

AN A.S. PRATT PUBLICATION

JANUARY 2016

VOL. 2 • NO. 1

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



**EDITOR'S NOTE: RINGING IN THE
NEW YEAR!**

Steven A. Meyerowitz

**WHEN A VIOLATION OF A RULE
OR REGULATION BECOMES AN FCA
VIOLATION: UNDERSTANDING THE
DISTINCTION BETWEEN CONDITIONS
OF PAYMENT AND CONDITIONS OF
PARTICIPATION**

Robert S. Salcido

**RECENT FALSE CLAIMS
ACT SETTLEMENTS HIGHLIGHT
PHYSICIAN COMPENSATION SCRUTINY**

Hal A. Goldsmith and Anne P. Sharamitaro

**CYBERSECURITY FOR GOVERNMENT
CONTRACTORS: NEW CONTROLLED
UNCLASSIFIED INFORMATION
REQUIREMENTS SLOWLY TAKE SHAPE**

Scott A. Schipma

**FEDERAL CONTRACTORS WILL HAVE
TO PROVIDE PAID SICK TIME**

Francine Esposito and Arielle B. Sepulveda

IN THE COURTS

Steven A. Meyerowitz

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 2

NUMBER 1

January 2016

Editor's Note: Ringing in the New Year!

Steven A. Meyerowitz

1

When a Violation of a Rule or Regulation Becomes an FCA Violation: Understanding the Distinction Between Conditions of Payment and Conditions of Participation
Robert S. Salcido

3

Recent False Claims Act Settlements Highlight Physician Compensation Scrutiny
Hal A. Goldsmith and Anne P. Sharamitaro

15

Cybersecurity for Government Contractors: New Controlled Unclassified Information Requirements Slowly Take Shape

Scott A. Schipma

19

Federal Contractors Will Have To Provide Paid Sick Time

Francine Esposito and Arielle B. Sepulveda

26

In the Courts

Steven A. Meyerowitz

30

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169

Email: heidi.a.litman@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844

Outside the United States and Canada, please call (518) 487-3000

Fax Number (518) 487-3584

Customer Service Web site <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940

Outside the United States and Canada, please call (518) 487-3000

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2016 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt® Publication

Editorial Office
630 Central Ave., New Providence, NJ 07974 (908) 464-6800
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Jenner & Block

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2016 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or

incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

Federal Contractors Will Have To Provide Paid Sick Time

*By Francine Esposito and Arielle B. Sepulveda**

This article explains a recent Executive Order requiring federal contractors and subcontractors to allow their employees to earn at least seven days of paid sick time each year if such contractors and subcontractors do not already have policies providing for at least that much paid time off that can be used for the same purposes and under the same conditions.

President Barack Obama recently signed an Executive Order (“Order”) requiring federal contractors and subcontractors to allow their employees to earn at least seven days of paid sick time each year if such contractors and subcontractors do not already have policies providing for at least that much paid time off that can be used for the same purposes and under the same conditions. Although the Order is effective immediately, its requirements will only apply to federal service contracts, including “contract-like instruments,” that are solicited or awarded on or after January 1, 2017.

COVERED CONTRACTS AND SUBCONTRACTS

In order for a contract or subcontract to be covered by the Order, it must be one of the following:

- 1) a procurement contract for services or construction;
- 2) covered by the McNamara-O’Hara Service Contract Act (“Service Contract Act”), which requires contractors and subcontractors performing services on prime contracts in excess of \$2,500 to pay service employees in various classes no less than the applicable prevailing wages and fringe benefits or the rates contained in a predecessor contractor’s collective bargaining agreement;
- 3) a contract for concessions; or
- 4) a contract with the federal government in connection with federal property or lands and related to services for federal employees, their dependents, or the general public.

* Francine Esposito is a partner at Day Pitney LLP, where she represents employers before various administrative agencies, at labor arbitrations, in employment-related litigation, and conducts harassment and other workplace investigations. Arielle B. Sepulveda is an associate in the firm’s Labor and Employment department. The authors may be reached at fesposito@daypitney.com and asepulveda@daypitney.com, respectively.

In addition to being one of the four above-listed types of contracts, employee wages under the contract or subcontract must be governed by the Davis-Bacon Act (construction contracts involving an amount exceeding \$2,000), the Service Contract Act (service contracts involving an amount exceeding \$2,500), or the Fair Labor Standards Act (“FLSA”) (covered contracts involving an amount exceeding \$3,000). The Order does not apply to federal grants, agreements with Indian tribes, or contracts that are expressly excluded in the implementing regulations, which shall be promulgated by the Secretary of Labor in the future.

