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DirectEmployers

a nonprofit association of employers

HOW TO COMPLY WITH THE NEW OBAMA EMPLOYMENT RULES YOU HAVE TO FOLLOW DESPITE FEDERAL INJUNCTIONS

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AGENDA

ABBREVIATION KEY

- ALJ = Administrative Law Judge
- ARB = Administrative Review Board
- CFR = Code of Federal Regulations
- CO = Contracting Officer
- COTS = Commercial Off The Shelf (item)
- Ees = Employees
- EO = Executive Order
- FARs = Federal Acquisition Regulations

ABBREVIATION KEY, CON'T

- FLSA = Fair Labor Standards Act
- FPSW = Fair Pay and Safe Workplaces
- FR = *Federal Register*
- *IC* = Independent Contractor
- K = Contract
- Kor = Contractor
- SubKor = Subcontractor
- USDOL = U.S. Department of Labor
- W-H Division = Wage-Hour Division

INTRODUCTION

- Unless You Just Want General Education, You May NOW End Your Participation In This Webinar If Your Company Does Not Intend To Sign A "New" K On Or After January 1, 2017 Meeting The Below Noted Federal Contracting Thresholds:
  - **FPSW**: "a" federal contract/subcontract > $500,000 (no aggregation)
  - **PAID SICK LEAVE:**
    - (1) a construction contract covered by Davis-Bacon (>$2,000);
    - (2) contracts for services covered by the Service Contract Act (> $2,500);
    - (3) contracts for concessions, including any concessions contracts excluded by Department of Labor regulations at 29 C.F.R. § 4.133(b); or
    - (4) contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

1. Where Are We on the Fair Pay & Safe Workplaces Final Rule?

- The "PayCheck Transparency" component of the FPSW Final Rule survived federal court injunction and will become legally effective January 1, 2017
- President-Elect Trump takes office January 20, 2017

1. Where Are We on FPSW? (Con't)

- There is a widespread assumption that President-Elect Trump will on January 20, 2017 withdraw, among other things, President Obama's:
  - FPSW Executive Order 13673 published August 5, 2014; and
  - Executive Order 13683 published December 16, 2014 to amend EO 13673 to correct a statutory citation to VEVRAA; and
  - Executive Order 13738 published August 23, 2016 to further amend EO 13673 to change the handling of SubKor disclosures and clarify requirements for public disclosure of FPSW documents

1. Where Are We on FPSW? (Con't)

- There is also a widespread assumption that soon after he is sworn in, President Trump will then cause The Far Council to withdraw the Legislative-Type "Final Rule" it published on August 25, 2016 at 81 *Federal Register* 58562-58651 to implement the FPSW EO (including as to "Paycheck Transparency" and the "arbitration limitation")

  A. Preamble: *FR* pages 58562-58631.....69 pages

  B. Costs Assessment: *FR* pages 58631-58637.....6 pages

  C. Rule: *FR* pages 58637-58651.....14 pages

  Total *Federal Register* pages:.....89 pages

1. Where Are We on FPSW? (Con't)

- There is a further widespread assumption that incoming Secretary of Labor Andrew Puzder will in early 2017 withdraw the "Final Guidance" the USDOL published on August 25, 2016 at 81 *Federal Register* 58654-58768 to interpret the FPSW EO

The Final Guidance is only an "Interpretive Rule" to interpret EO 13673, as amended

1. Where Are We on FPSW? (Con't)

Like The FAR Council Final Rule, the USDOL Final Guidance was lengthy:

A. Preamble *Federal Register* pages 58654-58716.....62 pages

B. Guidance *Federal Register* pages 58716-58742.....26 pages

C. Appendices *Federal Register* pages 58742-58768...26 pages

Total *Federal Register* pages:.....114 pages

1. Where Are We on FPSW? (Con't)

At the same time, litigation concerning the FAR Council Final Rule is wending its way forward to the United States Court of Appeals for the Fifth Circuit (New Orleans)

A federal District Court in Beaumont, Texas on October 24, 2016 issued a nationwide Preliminary Injunction stopping the FPSW Final Rule and USDOL Final Guidance as to their bid reporting requirements and as to the limitation on arbitration agreements

HOWEVER, the injunction did not stop the "Paycheck Transparency" requirements of the Final Rule/Final Guidance

The case is:

Associated Builders and Contractors of Southeast Texas, et al (Plaintiffs) v. Anne Rung, Administrator, Office of Federal Procurement Policy, Office of Management and Budget, et al. (Defendants).

