



OPERATING WITH INTEGRITY

COMMITMENT COMPLIANCE CULTURE

NEW PAID SICK LEAVE FAIR PAY, SAFE WORK PLACES & TIMEKEEPING

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PAID SICK LEAVE FOR FEDERAL CONTRACTORS

- Final rule effective Nov. 29, 2016
- Implements Executive Order 13706
- Requires certain parties that contract with the Federal Government to provide paid sick leave for their employees
- Sets forth requirements and restrictions governing accrual and use of paid sick leave
- Prohibits interference with or discrimination for exercise of rights under Executive Order

COVERED CONTRACTS

Paid Sick Leave Requirements apply to:

- Contracts that incorporate the Davis-Bacon Act (DBA) or the Service Contract Act (SCA)
- Contracts for concessions, including any concessions contracts excluded from SCA coverage by DOL regulations (29 C.F.R. 4.133(b))
- Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public

EFFECTIVE DATES

- Effective for all new federal contracts awarded on or after Jan. 1, 2017, including:
 - Covered contracts that are added to the GSA Schedule in response to GSA schedule solicitations on or after Jan. 1, 2017
 - Covered task orders issued pursuant to those contracts also deemed to be new contracts
 - Existing contracts renewed, extended, or amended after Jan. 1, 2017
- Temporary CBA exclusion until Jan. 1, 2020
 - Exclusion applies to employees and not contract
 - CBA must have been ratified before Sept. 30, 2016
- Excludes individuals working on grants, contracts and agreements with Indian Tribes, contracts for construction that are not subject to the DBA and certain service contracts

EMPLOYEE COVERAGE

- Any person performing work on or in connection with a covered contract
 - “In connection with” excludes employees performing less than 20% of work hours in a given workweek on a covered contract
 - But applies to all employees working “on” a covered contract
 - Existing contracts renewed, extended, or amended after Jan. 1, 2017
- Employees whose wages are governed by the SCA, DBA, FLSA, including salaried employees, regardless of the contractual relationship
 - Independent contractors too!

SICK LEAVE REQUIREMENTS

- 1 hour for every 30 hours worked
 - Excluding paid time off
 - Physical impossibility exception added to the minimum increment of 1 hour
- Cannot be capped at less than 56 hours (7 days) per year
- Can be carried from year-to-year
- Requires accrual to occur at the conclusion of each pay period or each month, whichever interval is shorter

SICK LEAVE REQUIREMENTS (CONT.)

Contractors may:

- Estimate the portion of an employee's hours worked in connection with covered contracts
 - May need to provide verifiable information if requested and maintain records
- Prorate amount of paid sick leave provided to employees depending upon accrual year start date option
- Ask employees to make a reasonable effort to schedule foreseeable absences for paid sick leave
- Require employees to provide documentation for absences of 3 or more consecutive full workdays

SICK LEAVE REQUIREMENTS (CONT.)

Contractors may NOT

- Require employees to provide extensive or detailed information about:
 - the need to be absent from work or
 - the employees family or family-like relationship with the individual for whom the employee is requesting care
- Make an employee's use of paid sick leave contingent on employee's finding a replacement worker

SICK LEAVE REQUIREMENTS (CONT.)

Final rule requires contractors to:

- Keep written records regarding sick leave requests, denials, unused sick leave, employee financial payments and more (each pay period)
- Maintain confidentiality requirements under Genetic Information Nondiscrimination Act (GINA) and the ADA for employee medical information

Contractors may also retroactively deny and recoup payments if employee provides insufficient certification or documentation pertaining to 3+ consecutive work day absences



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FAIR PAY, SAFE WORK PLACES



FAIR PAY SAFE WORKPLACES

EXECUTIVE ORDER 13673

- Requires disclosure of violations of 14 different federal employment laws and state equivalents

Effective October 25, 2016*

- Phase-in implementation of mandatory disclosure of labor law compliance
- Different disclosure requirement dates for prime contractors and subcontractors depending upon contract revenue

*Oct. 24, 2016, federal judge in TX issued preliminary injunction to block the arbitration and disclosure portions of rule from taking effect

14 FEDERAL LABOR LAWS

- Fair Labor Standards Act
- Occupational Safety and Health Act
- Migrant and Seasonal Agricultural Worker Protection Act
- National Labor Relations Act
- Davis-Bacon Act
- Service Contract Act
- Executive Order 11246 of Sept. 24, 1965 (EEO)
- Family and Medical Leave Act
- Title VII of the Civil Rights Act
- Section 503 of the Rehabilitation Act of 1973 (prohibits disability discrimination)
- Vietnam Era Veteran's Readjustment Assistance Act
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Executive Order 13658 of Feb. 12, 2014 (contractor minimum wage)
- State law equivalents

DISCLOSURE REQUIREMENT EFFECTIVE DATES

October 25, 2016*

- Prime contractors bidding on contracts equal to or in excess of \$50 million
 - Disclosure of labor law violations dating back to October 25, 2015 until October 25, 2018
 - After October 25, 2018, disclosure of violations having occurred 3 years prior to date of solicitation
 - Arbitration prohibitions effective
- * Labor law disclosure and arbitration provisions subject to ongoing legal challenges

