This is not going to be political. We are not going to get involved in any discussions about whether the President of the United States of America has the authority to issue Executive Orders, or whether s/he *should* issue Executive Orders that may or may not usurp the constitutional role of the Legislative Branch. Let's just take it as a given that President Obama—like all other Presidents in recent memory—issues Executive Orders from time to time, and employees of the Executive Branch have to follow those E.O.'s. To the extent those Executive Branch employees are policy-makers and rule-makers (and Contracting Officers), those E.O.'s have to be followed. To the extent the E.O.'s impact Federal contractors, they have to be followed as well.

But the implementation of certain E.O.'s can be tricky and the recent E.O. that required Federal contractors to establish paid sick leave programs for all their employees is a good case in point.

The **Executive Order** doesn't even have a number, at least that we can see. It was issued September 7, 2015. Let's briefly recap the E.O. (you can follow the link to see it in its entirety).

Section 1 establishes the policy that Federal contractors will permit "employees [performing work] on [Federal] contracts can earn up to 7 days or more of paid sick leave annually, including paid leave allowing for family care." The policy doesn't apply to all companies—just Federal contractors. And the policy doesn't apply to all employees of the contractor—just those performing work on a Federal contract. Presumably, we can infer this means all contractor employees whose labor is charged to a Federal contract either as a direct cost or as an indirect cost. But the policy is somewhat ambiguous in that regard.

Section 2 is the meat of the E.O. It first requires Executive Branch departments and agencies to “ensure that new contracts, contract-like instruments, and solicitations” must include a clause “which the contractor and any subcontractors shall incorporate into lower-tier subcontracts” that specifies “as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, shall earn not less than 1 hour of paid sick leave for every 30 hours worked.”

Let’s stop there and see what we’ve got.

The first thing we see is that there will be a new solicitation provision and a new contract clause, and that those new requirements will be incorporated into new solicitations and new contracts. Later on (Section 3) we will see that the new requirements apply to contracts entered into after January 1, 2017. So the requirement cannot apply to existing contracts—unless a bilateral contract modification incorporates the new contract clause post-award. We are not attorneys, but we strongly suspect that if your customer incorporates that new contract clause into your contract post-award, you would be entitled to an equitable adjustment to the original contract price for any increased costs you incurred as a result.

In fact, at the end of the E.O. we found this statement: “This order shall not apply to contracts or contract-like instruments that are awarded, or entered into pursuant to solicitations issued, on or before the effective date for the relevant action taken pursuant to section 3 of this order.” Thus, to the extent your customer attempts to incorporate the new requirement into your contract via post-award contract modification, you would have good grounds to tell your customer that s/he was actually violating the E.O. by trying to implement it retroactively.

Also, in Section 2 we see the basic benefit: ***Covered employees (i.e., those performing, or who will be performing, on a Federal contract that contains the requirement) must “earn” not less than 1 hour of paid sick leave for every 30 hours they work.***
To the extent you have covered employees who do not currently earn paid sick leave, you must now extend to them that benefit. You can do more if you’d like, but that is the new minimum benefit requirement.

Section 2 also provides details regarding that basic benefit.

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The accumulated paid sick leave can be capped at 56 hours, but not less. In other words, if you like, the employee benefit can stop once the employee has accumulated 56 hours of paid sick leave. But until that floor is reached, the basic benefit continues to operate.

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The accumulated paid sick leave benefit can be used for a wide variety of reasons. For most of us, our bosses don't check too closely as to our rationale for using sick leave. (In our experience, the simple explanation "I need to stay home to clean my gun collection because the voices in my head told me to" is usually good enough for most bosses.) However, if you are the kind of employer or kind of boss who doesn't want an employee misusing that precious sick leave benefit, then Section 2 establishes the kind of things for which the benefit may be used.

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An employee can use the benefit whenever s/he needs to, and "the use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed." Thus, it's up to the boss to keep the work progressing while the employee is on sick leave. That implies there needs to be some thought given to workforce staffing and contingency planning. (Efforts which, by the way, you should be doing in any case, regardless of this E.O.)

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There are some other requirements regarding when and how an employee requests paid sick leave, but they don't seem especially bureaucratic. "Paid sick leave shall be provided upon the oral or written request of an employee that includes the expected duration of the leave, and is made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable."

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If the contractor is already covered by the Service Contract Act or the Davis-Bacon Act, then those sets of requirements supersede this E.O. To the extent that the contractor's paid leave policy under the SCA or DBA already meets or exceeds the basic benefit requirement, then it need do nothing else. But if the contractor complies with SCA or DBA requirements, and the paid leave benefit does not meet the basic benefit requirement, then it must do more for covered employees.

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This part is important. According to the E.O.—"Paid sick leave accrued under this order shall carry over from 1 year to the next and shall be reinstated for employees rehired by a covered contractor within 12 months after a job separation." Moreover, "Nothing in this order shall require a covered contractor to make a financial payment to an employee upon a separation from employment for accrued sick leave that has not been used." We'll discuss the implications of this requirement below because it affects the cost accounting.

