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Executive Order Requires Federal Contractors to Provide Paid Sick Leave

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On Labor Day, President Obama unveiled the latest executive branch action taking aim at federal government contractors. As labor and employment legislation has stalled in a divided Congress, the White House has again turned to an executive order to impose new requirements on certain employers, this time with respect to paid sick leave. Executive Order 13706 requires that certain federal contractors provide employees with up to seven days of paid sick leave per year.¹ The executive order closely mirrors provisions in paid leave legislation (the “Healthy Families Act”) that has failed to advance in Congress.

This executive order applies to contracts entered into after January 1, 2017, that are (a) procurement contracts for services or construction; (b) contracts for services covered by the Service Contract Act; (c) contracts for concessions, including any concessions contracts excluded by Department of Labor regulations at 29 CFR 4.133(b); or (d) contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public. A White House fact sheet² estimates that approximately 300,000 people working on federal contracts will for the first time be able to earn up to seven days of paid sick leave each year. The paid sick leave requirement is part of the White House’s “Middle Class Economics” agenda, which also includes the recent proposed changes to the Fair Labor Standards Act white collar overtime exemption regulations. As discussed below, this paid leave executive order imposes substantial new obligations on many employers.

Accrual and Carry-Over of Sick Leave

The executive order provides that covered contracts entered into after January 1, 2017, must contain a clause in which the contractor certifies that all of its employees, in the performance of the contract or any subcontract thereunder, “shall earn not less than 1 hour of paid sick leave for every 30 hours worked.” In addition, the contractor and any related subcontractors must permit

1 Executive Order 13706 of Sept. 7, 2015, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697-54700 (Sept. 10, 2015).

2 White House Office of the Press Secretary, *FACT SHEET: Helping Middle-Class Families Get Ahead by Expanding Paid Sick Leave* (Sept. 7, 2015).

employees to accrue up to 56 hours of paid sick leave per year. Thus, the executive order requires covered employers to provide more sick leave than is required by the laws that have recently been enacted in many states.

Under the executive order, accrued, unused sick leave does not have to be paid out upon termination of the employment relationship. That said, paid sick leave shall carry over from one year to the next and must be reinstated for employees rehired by a covered contractor within 12 months after a job separation.

Use of Sick Time

According to the executive order, paid sick leave may be used: (1) for an employee's own illness, injury, medical condition or when an employee needs to obtain diagnosis, care, or preventative care; (2) 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" who has an illness, injury, medical condition, or who needs to obtain diagnosis, care, or preventative care; (3) for domestic violence, assault, or stalking situations resulting in an illness, injury or medical condition or the need for obtaining diagnosis, care, or preventative care; or (4) to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action for the employee or one of the above-listed individuals in domestic violence, assault or stalking situations.

The use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed. In addition, according to the executive order, paid sick leave must be provided upon the employee's oral or written request "that includes the expected duration of the leave, and is made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable."

The executive order further provides that employers may only require that the employee taking leave provide a certification issued by a health care provider if the sick leave lasted for three or more consecutive workdays and was taken for a reason other than domestic violence, stalking or assault. The documentation should contain only "the minimum necessary information establishing a need for the employee to be absent from work."

Enforcement and Upcoming Regulations

Covered employers are prohibited from interfering with or discriminating against an employee for taking, or attempting to take, paid sick leave, or for assisting any other employee in asserting his or her rights to sick leave. The Secretary of Labor is charged with investigating potential violations of and obtaining compliance with the executive order.

The executive order outlines the paid sick leave requirements in relatively broad strokes. The details of employer's obligations under the order will be set forth in regulations to be issued by the Department of Labor. The Secretary of Labor is directed to issue regulations by September 30, 2016, concerning the requirements of the executive order.

Conclusion

As federal legislation to mandate paid sick leave languishes in Congress, many employers have been facing an increasingly complex maze of paid sick leave requirements at the state and local levels. For many government contractors and subcontractors, the task has just become even more complex. As discussed above, the executive order imposes substantial new obligations on covered employers. Even if such employers have developed paid sick leave policies to comply with the rash of recently enacted state and local laws requiring paid sick leave, they need to review their policies to ensure that those policies comply with the executive order and its implementing regulations. We will provide updated guidance once the Secretary of Labor issues regulations that offer more detail concerning the requirements of the executive order. In the interim, employers should consult with experienced employment counsel when addressing these issues.