

Update to the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional (EAP) Employees

Overtime (OT) rules change effective 1 Dec 16. Earlier this year, the Department of Labor (DoL) amended 29 CFR 541 to make the salary threshold more "in line" with current economic conditions. This change will affect who is or is not covered by the OT provisions of the Fair Labor Standards Act (FLSA), and by extension, who is or is not a service employee (Service Contract Act applicability) and to an extent who is or is not a laborer or mechanic (Davis-Bacon Act coverage).

DoL regulations require each of three tests to be met for the FLSA's EAP exemption to apply: (i) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed ("salary basis test"); (ii) the amount of salary paid must meet a minimum specified amount ("salary level test"); and (iii) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations ("duties test").

Key points:

- (i) The salary requirement will double from \$455/week to \$913/week (i.e., annual salary of \$47,476).
- (ii) Highly Compensated Employees total annual compensation requirement is changed from \$100,000 to \$134,004 annually.
- (iii) Requires the salary requirement to be revisited every 3 years; prior to this rule, there was no mandatory requirement to revisit salary levels.
- (iv) Leaves the duties test(s) unchanged. This is important since changing the duties test would have had a more far-reaching impact, especially on federal contracts, than changing the salary test alone.

Employers with 'exempt' personnel that do not meet the new salary requirement will have 3 options:

- (i) raise salaries to maintain exempt status;
- (ii) maintain existing salary levels but pay overtime for hours worked over 40-hours; or
- (iii) readdress staffing levels and workload distribution.

DoL has published a factsheet with a much longer summary here:
<https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>.

We expect minimal impacts to most federal contracts, but do expect some effects in the fast food, restaurant, hotel, and housekeeping industries since management salaries are traditionally lower in these fields.

No changes to FAR 22 are necessary as a result of this rule change.

Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors

On 7 Sep 15, President Barack Obama signed Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors*. The Executive Order requires certain employers that contract with the Federal Government to provide their employees with up to seven days (56 Hours) of paid sick leave annually, including for family care and absences resulting from domestic violence, sexual assault, and stalking.

Coverage

Executive Order 13706 applies to new contracts (or follow-on contracts) with the Federal Government that result from solicitations issued on or after 1 Jan 17 (or that are awarded outside the solicitation process on or after 1 Jan 17). Coverage of contracts and employees under the Final Rule is nearly identical to coverage under the regulations implementing Executive Order 13658 that requires the payment of a minimum wage to employees of Federal contractors, except that the Final Rule also covers employees who qualify for an exemption from FLSA's minimum wage and overtime provisions.

Under the Final Rule, Executive Order 13706 applies to four major categories of contractual agreements:

- (i) procurement contracts for construction covered by the Davis-Bacon Act (DBA);
 - (ii) service contracts covered by the McNamara-O'Hara Service Contract Act (SCA);
 - (iii) concession contracts, including any concession contracts excluded from the SCA by the DoL's regulations at 29 CFR 4.133(b); and
 - (iv) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.
- Furthermore, a subcontract at any tier of a covered contract that (like the prime contract) falls into one of these four categories is subject to the paid sick leave requirements.

Employees Who Are Entitled to Paid Sick Leave Under the Executive Order

The Final Rule provides that the Executive Order applies to any person engaged in performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. The Final Rule includes a narrow exemption from the rule's accrual requirements for employees who perform work duties necessary to the performance of a covered contract (but who are not directly engaged in performing the specific work called for by the contract) and who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with such contracts.

Accrual

Under the Final Rule, employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. As to employees for whom contractors are not already required to keep records of hours worked pursuant to the DBA, SCA, or FLSA (such as employees who are employed in a bona fide executive, administrative, or professional capacity under FLSA regulations), contractors can use the assumption that the employees are working on or in connection with covered contracts for 40 hours each week. Contractors are also permitted to use an estimate of time their employees work in connection with (rather than on) a covered contract as long as the estimate is reasonable and based on verifiable information.

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 paid sick leave from one year to the next. The Final Rule also allows contractors to limit the amount of paid sick leave employees have accrued to 56 hours at any point in time.

Accrual is calculated, and employees are to be notified in writing of the amount of paid sick leave they have available, at the end of each pay period or each month, whichever interval is shorter.

Contracting Agency Obligations

At time of writing, the FAR language implementing the Final Rule has not been released. Contracting agencies will be responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to provide the required paid sick leave, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13706 to the Wage and Hour Division (WHD). Enforcement responsibility will reside with DoL.

Note:

If we assume 1920 hours (assumes 10, 8 hr holidays and 80 hrs of vacation time) as a “standard work year” per employee, “standard” employees could actually accrue 64 hrs of paid sick leave per year if employers chose to do so. However, DoL will not punish an employer for doing more than the minimum. Note that maximum compensable hours (hours worked or hours in other paid status) in relation to FAR 52.222-43, in most circumstances, will remain at 2080 per employee (although this excludes any possible overtime). Thus, it is unlikely that any blanket price adjustment requests for “an additional 56 hours of paid sick leave” would be warranted. This is especially so since the rule, in its current form, does not require an employer to pay out any unused sick leave, nor will sick leave transfer from employer to employer. More likely, the real impact will be a slight increase in contractor employee end-strength (more people) to compensate for lower per-employee productivity (assumes employees use sick leave that they earn).

For more in-depth information, DoL has published a factsheet:

<https://www.dol.gov/whd/govcontracts/eo13706/PaidLeaveFS.htm>

Fair Pay and Safe Workplaces

On 24 Oct 16, the United States District Court of Eastern Texas issued a preliminary injunction to prevent the disclosure and arbitration provisions (and clauses) of the rule from taking effect while the lawsuit is pending. However, the portion of the Executive Order that deals with paycheck transparency will still take effect for new solicitations issued on or after 1 Jan 17. If you have questions please contact your labor advisor.