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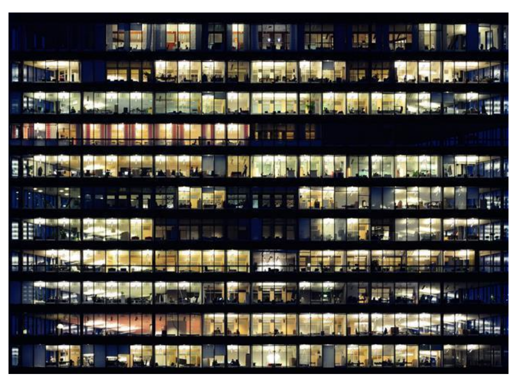
What a Shutdown Repeat Could Mean for Employers with (and without) Federal Contracts

Although the government is again open for business as of Monday night and we have a Cadillac tax extension, CHIP, and more, we could see a shutdown replay when the negotiated February 8 extension expires. Employers may wish to think through appropriate steps for their own businesses if a longer shutdown occurs.

How Will a Longer Shutdown Affect Employers?

On Monday, Senators negotiated an end to the three-day government shutdown, extending the Cadillac tax and CHIP in the process. (See our January 23 *FYI Alert*.) However, because the federal government runs out of money again on February 8, it's possible that discussions will break down and leave us with a repeat of 2013. The shutdown that year lasted more than two weeks, from October 1 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, immigration reform — primarily for select Dreamers currently protected by DACA — is the rub.

In considering the prospect of another shutdown, employers may ask: What might this mean for my business and my employees? For employers with federal contracts, a top priority is managing potential layoffs or furloughs, as well as the impact of those employment actions. However, all employers, especially those with businesses in or that may be 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. In addition, for 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.



Healthcare

A government shutdown could result in layoffs and/or furloughs, necessitating notices about COBRA enrollment (triggered by a loss of coverage from a reduction of hours or layoff). In this situation, employers would need to:

- Review the terms of their employer-sponsored health plans and evaluate whether the structure of any furloughs or layoffs 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). (See our March 4, 2015 *For Your Information* to learn about potential costs of COBRA compliance failures.)
- 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 laws.
- Ensure that the collection of contributions via payroll deduction upon a return from layoff/furlough does not run afoul of any 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 collection via payroll of past-due contributions.

Furloughs and layoffs could also impact 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. (For more on the employer shared responsibility requirements, see our April 17, 2014 *FYI In-Depth*).

Furloughs and layoffs could also impact ACA reporting obligations. Employers should review their administrative operations to ensure that employee/participant data can be captured correctly for various purposes, including as is necessary to report properly on IRS Forms 1094 and 1095. (For more on employer ACA reporting, see our December 27, 2017 *For Your Information.*)

Retirement

A government shutdown, together with the layoffs and furloughs that may accompany it, may present challenges for retirement plans. Employers should evaluate whether a short-term, temporary or partial furlough or layoff would result in a termination of employment under the terms of their retirement plans, or otherwise trigger participants' rights for plan distributions. Employers should also prepare for the possibility of an uptick in applications for loans or hardship distributions if a shutdown goes on for a while.

One key area of concern and potential complexity is repayment of outstanding 401(k) loans. Employers should review their 401(k) plan rules to determine how to approach plan loan repayments in the event of short- or long-term absences:

- See 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.
- Determine whether repayments are permitted outside of payroll deductions.
- Coordinate any loan modifications with the plan recordkeeper, the company's payroll vendor, and the affected employees/participants.

A second area of concern is contributions that might not be made (due to no pay or reduced pay during a layoff or furlough) and any related company matching contributions. Under some plans, the "missed" employee contributions [i.e., 401(k), Roth, after-tax, catch-up] can be made up in later paychecks by increasing the elected contribution rate. That option may not be available if the plan's rules limit the maximum permitted contribution rates per pay period. 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, for example via communications, website "popup notices," and FAQs for the call center.

A third area of concern is access to information. Laid off or furloughed employees participating in the savings plans, for example, may need instructions on how to access the plan outside the employer's HR portal. They may also need to use alternative access points to sign on to the savings plan website to:

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

A fourth area is eligibility to participate. Layoffs and furloughs may cause certain employees to lose eligibility to participate in the plan, or delay their eligibility to participate in the first place. 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.

A final 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 under the IRC 436 prohibited payment rules.

Labor and Employment

Businesses that implement temporary shutdowns, shorten workweeks or reduce employees' work hours, lay off or furlough workers, or require their use of paid leave 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 that may contain more stringent requirements.
- Evaluate whether such actions would jeopardize employees' exempt status or raise other compliance issues under the FLSA or applicable state wage and hour laws.
- Review PTO and other paid leave policies as well as applicable state laws to ensure that they allow mandating the use of leave.
- Review collective bargaining agreements, if any, to evaluate whether union negotiations may need to happen before taking such actions.
- Where feasible, assign employees who were not furloughed to cover furloughed employees' responsibilities.
- Prepare for disruption in hiring employees, as it's likely that:
  - E-Verify, the federal government's electronic system to confirm work authorization, will be unavailable.
  - Processing of H-1B and other visa applications will be suspended.
- Consider options for foreign workers on employer-sponsored visas to avoid impacting their immigration status.

- Prepare to respond to expected claims for unemployment benefits and field related inquiries from local agencies that process them.
- Communicate, communicate, and communicate with employees. Let them know what the business plans are. Consider setting up a hot line to answer questions.
- Post-shutdown, review minimum wage laws to ensure that the collection of premiums for returning employees' health and welfare benefits for weeks past do not violate such laws.

Looking Forward

Employers are encouraged to put contingency plans in place in the event of a government or other shutdown, such as a disaster-related closing. The potential impact for employees, employers and employer-sponsored benefit plans is broad, and the risk of a government shutdown during 2018 remains with a current agreement that only lasts until February 8.

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