



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 11, 22, and 52

[FAC 2005-100; FAR Case 2017-001, Item I; Docket No. 2017-0001; Sequence No. 1]

RIN 9000-AN27

Federal Acquisition Regulation; Paid Sick Leave for Federal Contractors

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are adopting as final, without change, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Executive Order (E.O.), Establishing Paid Sick Leave for Federal Contractors. The interim rule also implemented a final rule issued by the Department of Labor.

DATES: Effective: [**Insert date of publication in the FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat

Division at 202-501-4755. Please cite FAC 2005-100, FAR Case 2017-001.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the Federal Register at 81 FR 91627 on December 16, 2016, to implement E.O. 13706, Establishing Paid Sick Leave for Federal Contractors. The E.O. was signed September 7, 2015, and was published in the Federal Register at 80 FR 54697 on September 10, 2015. The E.O. seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that employees on those contracts can earn up to 7 days or more of paid sick leave annually, including paid sick leave for family care. The interim FAR rule also implemented the final rule issued by the Wage and Hour Division of the Department of Labor (DOL) to implement E.O. 13706. The DOL final rule, entitled "Establishing Paid Sick Leave for Federal Contractors", was published in the Federal Register at 81 FR 67598 on September 30, 2016. Seven respondents submitted comments on the interim FAR rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of significant changes

There are no changes to the interim rule.

B. Analysis of public comments

Comment: Six respondents strongly supported the interim FAR rule. The respondents stated that the interim rule is necessary to guarantee more workers the job and economic security that paid sick days provide, reduce workplace contagion, and increase productivity and retention. The respondents also presented rationale as to why the interim rule will benefit businesses, individual workers, taxpayers, and the economy.

Response: Noted.

Comment: One respondent provided a scenario and asked whether in that instance the contract was subject to the requirements of this FAR rule. The respondent described a contract action extending the term of the contract by exercising an option adjusting the price for escalations in labor rates.

Response: According to DOL (see Notice of Proposed Rulemaking, 81 FR 9592, published February 25, 2016),

unilateral exercise of a contract option that has pre-negotiated prices that are subject to adjustment due to escalation in labor rates is not a new contract covered by E.O. 13706, as implemented in the DOL rule and FAR rule, as long as no bilateral negotiations occur (other than any necessary to determine and effectuate those pricing adjustments).

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563, Improving Regulation and Regulatory Review, emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Executive Order 13771

This rule is not subject to E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

V. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA are converting to a final rule, without change, an interim rule that amended the Federal Acquisition Regulation (FAR) to implement Executive Order (E.O.) 13706, Establishing Paid Sick Leave for Federal Contractors, dated September 7, 2015, and associated Department of Labor (DOL) regulatory requirements at 29 CFR Part 13. DOL published a final regulatory flexibility analysis in their final rule (81 FR 67598 at 67703).

The FAR rule established requirements for contractors under contracts containing the clauses at FAR 52.222-6, Construction Wage Rate Requirements, or FAR 52.222-41, Service Contract Labor Standards, i.e., "covered contracts," to allow employees to accrue and use paid sick leave in accordance with E.O. 13706 and 29 CFR Part 13. Contractors must also include a paid sick leave contract clause in covered subcontracts and require covered subcontractors to include the substance of the clause in covered lower-tier contracts.

No public comments were received in response to the initial regulatory flexibility analysis.

This rule applies to contracts and subcontracts at all tiers covered by the Service Contract Labor Standards statute, or the Wage Rate Requirements (Construction) statute, which require performance in whole or in part within the United States. For procurement contracts where employees' wages are governed by the Fair Labor Standards Act, this rule applies when the contract exceeds the micro-purchase threshold, as defined in FAR 2.101. When performance is in part within and in part outside the United States, the rule applies to the part of the contract or subcontract performed within the United States. Data available through the Federal Procurement Data System

(FPDS) for Fiscal Year 2015, reveals contracts were awarded to 18,874 unique small business vendors for services, which contained the FAR clause at 52.222-41, Service Contract Labor Standards. Additionally, contracts were awarded to 6,753 unique small business vendors for construction, which contained the FAR clause at 52.222-6, Construction Wage Rate Requirements, for a total of 25,627 unique small businesses.

The DOL final rule identifies records to be kept by all firms, including small entities (29 CFR 13.25). Some records are already required under the Fair Labor Standards Act, Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, and their governing regulations. DOL noted in their final rule (81 FR 67598 at 67669) that OMB assigned control number 1235-0029 for the recordkeeping requirements related to paid sick leave. The information collection requirement under 1235-0029 includes recordkeeping and regulatory familiarization.

Regarding initial implementation, DOL assumed firms that need to create a sick leave policy will each spend 10 hours of time developing this policy, regardless of the number of employees, and firms with a program in place will spend one hour, regardless of the number of employees. DOL also stated in its final rule that "Transfers from small contractors and costs to small contractors in Year 1 are less than 0.02 percent of revenues on average and are no more than 0.17 percent in any industry". Therefore, according to DOL its final rule would not have a significant impact on small businesses. This FAR rule finalizes the interim rule without change and neither increases nor decreases the cost of the interim rule (81 FR 91627), which has been in effect since January 1, 2017.

There are no known significant alternatives to the rule that would accomplish the stated objectives of the E.O. and DOL regulation. In its final rule, DOL introduced several changes and clarifications that may ease the compliance burden. For instance, DOL provided greater detail and clarity about how companies with paid time off policies can use those policies to satisfy their obligations under the E.O. In addition, if a collective bargaining agreement (CBA) ratified before September 30, 2016, applies to an employee's work performed on or in connection with a covered contract and provides at least 56 hours of paid sick time each year, the employee will be exempted from the requirements of the E.O. and 29 CFR part 13 until CBA termination or January 1, 2020, whichever is earlier.

The rule was also modified to allow employers to meet the requirements of this rule through multiemployer plans or other funds, plans, or programs. This may ease the burden for those employers in industries with transitory or mobile workforces.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. However, the information collection requirements to the paperwork burden were previously approved for the DOL regulations under OMB Control Numbers 1235-0018, Records to be kept by Employers—Fair Labor Standards Act, 1235-0021, Employment Information Form, and 1235-0029, Government Contractor Paid Sick Leave.

List of Subjects in 48 CFR Parts 1, 11, 22, and 52

Government procurement.

Dated: July 31, 2018.

William F. Clark,
Director,
Office of Government-wide
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Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR parts 1, 11, 22, and 52 which was published in the Federal Register at 81 FR 91627 on December 16, 2016, is adopted as a final rule without change.

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