How To Avoid Wage And Hour Issues During A Gov't Shutdown

By **Shlomo Katz**
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As the federal government fiscal year nears its end, the airwaves are once again filled with the words “government shutdown” and “sequestration.” If those events come to pass, companies that are dependent to any significant degree on federal funding, whether through contracts or grants, may need to think about furloughing some of their staff.

Furloughing hourly workers can be relatively simple, so long as any contracts and collective bargaining agreements are complied with. Under the Fair Labor Standards Act, which covers workers in general, and the Service Contract Act, which covers many government contracts workers, hourly workers don’t need to be paid when they don’t work. As for the Worker Adjustment and Retraining Notification Act, a law that requires advanced notice of certain layoffs, the U.S. Department of Labor took the position prior to a previous government shutdown that this law does not apply to layoffs caused by sequestration. It is unlikely the current DOL would take a tougher line.

One type of worker does present a challenge when an employer shuts down or slows down because of a lack of government funding. These are so-called “exempt” employees: executive, administrative and professional employees, and some “computer employees” (DOL’s term for programmers and certain other workers), who must be paid on a “salary basis” in order to be exempt from the minimum wage and overtime requirements of the FLSA and the prevailing wage and fringe benefit requirements of the SCA. If employers don’t comply with the salary basis test, they could end up owing overtime pay to previously exempt employees. This is not something to take lightly given that roughly 8,000 new FLSA lawsuits are being filed in federal court every year. Moreover, workers on government contracts who lose their exempt status may become subject to the prevailing wage and fringe benefit requirements of the SCA.

DOL regulations say that to be paid on a salary basis means to receive a predetermined amount, which is not subject to reduction because of variations in the quality or quantity of work performed. The regulations add that an employee is not paid on a salary basis if deductions from the employee’s predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Rather, if the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

Thus, if government contractors' exempt employees are furloughed for a day here and a day there because of funding shortfalls, the effect would be to convert them to nonexempt

employees and entitle them to overtime pay in weeks when they work overtime. So, what's a contractor to do?

One option may be for employers to reassign those employees to commercial work, if that is available, or to business development or privately funded research and development projects. But that's not necessarily practical. Instead, here are three other solutions derived from DOL opinion letters issued over the years:

1. Employers can require employees to use any accrued vacation. Even though salary deductions are not permitted for lack of work or partial day absences, the DOL says that it's okay for employers to deduct from exempt employees' leave banks for full or partial days when those employees are instructed not to report to work because of budgetary constraints or lack of work, so long as employees' weekly salaries are not reduced.

2. The DOL's regulations make clear that exempt employees need not be paid for any workweek in which they perform no work. Therefore, if the workplace is closed for a full week, whatever the reason, including a government shutdown, employees need not be paid for that week. (Don't stop reading here; below we offer a cautionary note about what it means to "miss work" in the age of remote email access, iPhones and the Blackberry.)

3. The DOL has said if a company decides in advance, and with no improper motive, to reduce costs by shortening the workweek, the company may also reduce the salaries of exempt employees by any amount it chooses. One caveat is that those salaries must remain above the minimum FLSA thresholds for exempt employees (currently $455 per week). In the case discussed in one DOL opinion letter, for example, the employer reduced the fourth workweek of each month from five to four days with no effect on its exempt employees' status. The DOL also has blessed reducing each workweek from five days to four days and reducing salaries by one-fifth as well. (But here's another very important caveat: In order to pass muster, such a furlough must not be ad hoc. It must be announced in advance and must be scheduled to last for at least two or three months. This type of reduction may not be used for occasional unplanned and transitory periods of low workload.)

In deciding which of these options best meets your company's needs, keep in mind the potential impact to other parts of employee compensation. For example, if a company has a pension that determines benefits based on an employee's five highest salaries, then giving employees a pay cut now could affect them for decades to come. Also, check your health plans to see what obligations you may have during a furlough.

As noted above, an exempt employee must be paid for the full workweek if he or she performs any work during the workweek, unless the employee's leave bank is charged for the time not worked. Therefore, it is important to remember that the definition of work under the FLSA focuses on whether the employee actually worked, not on whether the employee was at work. In this age of remote email access, prolific mobile phone use, and devices for checking email and voicemail on the go, an employer who furloughs its employees (or

intends for any legitimate reason not to pay them) must establish a clear policy prohibiting work from home. It might even be prudent for employers to block remote email access for such employees if possible.

Two final notes: First, some states, notably California, may have their own laws on the subject, so be sure to check those as well.

Second, as mentioned, the suggestions in this article are based on DOL opinion letters. Under a law called the Portal-to-Portal Act, employers are shielded from certain types of liability if they rely in good faith on such government pronouncements, even if a court later disagrees with the DOL's interpretation of the FLSA's requirements. And, it is almost inevitable someone, somewhere, will sue over this. Therefore, before taking any action, it would be wise to obtain copies of the relevant DOL letters addressing these issues and place them carefully in your files. And, now that the DOL has announced that it will again issue wage-hour opinion letters after an eight-year hiatus, you can even ask the DOL whatever questions you have about this subject.

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This article is part of a monthly column by Katz discussing regular challenges that employers face under the Fair Labor Standards Act.