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MEMORANDUM

TO: All MARBA Associations
FROM: Aaron Janik
DATE: April 14, 2016
RE: Executive Order 13706 and DOL NPRM
Federal Contractor's Paid Sick Leave

At the March 8, 2016, MARBA Board Meeting Robert Casey, MARBA's Outside Legal Counsel from Ogletree Deakins, submitted his bimonthly Legal Report highlighting President Obama's Executive Order (13706) dealing with Paid Sick Leave. The Legal Report indicated the Department of Labor's had issued a Notice of Proposed Rule Making (NPRM) to implement Executive Order 13706. The Legal Report further discussed several aspects of the NPRM.

A few days before the MARBA Board Meeting the DOL issued a Fact Sheet that summarizes the NPRM's key provisions and provides information regarding the comment period. Importantly, the Fact Sheet covers "**Procurement Contracts for Construction**". That section of the Fact Sheet states, "Under the NPRM, any contract covered by the DBA and its implementing regulations is subject to the Executive Order's requirements. The Executive Order does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts, i.e., Acts under which Federal agencies provide financial and other assistance to construction projects through grants, loans, guarantees, insurance and other methods, but do not directly procure construction services." (Emphasis added).

For example, the Federal Aid Highway Act, as amended by the Surface Transportation Act is a DB Related Act. If that is what your contract is awarded under, then that work is not covered. But if your work is under DB itself, it is covered by Executive Order 13706.

Additionally, the Fact Sheet addresses the issue of the accrual rate for paid sick leave stating, "**Accrual:** Under the proposal, employees would accrue not less than one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, to be calculated at the end of each workweek. The proposal also creates an option for contractors to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue the leave based on hours worked. All covered contractors would be required to inform employees in writing of the amount of paid sick leave they have accrued no less than monthly and at other times." (Emphasis added).

Robert Casey's Legal Report and the DOL Fact Sheet are attached to this memorandum for easy reference. Additional information may be found at <http://www.dol.gov/whd/flsa/eo13706/faq.htm>

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Adverse Action: The guidance acknowledges what the EEOC has believed for years: the definition includes “any action that might well deter a reasonable person from engaging in protected activity.” Even though courts generally refer to this element as an “adverse employment action,” the guidance defines the element to include actions that are not work-related as a suitable basis for a protected complaint. The guidance states, “[a]n adverse action may also be an action that has no tangible effect on employment, or even an action that takes place exclusively outside work.” Further, “[i]f the employer’s action would be reasonably likely to deter protected activity; it can be challenged as retaliation regardless of the level of harm.”

Third-Party Retaliation: Retaliatory animus can also be found where the materially adverse action is taken against a third party “who is closely related to or associated with the complaining employee,” e.g., threatening to fire an employee’s fiancé might dissuade the employee from engaging in protected activity. Adverse action could also be found where an employer punishes an employee by cancelling a vendor contract with the employee’s husband, even though he was employed by a contractor, not the employer.

Conclusion: The guidance confirms the EEOC will find protected activity and retaliatory animus in nearly all situations in which an employee subjectively believes the employer has retaliated against him or her. Circumstantial evidence forming a “convincing mosaic” also renders the employee’s entire employment history, no matter how many years it spans, fair game for finding evidence of protected activity or retaliatory animus. In short, the new guidance confirms what many employers have always believed—the EEOC strains to find protected activity and retaliatory animus in nearly every complaint.

III. Federal Contractors and Paid Sick Leave: The DOL Issues Its NPRM

In the November 2015 Legal Report we reported on *Executive Order 13706*, signed last September which will require covered federal contractors and subcontractors to provide at least one hour of paid leave for every 30 hours worked and will enable employees to earn up to 7 days or more of paid sick leave annually.

On February 25, 2016, the U.S. Department of Labor (DOL) released its Notice of Proposed Rulemaking (NPRM) to implement EO 13706. Final DOL regulations are due by September 30, 2016, after which the Federal Acquisition Regulatory Council will have to amend the Federal Acquisition Regulation to incorporate the paid sick leave obligations into the required government contracts. It is still expected that the rules will apply to future contracts or solicitations issued on or after January 1, 2017

Here are some highlights of the proposed rules:

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Coverage: Subject to certain exclusions, the paid sick leave obligations will apply to federal government contracts if (a) the wages of employees “performing on or in connection with” the contract are governed by the Davis-Bacon Act of 1931 (DBA), the McNamara-O’Hara Service Contract Act (SCA), or the Fair Labor Standards Act (FLSA), including employees who qualify for an exemption from the FLSA’s minimum wage and overtime provisions, and (b) the contract falls into one of the following four categories:

- ✓ a procurement contract for construction covered by the DBA;
- ✓ a contract for services covered by the SCA;
- ✓ a contract for concessions, including any concessions contract excluded from coverage under the SCA by Department of Labor regulations at 29 CFR 4.1333(b); or
- ✓ a contract in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

Definitions: Without delving into the minutiae of the NPRM’s lengthy section of definitions, there are a few definitions worth highlighting at this juncture.

