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FEW Washington Legislative Update
September 1-15, 2023
Can Congress Avoid a Government Shutdown?

In Congress:

On Wednesday, September 6, 2023, a pair of Virginia Democrats introduced a new bill aimed at preventing federal agencies from shutting down and restricting the legislation Congress can consider during lapses in appropriations. The End Shutdowns Act, introduced by Sen. Tim Kaine and Rep. Don Beyer, would create a mechanism by which, if full-year appropriations bills are not enacted by the start of a new fiscal year on October 1, federal agencies would be funded automatically as if Congress had passed a continuing resolution.

On Tuesday, September 12, 2023, the House will be in session at the same time as the Senate for the first time since the end of July. Both chambers return to big spending fights and a looming deadline to prevent a government shutdown at the end of the month. While government funding technically expires on September 30, the House has just 11 working days to pass a short-term funding extension – called a continuing resolution (CR) – to buy lawmakers more time to hash out the details of a spending package. The Senate already returned from its recess last week, and Senate Majority Leader Chuck Schumer, (D-New York), has praised his colleagues from both sides of the aisle for working together on spending compromises without much heartburn.

The Senate this week is scheduled to consider measures funding veterans, agriculture and housing programs — the first time in years that spending bills have been considered separately on the floor as the chamber deviated from the traditional appropriations process. Votes on proposals to change the legislation are anticipated, but Senate leaders hope to win quick approval, providing leverage over the House

should embattled Speaker Kevin McCarthy (R-California) be unable to push any spending bills over the finish line. The House is planning this week to take up just one spending bill covering the Pentagon. A group of ultra-right lawmakers from the House Freedom Caucus have drawn hard lines even before the House came back into session, openly threatening to leverage a shutdown if a continuing resolution does not include deep spending cuts or other demands, such as more security on the southern border and opening an impeachment inquiry into President Joe Biden. Adding to the funding mess is the White House's $40 billion supplemental request, which was unveiled last month and includes $24 billion for Ukraine, sparking another controversy. Senate leaders from both parties want to pass the full supplemental, which also includes disaster funding. But many House Republicans in the right flank are vehemently opposed to any more funding for Ukraine and in some cases increased disaster aid.

On Thursday, September 14, 2023, House Democrats voted to allow state-level limits or bans on gas-powered vehicles following the United Auto Workers of America's strike announcement. The House's 222-190 vote on Thursday to halt restrictions on gas-powered vehicles followed efforts by California lawmakers to ban the sale of them by 2035 — but it became more politically volatile following the autoworkers' strike announcement.

Diversity, Equity, and Inclusion:

FEMA Rolls out Climate Adaptation Loans for Small & Overlooked Communities

Though the Federal Emergency Management Agency, or FEMA, is best known for disaster response, it has emerged as perhaps the federal government's most robust resource for preparing the country for the effects of a warming world. The agency has pumped billions of dollars into climate adaptation projects over the past few years, helping states and cities relocate flood-prone homes and harden infrastructure against wildfires. But the agency's infrastructure programs have drawn criticism for disproportionately funneling money toward larger, wealthier, and whiter communities, leaving smaller and poorer jurisdictions without the money they need to adapt to worsening climate-driven disasters.

There are two big reasons for this funding gap. The first is that FEMA doles out adaptation money through competitive grant programs, which means that a local government needs significant funding and staff to put together an application that stands a chance of attracting federal dollars. The second is that federal law requires the agency to fund only those adaptation projects that pass what it calls a "benefit-cost analysis." In other words, a city must prove that its proposed project prevents more

damage than it costs to build. Big infrastructure projects like sea walls and stormwater pipes are much more likely to pencil out in dense cities with high property values than in smaller, low-income towns.

“We know we have work to do in this area,” said David Maurstad, a senior FEMA official, when he acknowledged the funding gap during congressional testimony on the subject last year.