1. Where Are We on FPSW? (Con't)

See our Week In Review write-up of that case for additional information:

There is a widespread assumption the United States will eventually appeal to the United States Court of Appeals for the Fifth Circuit (New Orleans) any "Permanent Injunction" the District Court might enter in coming months

NOTE: The litigation will continue despite any withdrawal of the FPSW Final Rule/Final Guidance AND it is highly likely labor unions will (eventually) file suit to overturn any withdrawal of the Final Rule the Trump Administration may accomplish. (The unions would file suit to challenge the Trump Administration's Final Rule withdrawing the Obama Administration's Final Rule)

1. Where Are We on FPSW? (Con't)

NOTE: Withdrawal of the Final Rule and Final Guidance is NOT a legal "slam dunk." There has to be a policy and/or operating rationale for the withdrawal so soon after The Far Council's exercise of its discretion that the Final Rule was in the best interests of promoting greater economy and efficiency in the federal Executive Branch's procurement of goods and services. What changed in the three month passage of time between the end of October 2016 and late January 2017, legal challengers to the withdrawal will ask?

This is why the lawsuit will continue so there might be a ready legal explanation that the FPSW EO lacked legal authority

AND, the Congress will also likely join the fray by issuing at least a Resolution noting it did not authorize President Obama to issue his Final Rule/Final Guidance

2. What The Paycheck Transparency Rule Requires if you are Going To Comply

The FAR Council prescribed new pay stub display requirements (dubbed "Paycheck Transparency") for covered Kors/SubKors:

1) See 81 *FR* 68650-58651

2) Not to be confused with OFCCP's "Pay Transparency" Rule

3) Effective January 1, 2017 as to all "new" contracts "which exceed" $500,000, (even before a Kor/SubKor with a K/SubK exceeding $500,000 might have to make Compliance History disclosures on and after April 26, 2017)

   -"New"=

   (a) newly signed K on/after January 1, 2017

   (b) existing K which is "altered" or "amended" via *bi-lateral* negotiation

4) NOTE: A SubKor is not a "covered SubKor" if the SubKor's only $500,000+ federal SubK is a COTS item

2. Paycheck Transparency Requirements (Con't)

"(a) *Wage statement*. In each pay period, the Contractor shall provide a wage statement document (*e.g.* a pay stub) to all individuals performing work under the contract (emphasis added) subject to the wage records requirements of any of the following statutes:

1) The Fair Labor Standards Act.

2) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (formerly known as the Davis Bacon Act).

3) 41 U.S.C. chapter 67, Service Contract Labor Standards (formerly known as the Service Contract Act of 1965)."

IMPORTANT NOTE: Are you really going to/be able to parse which employees are working on or under the $500,000+ federal contract and deliver a special form of pay stub to (only) them?

2. Paycheck Transparency Requirements (Con't)

"(b) *Content of wage statement.* (1) The wage statement shall be issued every pay period and contain—

(i) The total number of hours worked in the pay period;

(ii) The number of those hours that were overtime hours;

(iii) The rate of pay (*e.g.*, hourly rate, piece rate);

(iv) The gross pay; and

(v) Any additions made to or deductions taken from gross pay. These shall be itemized. The itemization shall identify and list each one separately, as well as the specific amount added or deducted for each."

2. Paycheck Transparency Requirements (Con't)

"(2) If the wage statement is not provided weekly and is instead provided bi-weekly or semi-monthly (because the pay period is bi-weekly or semi-monthly), the hours worked and overtime hours contained in the wage statement shall be broken down to correspond to the period (which will almost always be weekly) for which overtime is calculated and paid."

2. Paycheck Transparency Requirements (Con't)

"(3) The wage statement provided to an individual exempt from the overtime compensation requirements of the Fair Labor Standards Act (FLSA) need not include a record of hours worked, if the Contractor informs the individual in writing (emphasis added) of his or her overtime exempt status. The notice may not indicate or suggest that DOL or the courts agree with the Contractor's determination that the individual is exempt. The notice must be given either before the individual begins work on the contract, or in the first wage statement under the contract. Notice given before the work begins can be a stand-alone document, or can be in an offer letter, employment contract, or position description. If during performance of the contract, the Contractor determines that the individual's status has changed from non-exempt to exempt from overtime, it must provide the notice to the individual before providing a wage statement without hours worked information or in the first wage statement after the change."