- Paid sick leave can be used to care for a broader group of people than the individuals for whom Family and Medical Leave Act (FMLA) leave can be taken. Notably, leave to care for a child is allowed without regard to the age of the child and therefore can apply to care for adult children as well as minors.
- The concept of domestic partnership is broadly defined to include “a committed relationship with another adult.”
- “Family relationship” is defined as a relationship with any person with whom an employee has a significant personal bond—regardless of biological or legal relationships—including a cousin, close friend, or fiancé.
- “Physical or mental illness, injury, or medical condition” encompasses any illness, injury, or medical condition, regardless of whether it requires attention from a health care provider or whether it would be a “serious health condition” under the FMLA. Examples cited by the DOL include a common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode.

No Private Right of Action: The NPRM also establishes an administrative procedure to address compliance failures and makes clear that it does not create a private right of action.



Sample Clause: The NPRM includes as Appendix A the contract clause to be included in applicable solicitations and government contracts. An excerpt appears below:

(a) *Executive Order 13706.* This contract is subject to Executive Order 13706, the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the Executive Order, and the following provisions.

(b) *Paid Sick Leave.* (1) The contractor shall permit each employee (as defined in 29 CFR 13.2) engaged in the performance of this contract by the prime contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the contractor and employee, to earn not less than 1 hour of paid sick leave for every 30 hours worked. The contractor shall additionally allow accrual and use of paid sick leave as required by Executive Order 13706 and 29 CFR part 13. The contractor shall in particular comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract.

(2) The contractor shall provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account. The contractor shall provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken.

(3) The prime contractor and any upper tier subcontractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with the requirements of Executive Order 13706, 29 CFR part 13, and this clause.

The full text of the NPRM, along with a fact sheet and further information on the proposal, can be found at <http://www.dol.gov/whd/flsa/eo13706/nprm.htm>.



Fact Sheet: Proposed Rulemaking to Implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors

On September 7, 2015, President Barack Obama signed Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors*. The Executive Order requires certain employers that contract with the Federal Government to provide their employees with up to seven days of paid sick leave annually, including for family care and absences resulting from domestic violence, sexual assault, and stalking. The Executive Order directs the Secretary of Labor to issue regulations to implement the Order's requirements by September 30, 2016. The Department published a Notice of Proposed Rulemaking (NPRM) on February 25, 2016. This fact sheet summarizes the NPRM's key provisions and provides information regarding the comment period.

*** Key Provisions of the NPRM ***

The NPRM proposes a set of rules to implement the Executive Order (EO) that the Department estimates will provide paid sick leave to nearly 437,000 workers employed by federal contractors who currently receive no paid sick leave. The NPRM specifies the contracts and employees covered by the EO, as well as rules for how sick leave will accrue, when it can be used, and how the Department will ensure that covered employers comply with these new requirements. This is a *proposed* rule **and the Department encourages interested parties to submit comments on all aspects of the NPRM**. The full text of the NPRM, as well as information on the deadline for submitting comments and the procedures for submitting comments, can be found at: <http://go.usa.gov/cdXPA>

Coverage

Executive Order 13706 applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2017 or that are awarded outside the solicitation process on or after January 1, 2017. Coverage of contracts and employees under the proposal is nearly identical to coverage under the regulations implementing the Minimum Wage Executive Order, except that this proposal also covers employees who qualify for an exemption from the Fair Labor Standards Act's (FLSA) minimum wage and overtime provisions.

Under the proposal, Executive Order 13706 applies to four major categories of contractual agreements:

- (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA);
- (2) service contracts covered by the McNamara-O'Hara Service Contract Act (SCA);
- (3) concessions contracts, including any concessions contracts excluded from the SCA by the Department's regulations at 29 CFR 4.133(b); and
- (4) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Procurement Contracts for Construction

Under the NPRM, any contract covered by the DBA and its implementing regulations is subject to the Executive Order's requirements. The Executive Order does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts, *i.e.*, Acts under which Federal agencies provide financial and other assistance to construction projects through grants, loans, guarantees, insurance and other methods, but do not directly procure construction services.

Service Contracts

Under the NPRM, both procurement and non-procurement contracts that are subject to the SCA and its implementing regulations are subject to the Executive Order's requirements.

Contracts for Concessions

The NPRM defines the term concessions contract to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term concessions contract includes, but is not limited to, a contract whose principal purpose is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public. The proposed rule thus extends coverage of the Executive Order to all concession contracts with the Federal Government, including those excluded from SCA coverage by regulations, such as concession contracts with the Federal Government to operate souvenir shops or to provide food or lodging in national parks.

