

How a Federal Shutdown Would Affect Enforcement, Investigations, Bloomberg Law

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With the government's annual funding package set to expire Sept. 30 and no spending compromise in sight, the federal government appears headed for an imminent shutdown.

Any shutdown will send hundreds of thousands of government workers home and bring many functions of government to a halt, with wide-ranging impacts on individuals and businesses across the US.

For those organizations and businesses that rely upon and interact with the federal government, it's essential to understand the shutdown's legal impact—on agencies that make regulations, on the Department of Justice's ability to enforce the law, on congressional investigations, and on the federal court system.

Shutdown Rules

When Congress fails to fund the federal government, the operations of most federal agencies are restricted by the Antideficiency Act—a 150-year-old law that bars them from spending any money in the absence of either an appropriation from Congress or express legal approval. This means many federal employees can't do their jobs in a shutdown.

Some employees are “excepted” from a shutdown because they are required, for one of many possible reasons—including the need to protect the safety of life or property—to continue performing their jobs.

And many others are “exempt,” at least temporarily, because their agencies may have been separately funded and can continue operating until they run out of alternative sources of funding.

But hundreds of thousands of employees fall into neither category and are thus forbidden from working—even for free. The resulting labor stoppages across agencies will substantially impact the ability of the federal government to carry out its work.

Regulatory Agencies and the DOJ

Every federal agency has its own individual contingency plan for operating during a government shutdown; however, these plans generally adhere to the restrictions of the Antideficiency Act. This means much agency work will come to a standstill.

However, some agencies will continue to operate at full capacity in the short-term because they have leftover funding from last year's appropriations or continuously because they are fee-funded, like USCIS.

In addition, some very specific agency activity is exempted from the Antideficiency Act restrictions. For instance, the Federal Trade Commission's merger challenges still proceed because there is a compelling government interest in stopping unlawful mergers before they are consummated.

Beyond these exceptions, ordinary investigatory activity across agencies will be halted due to staff furloughs—unless a pause in the investigation presents an urgent risk to human life or property. And all non-emergency agency rulemaking will freeze.

Practically, this means businesses subject to general probes or negotiating on proposed regulations may see their federal counterparties disappear for the duration of the shutdown, while those dealing with more urgent investigations and/or emergency rulemakings are more likely to have to continue dealing with the federal government.

Because of its importance to the “safety of human life and protection of property,” many Department of Justice activities are exempt from shutdown restrictions under the Antideficiency Act. Critically, all criminal proceedings are exempt, meaning prosecutions will continue uninterrupted. Exemptions for the protection of human safety and property also allow federal law enforcement and national security agencies, including the FBI, to continue their activities as normal during a shutdown.

Comparatively, on the civil side, the DOJ will seek to delay litigation in most situations—except where a pause jeopardizes human life or property, or a court denies a request for postponement. Thus, for example, many personnel in the Civil Rights and Environment and Natural Resources Divisions will be furloughed and all non-emergency work in those divisions will cease.

Congress

Unlike federal agencies, congressional operations during a shutdown largely continue uninterrupted. Because the 27th Amendment bars any alteration to congressional pay until the next term, salaries for members of Congress will continue to be paid.

And members of Congress are given broad discretion to designate members of their staff as essential employees during a shutdown, meaning many staffers will be required to show up for work without pay, receiving backpay only after the shutdown ends. Members from both parties have indicated their plans to maintain most of their staffs.

This means that while congressional hearings are likely to be postponed or canceled as members publicly focus on finding solutions to fund the government, staff work will continue apace, including on investigations. Any individual or company currently subject to a congressional investigation is unlikely to see any slowdown.

Federal Courts

The federal courts have said they will be able to continue operations for at least two weeks in the event of a shutdown, relying on court fees and other available funds to continue hearing cases. But if the shutdown goes longer than that, the courts will be impacted—the judiciary’s operations will be curtailed and only those staff members essential to the court’s most critical responsibilities would continue to work.

Should a prospective shutdown last more than two weeks, organizations with pending business before a federal court can expect their proceedings to slow or be postponed until appropriate funding is allocated to resume the courts’ functions at full capacity. In the short term, however, criminal and civil proceedings in federal court should continue as normal.

Impact

A shutdown will substantially impact the scope of the government’s investigatory, adjudicatory, and regulatory capabilities.

Many businesses and organizations around the country actively engage with federal employees, and it’s essential that they understand how that engagement is about to change. Ironically, Congress and its ongoing investigations will see the least day-to-day impact during the course of the shutdown.

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