Section 3 establishes that the Secretary of Labor will issue the implementing regulations. (You need implementing regulations to define the solicitation provision and the contract clause, and to tell people when they are to use them.) It states that the E.O. requirements are to be effective in contracts awarded after January 1, 2017. Importantly: "This order creates no rights under the Contract Disputes Act, and disputes regarding whether a contractor has provided employees with paid sick leave prescribed by this order, to the extent permitted by law, shall be disposed of only as provided by the Secretary in regulations issued pursuant to this order." That's interesting, isn't it? The rule will be promulgated and enforced by the Department of Labor, even if you are contracting with the Department of Defense or the Department of Energy or NASA. And if you don't like the way the rule is being enforced, you have no contractual right to appeal the enforcement under the Contract Disputes Act. (Of course, expect the Secretary of Labor to establish an appeal procedure when the regulations are promulgated.)

Section 6 establishes the types of contracts that will be covered by the E.O. It's a rather broad list, and includes contracts for services or for construction, SCA-covered contracts, DBA-covered contracts, contracts covered by the Fair Labor Standards Act, concession contracts, and to contracts in connection with Federal property or lands. It does not apply to grants, or to "contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (Public Law 93-638)."

The litany of covered contracts above does not include contracts to acquire supplies, presumably because labor costs are already included in the price being paid for the supply items being acquired. But we assume that the E.O. applies to acquisitions of services, even if those services meet the FAR 2.101 definition of "commercial item."

Let's talk about accounting for the new basic benefit. Assuming you have employees that do not have a paid sick leave benefit, how do you measure the benefit cost, and how do you price it into your bids and cost proposals?

As we saw in Section 2 of the E.O., the employee will accumulate sick leave at a minimum rate of 1 hour for every 30 hours worked. That hour has a cost, which is the current hourly rate paid to the employee. In other words, the contractor must recognize a liability (on the balance sheet) and the value of that liability is the accumulated paid sick leave for all covered employees. (We note that as employees receive pay raises, the value of that liability must be adjusted accordingly.) But that's GAAP accounting. The question is how to recognize that accumulating liability as an expense for government cost accounting purposes.

The key E.O. provision is that the accumulated paid sick leave benefit does not get paid to an employee if s/he departs the company, either through voluntary separation or through lay-off. If the sick leave benefit is not used, the employee forfeits it. Yes, the accumulated sick leave carries over from one year to the next, but there is nothing in the E.O. that creates a non-forfeitable right to the accumulated sick leave. Indeed, as we noted, the E.O. expressly states that the benefit is lost upon separation. If there is no non-forfeitable right then the cost of the paid sick leave is recognized
when it is used
, not when it is earned. If the employee doesn't use the paid sick leave, there is no cost to be recognized for government cost accounting purposes.

The foregoing guidance is based on CAS 408 ("Accounting for the Costs of Compensated Personal Absence"). 9904.408-50(b) clearly states, "compensated personal absence is earned at the same time and in the same amount as the employer becomes liable to compensate the employee for such absence if the employer terminates the employee's employment for lack of work or other reasons not involving disciplinary action, in accordance with a plan or custom of the employer." When, as is the case here, there is no non-forfeitable right to the accumulated paid sick leave benefit, then "compensated personal absence will be considered to be earned only in the cost accounting period in which it is paid." Thus, the cost of the benefit is recognized as it is used by employees, not as it is accumulated on the balance sheet.

Seems relatively straightforward. But over at WIFCON, government contracting practitioners foresee some real problems with implementation of the requirements of this E.O.

For example, Vern Edwards posted—

The biggest problem may well be with subcontractors at the various tiers, especially subcontractors under contracts for commercial items. And what about companies that have both government and nongovernment contracts but that do not provide paid sick leave? How are they supposed to handle this? Do some of their employees get the benefit while some don't? …

Disputes will not be subject to the Contract Disputes Act, but to enforcement by the Secretary of Labor. What kind of enforcement action can the Secretary take? Withholding of payment? Fines? Suspension and debarment?

Those pointed questions are very important. If covered employees are only those who perform (or charge to) a covered contract, then what about the employees who aren't covered? Will a contractor have a two-tier benefit system, one where covered employees get a paid sick leave benefit while non-covered employees do not? That doesn't seem right.

And how will prime contractors (and higher-tier subcontractors) ensure their subcontractors are complying with the requirements? Remember, the clause (when promulgated in regulation) will become a mandatory flow-down requirement.

And how will disputes work? That's going to be interesting.

Mr. Edwards also asked about dollar thresholds. Typically, a clause applies to contract values above a certain threshold, the logic being that the larger the contract value, the more rules with which the contractor will have to comply. But the E.O. says nothing about dollar thresholds, so presumably the E.O. requirements will apply to micro-purchases paid for via procurement cards and/or imprest funds. That doesn't seem right.

The point of those questions is that the implementation cost incurred by contractors to comply with this E.O (and resulting regulations) will depend on a number of factors, not the least of which is whether all contractor employees are covered, or just the ones working on Federal contracts. That would matter if you are a commercial entity with just a few Federal contracts. If all your employees were subjected to the new requirements, it might well be a case of "the tail is wagging the dog."

If you are a Federal contractor who will have to start new or enhanced employee benefits in order to comply with this Executive Order, then these are the types of questions you would want to be thinking about right now. Because to the extent you are currently submitting proposals for contracts to be awarded after January 1, 2017, you are going to want to include the cost of the new employee benefit in your bids and/or proposals. And to the extent it's going to cost you money to implement the new employee benefit, you are going to want to include that cost in your indirect rates so that you will be made whole by your customer for complying with the requirements of this Executive Order.