2. Paycheck Transparency Requirements (Con't)

"(c) *Substantially similar laws.* A Contractor satisfies this wage statement requirement by complying with the wage statement requirement of any State or locality (in which the Contractor has employees) that has been determined by the United States Secretary of Labor to be substantially similar to the wage statement requirement in this clause. The determination of substantially similar wage payment states may be found at *www.dol.gov/fairpayandsafeworkplaces*."

FOX NOTE: These determinations are not yet in fact on USDOL's website supporting the FPSW Final Guidance

2. Paycheck Transparency Requirements (Con't)

"(d) *Independent contractor*. (1) If the Contractor is treating an individual performing work under the contract (emphasis added) as an independent contractor ****and not as an employee, the Contractor shall provide a written document to the individual informing the individual of this status* * * *The Contractor shall provide the document to the individual either at the time an independent contractor relationship is established with the individual or prior to the time the individual begins to perform work on the contract. The document must be provided for this contract, even if the worker was notified of independent contractor status on other contracts. The document must be separate from any independent contractor agreement between the Contractor and the individual." (81 *FR* 58643-58644)

-If an EE changes status to IC during the contract, Kor must so advise

2. Paycheck Transparency Requirements (Con't)

Flow Down Provision to covered Federal SubKors

"(f) *Subcontracts*. The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts that exceed $500,000, at all tiers, for other than commercially available off-the-shelf items."

- So, you get to write your own form of clause to insert into your contracts with covered SubKors

2. Paycheck Transparency Requirements (Con't)

- So, if your company is going to sign a "new" covered federal contract between January 1, 2017 and January 20, 2017, you face a dilemma: do you:

  A. comply for 20 days or so while awaiting Mr. Trump's swearing in,

  B. or decide not to comply

  while waiting to see if Mr. Trump, once sworn into office, withdraws the Obama FPSW Executive Order in its entirety, including as to the Paycheck Transparency requirements?

2. Paycheck Transparency Requirements (Con't)

- NOTE: It is a federal criminal and civil offense to make a false or knowingly misleading statement to a federal officer or on a federal form. See 18 USC 1001.
- So, if your Contract Officer conditions award of your federal contract on your company's certification of compliance with the Paycheck Transparency requirements, you lie at your personal risk.

2. Paycheck Transparency Requirements (Con't)

- NOTE: The likelihood of your company complying for 20 days in January 2017 and then reverting back to the 2016 version of your wage statement is low (as a practical matter).
  - Once you transition your wage statement, if you do, my bet is you will likely keep your new wage statement to avoid confusion and derision by your workforce despite any Trump Administration roll-back of the Paycheck Transparency requirements
  - Final Thought: If you do not want to comply, can you delay signing any "new" covered federal contracts until late January 2017 to see what Mr. Trump does, once sworn in?

3. The Federal Paid Sick Leave Final Rule Is Likely Here to Stay & Is Legally Effective January 1, 2017, So Here Is What It Requires

- USDOL published its Final Rule "Establishing Paid Sick Leave For Federal Contractors" on Friday September 30, 2016: 81 *Federal Register* pp. 67598-67724 (126 pages)
- The Wage-Hour Division of USDOL will enforce
- Covers certain prime federal Kors and covered SubKors (not defined). Not all Federal Contractors are covered. Limited Footprint:
  - Follows the federal Minimum Wage Executive Order coverages
    - Davis Bacon Act covered construction projects (>$2,000)
    - Service Contract Act covered services (>$2,500)
    - K for concessions;
    - K "in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public"
- USDOL estimates that this footprint excludes approximately 80% of federal contractors

3. Federal Paid Sick Leave Requirements (Con't)

- The Final Rule Covers Only Some Of Your Employees
  - Workers who are employees pursuant to the Davis-Bacon Act (which may include Independent Contractors), Service Contract Act (which may include Independent Contractors), and/or Fair Labor Standards Act (including exempt employees), and
  - Who work "on or in connection with" a covered contract (including those persons working in a USDOL-sponsored or state-sponsored apprentice program which USDOL recognizes)
    - "An employee performs 'in connection with' a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract."
      - Example: The Preamble to the Final Rule broadly interprets the "in connection with" language to include an accounting clerk who processes invoices and work orders for a janitorial contract