DISCLOSURE REQUIREMENT EFFECTIVE DATES

April 25, 2017

- Effective mandatory disclosure requirement for prime contractors bidding on contracts equal to or in excess of \$500K for new solicitations

October 25, 2017

- Subcontractors under consideration for contracts with total value greater than \$500K required to undergo mandatory assessment by DOL
 - Subcontracts for commercially available off-the-shelf items not subject to final rule

PRE-AWARD EVALUATION ENGAGEMENT PROCESS

- If contractor discloses labor law violation in bid and selected as apparent awardee
 - CO to request that contractor to provide information for consideration before making responsibility determination
 - Referred to Agency Labor Compliance Advisor (ALCA) for evaluation of information provided by contractor and provides recommendation to CO
 - Supposed to occur within 3 days of award

PRE-AWARD EVALUATION ENGAGEMENT PROCESS (CONT.)

- ALCA must consider whether violations are “serious, repeated, willful, or pervasive,” numerous, and whether contractor has taken remedial measures
- ALCA may find
 - Contractor is responsible and has a satisfactory record of labor compliance despite violation OR
 - Contractor needs to commit to improving record by entering into labor compliance agreement before or after CO makes the award OR
 - ALCA may recommend suspending and debarring official be notified that contractor is not responsible
- CO has final discretion regarding responsibility determination

DISCLOSURES DURING PERFORMANCE

- Representations in SAM
- CO may:
 - Take no action
 - Refer to appropriate agency for compliance agreement
 - Decline to exercise option
 - Terminate contract
 - Notify agency suspending and debarring official

SUBCONTRACTORS

Prime Contractor must:

- Require subcontractors to provide certification they are responsible (from DOL)
- Prior to awarding subcontract
- In limited circumstances, within 30 days after award is made
- Does not apply to commercial off-the-shelf items
- DOL to review compliance of subcontractors and subcontractor makes representation to the prime

LABOR VIOLATIONS DEFINED

Contractors should disclose:

- Civil judgements
- Administrative merits determinations
- Arbitration awards occurring as the result of a violation of 14 labor laws and state law equivalents

FAR and DOL expected to release additional regulations regarding state law equivalents at a future date

REPORTABLE VIOLATIONS

Civil Judgement/Arbitral Award

- Award by a court or an arbitrator or arbitral panel in which it is determined that contractor violated labor laws
- Includes a judgment or order that is not final or is still subject to appeal
- Granting of partial summary judgment may be a civil judgment

REPORTABLE VIOLATIONS

Administrative Merits Determination:

- WH-56 from DOL
- Letter indicating violations of Section 6 or 7 of FLSA
- Letter/Notice assessing civil monetary penalties
- Order from ALJ
- OSHA citation
- Imminent danger notice
- Notice of abatement
- Show cause notice from OFCCP
- Letter of determination of reasonable cause or civil action filed by EEOC
- NLRB complaint

REPORTING ADMINISTRATIVE MERITS DETERMINATIONS

Contractors must report all applicable administrative merits determinations **EVEN if challenging determination**

- Major basis for legal challenge to Fair Pay Safe Workplaces rule because of due process concerns
- Stay tuned for final outcome of ongoing legal challenges to the rule

CONSIDERING MITIGATING FACTORS

Mitigating Factors:

- Contractor remediation
 - Correct violation and demonstrate effort to prevent similar violations?
 - Labor compliance agreements
- Number of violations relative to size
- Recent legal or regulatory change
- Good faith and/or reasonableness
- Significant period of compliance

COMPLIANCE STRATEGIES

- Evaluate past labor compliance
- Identify potential risks
- Take any appropriate mitigating action
- Analyze current pay practices and employee agreements
- Be responsive to employee complaints (complaint procedure)
- Prepare for evaluation process
- Calculate cost impact and assess appropriate changes
- Will you engage in pre-award assessment?

EMPLOYEE ARBITRATION AGREEMENTS

- Contractors should review pre-dispute arbitration agreements
 - Contractors with contracts in excess of \$1 million are prohibited from arbitrating Title VII disputes or torts relating to sexual harassment or sexual assault
 - Extends to subcontracts but excludes COTS items
- Final rule and DOL Guidance exempt agreements entered into before effective dates
- Current appeals to Supreme Court in cases seeking to bar employers from utilizing these types of agreements

PAYCHECK TRANSPARENCY EFFECTIVE DATE

January 1, 2017

- Paycheck Transparency clause:
 - Requires contractors to provide wage statements with specified information to employees
 - e.g., hours worked, overtime hours, pay and additions to and deductions from pay
 - Requires contractors to provide exempt employees and independent contractors notice of employment status



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TIMEKEEPING RULES FOR FEDERAL CONTRACTORS



TIMEKEEPING ROLES & RESPONSIBILITIES

Federal government Requirements

- False Claims Act

Labor Requirements

- FLSA, SCA, DBA

Ethics

TIMEKEEPING BASIC REQUIREMENTS

- Employee maintains control of timesheet
- Timesheets completed daily
- Changes to timesheets explained
- All time (paid or unpaid) recorded
- Employee understands charge codes
- No hours recorded in advance
- Supervisor approves
- Policies read and understood

TIMEKEEPING ROLES

Federal Contractor

- Employee
- Supervisor
- Tone from the top!