This week, FEMA finally moved toward narrowing that gap. The agency announced a new loan program that will give states a total of $500 million to dole out to local governments in the form of low-interest loans for small-scale adaptation projects. This way not only can local officials representing small towns, minor cities, and tribes skip the extensive application process associated with federal grants, but they also don’t have to justify their projects in cost-benefit terms.

“There’s large infrastructure projects that communities need to fund in order to adapt to the changing climate, but there’s often many small projects that need to get done as well,” said Victoria Salinas, FEMA’s associate administrator for resilience, in a press conference announcing the program on Tuesday, September 12. “The burden of getting a smaller project done that actually has a major impact on reducing human suffering is very high.”

The agency is piloting the program by sending $50 million in “seed capital” to seven states — Louisiana, Maryland, Michigan, New Jersey, New York, South Carolina, and Virginia — as well as Washington, D.C. The states will get about $6 million each, and they’ll be able to loan that money out to smaller governments at interest rates of less than 1 percent. (The benchmark interest rate for mortgage and credit card lending in the U.S. is currently around 5.5 percent.) The local governments can use that money to buy out homes that are in the path of fire or flood, elevate streets, or repair water infrastructure. States will decide how long local governments will have to pay the loans back.

In Washington, D.C., officials are planning to loan money to pay for storm drain upgrades in a public housing complex that has faced frequent flooding. The District of Columbia has already received money to upgrade a stormwater pump station through FEMA’s other climate adaptation initiative, the Building Resilient Infrastructure and Communities program, but the new loan will help officials pursue projects that wouldn’t qualify for that grant money.

Because states themselves will be running the loan programs, rather than the federal government, borrowers won't have to worry about following the extensive federal spending guidelines that often hamper adaptation projects, or about passing a strict cost-benefit analysis. Experts have criticized federal benefit-cost regulations for placing too much emphasis on property values and neglecting to consider intangible assets like community cohesion and cultural heritage.

Furthermore, the program is a "revolving" loan fund, meaning states can reuse FEMA's seed capital over and over again. If a state gives a city a loan of $1 million and the city pays the loan back after five years, the state will then have just over $1 million to lend out somewhere else. The program doesn't have an expiration date, which Salinas said makes it "a more durable source of financing" than the agency's other grant programs. The loan interest rates are far lower than cities tend to pay for standard municipal bonds, so the risk of default is low.

Sourced From: (Federal News Network)

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Tier I

Pregnant Workers Can Move Forward With Class Lawsuit Alleging Discrimination at CBP

Customs and Border Protection (CBP) employees are moving forward with a class lawsuit alleging years of discrimination against hundreds of pregnant workers at the agency.

After CBP appealed the initial class certification decision in May, an administrative judge at the Equal Employment Opportunity Commission (EEOC) ruled in favor of the group of employees and upheld the class in an August 30 decision.

The CBP employees said after telling their supervisors they were pregnant, they were systematically forced into temporary light duty (TLD) status, regardless of whether they requested it. The case specifically alleges a violation of the Pregnancy Discrimination Act of 1978, which states that pregnant employees should only be given work accommodations if they ask for them.

At the time that CBP appealed the class certification decision, the agency said the case did not meet commonality requirements and that the testimony of the so far 24 employees in the case were generally not similar enough to constitute a class. The agency also said the number of employees affected was “relatively few.”

But EEOC dismissed the agency’s appeal and said based on the evidence so far, supervisors had treated the employees consistently after learning they were pregnant. Additionally, although there is testimony from just a couple dozen employees, it’s estimated that the class contains about 515 individuals in total. Ultimately, the EEOC administrative judge reversed the agency’s final order that had rejected class certification.

“Despite working at different duty stations across the country, employees were treated in a consistent manner once the agency learned that they were pregnant,” EEOC Director of the Office of Federal Operations Carlton Hadden said in the decision. “Accordingly, we find that the administrative judge’s determination that they established commonality and typicality for class certification is supported by record evidence.”

