



PAID SICK LEAVE EXECUTIVE ORDER

One-Size-Fits-All Executive Order on Paid Sick Leave for Federal Contractors Does Not Fit the Construction Industry

Action Needed:

Block the Executive Order on Paid Sick Leave for Federal Contractors by: 1) prohibiting funds for the Wage and Hour Division's implementation of this Executive Order; and 2) exempting the construction industry from its requirements.

Background:

- On Sept. 7, 2015, President Obama signed Executive Order 13706 that requires federal contractors and subcontractors to provide employees up to seven days of paid leave for sickness and other purposes annually. On Feb. 25, the Wage and Hour Division of the U.S. Department of Labor issued an 81-page notice of proposed rulemaking. A final rule is expected on or before Sept. 30, as required by the Executive Order.

AGC Message:

- **The Executive Order Does not Account for the Project-based, Transitory and Seasonal Aspects of Construction.** Most craft workers, laborers and mechanics move from project to project or employer to employer, often within short periods of time. They may earn fluctuating rates of pay due to changes in project type, location or assigned tasks. They may also experience long periods of layoff due to seasonal weather or a downturn in the demand for construction. The Order requires that employers reinstate paid leave for employees rehired by the same employer or a successor employer within 12 months after job separation. However, in the transitory construction industry, knowing what constitutes "job separation" and what constitutes "reinstatement" is nearly impossible, particularly for union workers where contractors obtain workers from hiring halls on an "as-needed" basis for the portion of a project that requires the skills of the workers' particular trade.
- **Legislators and Regulators Generally Recognize the Uniqueness of Construction in Broad-Based Policy Making.** Congress and federal regulators have established many special rules for the industry to accommodate that uniqueness, such as special affirmative action rules under Executive Order 11246, special voter liability rules under the National Labor Relations Act, and special pension plan withdrawal liability rules under the Employee Retirement Income Security Act, to name a few. State and municipal lawmakers have also recognized it in their adoption of paid leave laws, many of which expressly limit or exempt construction industry coverage.
- **Prime Contractors are Liable for Subcontractor Violations for Which Primes Could Not Know About.** The Executive Order places liability upon prime and upper-tier contractors for violations by their subcontractors. However, determining whether a subcontractor is abiding by this Order is impossible for prime and upper-tier contractors. A prime contractor has no available means to determine whether or not a subcontractor happens to be working for that prime contractor at the time of the paid leave request. Given the carryover provisions of this Order, subcontractor violations can occur years after the relationship between subcontractor and prime contractor has ended.

- **The Executive Order Will Punish Innocent, Compliant Contractors for Violations of Bad Actors.** A federal agency contracting officer can withhold payments to the prime contractor as necessary to pay employees the full amount owed. However, the prime contractor may not be the violator. Rather, a subcontractor could be. So, when a contracting officer withholds payment to a prime contractor for one subcontractor's violation on a project involving 100 subcontractors, the compliant prime contractor and 99 compliant subcontractors will not receive payment for work they completed and their employees may not be paid.