



# *SBLC WEEKLY*

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## ***UP THIS WEEK***

The House will consider H.R. 4, the bill to repeal the expanded Form 1099 requirement. The only question is whether it will substitute the language of H.R. 705, the bill which repeals the expanded Form 1099 requirement plus another Form 1099 expansion for “incidental” rental property owners, and pays for it all with a revenue offset that would recapture excess premium assistance credits that are scheduled to be issued when the new health care system kicks in. Whatever the House passes, it will move the debate back to the Senate.

This week, the Senate will debate the merits of a patent reform bill, S. 23. There will be some efforts on the floor to revise it including retaining the “first to invent” patent right. The bill approved by the Senate Judiciary Committee would switch the U.S. system to “first to file.”

## ***AM I ESSENTIAL?***

On March 4<sup>th</sup>, the current temporary continuing resolution (CR) funding the Federal government for the fiscal year 2011 expires. Congress is debating the nature of the next continuing resolution. The new

House majority has had their first opportunity to “make a statement.” They approved a continuing resolution, H.R. 1, which makes significant cuts in specific programs for the rest of the year. In theory, it would be up to the Senate to act next. It is almost 100 percent certain they will not pass H.R. 1, as is.

But that will not be the next step. With each passing moment, it looks as if there will be at least one more short term temporary CR. Right now the choices are a Senate one-month CR or a House a two-week CR with additional cuts. Of course, once whatever CR they approve runs out, they are back to shutdown showdown. Here’s an SBLC primer on shutdowns.

First, the popular history. Everybody talks about the 1995 shut down. There were two shutdowns that year. From Monday, November 13, 1995 to Sunday, November 19, 1995 and from Friday, December 15, 1995 to Saturday, January 6, 1996. About 800,000 federal employees were furloughed initially. The second included only about a fourth of those employees for reasons explained below. While it is the shutdown everybody talks about, it

was not the first shutdown of the government. Since 1977 there have been seventeen of varying lengths but none since 1995/96.

## ***Why Does the Federal government have to shut down?***

Article I, Section 9 of the Constitution states that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This is often referred to as the “Appropriations Clause.”

The language would seem to be rather straightforward. No exceptions. It did not take long after the Constitution was ratified for unwritten “exceptions” to emerge. Somewhere along the line, the premise that “emergencies” were exceptions took hold. I will not go into the Constitutional arguments about the authority for the emergencies, but it is not a straight line between the Constitution and modern day. Turns out our initial leaders took the opportunity to fill in the blanks (Remember your Federalist Papers?) and one of them was the President could not always wait for Congress to appropriate, notwithstanding the provision of the Constitution. Apparently, the

Judiciary (i.e. the Supreme Court) has never provided specific guidance on the scope of the “exceptions.”

Here’s a law I bet you never heard of. According the General Accountability Office (GAO), the “The Antideficiency Act (ADA) is one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse.” (*No hyphen after the anti, it will drive spell check crazy so I am using the acronym ADA, even though most of us think of that as the Americans with Disabilities Act.*)

According to the Senate Budget Committee: “In 1870, the legislative appropriations bill was the vehicle for a number of reforms relating to appropriations practices, including the section later known as the Antideficiency Act. This was the first major effort by Congress to exert more control over Government expenditures. At the time, agencies frequently obligated more funds than they had been appropriated and then submitted ‘coercive deficiency’ requests to Congress to pay their bills. The Antideficiency Act provided that no department could make greater expenditures during a fiscal year than had been provided by Congress. In addition, the departments could not enter into contracts for the future payment of money in excess of appropriations.”

Over the years, those ADA provisions were amended and recodified. An important amendment for the purposes of this discussion was added in 1884 (*yes, 1884*). It added an exception to the prohibition on expenditures without an appropriation: “except in cases of sudden emergency involving the

loss of human life or the destruction of property.”

In its current form, the law prohibits:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law.
- Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law.
- Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of **emergency involving the safety of human life or the protection of property.** (*emphasis added*).

One can quickly see an irony. While the ADA is often referred to as the statutory implementation of the Constitutional limitation, it is actually as much the formalization of the amorphous unwritten exceptions to the Constitution. As a practical matter, since its adoption, the analysis of the emergency exceptions is built around it rather than the Constitution.

While we always hear about “essential” and “non-essential” employees, on the non-defense side of the government, there is no statutory definition. More accurately there are “excepted” personnel necessary for performing the “excepted” activities/functions permissible under the exceptions to the ADA.

