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DOL issues FFCRA guidance for government contractors

On August 3, the DOL issued guidance for employers with federal contracts covered by the McNamara-O’Hara Service Contract Act or the Davis-Bacon Act on complying with the Families First Coronavirus Response Act. Q&As clarify government contractors’ pay obligations to employees who take leave under its emergency paid sick leave and expanded family and medical leave provisions.

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Background

The McNamara-O’Hara Service Contract Act (SCA) covers contracts to furnish services to the federal government. The Davis-Bacon Act (DBA) covers government contracts in excess of \$2,000 for the construction, alteration, or repair of public buildings or public works. Both the SCA and the DBA generally require the payment of locally prevailing wages and fringe benefits to workers employed on those contracts.

Typically, prevailing wages (including both a base wage and fringe benefit component) are specified in the SCA or the DBA wage determination in the contract. Like the SCA, the DBA allows contractors to pay the prevailing wage entirely as cash wages (including “cash-in-lieu payments” — additional cash compensation to satisfy a fringe benefit obligation) or by a combination of cash wages and employer-provided fringe benefits.

Buck comment. Contractors often opt to provide benefits instead of their cash equivalent to avoid additional payroll taxes and other costs. Those that choose to do so must continue to maintain that coverage while an employee is out on FFCRA-protected leave.

DOL guidance

On August 3, the DOL’s Wage and Hour Division issued [Q&As](#) providing guidance for government contractors covered by either the SCA or the DBA on how to pay employees who take emergency

paid sick and/or expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA). (See our [March 18, 2020 FYI](#) for more information on the FFCRA.)

Calculating compensation

The Q&As confirm that for purposes of calculating employee compensation for FFCRA leave:

- An employee is entitled to be paid their regular rate of pay, the federal minimum wage, or the applicable state or local minimum wage, whichever is higher.
- The SCA health and welfare fringe benefit rate is not included in the regular rate of pay.
- DBA fringe benefits are not included in the regular rate of pay.

Thus, to the extent that a contractor has been making cash-in-lieu payments, it would not be required to pay the SCA health and welfare fringe benefit rate or the DBA fringe benefit rate for leave taken pursuant to the FFCRA. However, to the extent that a contractor has been providing employee health insurance, it would have to maintain coverage as if they were working during the FFCRA paid leave.

Concurrent leave

The SCA requires health and welfare payments to be made for all hours paid (including paid sick leave, vacation, and holiday hours), up to a maximum of 40 hours per week and 2,080 hours per year on each contract — unless the wage determination specifies otherwise. Thus, an employee who uses paid vacation, sick leave, or holiday hours under the SCA concurrently with expanded family and medical leave under the FFCRA would be entitled to health and welfare payments.

In addition to a contractor's obligations under the SCA and DBA, [Executive Order 13706](#) (EO) requires parties that enter into covered contracts with the federal government to provide up to seven days (56 hours) of paid sick leave annually, including paid leave for family care. Employees who use expanded family and medical leave under the FFCRA concurrently with paid sick leave under the EO must be paid any SCA health and welfare benefits, DBA fringe benefits, or monetary equivalent required by the EO for the hours paid under it.

In closing

Recent guidance from the DOL clarifies federal contractors' pay obligations for purposes of FFCRA paid leave. Government contractors should review their pay and fringe benefit practices and leave administration policies to ensure compliance. Failing to properly pay wages could result in back pay owing, contract funding being withheld, or debarment from working on government contracts.

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