



Employment Law Note

January 2019

Employers and the Partial Government Shutdown



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The United States Constitution, in Article I, Section 9, states that “No Money shall be drawn from the Treasury, but in

Consequence of Appropriations made by Law.” A related federal statute, known as the “Antideficiency Act,” makes it unlawful for federal employees to “make or authorize an expenditure or obligation,” or to involve the government “in a contract or obligation for the payment of money,” if Congress has not already appropriated the money in question. You can read all about it in 31 U.S.C. § 1341.

Congress’ last appropriation to fund the operation of much of the federal government expired on December 21, 2018. Since then, those portions of the federal government have been “shut down” for lack of a valid appropriation: the agencies in question are barred by the Antideficiency Act from incurring obligations to pay wages (or other things) for which no appropriation exists--or at least so goes the argument made by the agencies implementing the shutdown. As of this writing, the shutdown has persisted for 23 days, with no end to the shutdown being evident.

The popular press has written at length about the effect of the partial federal government shutdown on things such as air travel and national park usage. But there are aspects of this shutdown that affect employers as well. This article summarizes the most notable.

E-Verify

E-Verify is operated by the United States Customs and Immigration Service (“USCIS”), an agency within the Department of Homeland Security.

E-Verify has been unavailable since the beginning of the partial federal government shutdown. Presently the E-Verify website contains a banner indicating that “Due to the lapse in federal funding, this website will not be actively managed.” Employers are therefore unable at present to access or use E-Verify when onboarding new employees (or for any other reason, for that matter).

However, before the shutdown, USCIS published guidance on its website about the handling of various issues relating to the looming unavailability of E-Verify. According to this guidance:

- The “three-day rule” is “suspended for cases affected by the unavailability of E-Verify.” Ordinarily, E-Verify employers must open a case within E-Verify within three business days after an employee has started work. This is the rule that is presently suspended--although those employers should still complete a manual employment authorization using the traditional I-9 form.
- For any employee who has received a “TNC” (a “tentative nonconfirmation”) through E-Verify, their deadline to resolve that TNC will be extended, in that the duration of the shutdown “will not count toward

the days the employee has to begin the process of resolving their TNCs.”

- Employers cannot “take adverse action” against employees merely because their E-Verify case “is in an interim case status, including while the employee’s case is in an extended interim case status due to the unavailability of E-Verify.”

- Employers will be unable to access their myE-Verify accounts.

USCIS has promised to provide additional guidance about these subjects once the shutdown ends.

In addition to temporarily shutting down E-Verify, USCIS has also stopped processing new Labor Condition Applications, which will make it impossible for anyone to pursue a new application for an H1-B, H-2, or E-3 visa.

EEOC

The Equal Employment Opportunity Commission (“EEOC”) is also affected by the shutdown. Its website currently states that the agency is “closed” and only a “limited” number of EEOC services are available. This closure has significant impacts on both employers and employees:

- All current investigations are suspended.
- All of the EEOC’s various online portals are offline and unavailable.
- All scheduled intake interviews will be canceled-- but the EEOC will wait until the day before the

scheduled interview to send the notice of cancellation, presumably so that the interview can proceed if the shutdown suddenly ends.

- All EEOC mediations are canceled
- No questions about existing Charges will be answered.
- No new Charges will be processed. The EEOC will accept “Pre-Charge Inquiries” from prospective charging parties, but only if they are printed and delivered (by mail, hand, or fax) to the nearest EEOC office.
- No Freedom of Information Act requests will be processed (although they will be accepted and processed once the shutdown ends).

The EEOC also states that limitations period to file a charge will *not* be extended because of the shutdown— although concerned employees can submit “Pre-Inquiry Letters” before the deadline expires to preserve their rights.

The NLRB and OSHA

Before the shutdown, Congress had separately appropriated funding for the National Labor Relations Board (“NLRB”) and the Occupational Safety and Health Administration (“OSHA”). This means that these agencies have funding to operate through October 1, 2019. It is, therefore, business as usual for both the NLRB and OSHA, at least for another nine months.

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