Fate of Unpaid Sick Leave for Workers on Federal Contracts Uncertain

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December 2016

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FATE OF UNPAID SICK LEAVE FOR WORKERS ON FEDERAL CONTRACTS UNCERTAIN

By: Barbara G. Stephenson

I. INTRODUCTION

The outcome of the recent presidential election may result in the reversal of many of what are viewed as "employee friendly" initiatives of President Obama. One such action was Executive Order (E.O.) 13706, signed by President Obama on September 7, 2015, which established paid sick leave for federal contractors. After the E.O. was issued, the U.S. Department of Labor estimated that about 1.15 million workers employed by federal contractors would benefit from this order.

E.O. 13706 can be reversed by President-elect Trump, through his own executive order, the first day he is in office. The reversal of U.S. Department of Labor (DOL) implementing regulations may, however, be a bit more complicated. It should be noted that an earlier order issued by President Obama in February 2014, E.O. 13658, established a minimum wage initially of $10.10 for all workers on federal construction and service contracts. This E.O. also likely will be targeted by the new administration although the final regulations for this order, which became effective December 8, 2014, present additional questions about undoing federal regulations.

II. COVERAGE AND BENEFITS UNDER E.O. 13706

E.O. 13706 directed the U.S. DOL to issue regulations to implement its requirements and the resulting Final Rule was published on September 30, 2016. Key concepts under the Final Rule are as follows:

- E.O. 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.

- E.O. 13706 applies to four major categories of contractual agreements, including procurement contracts for construction covered by the Davis-Bacon Act; service contracts covered by the McNamara-O'Hara Service Contract Act; concession contracts; and contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

- Any subcontract of a covered contract that falls into one of the four above categories is subject to paid sick leave requirements.

Coverage of contracts and employees under the Final Rule is nearly identical to coverage under the regulations implementing E.O. 13658 which established a contractor minimum wage.

There are narrow exclusions from E.O. 13706 which apply to certain types of contractual agreements such as contracts and agreements with and grants to Indian Tribes. Further, if there is a collective bargaining agreement in place before September 30, 2016 which provides employees with at least 56 hours (or seven days) of paid sick leave each year, then the requirements of the E.O. 13706 and the Final Rule do not apply until the date the agreement terminates or January 1, 2020, whichever is first. If the collective bargaining agreement provides less than seven days of sick leave, the contractor must provide covered employees with the different between seven days and the amount provided under the collective bargaining agreement.

Under the Final Rule, employees must accrue one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. The Final Rule 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 leave based on hours worked. 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 sick leave from one year to the next. Contractors are not required to pay employees for accrued unused sick leave at the time of termination of employment. The E.O. and the Final Rule describe circumstances under which an

employee may use paid sick leave, which generally include the employee's own illness, injury, obtaining diagnosis, care, or preventative care, or caring for an 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. A contractor may require certification only for absences of three or more consecutive full days and the employee must have received notice of the requirement to provide certification or documentation before he or she returns to work.

III. ANTICIPATED USE OF THE CONGRESSIONAL REVIEW ACT

The Congressional Review Act (CRA) was passed in 1996 as part of the "Contract with America" which was an initiative of then-Speaker Newt Gingrich. The CRA provides a special fast-track mechanism by which Congress may overturn an agency regulation within 60 session days of its issuance. Since "session days" are days in which Congress actually is in session, many months may pass before the 60-day cut-off is reached. Any resolution under the CRA passed by the present Congress will naturally be vetoed by President Obama and the question really is what federal regulations are subject to a CRA resolution when the new Congress is sworn in this January. Most Congressional watchers agree that any regulations issued by the Obama administration later than approximately May 30, 2016 will be subject to a CRA resolution passed by the new Congress. For regulations not subject to a fast-track resolution under the CRA, an agency will have to go through the notice and comment rulemaking process, which is the same process that is used to develop a new regulation. A resolution of disapproval such as one attacking the Final Rule implementing E.O. 13706 will likely be signed by the new President. What is not know at this point, however, is whether the Final Rule under E.O. 13706, is a topic of sufficient priority to warrant CRA attention.