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CLIENT ALERT

The Shutdown Labor & Employment Top 10

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With the federal government shut down heading into its second week, many employers, especially contractors, have been faced with difficult decisions regarding laying off and furloughing employees. If your company has faced or is facing these decisions, keep in mind the following labor and employment issues that could expose the company to liability.

- 1) Fair Labor Standards Act (FLSA): As you know, exempt and non-exempt employees are treated differently under the FLSA. Employers should exercise caution so as not to risk losing an employee's exempt status that may trigger liability for overtime hours the employee worked prospectively and retrospectively. An exempt employee is entitled to receive his or her full salary for any week in which the employee performs any work, without regard to the number of days or hours worked. However, a company can ask employees to take accrued paid time off for any partial week worked. Make sure you are aware of how the company has defined the workweek, that you instruct non-working employees not to do any work until instructed to do so and secure all remote devices or access to work applications.
- 2) State Wage and Hour Laws: While most state laws mirror the federal guidance, be sure to check state wage and hour laws and regulations to ensure that the company is in compliance. Wage and hour issues generally do not bite you now, but tend to surface down the road after termination.
- 3) Furlough or Layoff: The term furlough is most often associated with government employees but has more recently been used by private industry. A furlough is generally expected to be temporary due to a temporary interruption of work while a layoff is more definite. Although a layoff may be temporary, the employee has less expectation of returning to work. In either case, it is likely an employee is eligible for unemployment benefits. However, in a furlough situation, the employer still maintains fringe benefit programs, like health insurance, and collects or absorbs the employee portion of any premiums. With a layoff, the employee is effectively terminated, however temporary, and may be eligible for 401(k) benefits and COBRA.
- 4) Avoid Discrimination Claims: When choosing whom to layoff or furlough, approach the decision as you would any layoff. Before instituting the employment action, have a sound and well-documented process for selecting those who will be subject to the

furlough or layoff. Make sure you analyze the results of your decision to determine whether the analysis indicates a disparate impact or discriminatory intent.

- 5) Service Contract Act (SCA): At this point, there is no reason to believe that the shutdown will constitute a break in service for the purpose of benefit calculation under the SCA. Should the shutdown continue for several months, this may change.
- 6) False Claims Act/Whistleblower Statutes: False Claims Act and whistleblower allegations are common where there are complex staffing and billing situations. Be mindful of the impact that work force decisions will have on your ability to bill the government for certain workforce costs. You should also carefully review payments to the government and reconcile any discrepancies. The False Claims Act can be found at 31 U.S.C. §§ 3729–3733.
- 7) Security Clearances: Security clearances will not be processed during this time. This is important for contract administration and staffing concerns. Advance staff management and planning will be critical to many employers who will have to ramp back up when this is all over.
- 8) E-Verify: The E-Verify system is offline during the shut down. However, the I-9 requirement is still in place. All new hires continue to be subject to I-9 employment verification by employers.
- 9) Track Costs: These may be recoverable costs. Make sure you adequately track any and all costs associated with the wind-down, ramp-up or acceleration of work, including labor costs and attorneys fees.
- 10) Communication: Clear communication with employees is critical and avoids many employer-employee disputes. Give some thought to how you will notify employees of their work status. Also, let employees know that they may be eligible for unemployment and how their fringe benefits may be affected by their work status.

If you have any questions regarding impending employment actions, contact Nichole DeVries, ndevries@pilieromazza.com.