Now after the upholding, any CBP employee who was involuntarily placed on TLD on or after July 18, 2016, due to their pregnancy is considered eligible for the class. Nearly 80 percent of all TLD placements for pregnant employees originated from the agency’s eight largest field offices, EEOC found. In total, the current and former employees in the case are from eleven different CBP field offices.

When put on TLD, employees usually have to temporarily work in a different position within the agency and see cuts to benefits such as overtime pay, training eligibility, promotional opportunities, and the ability to obtain preferred work schedules. Employees said they also lost their right to carry a firearm and later had to requalify for it.

“Class members who carried weapons averred that they were required to return their weapons because they were pregnant and had to requalify upon their return to full duty,” Hadden said. “They were then assigned to various light duty positions, such as cashier positions, which affected their ability to work overtime or earn additional compensation, such as night differential pay.”

Cori Cohen, partner at Gilbert Employment Law and appointed co-counsel for the plaintiffs, said EEOC’s ruling validates the experiences of CBP employees who lost job opportunities when they became pregnant.

“The agency implemented a widespread policy based on patriarchal stereotypes about the abilities of pregnant women,” Cohen said in a statement.

In one example, a pregnant employee at CBP was required to get a doctor’s note stating that she needed light duty, removed from her agriculture specialist position, and mandated to train her colleagues on her job duties, EEOC said. The employee’s supervisor also put her on an overnight shift and required her to work more than 40 hours a week against her medical restrictions.

And another class member, according to EEOC, said she hid her pregnancy for as long as possible because she knew from the experiences of other pregnant employees that she would be immediately instructed to go on light duty due to her pregnancy.

Roberta Gabaldon, a CBP employee and one of the class agents, said she was grateful for EEOC’s upholding of class certification.

“When I let my supervisors know I was pregnant … I was devastated to endure a humiliating forced reassignment and a complete disregard for my ability to keep working as I was trained to and in a job that I loved,” Gabaldon said. “[I] hope that through this decision we can create meaningful change at the agency.”

CBP has until September 14 to notify all class members of the certification of the class complaint.

Sourced From: (Federal News Network)

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Tier II

Regulations Aimed at Derailing a Schedule F Revival Proposed by OPM

The Office of Personnel Management (OPM) on Friday, September 15, announced that it is proposing new regulations aimed at hamstringing future administrations from reviving a controversial plan to strip tens of thousands of federal workers of their civil service protections, potentially accelerating a long-simmering battle between good government groups and conservative Republican activists.

In October 2020, then-President Trump signed an executive order creating a new job category—Schedule F—within the federal government’s excepted service for federal

employees in policy-related jobs and exempting their positions from most civil service rules. The order instructed agencies to identify positions that would qualify for the new job classification and convert employees in those jobs to Schedule F, effectively making them at-will employees.

The Trump administration ultimately ran out of time to implement the order before the end of his term, and no positions were converted to Schedule F before President Biden rescinded it shortly after taking office in January 2021.

Though off the books, the initiative has continued to loom like a specter over the federal workforce, thanks to renewed efforts by former Trump administration staffers, who have spent the last two years preparing to immediately reinstate Schedule F upon the election of a Republican president.

Multiple Republican presidential candidates, particularly Trump, Florida Gov. Ron DeSantis and, most recently, Vivek Ramaswamy, have endorsed Schedule F or analogous plans to fire large portions of the federal workforce, while activists and conservative lawmakers have proposed making the entire civil service at-will employees.

OPM's newly proposed regulations, which will be published Monday in the Federal Register, seek to at least slow down a future administration from reviving Schedule F. It stipulates that when a federal employee's job is converted from the competitive service to the excepted service, the employee retains "the status and civil service protections they had already accrued," unless they voluntarily transfer into an excepted service position.

The proposal also establishes a narrow definition of "policy-related" jobs in the federal government, whittling it down to refer only to noncareer political appointments, and it grants federal workers the right to appeal any job reclassification that would result in the loss of civil service protections to the Merit Systems Protection Board.

