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NEW FEDERAL CONTRACTOR SICK LEAVE REQUIREMENT BECOMES EFFECTIVE WITH MOST CONTRACTS OR SOLICITATIONS AFTER JANUARY 1, 2017

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On September 30, 2016, the Department of Labor (“DOL”) published the final rule implementing Executive Order 13706, which requires that Federal contractors provide up to seven days of paid sick leave annually. The final regulations go into effect on November 29, 2016, for solicitations and contracts issued after **January 1, 2017**. For certain procurement contracts subject the FAR regulations, the effective date of the final regulations will be delayed until after publication of additional FAR regulations addressing sick leave. Federal contractors should closely read their contracts to determine if EO 13706 paid sick leave is required under the contract.

Please keep in mind that with the election of Donald Trump, some executive orders and regulations, such as this one, may be rescinded or modified. Please continue to monitor any changes in the laws and regulations.

I. Employees on Covered Contracts Are Entitled to up to Seven (7) Days of Sick Leave Annually.

EO 13706 requires certain federal contractors to provide 1 hour of paid sick leave for each 30 hours worked to employees performing work “on or in connection with” a covered federal contract (including subcontracts), up to a maximum of 56 hours (7 days) per year. Covered contracts include a procurement contract for construction covered by the Davis-Bacon Act, but does not include federally-assisted construction contracts that are subject to the Davis-Bacon Related Act.

Sick leave rolls over to the next year. Sick leave is not required to be paid out upon separation of employment, but accrued leave must be reinstated if an employee is rehired within 12 months after the date of separation. The paid sick leave is in addition to any other requirements of the Davis-Bacon Act or similar acts, and the federal contractor does not get credit towards fringe payment requirements for sick leave paid out pursuant to the requirements of EO 13706.

Employees must be allowed to use the leave to care for their own illness or medical condition, see a health care provider, care for a child, parent, spouse, domestic partner, or other

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individual related by blood or affinity that is the equivalent of a family relationship, or for certain items relating to domestic violence, sexual assault, or stalking if the employee or a family member is the victim.

Leave must be granted based on an oral or written request made 7 days in advance when the leave is foreseeable and as soon as practicable if the need for leave is not foreseeable. An employer can require certification or documentation relating to the leave only if the leave is three or more consecutive working days. If requiring documentation relating to leave for domestic violence, assault, etc. the employer must request the minimum necessary information to establish that the employee's absence from work is for a covered reason, and must keep the information (and the fact of the domestic violence, sexual assault, etc.) confidential unless the employee consents to disclosure or such disclosure is required by law. The employer has the option to provide the leave only when the employee would have otherwise been working on or in connection with a covered contract.

An employer is prohibited from interfering with the employee's ability to use sick leave or retaliating against the employee for using sick leave or asserting any rights under the Executive Order or assisting others in doing the same.

If any other Federal, state or local law or a collective bargaining agreement requires greater leave than required by EO 13706 or provides greater protections for the employer, the employer must comply with all of the applicable laws and provide the greatest benefits to the employee.

If the employer already has a sick leave or paid time off program that provides as great of or greater time off and rights, such plan will satisfy EO 13706.

II. Exempt or Non-Exempt Employees Working "On or in Connection with" a Covered Contract Are Entitled to Accrue Sick Leave.

The sick leave accrual requirements apply to all employees who are performing "on or in connection with" the covered contract, including employees who are otherwise exempt from the minimum wage and overtime requirements of the Fair Labor Standards Act. Work performed "on" the covered contract is the specific work required by the contract. Employees who perform work "in connection with" the covered contract are also entitled to paid sick leave. The regulations define this group as employees "who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract." There is an exception for employees who are working "in connection with" covered contracts for less than 20% of the work week.

The introductions to the regulations explains that working "in connection with" a covered contract will be interpreted similarly to the Federal Contractor Minimum Wage regulations. Employees that may be considered working "in connection with" a DBA contract can include a security guard working at the construction site, the payroll clerk who processes the payroll or completes the certified payroll reports, the human resources staff who recruit, interview, and hire employees for a covered contract, quality assurance or project management employees who oversee the performance of the work on the DBA contract, administrative staff who schedule

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meetings for project managers or others relating to the project, employees who order the materials for a project, etc.

III. Federal Contractors Should Review Leave Policies and Recordkeeping Systems to Prepare for New Rules.

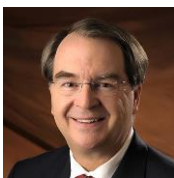
Federal contractors should review their current leave policies. Any policies that provide greater leave and rights than the new federal rules will satisfy the EO 13706 requirements. If the employer does not already have a paid leave policy, it should work with legal counsel to draft a compliant leave policy to implement after January 1, 2017. The policy should clearly define what type of work is covered by the leave and who is entitled to accrue leave.

Federal contractors should also review their timekeeping and record keeping systems to ensure that there are programs in place that can separately track hours worked on or in connection with federal covered contracts separately from other hours and accrue sick leave for only those hours on a covered Federal contract (unless the employer wants to provide a more generous leave policy).

Employers should also consider implementing procedures for employee to use to request leave and for the company to evaluate leave, which should address things such as the form to use to request leave or grant leave, the procedure for tracking leave, when a return to work or other doctor certification should be required, etc. Additionally, employers should consider training the HR staff to respond to requests and track accrual and usage of paid sick leave.



Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and wrongful discharge, and against charges by the EEOC or ACRD. She handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, ERISA, ACA, Davis-Bacon, FAR, SCA, government contracts, and wage and hour laws. She regularly provides training to companies and assists with investigations. Julie can be reached at 602.322.4046 or jpace@cavanaghlaw.com



Dave Selden's practice focuses on defending employers in employment and commercial litigation relating to the full range of employment issues, including but not limited to wrongful termination, non-competes, independent contractor and alleged misclassification issues with DES and other government agencies, defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and breach of fiduciary duties, and against charges by the EEOC or ACRD. He handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, Davis-Bacon, FAR, SCA, government contracts, and wage and hour laws. Dave can be reached at 602.322.4009 or dselden@cavanaghlaw.com

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