For that matter what the permissible activities/functions are is a matter of interpretation. Opinions of Attorneys General (OAGs) have

been the principal source of interpretation in the absence of court ruling. Two Harvard law researchers observed this regarding the history of emergency exceptions: “One of the earlier Attorney General opinions commenting on the matter of appropriations lapses came on March 21, 1877 in an opinion entitled ‘Support of the Army.’ Congress had adjourned weeks earlier without appropriating funds for the Army, and the question arose as to whether private, voluntary contributions could be provided as a substitute. At the time, the relevant statute, focused on a general prohibition against contracts in excess of appropriation, with certain exceptions for items such as clothing, forage and shelter. After noting the statute’s connection to the Appropriations Clause, the Attorney General emphasized the explicit exception for certain obligations -- **which may or may not have provided the foundation for today’s ‘emergency’ exception, since no opinion since has expressly cited such language in discussing the relevance of an ‘emergency’** -- and concluded the War and Navy Department could enter into contracts for clothing, etc. without Congressional funding.”

The modern day authority for excepted actions is two opinions issued by then Attorney General Benjamin Civiletti in 1980 and 1981. The opinions were a double edged sword in that they gave more credibility to the premise that agencies HAD to shut down, while also softening the blow with the exceptions.

Based on the opinion letters, the interpretation used in 1995 was based on the 1981 version of an Office of Management and Budget

**(OMB) Memorandum from then Director David Stockman:**

Beginning [on the first day of the appropriations hiatus], agencies may continue activities otherwise authorized by law, those that protect life and property and those necessary to begin phasedown of other activities. Primary examples of activities agencies may continue are those which may be found under applicable statutes to:

1. Provide for the national security, including the conduct of foreign relations essential to the national security or the safety of life and property.
2. Provide for benefit payments and the performance of contract obligations under no-year or multi-year or other funds remaining available for those purposes.
3. Conduct essential activities to the extent that they protect life and property, including:
  - a. Medical care of inpatients and emergency outpatient care;
  - b. Activities essential to ensure continued public health and safety, including safe use of food and drugs and safe use of hazardous materials;
  - c. The continuance of air traffic control and other transportation safety functions and the protection of transport property;
  - d. Border and coastal protection and surveillance;
  - e. Protection of Federal lands, buildings, waterways, equipment and other property owned by the United States;
  - f. Care of prisoners and other persons in the custody of the United States;
  - g. Law enforcement and criminal investigations;
  - h. Emergency and disaster assistance;
  - i. Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;
  - j. Activities that ensure production of power and maintenance of the power distribution system; and
  - k. Activities necessary to maintain protection of research property.

Can you say loophole big enough to drive a truck through?

Over the years, OMB memos have been issued, revising this list slightly. There were some Department of Justice opinions in 1995 that opened the door wider on “excepted functions” and “excepted employee” interpretations. (The memos and OAGs refer to

“functions” and “activities” interchangeable. I have no idea whether there is a technical difference and I know you really don’t care.)

Presumably, OMB would issue a new one if a shutdown is imminent. OMB has a “standing” circular that requires agencies to maintain a shutdown plan at all times.

***I remember that the entire government did not shut down in 1995. Is my memory correct?***

Good memory. In addition to the exceptions, if Congress passes and the President signs into law an appropriations bill for an agency or agencies and/or programs for the fiscal year the agency or agencies and/or programs are not at risk of a shutdown. The CR covers only the other unfunded agencies and/or programs. In 1995, by the time of the second shutdown, seven appropriations bills had been signed into law. *Currently, no appropriations bills have been signed into law for this fiscal year.*

***What about Congress?***

Members of Congress, the President, presidential appointees, and certain legislative branch employees get paid. This has to do with executing their Constitutional responsibilities. Most “regular” congressional staffers are not excepted and thus are furloughed. There are some murky standards for allowing the individual Representatives and Senators to deem some staffers as “essential” (there’s that word) but without pay.

***What about Social Security checks?***

Social Security is a permanently appropriated program, as are most entitlement programs. But...

The Congressional Research Service notes “Programs that are funded by laws other than annual appropriations acts—for example, some entitlement programs—may, or may not, be affected by a funding gap. Specific circumstances appear to be significant. For example, although the funds needed to make payments to beneficiaries may be available automatically, pursuant to permanent appropriations, the payments may be processed by employees who are paid with funds provided in annual appropriations acts. In such situations, the question arises whether a mandatory program can continue to function during a funding gap, if appropriations were not enacted to pay salaries of administering employees. According to the 1981 Civiletti opinion, at least some of these employees would not be subject to furlough, because authority to continue administration of a program could be inferred from Congress’s direction that benefit payments continue to be made according to an entitlement formula.”

