

One Minute Memo®



Potential Government Shutdown: Immigration Consequences for Employers and their Foreign National Employees

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***Seyfarth Synopsis:** If Congress fails to pass a funding bill by midnight on Friday, April 28, resulting in a federal government shutdown, it would trigger numerous immigration-related ripple effects on employers, both large and small. The federal government, through its various agencies, plays a key role in authorizing and regulating the employment of foreign citizens in the United States. Employers should be aware of how the federal government shutdown could affect their ability to hire, verify and maintain the status of foreign national employees.*

Background

A federal government shutdown could begin at midnight on Friday, April 28 if Congress fails to pass a funding bill. This means that, effective Monday, May 1, only "essential" government workers would report to work until Congress passes a spending bill.

U.S. Citizenship and Immigration Services (USCIS)

USCIS would be minimally impacted because it is largely a user-fee funded service. The vast majority of USCIS workers would continue to report to work during a shutdown. This means USCIS would continue to process applications and petitions for immigration benefits, with some processing delays possible. As explained below, however, petitions for which a Department of Labor (DOL) certification is required -- such as the H-1B that requires a Labor Condition Application (LCA) -may be adversely affected. USCIS has not yet announced whether it would temporarily accept extensions without DOL-certified LCAs, although historically USCIS has not.

E-Verify, USCIS' free, internet-based system that allows businesses to determine the eligibility of their employees to work in the United States, would be inaccessible during the shutdown. However employers are reminded that they must continue to complete I-9 forms in compliance with the law and when E-Verify becomes available, create cases in the E-Verify system. During a prior shutdown, USCIS issued guidance suspending the "three day rule" for any case affected by the shutdown. Historically employees caught in the Tentative Non-Confirmations (TNCs) process were provided an extended time period to resolve the issue.

Again, employees would still be required to complete Section 1 of the Form I-9 on or before the first day of employment and employers would still need to complete Section 2 of the Form I-9 no later than the third business day after an employee begins working for pay.

Other components of the Department of Homeland Security (DHS), such as Customs and Border Protection (CBP) and Immigration Customs Enforcement (ICE) are expected to retain most of their essential staff. CBP has not yet indicated whether it would process immigration applications at the border, such as initial TN and Blanket L applications for Canadian nationals, but it is expected that these adjudications would continue.

Department of Labor

Office of Foreign Labor Certification (OFLC) employees, who fall under the umbrella of DOL, are considered non-essential and would be placed in furlough status during the government shutdown. **OFLC would neither accept nor process any applications or related materials**, including LCAs, applications for a prevailing wage determination, applications for temporary employment certification, PERM audit responses or applications for permanent employment certification (.e.g PERM applications). **OFLC's web site, including the iCERT Visa Portal System, would become static and unable to process any requests or allow authorized users to access their online accounts.** Employers with concerns about these deadline-specific functions should consult an immigration attorney with questions about proper maintenance of status during these uncertain times.

Department of State (DOS)

Visa issuance should continue, at least temporarily. Domestic and overseas Consular operations should remain fully operational as long as sufficient fees exist to support operations. However, if a passport agency is located in a government building affected by a lapse in appropriations, that facility may become unsupported. The continuance of consular operations in such instances would be treated on a case-by-case basis by the Under Secretary for Management.

Department of Justice (DOJ)

DOJ trial attorneys and immigration judges should conduct removal (deportation proceedings) only for individuals in federal custody at least for a short period of time. All other cases would likely be suspended during the shutdown. Similarly, furloughed would be attorneys and staff within the Immigrant and Employee Rights section of DOJ charged with accepting and investigating charges of workplace discrimination arising under the immigration laws.

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