


MEMORANDUM

October 3, 2013

TO: Tribal Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP  DYNAM

RE: *Indian Health Service Conference Call for Tribal Leaders on the Partial Government Shutdown*

We report on the October 1, 2013, conference call hosted by Indian Health Service (IHS) director Yvette Roubideaux, M.D., M.P.H. regarding the status of IHS and tribal operations during the partial government shutdown necessitated by the lack of enactment of FY 2014 appropriations for the Indian Health Service. In fact, Congress has not enacted a single FY 2014 appropriations bill. Under the Anti-Deficiency Act federal agencies are not allowed to incur obligations that are in advance of, or exceed, an appropriation. However the Department of Justice has ruled that there are some exceptions to this, notably including work directly related to the safety of life and property.

FY 2014 Appropriations. There are no FY 2014 IHS appropriations for IHS or any other federal agency. IHS and tribal health care services in FY 2014 must at this time be provided using third party collections or carryover funds or other alternate resources.

Status of IHS /Tribal Employees. Employees funded through annual appropriations are either in the category of "excepted" (who used to be called "essential") or "non-excepted" (who used to be called "non-essential"). Each federal agency has to make the determination of who falls into which category and notify each employee accordingly. And, while tribal contact/compact programs are in the excepted category, each tribe/tribal organization has to work out the details regarding status of its employees.

Excepted -- Working but Not Currently Being Paid. Employees whose positions involve the safety of human life or the protection of property are in the "excepted" category. They are working but not currently being paid although it is expected that once the shutdown is over, they will receive back pay. Hence, 94% of *IHS employees* are in the excepted category, much, much higher than many other agencies. All IHS Service Unit employees are in the "excepted" category.

As with IHS direct health care services, IHS considers *PL 93-638 health care services* as involving the safety of human life and so they are under the "excepted" category. Tribal health care providers are encouraged to continue their health care services, hopefully being able to access alternate resources such as third party collections. IHS encourages tribal and urban Indian organizations to continue providing services the best as they can.

Commissioned Corps (CC) officers are primarily IPA/MOA employed and they are excepted. They can, unlike other excepted employees, request leave during the shutdown (thus receiving pay during this time), but IHS is encouraging them to continue working in IHS/tribal programs. A question was asked if the tribe paid the CC officers during the shutdown, if they would eventually get reimbursed, but we are unsure of the response.

Non-Excepted -- Furloughed and Future Pay Uncertain. The category of employees whose jobs are "non-excepted" are furloughed, meaning they may not work and are not being paid. In the past government shutdowns Congress has compensated furloughed workers for lost pay, but there is no guarantee of it. Indeed, there are some members of Congress who say that furloughed workers should not be paid for work they did not do. Six percent of IHS workers are furloughed. Most furloughed workers are in the IHS Headquarters and Area offices.

Employees not paid via annual appropriations or other exceptions. Some employees are paid on prior year funds, mandatory appropriations, or reimbursements, and they are to continue work as usual (are not excepted and are not furloughed). The Special Diabetes Program for Indians is mandatory funding (not subject to appropriations) and those funds will continue, but given the four cycles of funding under that program it is complicated – one should call the Division of Diabetes and Prevention on Albuquerque with questions.

Questions

In response to a question about the affect of the shutdown on contract support costs settlements, Dr. Roubideaux noted that the funding comes from the Judgment Fund (not connected to FY 2014 appropriations). She said that most OSG staff have been furloughed, but that if there is an outstanding offer, let her know and she will try to continuing it through the process.

Dr. Roubideaux was asked how the IHS is continues to operate and she responded that it is being funded by third party collections and carryover at this point, but said she understands that each program is in a different situation.

A question was asked about the status of IHS meetings in Rockville and the response was that the work of the IHS headquarters is to do things that support local facilities, so we take that to mean it will depend on the nature of the meetings. We note that Interior Assistant Secretary

Washburn has in a letter to tribal leaders said that there will be no meetings at Indian Affairs during the shutdown.

A question was asked about contract health service referrals since there is no appropriation. Dr. Roubideaux did not really have answer, saying perhaps you could look at what you expended last year or "proceed as you can to provide services at what you feel is prudent."

A question was asked about the length of time it takes for Congress to appropriate money and when it would reach the tribes. The response from Dr. Roubideaux was that it varies, taking from a couple weeks to a couple months. The process is: Congressional enactment of funding; OMB review; OMB apportionment; IHS allots funds to the Area Office; Area Office distributes it to the tribe. Dr. Roubideaux said she guarantees that IHS will get the funds to the Area office ASAP and that that the Area Offices will distribute it as soon as possible. She said the process is faster now due to technology, and they can get the funds allocated from Headquarters to Area offices in a day or so.

A question was asked if furloughed employees qualify for unemployment and the response was it depends on how long the shutdown lasts.

Dr. Roubideaux said that there will probably be another tribal leaders conference call if the government shutdown lasts a few more days.

Please contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282), or Karen Funk (kfunk@hobbsstrauss.com or 202-822-8282) if we may provide additional information on the IHS activities during this time of government shutdown.