***So, are there essential employees?***

The term seems to have taken root after the 1980/1981 OAGs. One of those opinion states: “The Constitution and the Antideficiency Act itself leave the Executive leeway to perform *essential* functions and make the government ‘workable.’” The OMB memos issued at the time and in 1995/96 also use the term “essential” with respect to activities/functions

several times but not with employees. The terms “essential employees” and “non-essential employees” appeared in various agencies’ internal directives during the 1995/96 shutdown. I cannot find anyone who would claim the dubious distinction of having been the first one to use it.

Current OMB materials continue to avoid references to the term; rather they talk about “employees to be retained to protect life and property.” There is a statutory definition for emergency essential civilian employees for the Department of Defense.

By the way, these “excepted” workers, whether in the agencies or on the Hill, unlike their bosses, do not get paid. The President and Congress are considered permanently appropriated positions. This is always one of the sub themes in the negotiations during a shutdown; do the excepted workers and their furloughed brethren get paid retroactively?

Old habits die hard. Essential will still be the search engine word of day if there is a shut down.

## ***BOILERS***

The Environmental Protection Agency (EPA) has issued a final rule regulating boilers and incinerators under the Clean Air Act. The EPA was under a court order to issue the final rule by February 21, 2011. The final rules become effective 60 days from publication in the Federal Register.

For those of us who did not go to Purdue, a “boiler” is an enclosed combustion device having the primary purpose of recovering thermal energy in the form of steam or hot water. Industrial boilers are used in manufacturing, processing, mining, refining, or any other industry. Commercial boilers are used in commercial establishments such as stores/malls, laundries, apartments, restaurants, and hotels/motels. Institutional boilers are used in medical centers (e.g., hospitals, clinics, nursing homes), educational and religious facilities (e.g., schools, universities, churches), and municipal buildings (e.g., courthouses, prisons).

The rule divides the boiler world into two sections: boilers as “major sources” of which there are about 13,800, and boilers located at “area sources” of which there are about 187,000.

A “major source” facility emits 10 or more tons per year (tpy) of any single air toxic or 25 tpy or more of any combination of air toxics. EPA has identified 15 different subcategories of major source boilers and process heaters based on the design of the various types of units. The final rule includes specific requirements for each subcategory.

Sources that emit less than 10 tpy of any single air toxic or 25 tpy of any combination of air toxics are classified as “area sources.”

Not many small businesses will be a “major source,” but small businesses could be an “area source.”

Major source boilers and process heaters are used at industrial facilities such as refineries, chemical and manufacturing plants, and paper mills and may stand alone to provide heat for commercial facilities such as shopping malls or institutional facilities such as universities. The majority of major source boilers and process heaters are located at industrial facilities. The “major sources” probably know who they are, therefore the remainder of this summary will focus on the “area sources.” Also, this summary will focus on the rule for existing sources not new boilers.

Area source boilers burn coal, oil or biomass, such as wood, to produce energy or heat. (Note gas-fired boilers are not regulated.) Boilers in this category are used in manufacturing, processing, mining, refining, or any other industry. The majority of area source boilers, however, are located at commercial and institutional facilities such as medical centers or municipal buildings.

The final rule establishes standards to address emissions of mercury, particulate matter (PM) and carbon monoxide (CO). Particulate matter (PM) means any finely divided solid or liquid material, other than uncombined water.

Under the rule, area source coal-fired boilers, with heat input equal or greater than 10 million British Thermal Units per hour, are required to meet emission limits for mercury and CO.

Under the rule, area source biomass boilers, oil-fired boilers, and small coal-fired boilers are *not* required to meet emission limits. They are required to meet a work practice standard or a management practice by performing a boiler tune-up every 2 years. There are no minimum size of boiler or “minimum” emission thresholds for application of this standard for these boilers.

All area source facilities with large boilers (10M Btu or greater), whether coal-fired or biomass, or oiled fired, would be required to conduct a one time energy assessment to identify cost-effective energy conservation measures.

Yes, there is some paperwork involved. Both the tune ups and energy assessment have to be documented.

If you have a covered boiler, you must submit a signed statement in the Notification of Compliance Status report that indicates that you conducted a tune-up of the boiler and/or the energy assessment report.

More information can be found at <http://www.epa.gov/airquality/combustion>.

(The EPA also issued a separate rule that would classify two materials as not being solid waste. The significance is that it allows the materials to be burned as fuel without being subject to the solid waste incineration rules. With this rule, scrap tires are a non-waste fuel if removed from vehicles and managed under the oversight of established tire collection programs and resinated wood residuals (e.g. sawdust, excess trimmings) burned in a combustion unit (whether within the control of the generator (e.g. the sawmill, furniture manufacturer) or outside the control of the generator) would not be a solid waste, provided legitimacy criteria are met.)