EMPLOYEES’ USE OF PAID SICK TIME

Covered contracts will need to include a clause conditioning payment on the contractor or subcontractor providing employees with at least one hour of paid sick time for every 30 hours of work performed on the contract, up to at least 56 hours per year. Employees will be able to use paid sick time earned under the Order for the following purposes:

- Due to their own physical or mental illness, injury, or medical condition.
- To obtain diagnosis, care or preventive care from a health care provider.
- To care for a child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship; who has a physical or mental illness, injury, or medical condition; or who needs diagnosis, care or preventive care from a health care provider.
- To obtain counseling, seek relocation, seek assistance from victim services organizations, or participate in legal action related to domestic violence, sexual assault or stalking, or to assist a family member in engaging in any of these activities.

Employees will be able to carry earned paid sick time over to the next year. Contractors will not be required to pay employees for unused, accrued paid sick time upon separation from employment, but such time must be reinstated if the employee is rehired by that same covered contractor within a year.

DOCUMENTATION

Where the need for time off is foreseeable, employees must ask for paid sick time at least seven days in advance, either orally or in writing. Where the need is not foreseeable, employees must notify the contractor as soon as practicable. The contractor cannot condition use of paid time off on employees finding replacements to cover their absences. For absences lasting three or more

consecutive days, contractors may require employees to provide certification from a health care provider no later than 30 days from their first day of absence. Where the absence is due to domestic violence, sexual assault or stalking, contractors may require an employee to provide documentation from an appropriate individual or organization that gives enough information to demonstrate the employee's need for time off. Absent employee consent, and except as required by law, contractors must keep such information confidential.

OTHER PROVISIONS

Covered contractors are prohibited from interfering with or discriminating against employees for using or attempting to use paid sick time or for asserting, or helping another employee to assert, rights under the Order. Contractors may not use paid sick time to satisfy their prevailing wage or fringe benefit obligations under the Service Contract Act or the Davis-Bacon Act. Nothing in the Order prevents a contractor from providing employees with, or from complying with other laws that require, more paid sick time or greater leave rights.

IMPLEMENTING REGULATIONS

The Order directs the Secretary of Labor to issue implementing regulations by September 30, 2016. In addition to providing exclusions from the Order's paid sick time requirements, the regulations will define terms used in the Order, including "contract-like instrument," require contractors to maintain certain employee records, and set forth a procedure for resolving compliance disputes. The Order further mandates that, within 60 days of the Secretary of Labor issuing its regulations, the Federal Acquisition Regulatory Council, established to assist in the direction and coordination of procurement policy and regulation, will issue regulations in the Federal Acquisition Regulation, which governs the process by which the federal government acquires goods and services.

Ideally, the agency regulations will provide much-needed additional guidance. For example, it is unclear whether employees of federal contractors and subcontractors who may be integral to the business's operations but who do not directly work on a covered contract are entitled to paid sick time under the Order. Similarly, the Order does not specify whether a "year" equates to a calendar year or some other 12-month period. It is also unclear whether banks and other financial institutions, which are considered covered contractors under other executive orders enforced by the Office of Federal Contract Compliance Programs because they obtain federal deposit insurance, are intended to be excluded from coverage.

EXPANDING EMPLOYEE PROTECTIONS

Presidential Actions

The Order is the latest in a series of recent Presidential actions aimed at expanding employee protections. Other actions include the July 2014 Fair Pay and Safe Workplaces Executive Order (requiring contractors and subcontractors to, among other things, disclose violations of federal and state labor and employment laws and provide certain information with each paycheck to employees working under the covered contract), the July 2014 Amendment to Executive Order 11246 (prohibiting federal contractors and subcontractors from discriminating on the basis of sexual orientation and gender identity), and the February 2014 Minimum Wage for Contractors Executive Order (whose regulations establish a minimum wage of \$10.10 with annual adjustments beginning in 2016). In fact, on the day the President signed the paid sick time Order, he also urged Congress to pass the Healthy Families Act, which would require all businesses with 15 or more employees to offer up to seven paid sick days each year.

State and Municipal Laws

At the state and municipal levels, paid sick time laws have become popular. Indeed, California, Connecticut, Massachusetts, Oregon, Washington, D.C., and 22 cities, including New York City, San Francisco, Seattle, Philadelphia, and 11 municipalities in New Jersey, have enacted paid sick time laws. Dozens of other states and cities are currently considering proposed paid sick time legislation. The movement is not without some opposition, however. For example, in September, a group of Pittsburgh businesses challenged that city's recently passed paid sick time ordinance in state court, delaying its implementation.

CONCLUSION

Given the trend of paid sick time movements across the country and the President's renewed call for Congress to expand paid sick time under federal law, employers must pay attention to the on-going developments to ensure compliance.