

NICHOLS LIU

**Foreign Assistance:
Unfreezing Funds, Avoiding
Furloughs, and Other Measures**

Robert Nichols - Nichols Liu LLP

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Caveat

For informational purposes only

Not legal advice

Legal services available

Recent Lawsuit

- Applies to OMB memo freezing grants and loans
 - M-25-13, Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs (January 27, 2025), ordered a pause to the disbursement of federal grants and loans, to implement the Administration’s EO
 - Administrative Procedure Act lawsuit filed to stop M-25-13
 - Plaintiffs allege that
 - the implicated federal grants and funding “are the lifeblood of operations and programs for many . . . nonprofits, and even a short pause in funding . . . could deprive people and communities of their life-saving services.”
 - Defendants’ action was arbitrary and capricious, violates the First Amendment of the United States Constitution, and exceeded OMB’s statutory authority.
 - District Court Judge issued a temporary restraining order unfreezing funds until February 3, 2025, to preserve the status quo while the court considers the merits of the case.
 - OMB retracted the initial memo but stated that efforts to curtail federal funding would continue, but anticipate seeing another OMB memo that is more thought-out in near future

Lawsuit to Unfreeze Foreign Assistance Funds and Release Payments

- Ready to file lawsuit as soon as Monday – if we have industry support
- Crafting pleadings to make legal arguments, not political arguments
- U.S. District Court for District of Columbia
- Plaintiff
 - 501(c)(3)
 - Organizational/associational standing by representing members harmed by actions
- Objectives
 - Temporary restraining order followed by permanent injunction
 - Unfreeze funding
 - Restart payments
 - Clarity as to cost reimbursement
 - Avoid mooting the order by slightly changing the government's position

Lawsuit to Unfreeze Funds and Release Payments

- Statutory Standard
 - Administrative Procedure Act
 - Requires the court to set aside agency actions that "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law."
- Arguments
 - Freezing funds and not making/approving payments is arbitrary, capricious, an abuse of discretion, and not in accordance with law
 - For assistance awards, no right to suspend awards at all (caveat: where USAID clause is contained in award)
 - Suspending award before the program review violates 2 CFR
 - Rights to recover costs during suspension period must be affirmed

Lawsuit to Unfreeze Funds and Release Payments

- Risks
 - Challenge to standing
 - Changing positions to avoid the injunction – whack-a-mole
 - Termination of awards
 - Impoundment Control Act
 - Possible release of member names
 - ?

Lawsuit to Unfreeze Funds and Release Payments

- What We Need
 - Organizations that have been harmed to join as members
 - Statements of harms
 - Crowdsourcing contributions of funds
 - Sign up through website starting tomorrow

Retaining Employees While Mitigating Financial Risk

- Problems
 - Legal rights and obligations
 - Contractors have a legal obligation to mitigate costs during stop work period
 - Government must pay idle worker costs during stop work (assuming proper mitigation) – at least for contracts
 - But
 - Government's *willingness* to pay idle labor costs incurred during stop work/suspension period is unclear
 - When payments will be received is unknown
 - Result
 - Organizations are furloughing or laying off workforces to survive financially
 - Loss of capacity to restart work once stop work/suspension is lifted

Retaining Employees While Mitigating Financial Risk

- Possible Solution
 - Move employees to “idle capacity” status
 - Continue billing government for full costs of idle employees
 - Pay employees a small portion of salary during stop work period and balance of salary if and when paid by the government
- Benefits to Employers
 - Preserve ability to collect costs from government
 - Reduce costs to keep workforce as intact as possible
 - in viable
 - Do not pay full salary or most taxes unless and until paid
- Benefits to Employees
 - Would continue some income
 - *May* ultimately get full salary from idle capacity
 - *May* continue benefits
 - May receive unemployment (repayable if full salary is received)
- Administrative steps and language is key to comply with laws
- Risks need to be identified and addressed

Lines of Credit/Factoring Invoices

- Problem
 - Non-payment creates cashflow issues
 - Banks freezing lines of credit
- Possible Solutions
 - Lenders may be willing to take risks – for a price
 - Talk with banks and other lenders about risks
 - Assist with factoring invoices

Our Efforts

- Lawsuit: contributions requested
- Legal Advice: fixed price services for reasonable fees
 - Responding to stop work orders and suspension orders
 - Requests for equitable adjustment
 - Terminations for convenience
 - Labor and employment issues
 - M&A to help save jobs and programs
 - Representing to banks and lenders
 - Preparing for program reviews
 - Seeking waivers from program reviews

Questions?

rnichols@nicholsliu.com