3. Federal Paid Sick Leave Requirements (Con't)

- EXCLUSIONS FROM COVERAGE:
  - "Grants" (properly known as "Federal Financial Assistance") are NOT Ks and are NOT covered
  - Ks with Indian tribes not covered
  - Employees working on or in connection with the contract "who spend less than 20% of their hours worked in a particular workweek performing in connection with such contracts"
    - Uh oh! Timesheets for each of your employees who do or could work "on or in connection with" a covered federal contract?
      - Some of you will have businesses which can easily isolate work on or in connection with the federal contract. For others of you, this will be either a nightmare effort or it will be easier to just "bite the bullet" and cover all employees.
        - What do you value, what do you fear?

3. Federal Paid Sick Leave Requirements (Con't)

- A covered Kor must permit a covered employee to accrue not less than 1-hour of Paid Sick Leave ("PSL") for every 30 hours worked up to a maximum required of 56 hours per "accrual year"
  - Accruals need not be for less than 1 hour worked
  - Kor must, however, add any fraction of 30-hours worked to subsequent pay periods on or in connection with covered work
  - Without capping, 1 hr per 30 hrs worked on a 2080 hour year=69 hrs
  - Covered ERs must "aggregate an employee's hours worked on or in connection with <u>all</u> covered contracts" for that Kor for purposes of PSL accrual (i.e. front the EE the PSL accrual on the assumption the EE will remain and work the hours left in the accrual year)
    - Kor may prorate the upfront accrual award to a part-time EE beginning covered work after the accrual year has begun
    - Got payroll or hours reporting software to do this?

3. Federal Paid Sick Leave Requirements (Con't)

- Covered Kors may either track an **exempt** EE's actual hours worked or may simply assume a 40-hour work week
- Covered employers have to calculate an EE's PSL every pay period or every month, whichever comes first
- Notifications To Employees:
  - Kor must inform EE in writing of the amount of accrued PSL each pay period or monthly, whichever comes first
  - Also, upon termination
  - Also, upon reinstatement
- Kor may allow accrual throughout the work year, OR simply grant the 56 hour maximum at the beginning of each accrual year

3. Federal Paid Sick Leave Requirements (Con't)

- The "accrual year" may be any of the following, but must be commonly applied to all similarly situated EEs:
  - Date of EE's work on or in connection with the covered K
  - Any fixed date the Kor selects, such as:
    - perhaps the date the covered K began;
    - perhaps the Kor's Fiscal Year
    - perhaps a date relevant under state law
    - perhaps the date the Kor uses for FMLA entitlements

3. Federal Paid Sick Leave Requirements (Con't)

- Accrued and unused PSL must carry-over from year to year, up to the maximum accrual limit:
  - "Paid sick leave carried over from the previous year shall not count toward any limit the contractor sets on annual accrual."
    - Two options:
      - EE can accrue as s/he earns it (1 hr PSL every 30 hours worked); or
      - grant 56 hours PSL upfront at beginning of accrual year

3. Federal Paid Sick Leave Requirements (Con't)

- <u>Accrual As EE Earns It Option:</u>
  - If EE uses all PTO granted in year 1: no PSL carryover to year 2
  - If EE uses some PSL in year 1, but has leftover PTO, that left over must be allocated to PSL in year 2 (up to a limit of 56 hrs)
    - E.g. 10 days PTO granted in year 1; 4 days PSL used; 3 days PSL carries over to year 2
      - In year 2, employee will accrue 1 hr every 30 hrs worked (up to maximum of 56 hrs), starting with 3 days PSL (=24 hrs) in the bank…SO, EE COULD (not MUST) accrue in year 2 another 56 hrs (because maybe EE uses last year's 3 days at beginning of accrual year and then began to accrue 1 for 30 before reaching 56 hr cap for accrual for yr 2)
      - NOTE: Year-end carry-over can never be more than 56 hours

