this issue, we explore what a government shutdown could mean for employers and employer-sponsored plans.

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Week in Review

What more can be said? Pope Francis addressed the full Congress on September 24. Today is September 28. In a few days, we turn the calendar page and begin the government's new fiscal year. Will Congress fund the government and avoid a shutdown? As of today, we don't know if we will have a repeat of the 2013 shutdown, which began October 1 and continued through October 16. At that time, funding necessary to implement the Affordable Care Act (ACA) was a significant source of contention leading to the shutdown. This time, a primary issue wreaking havoc is funding for Planned Parenthood.

Could the federal government really shut down, again? Yes, indeed it could! Time is running short and numerous tactics could be leveraged to prevent quick passage of a continuing resolution (CR) necessary to permit the continuation of pre-existing appropriations (funding) for a short period. Notably, even if a CR is passed, and a government shutdown is averted for October 1, a CR would likely provide government funding for only a short time, and the risk of a government shutdown in early 2016 would remain a possibility.

With a government shutdown looming, we respond to an obvious question: *What might this mean for my business and my employees?* For employers with federal contracts, a top priority is to manage potential layoffs or furloughs, as well as the impact from such employment actions. However, *all employers*, especially those with businesses in or affected by the supply chain that includes a federal contract, should be thinking about the potential impact on their operations and thus on their workers and employer-sponsored plans. Indeed, absent a deep analysis, it's not always obvious which companies will be impacted by a government shutdown. Finally, for

Boehner to Resign

House Speaker John A. Boehner (R-OH) announced that he will resign from Congress, effective October 30. Sen. Boehner will also resign the speakership. The House will elect its next speaker, and a special election will be held to fill Boehner's seat in the House.

those employers who would not be directly or indirectly impacted by a potential shutdown, the discussion below could be valuable in the event of layoffs or furloughs for other business reasons.

Health Care

A government shutdown on October 1 would coincide with open enrollment for many employers. The shutdown may lead to layoffs and furloughs, resulting in employers simultaneously pushing notices to certain employees for both active employee enrollment and COBRA enrollment (triggered by a loss of coverage from a reduction of hours or layoff). Employers will need to:

- Review the terms of their employer-sponsored health plans and evaluate whether the structure of any furloughs or layoffs will trigger COBRA rights or the need to manage alternate means to collect employee contributions (such as via direct bill or payroll upon return from furlough/layoff)
- Coordinate with payroll vendors, as well as internal and external benefits administration teams, to ensure successful management of the process and minimize risk of liability for failure to comply with plan provisions and applicable law
- Ensure the collection of contributions via payroll deduction upon a return from layoff/furlough does not run afoul of state and local wage and hour laws, including minimum wage laws
- Honor the terms of any applicable collective bargaining agreement, as notice may need to be provided and consent may need to be obtained before the collection via payroll of past due contributions

Furloughs and layoffs could have an impact on ACA employer shared responsibility provisions and assessments. For example, if a full-time employee in an ACA stability period has a loss of medical coverage due to a reduction of hours or furlough and the employee enrolls in the marketplace and receives a premium subsidy, the employer would be subject to an ACA assessment.

Furloughs and layoffs could also have an impact on ACA reporting obligations. Employers should review their administrative operations to ensure that employee/participant data — in cases of layoffs or furloughs — can be captured correctly for various purposes, including as is necessary to report properly on IRS Forms 1094 and 1095.

Retirement

A government shutdown, together with the layoffs and furloughs that may accompany it, has the potential to wreak havoc for retirement plans. Employers should recognize the complexity of such employment actions, even though it's unlikely that a short term, temporary or partial furlough or layoff would result in a termination of employment for retirement plan purposes, or otherwise trigger participants' rights for plan distributions.

ACA Subsidies; Lawsuit Update

On Monday, September 21, the Obama administration filed a court motion in an effort to overturn the recent ruling that granted the House permission to continue its lawsuit alleging that there was no valid appropriation from Congress to spend ACA subsidies. The future of the ACA will continue to be explored as it is a focus of the president, the presidential candidates, Congress and the courts.

Insurance Mergers — Update

A second congressional hearing was held on September 22 to examine the potential impact on consumers of the pending health insurance company mergers. The hearing was held by a subcommittee of the Senate Judiciary Committee. Senators from both parties expressed that consolidation following the proposed Anthem/Cigna and Aetna/Humana mergers may violate the Clayton Antitrust Act of 1914 and could adversely affect consumers, in terms of both quality of patient outcomes and cost. See last week's [Legislate](#) for more on this subject.

