

ALERT

Preparing For COVID-19's Potential Effects on Employers That Depend on the Operations of the Federal Government

March 13, 2020

WHAT: As cases of COVID-19 continue to rise in the United States, federal agencies have begun preparing for the possibility of either a complete shut-down of operations or a move to teleworking for all employees able to do so. Wiley is closely monitoring the situation, but as the government continues to make more announcements regarding agency responses and federal facility closures, it is important government contractors prepare for the eventual effects of these announcements on its workforce.

WHEN: It appears that the agencies are making decisions regarding closures and/or moves to teleworking on a day-to-day basis. As of this alert's publication, the U.S. Securities and Exchange Commission has asked its Washington D.C. staff to telecommute, as well as the Federal Communications Commission. All Smithsonian museums and the National Zoo close on Saturday, March 14, and a number of other federal buildings have been closed to the public, such as the Library of Congress, the Capitol, White House, and Pentagon. The U.S. Office of Personnel Management has advised all agencies to establish telework agreements with their employees and to start expanding telework access to contractors. Most agencies have suspended non-essential travel, and several, including NASA, the Air Force, and the National Oceanic and Atmospheric Administration, have started conducting teleworking drills.

IMPACT ON INDUSTRY: Whether and to what extent the agencies' decisions to telework or complete closures will impact government contractors' employees is uncertain. Agencies need to expand their teleworking policies to ensure that employees, including contractors,

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at all levels are able to function outside of the traditional office environment. While agencies all have furlough procedures in place, it is less likely that any have prepared a policy well in advance for “emergency teleworking.” Agencies will need to determine the most efficient means to continue functioning despite the decentralized work force—decisions which will have a flow down effect on government contractors. Government contractors may be receiving a variety of different policy notices and expectations of uninterrupted work from different agencies.

Bearing in mind the uncharted waters the country is finding itself in, government contractors (and others that depend on the federal government to function) must now make decisions about how to deal with their workforce. Normally, in the case of a government shutdown, government contractors must make decisions regarding how to deal with “work-less” employees. Some of those decisions come down to 1) deciding whether to furlough employees, 2) how to furlough without placing employees’ exempt status at risk, or 3) if other arrangements, such as reduced workweeks or telework, would be more appropriate given the circumstances and nature of the company’s contracts.

With the latest announcements regarding both federal facility closures and the move to teleworking, government contractors will have to deal with all of the above considerations but with additional insecurity regarding how COVID-19 will affect operations—*i.e.* whether, and to what extent, the agencies will issue stop-work orders and whether employees should be sent home regardless to help prevent exposure to COVID-19. It remains to be seen how each agency will react to the spread of COVID-19. While some agencies may be forced to suspend the majority of operations due to the nature of their work, others may be able to handle the move to telework in a way more akin to when inclement weather causes agencies closure. Given the current agency responses, it is unlikely that most federal employees themselves will be furloughed; however, contractors may find the slowdown in work or functions requires them to temporarily shrink their workforce. While decisions regarding what to do with an idled or potentially idled workforce are never easy, they are especially difficult now given the unprecedented nature of the announcements and unclear responses by the agencies.

Bearing these things in mind, government contractors should carefully consider the following before making decisions regarding their workforce during the coming weeks:

- Work from Home Arrangements. Carefully consider whether employees can carry out their work from remote locations before asking employees to work reduced hours. Conforming to how the government is instructing its workforce to conduct business and implementing telework procedures will allow the contractor to demonstrate that it has attempted to mitigate against the effects of any shutdown. Many agencies are already working with contractors to develop work from home capabilities so that operations do not come to a complete halt during this time. Employees should be instructed on proper procedures for working from home and to take laptops, charging cables, and any other physical items needed to work remotely every evening.
- Security Concerns. Security requirements in federal contracts may require contractors to exercise increased diligence and implement additional policies and security measures should employees be

moved into telework positions. Similarly, with an increase in telework, risks associated with the lack of direct oversight will also increase—such as the over-billing of time, sloppy handling of confidential information, and lapses in communication. Contractors are advised to review their current policies and procedures, remind all employees of their obligations, and diligently monitor compliance.

- Federal and state wage and hour laws. To be exempt from overtime under the federal Fair Labor Standards Act, an employee must be paid on a salary basis of at least \$684 per week. Accordingly, while an employer can withhold payment for any full week in which the employee does not work, if the employer withholds payment for only part of a week in which the employee does not work due to a furlough or other work arrangement, that decision could jeopardize exempt status. The same considerations should apply before asking employees to work reduced schedules. Non-exempt employees who are able to work from home should be instructed to work their normal working hours.
- Published leave policies. In typical shutdowns, some government contractors have mitigated various wage issues by requiring exempt employees to use vacation pay or paid time off (PTO) to cover compensation during non-working weeks. Some states, however, require employers to comply with their published leave policies, thus it is essential to review those policies, or consider developing a policy specific for this situation, before mandating the use of vacation pay or PTO.
- Contractual Obligations to Employees. As always, carefully review any contracts to ensure that furlough or other employment decisions do not run afoul of any of the provisions.

Contractors should be careful to diligently track costs during this time, including any efforts taken to minimize increased costs, the costs to bring back idled employees, or any other costs associated with providing required services to the government during this time.

Finally, contractors are always advised to stay in close contact with their contracting officers throughout this uncertain time. It is essential that contractors have clear, preferably written, communications with the agencies regarding expectations for meeting contract requirements, including any requirements regarding personnel. As things develop, it will be necessary to continuously review the policies in place and stay abreast of any decisions or changes by the agencies.

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