3. Federal Paid Sick Leave Requirements (Con't)

- Upfront Annual 56 PSL Hour Award:
  - If EE leaves some PTO in his/her bank at the end of year 1, the Kor must presume the balance to be unused PSL and "carry over" to year 2
    - Example: 28 days PTO granted upfront but EE uses only 21 days PTO
      - 7 days (56 hours) PSL must carry over to year 2 + the upfront grant of an additional 56 hours awarded in year 2=112 hours (14 days available in year 2)
        - NOTE: Carry-over to year 3 could not exceed 56 hours, regardless what amount of PSL used in year 2

3. Federal Paid Sick Leave Requirements (Con't)

- Kor must "reinstate" accrued but unused PSL if the Kor rehires the EE within 12 months after a job separation AND works on or in connection with one or more covered Ks upon rehire.
  - Ambiguous: Eg.: EE rehired within 12 months, BUT does not work on a covered K until a month after re-hire (or what if not assigned covered K work until 13 months after rehire?)
  - Kor has no duty to buy out unused PSL upon an EE's termination, but if it does, Kor is then relieved of duty to reinstate unused PSL upon rehire within 12 months of separation (because the Kor extinguished that PSL)

3. Federal Paid Sick Leave Requirements (Con't)

- Kor is only required to allow EE to use PSL during the hours of the day the EE is working on or in connection with the covered K.
  - Do you have a tracking mechanism for that?
  - If, however, you estimate the hours the EE works on or in connection with the K (i.e. exempt EEs and those working on and off the covered K where you do not know the precise day/hour they work on the covered K), then you must allow PSL during any working hours

3. Federal Paid Sick Leave Requirements (Con't)

- PSL only allowed for enumerated reasons, but it is an expansive list:
  - A physical or mental illness/injury or medical condition
  - Obtaining diagnosis or medical care
  - Caring for employee's child, parent, spouse, domestic partner or person related by blood/affinity or "equivalent of a family relationship" who needs diagnosis or care (essentially paid FMLA leave)

3. Federal Paid Sick Leave Requirements (Con't)

- Seeking counseling, relocation, assistance from victim services, seeking legal services, assisting an individual related to the employee in re domestic violence, sexual assault or stalking
- Kor may only deduct PSL used "in increments of no greater than 1 hour"
- Kor may not pay PSL at hourly rate of pay less than the EE's regular rate of pay for hours worked under FLSA

3. Federal Paid Sick Leave Requirements (Con't)

- Kor may not limit the number of accrued and unused hours of PSL the EE uses (i.e. you cannot allow EE to use only 4 hours of accrued and unused PSL if the EE wants and qualifies to use 6 hours)
- Kor may NOT condition use of PSL on EE finding a replacement or it being convenient for the Kor
- EE may request PSL orally or in writing and need only supply information "sufficient to inform" the Kor that the EE wishes to be absent from work for one of the approved purposes of PSL

3. Federal Paid Sick Leave Requirements (Con't)

- EE need not use any "magic words" to request leave
- Kor may not require EE to "provide extensive or detailed information about the need to be absent from work or the employee's family or family-like relationship with an individual for whom the employee is requesting to care"
- EE must make 'good faith effort" to provide reasonable estimate of time out of work needed, but Kor must permit EE to return to work earlier than initially contemplated or continue to use available PSL for longer than anticipated

3. Federal Paid Sick Leave Requirements (Con't)

- Kor must maintain the confidentiality of any medical information received in EE's request
- EE must make request for PSL 7 calendar days in advance where reasonably foreseeable or as soon as practicable if need arises earlier than 7 days
  - "practicable" means same day EE learns of need or next business day, but could be longer or shorter period based on individual facts or circumstances

3. Federal Paid Sick Leave Requirements (Con't)

- Kor may communicate grant of use of PSL to EE either orally or in writing
- Kor MUST communicate denial of use of PSL IN WRITING "with an explanation for the denial" (i.e. EE did not provide sufficient information; reason given is not consistent with proper authorized uses of PSL; EE did not indicate when need would arise; EE had not accrued sufficient PSL and will not have so accrued by date of PSL use; or request is for time EE is scheduled to perform non-covered work.