Contracts in Connection with Federal Property or Lands and Related to Offering Services for Federal Employees, Their Dependents, or the General Public

To the extent that such agreements are not otherwise covered by the SCA, the NPRM interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services for Federal employees, their dependents, or the general public.

Contracts That Are Not Covered by the Executive Order and the NPRM

The NPRM contains certain narrow exclusions from coverage for the following types of contractual agreements: (1) grants; (2) contracts and agreements with and grants to Indian Tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under \$2,000); and (4) any contracts for services, except for those otherwise expressly covered by the proposed rule, that are exempted from coverage under the SCA or its implementing regulations. The NPRM also provides that the Executive Order does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, *i.e.*, those subject to the Walsh-Healey Public Contracts Act.

Employees Who Are Entitled to Paid Sick Leave under the Executive Order

The NPRM provides that the Executive Order applies to any person engaged in performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. The Department proposes to include a narrow exemption from coverage for employees who perform work duties necessary to the performance of a covered contract but who are not directly engaged in performing the specific work called for by the contract and who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with such contracts.

Contracting Agency Obligations

The NPRM sets forth the responsibilities of Federal agencies that contract with private companies under the Executive Order. These contracting agencies are responsible for ensuring that a contract clause setting forth the paid sick leave requirements under the Executive Order is included in any new contracts or solicitations for contracts covered by the Order. Contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to provide the required paid sick leave, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13706 to the Wage and Hour Division (WHD).

Paid Sick Leave

Accrual

Under the proposal, employees would accrue not less than one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, to be calculated at the end of each workweek. The proposal also creates an option for contractors to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue the leave based on hours worked. All covered contractors would be required to inform employees in writing of the amount of paid sick leave they have accrued no less than monthly and at other times.

Maximum Accrual, Carryover, Reinstatement, and Payment for Unused Leave

The NPRM provides that contractors may limit the amount of paid sick leave employees may accrue to 56 hours each year and must permit employees to carry over accrued, unused paid sick leave from one year to the next. The Department also proposes to allow contractors to limit the amount of paid sick leave employees have accrued to 56 hours at any point in time. Furthermore, under the proposal, contractors will be required to reinstate employees' accrued, unused paid sick leave if the employees are rehired by the same contractor or a successor contractor within 12 months after a job separation. Contractors will not be required to pay employees for accrued, unused paid sick leave at the time of a job separation ("cash-out").

Use

The Executive Order explains that an employee may use paid sick leave for an absence resulting from: (i) physical or mental illness, injury, or medical condition of the employee; (ii) obtaining diagnosis, care, or preventive care from a health care provider by the employee; (iii) caring for the employee's 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 any of the conditions or need for diagnosis, care, or preventive care described in (i) or (ii); or (iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee as described in (iii) in engaging in any of these activities. The Department proposes definitions of these terms. In addition, under the NPRM, contractors must account for the use of paid sick leave in increments of no greater than one hour and must provide employees using paid sick leave with the same pay and benefits they would have received if they hadn't used the leave.

Requests to Use Leave and Certification or Documentation of the Need to Use Leave

The Department proposes that paid sick leave shall be provided upon the oral or written request of an employee and that a leave request must be 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. A contractor would be required to communicate any denial of a request to use paid sick leave in writing, with an explanation for the denial.

Under the proposal, a contractor may only require certification for absences of three or more consecutive days. If the paid sick leave is used for the physical or mental illness, injury, or medical condition of the employee; obtaining diagnosis, care, or preventive care from a health care provider by the employee; or caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity, the certification would be issued by a health care provider. If the paid sick leave is used for an absence resulting from domestic violence, sexual assault or stalking, the documentation provided would be from an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work. The contractor would be prohibited from disclosing any verification information and would be required to maintain confidentiality about domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

Interaction with Other Laws and Paid Time Off (PTO) Policies

The Department's proposal explains how the paid sick leave requirements interact with contractors' obligations under the SCA, DBA, Family and Medical Leave Act (FMLA), and state or local paid sick time laws. It also explains that, if certain conditions are met, contractors' existing PTO policies can fulfill the paid sick leave requirements of the Executive Order.

Enforcement Procedures

Under the proposed rule, complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. The NPRM contains a mechanism for WHD investigations and informal complaint resolution, as appropriate; it also specifies remedies and sanctions for violations of the Executive Order and its implementing regulations, including the payment of damages and debarment. The Department's proposal also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

Opportunity for Public Comment

The NPRM is available at www.regulations.gov and at the WHD Website. The NPRM invites interested parties to submit written comments on the proposed rule electronically at www.regulations.gov, or by mail. The docket ID number is 1235-AA13. Only comments received during the comment period identified in the version of the NPRM published in the Federal Register will be considered part of the rulemaking record.

For additional information, visit our Wage and Hour Division Website: www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

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