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Beware of Employment Law Issues Amidst a Potential Government Shutdown

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Government Contracts

As Congress scrambles in a last ditch attempt to pass a funding proposal, government contractors face the various employment law implications of furloughs caused by the potential government shutdown. During the last government shutdown in 2013, many federal agencies furloughed employees and instructed contractors to implement similar reductions in contract hours. As of January 18, 2018, the continued funding of the government remains an open question, and employers must be aware of the legal consequences of furloughs should a shutdown come to pass.

Of particular concern to private employers is how to furlough employees who are exempt from overtime payments under the Fair Labor Standards Act ("FLSA"). A misstep could potentially result in an exempt employee being reclassified as non-exempt, which would require the employer to pay the employee overtime wages. Professional services contractors are particularly at risk, as many of their employees may be working on cost-reimbursable government contracts but may be compensated on a salaried basis.

Employers may consider the following potential options for furloughing their exempt employees:

- Furloughs in full week increments: With certain exceptions, FLSA requires that an exempt employee be paid a full week's salary in any week in which she performs work. However, there is no requirement that an exempt employee's salary be paid if the employee has not performed any work for the entire week. Notably, "no work" must be interpreted strictly to preclude any remote work of any kind. This could even include checking email on mobile devices, which could entitle the employee to a full week's pay.
- Mandatory leave bank or paid time off deductions: An employer can require its employee to use accrued leave while on furlough. Once accrued leave is exhausted, the remainder of that furloughed employee's leave may be without pay, so long as the employee performs no work while on furlough.
- "Non-temporary" schedule and salary reductions: An employer may reduce an exempt employee's hours and salary under certain circumstances without converting that employee's FLSA status to "non-exempt." The Tenth Circuit Court of Appeals has opined that an employer may do so if the reduced hours and pay are for a fixed period of at least two months. *See In re Walmart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2005); *see also Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 166 (2d Cir. 2008) (holding that prospective quarterly pay adjustments did not cause employee to lose exempt status). However, employers must be mindful that "pervasive manipulation of payments that makes a 'sham' of what purports to be salary" may cause loss of exempt status. *In re Walmart Stores, Inc.*, 395 F.3d at 1188. Additionally, employers also must ensure that

the salary meets the minimum FLSA salary requirements for exempt status (which, in most instances, is $455 per week).

- Voluntary reduction in hours: An employee may volunteer to reduce her hours and salary. However, her decision must be entirely and completely voluntary.

As compared to exempt employees, employers have many options to furlough non-exempt employees. Employers can reduce a non-exempt employee's hours (including furloughs of less than a full week) and wages without running afoul of FLSA. Of course, minimum wage laws (including regulations implementing President Obama's Executive Order mandating a $10.10 minimum wage for contractors) would still apply. Further, any H-1B employee placed on a reduced work schedule must still be paid at the full rate specified in her visa documentation.

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Another employment law issue for contractors to be aware of in connection with a government shutdown is the required notification to employees under the WARN Act. The federal WARN Act affects employers with at least 100 employees. If, in a six-month period, a furlough would reduce the hours of at least 50 employees by at least 50 percent, the employer must first provide at least 60 days' notice to affected employees. These federal requirements may be surpassed by state requirements, as State WARN Act requirements sometimes are more onerous.

Finally, government contractors with employees who are former or returning members of the military services must ensure that furloughs do not violate those employees' rights under the Uniformed Services Employment and Re-employment Rights Act ("USERRA"). A former service member who was reinstated under USERRA may be protected from discharge without cause for up to one year after reinstatement. Thus, to the extent an employer decides to terminate or furlough that employee, the employer should ensure it understands its USERRA obligations before taking action.

We will continue to track the latest on potential government furloughs and their impact on contractors. If you have any questions concerning the material discussed in this client alert, please contact the following members of our Government Contracts practice:

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