How Government Contractors Can Prepare for a Government Shutdown

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The federal government’s funding is slated to deplete on September 30th, 2021. Congress is currently debating the legislation that will allow operations to continue beyond this date, but it remains to be seen whether or not the government will experience a temporary shutdown. Regardless, the Office of Management and Budget signaled for agencies to prepare for a gap in funding, and President Joe Biden’s White House is preparing for this outcome.

“Government shutdowns impact government contractors in significant ways. Work
and payments suddenly stop, and contractors have to decide what to do with their skilled and knowledgeable workers, who suddenly have nothing to do for a company whose cash flow has taken a sudden hit,” said Guy Brenner, a partner in the labor and employment law department and head of the Government Contractor Compliance Group at Proskauer Rose LLP. “This is particularly difficult given that the length of the shutdown is difficult to predict.”

A government shutdown presents unique challenges, not only for federal agencies, but for government contractors and subcontractors as well. These challenges include (but are certainly not limited to) employee pay and overtime, unemployment benefits, the furloughing of employees and more. As a result, it’s important government contractors remain informed and prepare themselves for next steps, should the shutdown indeed take place.

**What Do Government Contractors Need to Know About the Shutdown?**

In years past, government shutdowns complicated pay and backordered work, and the ongoing COVID-19 pandemic adds another layer to the impending decision on September 30, 2021. With a possible shutdown approaching, government contractors should consider their options under their existing contracts. The looming possibility of a government shutdown creates an air of uncertainty, but workers can mitigate the effects with proper preparation. This includes provisions of the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act) which impacts larger employers.

Typically under the WARN Act, employers must notify employees within 60 days of an upcoming large-scale layoff. The WARN Act applies if there is an “employment loss,” which includes a layoff exceeding six months, an employment termination or a 50 percent reduction in hours in each month over six months.

Another consideration for government contractors during a shutdown is furloughing employees. Often contract workers who are furloughed are not paid their owed wages until after the shutdown has ended and a spending agreement is made, sometimes taking many months before issuing the payments. In some instances, such as during the shutdown of 2018/2019, lawmakers may vote against paying contractors for their furloughed time.

Another complication begins when government contractors take a hit during the shutdown and require workers to use their paid time off (PTO) as compensation rather than back pay. And those with PTO still fare better than contractors who are considered non-essential and cannot rely on PTO. What are the options for those workers?

In addition to furlough and PTO, another potential option for government contractors and their employees during the shutdown is unemployment benefits. However, some furloughed employees may not be eligible for unemployment benefits. Government contractors should check state laws to determine eligibility. Government contractors can find additional resources from the U.S. Department of Labor, including fringe benefits, paid sick leave and pay requirements.
How Can Government Contractors Prepare for a Shutdown?

Despite the uncertainty, government contractors can prepare in advance for a government shutdown. E-Verify, the online system used by employers to check the employment eligibility of new hires, is run by the Department of Homeland Security and may be unavailable during a shutdown. To prepare for this, government contractors should complete I-9 paperwork as soon as possible if E-Verify is unavailable.

Another consideration for government contractors during a shutdown is employee benefits. Furloughed employees may have their benefits affected if a government shutdown happens for a long period of time. The longest government shutdown on record was for 34 days in 2018-2019, which was a partial shutdown, whereas the government is facing a full shutdown this time since the government hasn’t passed any funding bills.

If the government shuts down and employees’ hours are reduced, they may lose COBRA health plan coverage. If this happens, government contractors must send qualifying event notices to affected employees, and employees must be given the option to continue coverage under the plan for the duration of the furlough at the employee’s expense for the maximum COBRA continuation period.

If the government is shut down and employees are furloughed, government contractors should tell employees not to do any work. If employees work while furloughed, they must be paid a salary for the entire week. Aside from furlough, government contractors may also decide to allow employees to work a reduced number of hours, but the process needs to be analyzed carefully and managed tightly, due to requirements for exempt employees, salary requirements, local regulations for a reduction in compensation, as well as contractual obligations, overtime exemptions and any foreign work authorizations.

Government contractors should consider incorporating the cost impacts of a shutdown into their planning and allow for it in their contracts. Contractors should plan to establish a line of communication with contracting officers ahead of time to discuss what work might be halted just in case they are unavailable if the government shuts down. Additionally, small businesses that rely on government funding can also prepare by speaking with their bank before any upcoming funding deadlines to ensure they have the cash flow to stay afloat during the shutdown.

What are the Next Steps for Government Contractors?

Government contractors can start preparing now for a government shutdown by completing necessary I-9 paperwork, determining furlough and unemployment benefit eligibility, determining WARN Act eligibility as well as planning for COBRA coverage interruptions.

“When the government shuts down, contractors can feel sudden and serious economic and workflow impacts, and naturally want to react quickly. But doing so without careful thought and planning may only solve one problem while creating an even bigger and potentially more costly one,” Mr. Brenner said. “Wage and hour,
immigration, benefits, unemployment insurance, and lay off laws are all issues contractors need to consider before taking action.”

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