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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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FAR Council Issues Interim Rule Implementing Paid Sick Leave Executive Order

*By Eric W. Leonard, Craig Smith, and Nina Rustgi**

The Federal Acquisition Regulatory Council has published an interim rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors. The authors of this article analyze the interim rule.

The Federal Acquisition Regulatory (“FAR”) Council has published an interim rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors.

The interim rule was published in the Federal Register on December 16, 2016, and became effective January 1, 2017. It applies to solicitations issued by the federal government on or after January 1, 2017, and resultant contracts. For existing contracts, the interim rule directs contracting officers to include the new FAR clause in bilateral modifications extending the contract when such modifications are individually or cumulatively longer than six months. It also “strongly encourage[s]” contracting officers to include the clause in existing indefinite-delivery indefinite-quantity contracts, if the remaining ordering period extends at least six months and the amount of remaining work or number of orders expected is substantial. The companion final rule published by the Department of Labor (“DOL”) stated the applicability in different terms and with different formatting, but differences in practice are likely to be limited. Interested parties have until February 14, 2017 to submit comments to be considered in the formation of the final rule.

IMPACT

Contractors will start seeing FAR 52.222-62, Paid Sick Leave Under Executive Order 13706, in solicitations and contracts going forward. The FAR Council’s interim rule largely follows the DOL final rule implementing Executive Order 13706. The FAR interim rule will require certain contractors that have not been providing paid sick leave to employees to create systems and processes to track the accrual of sick leave, track the use of sick leave, administer leave requests, and undertake significant recordkeeping obligations, among

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other responsibilities. For contractors that already provide paid sick leave, the interim rule warrants a compliance review to assess whether and how current policies are consistent with the interim rule's requirements.

ANALYSIS

As background, the White House issued Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, in September 2015 to require 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.

The Executive Order directed both DOL and the FAR Council to issue implementing regulations. DOL published its final rule implementing the Executive Order on September 30, 2016. The FAR interim rule is substantially similar to the DOL proposed and final rules. The FAR interim rule has the following key features:

- *Applicability:* The interim rule applies to contracts covered by the Service Contract Act ("SCA," also known as the Service Contract Labor Standards statute) or the Davis-Bacon Act ("DBA," also known as the Wage Rate Requirements (Construction) statute) and that require performance in whole or in part within the United States. It also applies to employees performing on or in connection with such contracts whose wages are governed by the SCA, the DBA, or the Fair Labor Standards Act ("FLSA"), including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions.

The interim rule does not exempt contracts at or below the simplified acquisition threshold or contracts for the acquisition of commercial items. Of course, because these statutes do not apply to contracts for the acquisition of supplies, the rule does not cover acquisitions of commercial-off-the-shelf items.

The interim rule does specifically identify three exclusions. In brief, it excludes: (1) employees performing in connection with contracts covered by the rule for less than 20 percent of their work hours in a given workweek; (2) until the earlier of the date the agreement terminates or January 1, 2020, employees whose covered work is governed by a collective bargaining agreement ratified before September 30, 2016 that meets certain criteria identified in the rule; and (3) contracts that do not contain the new FAR clause and for which the agency unilaterally exercises a pre-negotiation option to renew (i.e., the unilateral exercise of a pre-negotiated option to renew an existing contract that does not have the clause will not automatically trigger the

application of that clause).

- *Accrual*: The interim rule requires contractors to permit an employee to accrue not less than one hour of paid sick leave for every 30 hours worked on or in connection with a contract covered by the rule. Contractors may limit the amount of paid sick leave employees are permitted to accrue to not less than 56 hours in each accrual year. Contractors may choose to provide employees with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time.
- *Interaction with the SCA and the DBA*: The interim rule states that the requirements of the rule are in addition to the contractor's obligations under the SCA and the DBA, and the contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those statutes for any paid sick leave provided in satisfaction of the rule's requirements. Note, though, that any sick leave provided above the minimum (1 hour per 30 hours worked on covered contracts) may qualify as bona fide fringe benefits.
- *Employee Notices*: Contractors will be required to inform each employee, in writing, of the amount of paid sick leave the employee has accrued but not used at least once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave.
- *Carryover*: The interim rule states that paid sick leave shall carry over from one accrual year to the next (subject to certain limitations). Paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on annual accrual.
- *Reinstatement*: Contractors will be required to reinstate paid sick leave for employees only when the same contractor rehires the employee within 12 months after a job separation.
- *Payout*: There is no requirement for contractors to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment.
- *Leave Requests*: The interim rule requires contractors to permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request from an employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose identified in the rule and,

to the extent reasonably feasible, the anticipated duration of the leave. If the employee is absent for three or more consecutive full workdays, contractors may require certification issued by a health care provider or other appropriate individual if certain conditions are met.

- *Interaction with Paid Time Off Policies:* The paid sick leave requirements of the Executive Order, DOL final rule, and FAR interim rule may be satisfied by a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise, where the voluntary paid time off policy meets or exceeds the interim rule's requirements.
- *Recordkeeping:* The new FAR clause requires contractors to make and maintain, for no less than three years from the completion of the work on the covered contract, numerous categories of information. These categories include, for example, a copy of notifications to employees of the amount of paid sick leave the employee has accrued; a copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests; and a copy of any written responses to employees' requests to use paid sick leave.

All covered contractors had to begin shouldering these sick-leave obligations on January 1, 2017. Note, however, that these obligations may be challenged by the new administration. For example, the Executive Order may be rescinded, the final rule may be subject to Congressional disapproval under the Congressional Review Act, or the new administration may direct that the new obligations not be enforced.