"The proposed rule honors our 2.2 million career civil servants, helping to ensure they can carry out their duties without fear of political reprisal," said OPM Director Kiran Ahuja in a statement. "Career federal employees deliver critical services for Americans in every community. Prior attempts to needlessly politicize their work risked harming the American people."

Monday's filing also serves as the Biden administration's rebuttal to legal and historical arguments undergirding Schedule F and other efforts to convert federal workers into at-

will employees, highlighting how removal protections evolved from the enactment of the Pendleton Act 140 years ago to the 1978 Civil Service Reform Act, with the support of a series of precedential court decisions.

“Through various enactments . . . Congress has created conditions under which certain employees may gain a property interest in continued employment,” OPM wrote. “Congress has mandated that removal and the other actions described in [the U.S. Code] may be taken only ‘for such cause as will promote the efficiency of the service. This property interest in continued employment has been a feature of the federal civil service since at least 1912, when the Lloyd-La Follette Act required just cause to remove a federal employee. The Supreme Court in Board of Regents of State Colleges v. Roth recognized that restrictions on loss of employment, such as tenure, can create a property right.”

News of OPM’s proposal elicited plaudits from congressional Democrats, who thus far have failed to pass legislation barring Schedule F’s reinstatement, and federal employee unions, whose petition to OPM prompted the regulations.

“This isn’t just about protecting our union members,” said Doreen Greenwald, national president of the National Treasury Employees Union. “This is about making sure the American people are served by federal employees who were hired through an open, competitive process using criteria based on skills and expertise, not political affiliation. Our country depends on federal employees—like EPA scientists, FDA inspectors and IRS accountants—who take an oath to uphold the Constitution and are committed to the agency mission, not a politician.”

“Every American benefits from having federal workers who are hired on the basis of their qualifications, not politics,” said Sen. Tim Kaine, D-Va. “I’m glad to see the administration is taking action to safeguard our merit-based hiring system.”

“We applaud President Biden’s administration for taking concrete steps to protect the integrity of the civil service against those who seek to politicize routine government work and undermine our democracy," said American Federation of Government Employees National President Everett Kelley. “Whether these attacks take the form of Schedule F or other efforts to pack the executive branch with political flunkies, outlawing unions in the federal sector, illegally firing huge swaths of federal employees or eliminating agencies, the purpose is the same: to discredit government, diminish faith in our democracy, terrorize the federal workforce and inject politics into the routine day-to-day operations of government agencies.”

But Don Kettl, professor emeritus at the University of Maryland and former dean of its School of Public Policy, said the regulations are unlikely to meaningfully constrain a Republican president from reviving Schedule F.

“At this point, they have 16 months to be able to prepare to have a draft of a new executive order or a new set of regulations that can be put in place pretty quickly,” he said. “They do not need to do this on Jan. 20—if it takes two months, it’s still a victory because they’re in it for the long game, for sure. One big question is how much of a speed bump it would create for a Republican administration, and I think it is probably a speed bump, but not more than what you’d find in a parking lot.”

What the regulations do succeed in doing is accelerate the long simmering “existential” fight over the future of civil service. Kettl said the measure could serve to set up lawsuits against Schedule F under the Administrative Procedures Act—or to provoke a legal challenge from conservatives that could erupt amid the 2024 presidential race.

“The proposal directly challenges what it is Schedule F was seeking to do, given the fact that so many conservative organizations are rallying around the effort to reimpose it,” he said. “It brings to a head in a sharp and powerful way a debate that was certain to happen anyway, but it speeds it up and puts it right in the middle of the presidential campaign. That is a very big deal.”

OPM is soliciting comments on the proposed rule between now and November 17.

Sourced From: (Government Executive)

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Tier III

Abortion Pill Challenge Returns to SCOTUS

The future of the most popular method of terminating a pregnancy is back before the Supreme Court after the Biden administration and pharmaceutical company Danco appealed a lower court ruling rolling back years of Food and Drug Administration (FDA) policies broadening access to the drug.