3. Federal Paid Sick Leave Requirements (Con't)

- If there is some PSL available, but not a sufficient amount for entire PSL request, Kor must grant partial PSL
- If the denial is based on insufficient information, Kor must allow EE to re-submit
- If the denial is because request falls outside EE's work hours on covered K, Kor must advise EE in denial which hours are contract covered and not covered

3. Federal Paid Sick Leave Requirements (Con't)

- Kor must respond "as soon as practicable"
  - "practicable" here, however, has a different definition: based on individual facts and circumstances, but "it should be in many circumstances practicable for the contractor to respond to a request immediately or within a few hours."
    - If request is unclear, "practicable could mean within a day or no longer than within a few days"

3. Federal Paid Sick Leave Requirements (Con't)

- CERTIFICATIONS:
  - Kor may require certification issued by "health care provider" "to verify the need for" PSL "only if the employee is absent for 3 or more *consecutive* (emphasis added) *full* (emphasis added) workdays
  - The "health care provider" may be "any person involved in providing or assisting with the care, counseling, relocation, assistance of a victim services organization, attorney, clergy member, family member, or close friend. Self certification is also permitted."

3. Federal Paid Sick Leave Requirements (Con't)

- Kor may not require verification documentation BEFORE the EE returns to work. Do either:
  - By general written policy (we suggest this approach and which you can prove EE received/counter-signed); or
  - By informing EE with each leave request (better be in writing, we suggest)

3. Federal Paid Sick Leave Requirements (Con't)

- Kor may require certification within 30 days of the first day of PSL leave (of 3 days duration, or longer) BUT may NOT shorten that runway
  - If no certification is forthcoming, Kor may retroactively deny the PSL and deduct the value of the paid wages from future unpaid wages, vacation pay, profit sharing, etc (where state law, any union contracts and/or employee handbooks permit).
  - If inadequate certification is forthcoming, Kor must notify the EE in writing of the deficiency and give the EE five (apparently) calendar days to correct or supplement the certification documentation.
    - If the certification documentation is still deficient, the Kor may then retroactively deny the PSL, BUT must do so within 10 calendar days of the EE's deadline to provide sufficient documentation

3. Federal Paid Sick Leave Requirements (Con't)

- Kor contacts with 'health care provider" are limited:
  - Contact must be with provider who "created or signed" the certification
  - Kor inquiry may be only "for purposes of authenticating the document or clarifying its contents"
    - The Kor may not "request additional details about the medical or other condition referenced, seek a second opinion, or otherwise question the substance of the certification"
    - Kor must use an HR "professional," a "leave administrator:" or a "management official," but NOT the EE's direct supervisor "unless there is no other appropriate individual who can do so"

3. Federal Paid Sick Leave Requirements (Con't)

- This paid sick leave is a "floor;" not a "ceiling." Other state or local laws or collective bargaining agreements may require more PSL
- Davis-Bacon and Service Contract Act PSL requirements ***supplement*** Executive Order 13706's 1-in-30 hours requirement:

> "A contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and this part."

3. Federal Paid Sick Leave Requirements (Con't)

Kors may run FMLA leave concurrently with an EE's use of PSL :

> A Kor's obligations under EO 13706 "have no effect on its obligations to comply with, or ability to act pursuant to," the FMLA. PSL "may be substituted for (that is, run concurrently with unpaid sick leave under the same conditions as other paid time off…)"

FMLA certifications will simultaneously satisfy all PSL certifications and required documentation

3. Federal Paid Sick Leave Requirements (Con't)

- Paid sick leave a state or local law requires will satisfy EO 13706's PSL requirement so long as accrual and use requirements :meet or exceed" EO 13706's requirements and there are state/local prohibitions on interference and discrimination for use of PSL
- A collectively bargained or voluntarily supplied "Paid Time Off" ("PTO") policy will satisfy the PSL requirements of EO 13706 if your policy complies with all the core elements of EO 13706, including that" it:
  - is made available to the same "employees" as EO 13706 requires;
  - may be used for all of the purposes allowed pursuant to EO 13706;
  - is supplied in a manner and an amount (at least) which will satisfy EO 13706's accrual, request for use, carryover, reinstatement, payment for unused leave, certification and documentation rules;
  - complies with the "interference," "discrimination" and recordkeeping practices EO 13706 requires; and
  - Protects against waiver of rights per EO 13706 (discussed below)

PRACTICE TIP: You MUST now rewrite your PTO policy to conform to EO 13706's requirements if you want to offset the leave your policy provides against what EO 13706 requires

