

White House Issues New Executive Order Requiring Contractors to Provide Paid Sick Leave

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President Obama issued a new Executive Order (EO) this week requiring federal contractors to offer paid sick leave to employees. The EO, entitled Establishing Paid Sick Leave for Federal Contractors, requires executive departments and agencies to ensure that certain contracts, "contract-like instruments," and solicitations include a clause requiring contractors to provide employees with at least one hour of paid sick for every 30 hours worked. In addition, contractors may not set a limit on the total accrual of paid sick leave at less than 56 hours per year. The EO establishes a target effective date for implementing regulations of January 1, 2017.

The EO identifies the contracts that are covered by the new requirements. The EO applies to new contracts and "contract-like instruments," which will be defined by the Secretary of Labor, mirroring those covered by EO 13658, the EO establishing a minimum wage for contractor employees. The EO applies if:

- It is a procurement contract for services or construction;
- It is a contract or contract-like instrument for services covered by the Service Contract Act;
- It is a contract or contract-like instrument for concessions, including any concessions contract excluded by the Department of Labor (DOL) regulations at 29 C.F.R. 4.133(b); or
- It is a contract or contract-like instrument entered into with the federal Government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public; and

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- The wages of employees under such contract or contract-like instrument are governed by the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from its minimum wage and overtime provisions.

For contracts or contract-like instruments covered by the Service Contract Act or the Davis-Bacon Act, the EO applies only to contracts or contract-like instruments at the thresholds specified in the statutes. For contracts in which employees' wages are governed by the Fair Labor Standards Act, the EO applies only to contracts or contract-like instruments that exceed the micro-purchase threshold, unless otherwise stated in regulations issued pursuant to the EO. Notably, the requirements do not apply to grants.

That the new EO's coverage mirrors EO 13658's coverage suggests that the new EO, like EO 13658, will ultimately apply to contractor personnel beyond those directly performing under covered contracts. The regulations implementing EO 13658 apply the minimum wage to employees directly performing and those indirect-charge employees who spend more than 20% of their time supporting covered contractors. We would encourage contractors to prepare for similarly expansive reaches by implementing regulations for the new EO here.

The EO provides additional details on, among other issues, appropriate uses for paid sick leave, whether accrued sick leave can be carried over from one year to the next, and the interplay with the Davis-Bacon Act and Service Contract Act. Employees may use paid sick leave under four circumstances identified in the Executive Order, including in the event of physical or mental illness, injury, or medical condition and for caring for a child, parent, spouse, or domestic partner. Sick leave accrued over the course of a year may be carried over to the next year. Employers will be required to grant paid sick leave upon the oral or written request of an employee that includes the expected duration of the leave and that is made at least seven calendar days before the leave when the need for the leave is foreseeable.

Importantly, the EO specifies that paid sick leave is in addition to contractors' obligations under the Davis-Bacon Act and Service Contract Act, meaning that contractors likely will not receive credit toward their prevailing wage or fringe benefit obligations under these Acts for any paid sick leave required by the EO. In addition, any portion of sick leave provided by contractors pursuant to the EO's requirements presumably would not qualify as a "bona fide" fringe benefit under the Service Contract Act because such leave is being provided pursuant to federal law. However, keep in mind that sick leave amounts provided in excess of the EO's requirements may still qualify as a "bona fide" fringe benefit if the sick leave plan satisfies requirements set forth in DOL's Service Contract Act regulations.

As for timing of implementation, the EO directs the Secretary of Labor to issue regulations by September 30, 2016. The regulations may provide exclusions from the requirements where appropriate, define terms used in the EO, and institute recordkeeping requirements documenting compliance with the EO and regulations. Within 60 days of the issuance of DOL's regulations, the FAR Council is to issue regulations providing for the inclusion of a contract clause in covered solicitations, contracts, and contract-like instruments. The regulations shall then apply to covered contracts and contract-like instruments where the solicitation for such contract or contract-like instrument has been issued on or after January 1, 2017, or the contract or contract-like instrument has been

awarded outside the solicitation process on or after January 1, 2017.

As we've noted over the last few years, this EO is another one in a series of Executive Orders effecting federal contractors issued during the Obama Administration. Others include EO 13673: Fair Pay and Safe Workplaces, imposing obligations on contractors to disclose violations of employment and labor laws; EO 13658, the EO establishing a minimum wage for federal contractor employees mentioned above; and EO 13672, which amended previously-issued EOs to clarify that contractors cannot discriminate on the basis of sexual orientation and gender identity. Given the issuance of this new EO, along with a series of others in the recent past, government contractors would benefit from a review of their policies and procedures to prepare for and ensure compliance. Wiley Rein is available to assist in such an effort.