Federal Government

- Contracting Officer
- Department of Labor
- Auditor (Defense Contract Audit Agency – DCAA)

EMPLOYEE TIMEKEEPING

Employees Must:

- Consistently follow established procedures
- Record time promptly, daily, and accurately
- Approve time charges
- Seek overtime approval
- Record leave to proper accounts
- Know charge codes (direct/indirect)
- Account for all hours worked
- Correct errors (except in rare circumstances)

SUPERVISOR TIMEKEEPING

Supervisor Must:

- Monitor Compliance
- Approve time charge
- Do not change time
- Apply policies consistently

CONTRACTOR KEY PRACTICES

- Contractor Must:
 - “Tone from the Top”
 - Comply with applicable laws and contract requirements
 - Maintain policies, systems, training (at least annually)
 - Prepare charge codes and provide to employees
 - Keep records for 3 years
 - Evaluate labor distribution documenting hours and dollars
 - Internal review or internal audit

CONTRACTING OFFICER TIMEKEEPING

- Determine applicability of labor laws
- Obtain certified payrolls for DBA
- Determine if rates proposed are fair and reasonable
- Reviews and approves contractor compensation policies
- Determines if rates paid are fair and reasonable

AUDITOR (DEFENSE CONTRACT AUDIT AGENCY)

- Created to perform contract audits for Department of Defense
- Advisor to the Contracting Officer
- Timekeeping and Labor Audits
 - Floor checks
 - Labor system audits
 - Compensation system
- Prove timesheets capture costs accurately and in DCAA compliance
- Employees must show they have a clear understanding of policies and procedures for work assignments and consequences of improper timekeeping.

INSPECTOR GENERAL

Common Problems

- Personnel did not always record employee direct labor correctly or have adequate documentation to support it.
- Supervisors did not always segregate the timekeeping duties.
- Employees did not certify the time they worked on projects.
- Supervisors did not always have adequate oversight of contract labor hours, which personnel did not always record correctly.

ELECTRONIC TIMEKEEPING

- Password protection
- At least every six months, change.
- Limit access to project number, names, and codes, if possible.
- Audit **travel** feature

REGULATIONS OVER TIMEKEEPING

- *None*
- FAR 31.201-2(d), FAR Part 52
- DCAA Contractor Audit Manual/Form SF-1408

CONTROL OVER TIMEKEEPING

OBJECTIVE – Establish timekeeping and labor charging practices which result in the accurate assignment of allowable and allocable labor costs to U.S. Government Contracts

CONTROL OVER TIMEKEEPING (CONT.)

Policies and Procedures

- Provide adequate written policies and procedures for instructing employees on the proper charging of direct and indirect labor, and to reasonably assure the accuracy of recorded time charges to the cost objectives.
- The guidance should state that the nature of the work determines the proper distribution of time, not availability of funding, type of contract, or other factors.
- The company policy should state that the accurate and complete preparation of timesheet is the employee's responsibility. Careless or improper preparation may lead to disciplinary actions under company policies, as well as applicable Federal statutes.

CONTROL OVER TIMEKEEPING (CONT.)

Internal Controls

- The maintenance of accurate labor cost data,
- The accumulation and recording of labor costs allocable to cost objective for the purpose of determining proper cost reimbursement on government contracts,
- The verification of labor cost transfers, and
- The segregation of responsibilities for labor related activities.

AUDITOR EXPECTATIONS - CONTROLS

DCAA Timekeeping Procedures Guidance for Contractors

- Should be a segregation of responsibilities for labor-related activities;
- Procedures must be evident, clear-cut, and reasonable so there is no confusion;
- Maintenance of controls must be continually verified, and violations must be remedied through prompt and effective action;
- Individual employees must be constantly, although unobtrusively, made aware of controls that act as an effective deterrent against violations. Many businesses accomplish this by emphasizing the importance of timesheet preparation in staff meetings, employee orientation, and through the posting of signs throughout the workplace that remind employees of the importance of accurate and current timesheets.

PENALTIES

- Suspension/Debarment
- Fines (3x)
- Non-payment
- Criminal liability (18 U.S.C. 1001)

PENALTIES

Who?

- Employees who fill in and sign the timesheets with the false information
- Supervisor who approves the timesheets with the knowledge that they contain the false information
- Managers and officers who know those facts and make the claim anyway by submitting the invoice based upon the false timesheet
- The company, in a case where the falsification is known by individuals who submit or who have authority to submit or disapprove the submission of invoices, or who are of a sufficiently high enough level in the company that the court will impute their knowledge to the corporation

PENALTIES

There does not have to be a direct contractual relationship between the Government and the employee who submitted the false timesheet for the employee to be liable. A person may be liable even though he or she did not submit the fraudulent claim presented to the U.S. Government.

THANK YOU

QUESTIONS ?

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