

# Management Alert



## FISCAL CLIFF NO. 3: Impact on Federal Enforcement

In our first two Management Alerts addressing the Budget Control Act of 2011 (“BCA”), we discussed the impending “fiscal cliff” of tax increases and spending cuts and the potential that the combination would cause the nation’s private employers to lay off or furlough employees. In this Management Alert, we address the fiscal cliff’s anticipated impact on federal labor and employment enforcement agencies, and what that means for private employers.

### Sequestration

At the heart of the issue potentially impacting the federal labor enforcement agencies is what is known as “sequestration.” The BCA requires that certain steps be taken if Congress fails to enact deficit-reduction measures slashing the federal deficit by at least \$1.2 trillion. Unless an agreement is reached, President Obama must issue a sequestration order on January 2, 2013 that would reduce non-exempt defense and non-defense spending by a uniform percentage.

The 2013 cuts apply to “discretionary” spending and are divided between reductions to defense (\$500 billion) and non-defense (\$700 billion). For the Department of Labor, this translates (essentially) to an across-the-board budget cut of 8.2%.

### Impact of Sequestration on the Agencies’ Budgets

In the event of a sequestration order, the Wage and Hour Division (WHD), Equal Employment Opportunity Commission (EEOC), National Labor Relations Board (NLRB), Occupational Safety and Health Administration (OSHA), and Office of Federal Contract Compliance Programs (OFCCP) -- among many others -- will need to identify ways to reduce their “salaries and expenses” account by approximately 8.2%. The agencies will find themselves in a situation similar to many private employers and will need to consider many of the same cost-containing measures that private employers are considering.

There are, of course, numerous ways for the agencies to accomplish the required budget reduction. For example, at least some of the agencies are actively discussing reduced-schedule furlough programs where personnel take one unpaid day off every week or two. Undoubtedly, the agencies also are identifying opportunities to reduce costs by limiting out-of-town travel and by dramatically scaling back (or eliminating) conferences. As is the case in the private sector, teleworking, webinars, and conference calls will take the place of in-person meetings (to the extent that they have not already done so).

### What This Means for Employers

Although an across-the-board budget cut of 8.2% is hardly inconsequential, as a practical matter, it should not have a major impact on enforcement. There likely will be a slight decrease in the raw number of enforcement actions (particularly in remote locations, i.e., locations that require the agency to incur travel costs) and a slight increase in the duration of those investigations. It is doubtful that any strategies or areas of focus will undergo any significant changes. At the end of the day, although a particular employer may be marginally less likely to be subject to an enforcement action and an enforcement action may take a marginally longer amount of time to complete, employers in general should continue to operate under the

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same premise that they have in the past nearly four years: expect and prepare for aggressive enforcement.

For WHD, that means a continued focus on “fissured” industries, including construction, hotels, and restaurants; the assessment of liquidated (double) damages; an increased threat of agency initiated litigation; and an increased use of penalty assessments, debarment, “hot goods” designations, and criminal prosecutions. For the EEOC, it means an emphasis on aggressively resolving its inventory of charges and litigation, searching for attractive test cases to advance novel legal theories, and an ongoing focus on large systemic discrimination complaints. The NLRB will continue to vigorously promote policies extending the protected rights of non-union employees, favoring union organizing, and expanding the terms and conditions of employment in the work place subject to collective bargaining. OFCCP will prioritize enforcement efforts and pinpoint multi-establishment and industry-wide deficiencies and violations with particular interest in employment selection and pay equity issues and will sharpen its focus on the construction industry. Its enforcement of contractor obligations regarding recruiting and selection of veterans and persons with disabilities will increase once proposed veterans and disability regulations are finalized. OSHA will turn its attention to the countless number of new whistleblower statutes for which it has enforcement authority.

## Conclusion

Employers should take the time now to ensure that their policies and practices comply with federal labor and employment standards. Although the fiscal cliff may slow the federal enforcers down, investigative efforts are likely to continue and to continue aggressively.

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## Next Up

Seyfarth Shaw’s next Management Alert in this series discussing the potential impact of the Fiscal Cliff negotiations on the Affordable Care Act’s “Pay or Play” requirement and other tax benefits associated with employer-sponsored benefit plans that will expire if the Fiscal Cliff is not avoided.

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