The Supreme Court is unlikely to consider the case until next year at the earliest, and the justices previously ruled that no changes to federal regulation of the pills will happen until then — leaving the current state-by-state patchwork of access in place for now.

The looming case is expected to be the most sweeping abortion issue the high court examines since overturning Roe v. Wade, with implications that extend far beyond reproductive health and could impact how a vast array of drugs are approved and regulated.

What it says: In its appeal, the Department of Justice (DOJ) argues that allowing lower court rulings to stand would "compel FDA to return to a pre-2016 regulatory regime that imposes restrictions on distribution that FDA has found to be unnecessary and unjustified … with damaging consequences for women seeking lawful abortions and a healthcare system that relies on the availability of the drug under the current conditions of use."

Mifepristone, along with another drug, misoprostol, is approved through 10 weeks of pregnancy, and is used in more than half of abortions nationwide.

The DOJ also argues that the anti-abortion doctors who brought the challenge against the pills do not have standing to sue because they can't prove they'll be harmed in the future.

"They do not prescribe mifepristone, and FDA's approval of the drug does not require them to do or refrain from doing anything," Biden administration attorneys wrote.

Danco, the maker of the brand name version of mifepristone, argued to the Supreme Court in its own appeal that there is no evidence the FDA's rule changes since 2016 expanding access to the pills were made improperly.

"The case presents a serious question: whether courts can disregard constitutional and statutory limits on judicial review of agency action to overrule agency decisions that they dislike," the company said in the legal filing, adding that allowing the 5th Circuit ruling to stand would invite a wave of ideological challenges to other medications.

"For the pharmaceutical and biotechnology industry, permitting judicial second-guessing of FDA's scientific evaluations of data will have a wildly destabilizing effect," Danco wrote.

What's next: The appeals by the government and the drugmaker do not automatically mean the Supreme Court will hear the case. The justices will first receive a preliminary

round of briefing before deciding whether to add the case to the court's merits docket and schedule an oral argument.

Though it's possible the justices could opt not to take up the issue — a move that would allow the lower court's decision to take effect — most experts believe that is unlikely and expect the Supreme Court to accept the case.

How we got here: The Alliance for Hippocratic Medicine — a coalition of anti-abortion medical groups — sued last year over the FDA's 2000 approval of mifepristone as well as later actions that loosened restrictions on the pills, arguing the agency didn't adequately consider the drug's safety risks.

District Judge Matthew Kascmaryk issued a sweeping ruling in their favor in April, striking down the FDA's approval of mifepristone nationwide and issuing a de facto ban on the pills. A few weeks later, a three-judge panel at the 5th U.S. Circuit Court of Appeals partially upheld and partially overruled that decision, maintaining federal approval of the pills but sharply limiting who can get them. The Supreme Court intervened later that month, pausing any implementation of those lower court orders.

The 5th Circuit heard arguments on the case in May, and ruled in August to roll back actions the federal government has taken since 2016 to make the pills more accessible, including rules allowing online ordering, mail delivery and pharmacy dispensing of the drugs. It also would roll back access from the current 10 weeks of pregnancy to seven and would reimpose a requirement that only physicians can prescribe the pills.

Both the Biden administration and Danco — one of two pharmaceutical companies that make the pills — swiftly pledged to appeal — and both parties did so on Friday, September 8.

"The FDA has been entrusted to serve as the nation's gatekeeper of legal drugs. By repeatedly and unlawfully removing critical safeguards in the chemical abortion regimen, the FDA has failed to protect the safety of women and girls," said Alliance Defending Freedom Senior Counsel Erik Baptist: "Two courts have now held the FDA accountable for the damage it has done to the rule of law and the harm it has caused to countless girls and women. We hope the Supreme Court does the same."

Sourced From: **(Politico)**