3. Federal Paid Sick Leave Requirements (Con't)

- "INTERFERENCE:" EO 13706 adopts a National Relations Act violations concept prohibiting "Interference" defined to include but not be limited to:
  - Miscalculating the amount of PSL accrued
  - Denying or unreasonably delaying a response to a proper request to use PSL
  - Discouraging an EE from using PSL
  - Reducing an EE's PSL by more than the amount of PSL the employee used
  - Transferring the EE to work on non-covered Ks to prevent accrual and use of PSL
  - Disclosing confidential information in certifications and documentation
  - Conditioning the use of PSL on the EE finding a replacement worker for the Kor

3. Federal Paid Sick Leave Requirements (Con't)

- EO 13706 is written implying a "strict liability" Rule (thus finding "Interference" regardless whether the "Interference" was accomplished out of either a negligent Kor act or an intentional Kor act).
  - It is more likely than not the courts will NOT find "Interference" for a Kor's act proven to be merely negligent

3. Federal Paid Sick Leave Requirements (Con't)

- DISCRIMINATION: A Kor may not "discharge or in any other manner discriminate against any employee" for:
  - Using or attempting to use EO 13706 PSL
  - Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under EO 13706
    - NOTE: This turns a retaliatory act into mere discrimination (and thus avails the EE of a better (lower) standard of legal proof to prove what is really retaliation)

3. Federal Paid Sick Leave Requirements (Con't)

- DISCRIMINATION, con't
  - Cooperating in any investigation or testifying in any proceeding under EO 13706
  - Informing any other person about his or her rights under EO 13706

3. Federal Paid Sick Leave Requirements (Con't)

- RECORDKEEPING: A Kor's failure to "make and maintain" or to "make available" to USDOL Wage and Hour Division investigators records for inspection, copying and transcription or to comply with EO 13706's Recordkeeping obligations is a "violation"
  - Kor must "make and maintain" for (a) the duration of the covered K, and (b) for at least three (3) years thereafter 15 enumerated kinds of document and information set out in Section 13.25 of the PSL Final Rule
  - Records of medical histories or domestic violence, sexual assault, or stalking, created or provided to the Kor, whether of an EE or of an EE's 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, must be maintained in a confidential file(s) separate from the EE's personnel file.

3. Federal Paid Sick Leave Requirements (Con't)

- RECORDKEEPING, con't
  - If the confidentiality provisions of the Americans with Disabilities Act (ADA) and/or the Genetic Information Nondiscrimination Act (GINA) also attach to the documents the Kor receives to certify PSL entitlement, the Kor must also comply with those requirements if the Kor is subject to either or both statutes
  - The Kor may NOT disclose ANY documentation an EE uses to verify the need for 3 or more consecutive days of PSL and must keep confidential information about any domestic abuse, sexual assault, or stalking unless the employee consents or when disclosure is required by law

3. Federal Paid Sick Leave Requirements (Con't)

- EE WAIVER OF RIGHTS: Like Workers Compensation entitlements and rights to minimum wages and overtime pay, EO 13706 looks at PSL as a fundamental and basic right integral to maintaining the fabric of society and which EE's are not able to waive (even if the EE wished to do so)

3. Federal Paid Sick Leave Requirements (Con't)

- MULTIEMPLOYER BENEFIT PLANS: A Kor may fulfill its EO 13706 obligations jointly with other Kors through a multiemployer plan that provides PSL BUT SO LONG AS the plan meets all of the requirements of EO 13706
- PRACTICE TIP: Check with your multiemployer benefit Plan Administrator right away to make sure the multiemployer plan it administers is compliant with EO 13706, or will be by the time your company becomes signatory to a "new" "covered" K/SubK

3. Federal Paid Sick Leave Requirements (Con't)

- KOR FLOW DOWN REQUIREMENTS:
  - Kor must include in any covered subcontracts the applicable Executive Order 13706 contract clause (see Section 13.11(a) of Final Rule) and require, as a condition of paying the subcontractor under the covered contract, subcontractors to further imbed the clause in any further lower-tier covered subcontracts
  - "The prime contractor and any upper-tier contractor shall be responsible for the compliance by any subcontractor with the requirements of Executive Order 13706 and this part (meaning the Wage-Hour Final Rule) whether or not the contract clause was included in the subcontract"

