



Not paying feds on time during 2018-19 shutdown violated FLSA

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HOTLAW: The U.S. Court of Federal Claims found the government violated the **Fair Labor Standards Act** overtime and minimum wage provisions by forcing some federal employees to work without receiving their pay on regularly scheduled dates during the 2018-2019 shutdown.

Judge Patricia Campbell-Smith noted that "although the text of the statute does not specify the date on which wages must be paid, courts have held that employers are required to pay these wages on the employee's next regularly scheduled payday."

By not paying employees on regularly scheduled paydays during the shutdown, the government violated the **FLSA**, said Heidi Burakiewicz, a partner with Kalijarvi, Chuzi, Newman & Fitch, which jointly filed the lawsuit with the American Federation of Government Employees.

Case name: *Tarovisky et al., v. United States*, [120 LRP 37313](#), No. 1:19-cv-00004 (Fed. Cl. 12/01/20).

Ruling: The U.S. Court of Federal Claims found the government violated the **FLSA's** overtime and minimum wage provisions by failing to pay certain employees who were forced to work during the 2018-19 shutdown on their regularly scheduled paydays.

Background: During the longest government shutdown in history from Dec. 22, 2018, to Jan 28, 2019, certain "essential" employees had to continue working even though they were not being paid on their regularly scheduled pay dates. Although employees were paid retroactively at the end of the shutdown, the suit alleged the government violated the **FLSA** by failing to pay "essential" employees on their regularly scheduled pay dates, and that employees were entitled to liquidated -- or double damages -- because the government acted in bad faith by not figuring out how to comply with the **FLSA** before the shutdown occurred.

Liquidated damages

If the judge ultimately finds liquidated damages, the government could be forced to pay out "tens of millions of dollars" in damages because each covered employee would receive \$1,160 for the minimum wage violation plus an additional amount for the "full value of the overtime they worked during the shutdown," according to a KCNF press release.

The government asked the court to bar liquidated damages because the Anti-Deficiency Act prevented paying wages until funding was available, but Campbell-Smith declined to rule on liquidated damages at this early stage.

Therefore, the "only issue remaining in the case is whether the government is liable for liquidated damages," Burakiewicz told **cyberFEDS®**.

However, "we feel confident that the Government will not be able to establish that it acted in good faith -- the required showing to avoid liquidated damages -- since it was on notice of its obligation" based on previous case law.

In [*Martin, et al. v. United States*, 117 LRP 5798](#) (Fed. Cl. 02/13/17), the court found that employees were entitled to liquidated damages because the government did not pay minimum and overtime wages on the employees' next regularly scheduled payday, explaining that the Anti-Deficiency Act does not excuse the government from complying with the **Fair Labor Standards Act** during a government shutdown.

Retroactive pay

Normally, Congress approves retroactive pay at the end of a shutdown, but the judge noted that paying wages retroactively does not negate the **FLSA** violation, according to Burakiewicz.

"The remedy for that is liquidated damages, which are not meant to be punitive but to rather compensate employees for the harm they incurred," she added.

Given that the current continuing resolution expires Dec. 11 and there is a possibility of another government shutdown, "we can't expect employees to go to work under these extremely taxing and dangerous circumstances without pay, especially with the added stress about how they will feed their kids, buy holiday gifts, or pay for the medical care [if] they or their families get COVID-19," she added.

Congress passed the Government Employee Fair Treatment Act of 2019 to provide retroactive pay for federal employees affected by the lapse in appropriations that occurred between December 2018 and January 2019, as well as any future lapses.

However, this law would not necessarily fix **FLSA** violations because employee would not be paid until appropriations are restored, which could mean pay dates would be missed during the shutdown period.

Employees must opt-in

Burakiewicz emphasized that since this is an opt-in collective action, "employees are only eligible if they join the case at www.2018governmentsshutdown.com."

As of Dec. 1, 32,212 have joined the case, Burakiewicz said. This covers "essential" employees who performed a "variety of critical roles," such as correctional officers, food safety inspectors, hospital workers, federal air marshals, Secret Service police, and transportation security officers, the KCNF press release said.

AFGE National President Everett Kelley agreed noting that the union's "members put their lives on the line to keep our country safe and requiring them to work without pay is nothing short of inhumane. Positions that are considered 'essential' during a government shutdown are some of the most dangerous jobs in the federal government, including front-line public safety positions in law enforcement, among many other roles."

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