

DOL Issues Guidance on Coronavirus-Related Leave for Federal Service and Construction Contractors

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WHAT: The U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) released new guidance for federal contractors on providing paid sick leave or expanded family and medical leave under the Families First Coronavirus Relief Act (FFCRA) to employees working on contracts covered by the Service Contract Act (SCA) and Davis-Bacon Act (DBA).

First, under SCA-covered service contracts, contractors need not pay covered employees both prevailing wages and the health-and-welfare fringe benefit rate for hours taken as paid sick leave *unless* an employee takes FFCRA leave concurrently with leave provided under the SCA or Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors.

Second, and similarly, under DBA-covered construction contracts, contractors need not include fringe benefits when paying FFCRA paid sick leave or expanded medical leave *unless* employees are taking the FFCRA leave concurrently with leave provided under the DBA or EO 13706.

WHEN: The WHD published the additional guidance to its website on August 3, 2020.

WHAT DOES IT MEAN FOR INDUSTRY: Satisfying the SCA and DBA compensation requirements can be difficult enough under ordinary circumstances. WHD's guidance thus provides welcome assistance for determining compensation requirements for leave taken under the FFCRA.

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As discussed in a prior Wiley alert, DOL recently issued guidance clarifying the rights and responsibilities of employers and employees under the FFCRA. The amount of paid sick leave or expanded family and medical leave an employee receives depends on the employee's normal schedule and the reason for taking the leave. For paid sick leave, an employer must pay its employee the greater of:

1. their regular rate of pay,
2. the federal minimum wage under the Fair Labor Standards Act, or
3. the applicable State or local minimum wage.

Similarly, an employer must pay based on the employee's regular rate if an employee takes expanded family and medical leave under the FFCRA. This may require a contractor to, in some circumstances, pay health-and-welfare (H&W) fringe benefit rates in addition to the prevailing rate under the SCA or include fringe benefits while providing employees paid sick leave under the DBA.

An employee's regular rate of pay does not include SCA H&W rate or DBA fringe benefits. If a contractor pays cash instead of fringe benefits, they would not be required to pay the SCA H&W fringe benefit rate or the DBA fringe benefit rate for FFCRA leave. But contractors must maintain an employee's health insurance, if they had been providing it, throughout the employee's paid FFCRA leave.

In addition, unless otherwise specified in the SCA wage determination, a contractor must provide H&W payments for all hours paid under the SCA—up to a maximum of 40 hours per week and 2,080 hours per year on each covered contract. This results in a contractor's needing to provide H&W payments to an employee using existing paid vacation, sick leave or holiday hours under the SCA while concurrently using FFCRA expanded family and medical leave.

Under SCA and DBA, if employee uses expanded family and medical leave under the FFCRA concurrently with paid sick leave under EO 13706, the contractor must pay any fringe benefits, or monetary equivalent, required by the EO for the hours paid under the EO.