

WESTON HURD CLIENT ADVISORY
September 2015

**ARE YOU A FEDERAL SUBCONTRACTOR
WITHOUT EVEN KNOWING IT -- *REVISITED***

By Donald N. Jaffe, Esq.

In July 2014, we published a newsletter entitled "Are You a Federal Subcontractor Without Even Knowing It?" which discussed President Obama's Executive Order 13658 effective February 20, 2014. The major component of that Executive Order was increasing the minimum wage to \$10.10 per hour beginning January 1, 2015, and applying it to new government contracts issued on or after January 1, 2015. That Executive Order also provided, commencing January 1, 2016, and annually thereafter, the minimum wage applicable to federal contractors and subcontractors was to be "increased . . . by annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States City Average, All Items, Not Seasonally Adjusted)" as determined by the Bureau of Labor Statistics.



President Obama has now followed up with another employee benefit that must be provided by federal contractors and subcontractors. In Executive Order 13706 (September 7, 2015, Federal Register Volume 80, pages 54697-54700), the President has now ordered that, beginning with government contracts on and after January 1, 2017, a contractor or subcontractor will be required to provide paid sick leave for all employees to be earned at the rate of not less than one hour of paid sick leave for every 30 hours worked. Such a formula would thus provide for up to seven or more paid sick leave days annually. The salient features of the new Executive Order are:

1. A contractor or subcontractor may not limit the total accrual of paid sick leave per year at less than 56 hours;
2. Paid sick leave under the Executive Order may be used for the following:
 - o a physical or mental illness, injury or medical condition;
 - o obtaining diagnoses, care or preventive care from a healthcare provider;
 - o caring for a child, parent, spouse, domestic partner or any other individual related by blood or affinity with the employee who has any of the aforementioned conditions and requires care; and
 - o domestic violence, sexual assault or stalking if the time absent from work is for

purposes of obtaining counseling, to seek relocation, to seek assistance from victim services organizations or to take related legal action pertaining to any related civil or criminal legal proceeding.

3. Paid sick leave accrued under the Executive Order can be carried over from one year to the next, but the Order provides that a contractor or subcontractor is not required to pay an employee, upon separation from employment, for accrued sick leave that has not been used. This provision would clearly provide an incentive to an employee contemplating employment separation to "use it or lose it." The aforementioned provision, however, does not apply to a forfeiture of accrued sick leave where an employee is reinstated by the contractor or subcontractor within 12 months after a job separation. This provision would seem to apply to seasonal or laid off employees who are then subsequently reinstated by the contractor.

Several states also have laws requiring employers within those states to provide paid sick leave to all of their employees. Like those state laws, the Federal Executive Order provides that an employer does not have to add additional paid sick days on top of an existing paid time off ("PTO") policy so long as the existing policy permits the PTO to be used for the same purposes and under the same circumstances as the Federal benefit. Federal contractors and subcontractors may, however, wish to now separate out sick leave from other PTO prior to the Executive Orders going into effect because of the requirement in the Executive Order that employees be permitted to carryover unused sick leave from year to year without limit. If the employer's existing PTO policy does not allow such unlimited carryover, it may be necessary to revise your policy now to allow for seven paid sick days which can be carried over if they are not used. Please note that employers will *not* be permitted to change their PTO policies to reduce the overall amount of PTO once the order goes into effect.

The Executive Order further provides that the use of paid sick leave cannot be made contingent upon requiring the employee to find a replacement to cover any work time that is going to be missed. Also, the Order provides that contractors/subcontractors do not receive any credit toward their prevailing wage or fringe benefit requirements under existing federal acts (such as Davis-Bacon).

The paid sick leave is to be provided upon an oral or written request of the employee which must also include the expected duration of the leave time and, if the need for leave is foreseeable, the request should be made at least seven calendar days in advance. In other instances, the request should be made "as soon as is practicable."

The requirements of the new Executive Order, coupled with the President's previous Executive Order dealing with minimum wage, reflect that federal contractors and subcontractors will be subjected to increased scrutiny by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The administration of these two Executive Orders will impact on a contractor's costs in the performance of the particular government contract and in the administrative oversight required to comply with the Executive Orders.

The labor and employment attorneys at Weston Hurd LLP are available to address your questions and concerns regarding the impact of this Executive Order and the President's previous Executive Order pertaining to federal contract minimum wages. Please contact your Weston Hurd lawyer with any questions.



Donald N. Jaffe is Of Counsel to Weston Hurd LLP. He focuses his practice on estate planning, labor and employment matters, litigation and arbitration. Don can be reached at 216.687.3262 or djaffe@westonhurd.com.

About Weston Hurd LLP

With offices in Cleveland, Columbus and Beachwood, Weston Hurd LLP provides comprehensive legal counsel to Fortune 500 companies, insurance carriers, financial institutions, healthcare providers, small- and medium-sized businesses, the real estate industry, governmental agencies, non-profit enterprises and individuals.

For additional information regarding Weston Hurd's publications, please visit the [Publications](#) page on Weston Hurd's web site. Information about Weston Hurd's practice groups and attorneys, can be found on the [Practice Areas](#) page.

As a reminder, this material is being provided to draw your attention to the issues discussed.

Although prepared by professionals, it should not be utilized as a substitute for legal advice and representation in specific situations.



www.westonhurd.com

Copyright 2015