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FEDERAL CONTRACTORS AND SUBCONTRACTORS FACE NEWEST EXECUTIVE ORDER REQUIRING THEM TO PROVIDE EMPLOYEES WITH PAID SICK LEAVE

By Kenneth A. Rosenberg and Christina Stoneburner

As hay fever season kicks into high-gear for allergy sufferers, federal contractors and subcontractors are suffering too after President Barack Obama issued his newest Executive Order “Establishing Paid Sick Leave for Federal Contractors” on September 7, 2015.

Importantly, the Order requires federal contractors (herein “Contractor”) to provide at least seven paid sick leave days annually to their employees and to require their subcontractors to implement this benefit for their employees too.

The Order not only requires that Contractors provide seven paid sick leave days annually to employees, but it also establishes broad rules regarding sick leave usage, verification and carryover, among other things. As a result, Contractors’ eyes are watering and their noses are twitching as many of these provisions exceed the requirements of the various state and local paid sick leave laws, thereby increasing the compliance woes of large multistate employers and small employers alike.

In particular, the Order provides that employees who earn paid sick leave may use it for absences: (i) due to their own physical or mental illness, injury or

medical condition; (ii) to obtain diagnosis, care or preventative care from a health care provider; (iii) to care for a child, parent, spouse, domestic partner or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship and who needs diagnosis, care or preventative care or is otherwise in need of care (“Dependents”); or (iv) due to domestic violence, sexual assault or stalking if the absence is for the purposes set out in either (i) or (ii) above or to obtain counseling, to relocate, to seek assistance from a victim services organization, to take legal action, including preparation for or participation in any related civil or criminal legal proceeding or to assist an individual related to the employee in engaging in any of these activities.

Employees can use the paid sick leave for one of these purposes by making an oral or written request to the Contractor indicating the duration of the leave needed. The request must be made to the Contractor at least seven calendar days in advance when the need for the leave is foreseeable and as soon as is practicable in other cases. Contractors cannot require employees to obtain a replacement worker before using their accrued paid sick leave.

To control sick leave abuse, the Order allows a Contractor to require an employee who is seeking leave for three or more consecutive workdays to provide a certificate from a health care provider where the leave is requested either for their own or their Dependents' medical or preventative care or from an appropriate individual or organization where the leave is requested due to a domestic violence, sexual assault or stalking reason.

Although the Order allows an employee to carry over unused accrued sick leave from year to year and allows reinstatement of unused sick leave balances upon an employee being rehired within 12 months from termination, it does not require Contractors to pay out employees the monetary value of their sick leave balances upon their termination.

Additionally, the Order provides that an employer's existing paid leave policy only satisfies the Order if the amount of the leave offered under its existing policy can be used for the same purposes and under the same conditions described in the Order.

Finally, the Order prohibits Contractors from interfering with or discriminating against an employee for taking or attempting to take paid sick leave as provided for under the Order or assisting any other employee in asserting his/her rights under the Order.

Construction contractors are particularly worried because the Order provides that the paid sick leave required by the Order is in addition to a Contractor's obligations under the Service Contract Act and the Davis-Bacon Act. Thus, Contractors receive no credit toward their prevailing wage or fringe benefit obligations under those acts for any paid sick leave provided by the Contractor under the Order.

So too are Contractors operating in multiple jurisdiction as the Order adds additional onerous

requirements to the patchwork of existing state and municipal sick leave laws. For example, under the newly passed California, Massachusetts and Oregon state sick leave laws, an employee may use sick leave for reasons similar to those in the Order, including to address the effects of domestic violence. On the other hand, many other laws, such as New York City's, do not allow for the use of sick leave to address the effects of domestic violence. As such, in New York City, unless the regulations address the issues of conflicting laws, a federal contractor will have to allow for the accrual and usage of sick leave under both the local law and the Order. If the contractor's employee takes leave under the Order to seek a restraining order due to domestic violence, that time off will only count against the accrual under the Order and not time earned under New York City's Earned Sick Time Act. This will make it extremely difficult for Contractors to accurately track how much sick leave is available and how much has been used by a covered employee.

Contractors may be able to breathe a little easier knowing that even though the Order may never be implemented because it applies only to a new contract solicited for or awarded outside the solicitation process on or after January 1, 2017. Indeed, the Order provides that the Secretary of Labor's interpretative and defining regulations must be issued by September 30, 2016. Depending on who is elected President in 2016, the Order may be rescinded.

Of concern not just to Contractors, but to all employers, is whether the Order will reignite the debate over a national sick leave policy. Although proposed legislation mandating federal paid sick leave stalled in the Congress, grass-roots campaigns have been very successful in enacting paid sick leave laws and ordinances, and President Obama's issuance of this Order may revive the push for a federal sick leave law covering all employees.

In order to avoid being caught flat footed, Contractors should immediately examine their sick leave policies to not only ensure that they are in compliance with any existing state or local requirements but also to determine how the Order's requirements will potentially affect their compliance burdens and costs since as the old adage goes – "an ounce of prevention is worth a pound of cure."

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