A key area of concern and potential complexity involves repayment of outstanding 401(k) loans. Employers will need to:

- Review 401(k) plan rules to determine which approach should be taken for plan loan repayments in the event of short or long-term absences
- Determine if the plan permits a suspension of loan repayments with resumption of repayments following the absence, subject to re-amortization of the outstanding plan loan
- Examine whether repayments are permitted outside of payroll deductions
- Coordinate modifications with the plan recordkeeper, the company's payroll vendor and the affected employees/participants

A second area of concern is contributions that could not be made (due to no pay or reduced pay during a layoff or furlough) and any related company matching contributions. For some employees, the "missed" employee contributions (i.e., 401(k), Roth, after-tax, catch-up) could be made up in later paychecks by making an increase to the elected contribution rate. For other employees, that option may not be available if the plan's rules limit the maximum permitted contribution rates. In either case, matching contributions may be "missed" unless the plan has an end of year "true up" provision. Employers should carefully review the impact on employees and consider how best to manage participant expectations (e.g., via communications, website "popup notices", FAQs for the call center, etc.).

A third area of concern is access to information. Laid off or furloughed employees participating in the savings plans, for example, may need instructions about how to access the plan outside the employer's HR portal. They may also need to leverage alternative access points to sign on to the savings plan website to effectuate participant-directed activity, such as one of the following:

- Review or change investment allocations
- Request a hardship withdrawal or plan loan
- Change beneficiary designations

A fourth area of concern is eligibility to participate. Layoffs and furloughs may cause certain employees to lose eligibility to participate in the plan or delay eligibility to participate in the plan. Eligibility coverage rules should be reviewed carefully. For example, if a plan counts hours worked to determine eligibility, a furlough or layoff may cause a new, part-time employee to be unable to satisfy a plan's 1,000 hour rule during 2015.

A fifth area of concern, specifically for defined benefit plans, is plant shutdown benefits. A government shutdown could cause an employer to close a plant and trigger benefit payments. In such event, employers would need to review their plan and funding status, specifically the plan's Adjusted Funding Target Attainment Percentage (AFTAP). If it is less than 80% or 60%, benefits payments may be restricted.

Supplemental Unemployment Benefits

Employees may be eligible for unemployment benefits while out of work and employers may provide supplemental severance benefits for this period. To make the employer-provided benefits more valuable, both from the employer and employee perspectives by freeing them from FICA taxation liability, employers may wish to structure these benefits to qualify as SUB plans that satisfy the IRS requirements for FICA exemption.

To achieve this goal, the SUB plan's payment structure must be conditioned on eligibility for state unemployment benefits, and must be paid in installments rather than in a lump sum. Our [April 28, 2014 For Your Information](#) discusses the Supreme Court *Quality Stores* decision on the application of FICA to these plans.

Labor and Employment

As noted above, employers with federal contracts, as well as all businesses in the federal contract supply chain, may face many employment-related issues in response to a government shutdown. Businesses that implement temporary shutdowns, reductions in work hours, layoffs, or furloughs or require the use of PTO during the shutdown should:

- Consider whether such actions trigger notice or other requirements under the federal Worker Adjustment and Retraining Notification (WARN) Act or state mini-WARN laws
- Evaluate whether such actions impact the exempt status of affected employees or raise compliance issues under the FLSA or applicable state wage and hour laws
- Review minimum wage laws when employees return to employment (or return to the employment status enjoyed prior to a layoff, furlough or reduction of hours) to ensure that the collection of premiums for health and welfare benefits for weeks past do not violate such laws
- Review collective bargaining agreements, if any, to evaluate whether union negotiations may need to happen before taking such actions
- Prepare for disruption in hiring employees, as it's likely that:
 - E-Verify, the federal government's electronic system to confirm employee work authorization, will be inaccessible.
 - The DOL will suspend processing H-1B and other visa applications, thereby disrupting employers' ability to hire H-1B workers.
- Consider options for foreign workers on employer-sponsored visas to avoid impacting their immigration status
- Prepare to respond to expected unemployment claims and field related inquiries from local agencies that process them.

Week Ahead

We encourage employers to put contingency plans in place in the event of a government or other shutdown. The potential impact to and for employees, employers and employer-sponsored benefit plans is broad. Importantly, we remind employers that, if we learn later today or tomorrow that a government shutdown has been averted, the risk of a shutdown during 2016 will remain if funding is provided for a limited period, in accordance with a CR.

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