



THE KULLMAN FIRM

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CLIENT E-NEWSLETTER

SPECIAL BULLETIN

PRESIDENT SIGNS EXECUTIVE ORDER REQUIRING FEDERAL CONTRACTORS AND SUBCONTRACTORS TO PROVIDE PAID SICK LEAVE AND THE DOL ORDERS PAY TRANSPARENCY FOR THOSE SAME EMPLOYERS

On Labor Day, President Barack Obama signed an Executive Order (the "Order") requiring federal contractors to provide their employees with up to seven days of paid sick leave per year, the White House said in a statement. The Order will give approximately 300,000 workers the new ability to earn paid sick leave, and provide additional workers access to more sick leave than they had before, according to the statement.

Under the Order, employees earn not less than 1 hour of paid sick leave for every 30 hours worked. The accrued leave must carry over from one year to the next, and the leave must be reinstated for employees who are rehired by a covered contractor within 12 months after a job separation. Further, no limit can be set on leave accrued at less than 56 hours. Moreover, the leave must be provided upon the oral or written request of an employee 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 practicable."

The types of absences covered by the Order are expansive, and include those related to:

- **the employee's physical or mental illness, injury, or medical condition;**
- **the employee obtaining diagnosis, care, or preventive care** from a health care provider;
- **the employee caring for a family member** (which is broadly defined to include *anyone* "whose close association with the employee is the equivalent of a family relationship") for the same medical conditions or needs or where the family member "is otherwise in need of care";
- **domestic violence, sexual assault, or stalking where the employee is a victim** and needs to take leave for certain purposes, such as the need to obtain additional counseling, seek relocation, or seek legal action; and
- **assisting a family member who is a victim of domestic violence, sexual assault, or stalking** and who needs leave for the same reasons.

Notably, a contractor's existing paid leave policy will satisfy the requirements of the Order if the employee receives at least the same coverage as mandated by the Order. Further, a contractor is not required to pay out accrued leave upon separation of employment. However, the Order makes clear that it does not supersede or

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afford an excuse for noncompliance with any applicable law (including any Federal, State, or municipal ordinance) or collective bargaining agreement requiring greater paid sick leave or leave rights.

The Order does offer some (limited) rights to the employer. For example, the employer may require certification by a health care provider for paid sick leave related to illness or health care, which must be provided no later than 30 days from the first day of leave, but only if an employee is absent for 3 or more consecutive workdays. If 3 or more consecutive days of paid sick leave is used for domestic violence related reasons, an employer may require documentation "from an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work." This information, however, must be kept confidential unless the employee consents or disclosure is required by law.

Not surprisingly, the Order prohibits a contractor from interfering with or in any manner discriminating against employees for taking, or attempting to take, paid sick leave under the Order, or in any manner asserting, assisting other employees to assert, any right or claim under the Order. The Secretary of Labor is charged with enforcing the Order.

The Order is effective immediately, but generally applies to contracts where the solicitation for such contract has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017. The types of contracts covered by the Order include: procurement contracts for services or construction; contracts for services covered by the Service Contract Act; contracts for concessions; and contracts entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. These covered contracts appear identical to the contracts covered by the Executive Order the President signed in February of this year raising the minimum wage for certain federal contractors, which omitted from coverage a large portion of contractors – namely those who sell goods and supplies to the federal government.

Importantly, the Order applies to both contractors and subcontractors. Indeed, the Order charges executive departments and agencies with ensuring that the new contracts include a clause, which the prime contractor and any subcontractor must incorporate into lower-tier subcontracts, specifying as a condition of payment, that all employees, in the performance of contracts or subcontracts, shall earn the paid sick leave specified by the Order. We would assume that only subcontracts under the covered prime contracts would be implicated. Fortunately, the Secretary of Labor is charged with issuing implementing regulations due late next year, which should offer greater clarity on any outstanding questions.

Federal contractors and subcontractors also were made the subject of a new rule from the Department of Labor ("DOL") prohibiting pay secrecy policies (the "Transparency Rule"). According to the DOL, a "culture of secrecy" surrounding pay prevents women and people of color from finding out that they are being discriminated against. To combat this purported problem, the Transparency Rule amends the equal opportunity clause in federal contracts and subcontracts to add language prohibiting federal contractors from discharging, or otherwise discriminating against, employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants. The Transparency Rule also requires contractors to disseminate a nondiscrimination provision to employees and applicants using their existing employee manuals or handbooks, and either electronically or by posting the prescribed provision in conspicuous places available to employees and job applicants. This rule is effective January 11, 2016.

Importantly, the Transparency Rule applies to supervisors. Employers that frequently deal with the National Labor Relations Act ("NLRA") are most likely aware that policies prohibiting non-supervisory employees from discussing their compensation may violate the NLRA. The Transparency Rule, however, is not

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limited to non-supervisory employees. Accordingly, covered contractors should carefully review any employment policies to ensure that employees (both supervisory and non-supervisory) are not prohibited from discussing their compensation.

If you have any questions, please call The Kullman Firm attorney with whom you customarily work.

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