Volume 15 Issue 1 March 2016

Employment Bulletin

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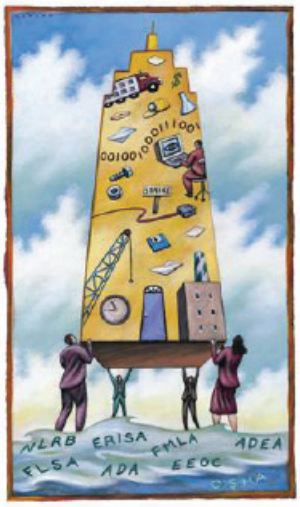

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Decoding the DOL's Paid Sick Leave Rule for Federal Contractors

On February 25, 2016 the United States Department of Labor (DOL) published a notice of proposed rulemaking to implement Executive Order 13706 (found at: https://www.gpo.gov/fdsys/pkg/FR-2015-09-10/pdf/2015-22998.pdf), "Establishing Paid Sick Leave for Federal Contractors," which requires certain federal contractors to provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care (the "Proposed Rule").

The 80-page proposal (found at: https://www.gpo.gov/fdsys/pkg/FR-2016-02-25/pdf/2016-03722.pdf) will only be open for public comment through March 28, 2016. Thus, contractors or other interested parties are encouraged to act quickly if they wish to provide the agency with comments before the rule is finalized. To aid in this process and to preview the requirements soon to be imposed on federal contractors, we are providing an overview of the proposal's key provisions.

Contracts Covered. The Proposed Rule lists four major contract categories to which the executive order applies: (1) procurement contracts for construction covered by the Davis-Bacon Act (the "DBA"), (2) services contracts covered by the McNamara-O'Hara Service Contract Act (the "SCA"), (3) concessions contracts, and (4) contracts in connection with federal property or lands and related to offering services for federal employees or the public. The Proposed Rule states the Order does not apply to contracts worth $3,000 or less, where wages are governed by the Fair Labor Standards Act (the "FLSA") – nor will it apply to contracts for the manufacturing or furnishing of materials, supplies or equipment.

The rule will apply to new contracts or replacements for expiring contracts with the federal government that result from solicitations issued on or after January 1, 2017. And the "contractors" covered by the rule include not only the prime contractor, but "all of its subcontractors of any tier on a contract with the Federal Government."

Employees Covered. The employees covered by the rule are individuals who work directly on covered contracts or conduct work "in connection" with covered contracts and whose wages are governed by DBA, SCA or the FLSA, regardless of the employer's characterization of its contractual relationship with the individual.

The Rule exempts from coverage any employee working 20 hours or less per week "in connection" with the covered contract; which means completing work necessary to complete performance of the contract, but not performing the work directly called for in the contract.

Notably, even if an employee is exempt under the Fair Labor Standards Act or is designated by the employer as an independent contractor, that employee may be entitled to accrue leave.

Accrual of Paid Sick Leave. Contractors must either allow covered employees to earn at least one hour of paid sick leave for every 30 hours of paid time on covered contracts, up to a minimum of 56 hours in a year, or provide a minimum of 56 hours of paid sick leave at the beginning of each accrual year. A contractor may choose its accrual year but must use a consistent option for all employees.

Contractors choosing the first option will have to account for all time for which an employee is or should be paid (including paid time off), and will be required to calculate accrued leave at least once every workweek. Notably, though, employees need not accrue leave in increments smaller than one hour for any fraction of 30 hours worked during the prior workweek. Also, in order to exclude time spent on non-covered work, the contractor must consistently record an employee's covered and non-covered hours worked. Contractors will be required to notify employees of the amount of their unused paid sick leave at least once a month.

The Proposed Rule does not require employers to permit the accrual of more than 56 hours in each accrual year, and a contractor may limit the total amount of paid sick leave available at any given time to 56 hours. Although employees will be permitted to carry over unused paid sick leave from the prior year, the carried-over hours cannot be used to exceed a 56-hour maximum otherwise in place by the contractor. As a consequence, the Proposed Rule permits contractors to prevent an employee from accruing additional paid leave in a year where that employee already has 56 hours of leave available, unless and until the employee chooses to use some portion of his or her available leave. An employer may of course choose to provide more than the 56-hour minimum to its employees pursuant to its own policy.

Use of Paid Sick Leave. Employees will be permitted to use paid sick leave for a number of reasons, including: (1) their own illnesses or healthcare needs (including preventive care); (2) the care of a family member (defined as 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"); or (3) for purposes related to being a victim of domestic violence, sexual assault or stalking (or to assist a family member who is a victim).

Under the Proposed Rule, if the need for sick leave is foreseeable, an employee is to provide seven days oral or written notice. If it is not foreseeable, an employee should notify his or her employer "as soon as is practicable." Contractors can require employees to provide certification from a health care provider of the employee's need for leave if three or more days of leave are used consecutively.

The Proposed Rule also contains specific requirements for an employer's communication of a denial of a request to use paid sick time. Specifically, a denial must be provided "as soon as is practicable," in writing, and with an explanation for the denial.

All of these features of the Proposed Rule are very similar to the Family Medical Leave Act.

Although contractors will not be required to pay employees for any unused paid sick leave upon termination, employees who are rehired by the contractor or a successor contractor within one year must have their accrued paid sick leave reinstated. And even if a contractor chooses to pay out accrued leave upon termination, the contractor is still required to reinstate the employee's paid sick leave if he or she is rehired within the one-year timeframe.

Additional Responsibilities Imposed on Contractors. The Proposed Rule also prohibits the interference with an employee's accrual or use of paid sick leave and prohibits an employer from discriminating on the basis of an employee's use of paid sick leave.

Additionally, it contains a number of recordkeeping requirements and states that employers will have to publish a notice to affected employees upon the finalization of the rule. Especially in light of these relatively onerous recordkeeping and notice requirements, contractors and subcontractors with federal contracts or interested in federal projects should begin evaluating their policies and benefits packages to ensure their practices will conform with the requirements of the Executive Order by next year.

Babst Calland's Employment and Labor Group will continue to keep employers apprised of further developments related to Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, and other employment and labor topics. If you have any questions or need assistance in addressing the above-mentioned area of concern, please contact John A. McCreary, Jr. at (412) 394-6695 or jmccreary@babstcalland.com, or Esther Soria Mignanelli at (412) 394-6422 or emignanelli@babstcalland.com.