

Management Alert



Federal Contractor News Roundup: Paid Sick Leave, Pay Secrecy, Posters, Plus More

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This year continues to be an active one for employers who are federal contractors or subcontractors. Yesterday, President Obama continued the trend of using Executive Orders where legislative solutions have stalled by ordering federal contractors to grant up to seven days of paid sick leave to some employees. President Obama also announced that the final pay secrecy regulations, which were issued in proposed form a year ago, are expected this week. Separately, the Office of Federal Contract Compliance Programs (OFCCP) issued a compliance checklist and model posters related to Section 503 and VEVRAA, though you should proceed with caution before adopting their use. Finally, as you may have seen, the OFCCP has issued a survey seeking feedback about contractors' experiences in audits. Let's get this roundup started.

Labor Day Surprise: Paid Sick Leave for Some Employees of Federal Contractors

Yesterday, President Obama signed an [Executive Order](#) that would require federal contractors to offer up to seven days of paid sick leave per year to some of their employees. This Executive Order did not put paid leave on a fast track; President Obama called for the Secretary of Labor to issue final regulations by September 30, 2016; if implemented, the rules -- and leave requirements -- will apply only to new federal contracts signed after January 1, 2017.

The Executive Order would:

- Permit covered employees to be eligible for up to seven days of paid sick leave each year. Covered employees will be eligible to earn up to one hour of paid sick leave for every 30 hours of qualifying work, capped at no less than 56 hours.
- Allow covered employees to use the paid leave to take care of themselves, a family member (including a child, parent, spouse, domestic partner, or "other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship") or for absences resulting from domestic violence, sexual assault, or stalking.
- Permit carry-over of sick leave, including reinstatement of leave for employees rehired within 12 months after a job separation.
- Apply only to employees working "in the performance of the contract or any subcontract." It is too soon to tell how the regulations will define "in the performance of the contract," or how broadly coverage will extend. The Obama Administration suggested that it will have limited reach, noting that it will impact, at most, 300,000 employees. Similar language was used in the Minimum Wage Executive Order, however, the regulations issued for that Executive Order (and the minimum wage) applied beyond only those employees who work directly on federal contracts or subcontracts. Employees working "on or in connection with" covered Federal contracts are generally entitled to receive the minimum wage for all time

spent performing on or in connection with covered Federal contracts. More information about the Minimum Wage Executive Order is available [here](#).

The Order would not permit contractors to receive credit toward their prevailing wage or fringe benefit obligations under the Service Contract Act or the Davis-Bacon Act for any paid sick leave required by this Order. If a contractor's existing paid leave policy makes paid sick leave available to all covered employees, the Executive Order states that this would satisfy the new requirements, assuming the existing paid leave is at or above the minimums required by the Order.

The Department of Labor and FAR Council will now begin the process of preparing proposed regulations to implement the Executive Order. We will keep you posted of further developments.

Pay Secrecy Final Rule Expected This Week

President Obama also announced yesterday that the Department of Labor's OFCCP will publish the final rule prohibiting federal contractors from taking adverse action against applicants and employees who discuss compensation. The proposed regulations, issued in September 2014 following President Obama's April 2014 Executive Order, covered:

- Both applicants and employees of federal contractors and subcontractors;
- Managers and supervisors;
- Activity that may not be considered to be "concerted" under the NLRA; and
- Information about the amount and type of pay and decisions, statements, and actions related to setting or altering employee compensation.

The regulations, if adopted in their proposed form, would give legal redress to applicants and employees under Executive Order 11246 who can demonstrate that discussing, or disclosing compensation information was a "motivating factor" in their termination or other adverse employment action. In addition, if adopted in their current form, the regulations would amend the existing Equal Opportunity Clause of Executive Order 11246 to require that all Federal contracts and subcontracts include language prohibiting discrimination against employees and applicants who disclose or discuss compensation, and require that covered employers incorporate this prohibition into employee manuals or handbooks and disseminate the nondiscrimination provision to employees and job applicants. The OFCCP also sought public comment on a proposal that could require training on these new retaliation requirements for managers during routine new manager training, or subsequent manager meetings. More information on the proposed rule is available [here](#).

Look out for additional information coming soon after the final regulations are issued.

The OFCCP is Listening: Voluntary Checklist and Posters, Plus More

We also wanted to make you aware of some new voluntary resources the OFCCP produced related to the disability and veterans affirmative action regulations. Last month, the OFCCP issued the following resources:

- **Section 503 Checklist:** The OFCCP's 14-page "[Checklist for Compliance with Section 503 of the Rehabilitation Act of 1973](#)," asks contractors "yes/no" questions about practices and policies related to persons with disabilities, and according to the OFCCP is designed to help contractors assess their compliance with the Section 503 requirements. The Section 503 Checklist is optional and we caution against using it as other than as a mental checklist, and then only at the direction of legal counsel. The Checklist suggests that some clearly optional regulatory requirements are mandatory. For example, the Checklist asks whether the contractor lists the identity of the official assigned responsibility for implementation of the contractor's affirmative action activities on all internal and external communications regarding the company's affirmative action program -- an activity which is only suggested but not required by the regulations. The Checklist also asks whether the contractor has developed "recruitment literature" that can be provided during formal briefing sessions with representatives from recruiting sources, which is again not a required activity. These are just two of the many examples of why caution is warranted.

- **OFCCP Outreach Poster:** The OFCCP's "[Outreach Poster](#)" was intended to "increase public awareness of OFCCP and its mission." The poster highlights employers' non-discrimination obligations and encourages individuals who believe they may have experienced discrimination to contact OFCCP. This is not a legally required poster and federal contractors are cautioned to speak with their legal counsel before deciding whether to post it. It would, however, be a good opportunity to double check that the legally required "[EEO is the Law Poster](#)" is posted on company bulletin boards, on your company intranet, and on your careers page or other application materials.
- **Protected Veteran "Infographic":** OFCCP has also published a new "[Infographic](#)" intended to help applicants and employees determine whether they are a "protected veteran" under the Vietnam Era Veteran Readjustment Assistance Act (VEVRAA). Under VEVRAA, a veteran may be classified as a "disabled veteran," "recently separated veteran," "active duty wartime or campaign badge veteran," or "Armed Forces service medal veteran" and many people have questions about whether they are considered a protected veteran. The one-page poster was developed in response to requests from the veteran community to clarify who falls within the protected veteran categories under the statute.

OFCCP's "Customer Experience Survey"

Finally, you were not dreaming – it is true that the OFCCP is actually asking for your feedback. Last month, the OFCCP launched a "Customer Experience Survey" for federal contractors that have undergone a compliance evaluation in the past four years. The survey, deployed electronically via SurveyMonkey, seeks to collect information on contractors' experiences during compliance evaluations to identify areas where OFCCP can strengthen its outreach and education, training, and processes. While the OFCCP states that survey responses submitted electronically are "anonymous" and that Survey Monkey will report aggregated information that does not identify any one respondent, contractors that have understandable confidentiality concerns may print the survey and mail it to the OFCCP at the following address: Debra Carr, Director, Division of Policy and Program Development, 200 Constitution Avenue, NW, Room C-3325, Washington, D.C., 20210. The survey will remain open until October 31, 2015.

Please reach out to your OFCCP, Affirmative Action, and Diversity Consulting attorney for advice and counsel in navigating these changes.

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