3. Federal Paid Sick Leave Requirements (Con't)

- KOR FLOW DOWN REQUIREMENTS, con't
  - Kor must notify all EEs who work on or under the covered K of their PSL by posting a USDOL drafted Notice (your poster "art" just increased in volume) in a "prominent and accessible place at the worksite so it may be readily seen by employees"
  - Kor may provide electronic notice so long as you "customarily" notice EEs about the terms and conditions of employment in this way and your posting is "displayed prominently" on your Website for Ees to find

3. Federal Paid Sick Leave Requirements (Con't)

- ENFORCEMENT:
  - USDOL Wage-Hour Division may receive complaints of non-compliance
    - May be written or oral (no Complaint form)
    - May be filed by EE or third parties (unions/other Kors/trade associations)

    USDOL Wage Hour Division may investigate Complaints or "at any time on his or her own initiative"

    - May interview and may access copy or transcribe Kor records

3. Federal Paid Sick Leave Requirements (Con't)

- REMEDIES
  - Interference:
    - USDOL will notify Kor of alleged violation and request remedy
    - If no voluntary resolution, W-H will issue "investigative findings letter" and "direct" Kor to provide appropriate relief
    - Remedies could be pay or benefits denied and "other actual monetary losses sustained as a direct result of the violation" or equitable relief
    - Liquidated damages "may also be directed" in an amount equaling an monetary relief unless W-H reduces this penalty because the violation was in good faith and (emphasis added) the contractor had reasonable grounds for believing it had not violated the Order or this part"

3. Federal Paid Sick Leave Requirements (Con't)

- DISCRIMINATION VIOLATIONS: USDOL W-H will "notify" the Kor and the relevant King agency of discrimination and request the Kor to remedy the violation.
  - If the Kor fails or refuses to remedy the violation, W-H shall "direct" the Kor via an "investigative findings letter" to provide appropriate relief to the affected employee(s)
  - W-H's Rule authorize employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits, and liquidated damages (which liquated damages W-H may reduce "because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the Order or this part"

3. Federal Paid Sick Leave Requirements (Con't)

- W-H's Rule also authorizes it to direct the contracting agency to withhold payments to the Kor on the contract (or any other federal K) as may be necessary to provide any monetary relief
- W-H's Rule also allows it to direct the contracting agency to transfer withheld Kor payments to W-H, upon a final order of the Secretary of Labor (sitting as a court of last administrative resort) to disburse to victims

3. Federal Paid Sick Leave Requirements (Con't)

- RECORDKEEPING VIOLATIONS: W-H will request the Kor to correct any recordkeeping violations.
  - If the Kor fails or refuses to correct a recordkeeping violation, either W-H or the contracting agency may take action to suspend any further progress payments under the K, advance or guarantee of funds on the contract until such time as the violations are discontinued (confiscation as incentive to comply)
- DEBARMENT AUTHORITY: W-H's Rule permits it to render ineligible to receive Ks (i.e. debar) the contractor, its "responsible officers" and "any firm, corporation, partnership, or association in which the Kor or responsible officers have an interest" for "up to" three years (i.e. "term debarment") if one or more of them "disregarded" obligations under the EO 13706 or W-H's Final Rule

3. Federal Paid Sick Leave Requirements (Con't)

- W-H may file a civil lawsuit in the courts to recover any payments to employees for which there is an insufficient amount of contract payment withholdings
- W-H may pay over to the U.S. Treasury any payments intended for victims W-H cannot locate

- ADMINISTRATIVE PROCEEDINGS: After USDOL W-H issues an "investigative findings letter," Kor may either comply by remedying the alleged violation or may contest by filing a request for Hearing, within 30 calendar days of the date of the W-H findings letter
  - W-H must then send an "Order of Reference" to the Chief ALJ with copies of the W-H "investigative findings letter" (which now serves as a Complaint against the Kor) and the Kor's Request for Hearing

3. Federal Paid Sick Leave Requirements (Con't)

- If there is no dispute of facts between the parties, the Kor must then file an appeal to the Administrative Review Board ("ARB") (the court of last administrative resort within USDOL)
- If there is a dispute about one or more material issues of fact, an Administrative Law Judge will then try the case, after which appeal lies to the ARB

THANK YOU

Questions?