WiFi

Network: Renaissance Conference
Password: officeteamfield

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This presentation is to provide general information and updates. These materials are not intended to provide legal advice.

Employers’ representatives should consult either with their in-house counsel or, as directed, with an experienced employment attorney for legal advice about whether, based on their specific facts and circumstances, their company complies with the applicable federal and state laws and regulations.
FortneyScott represents clients on workplace matters before federal enforcement agencies such as the U.S. Department of Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC") and state enforcement agencies.

Our attorneys have significant experience counseling clients on domestic and international workplace-related matters, including pay equity, OFCCP compliance, equal employment and nondiscrimination obligations, EEOC matters, wage and hour and prevailing wages, and investigations of workplace claims and complaints.
WorkPlace HR provides premium human resources consulting services to clients, emphasizing the design and deployment of legally sound compliance policies and procedures to help existing and new federal contractors meet their affirmative action and non-discrimination obligations.

WorkPlace HR provides consulting services and does not provide legal counsel or legal advice to its clients.
What We’ll Cover Today

➢ Update on Trump Administration
➢ Davis-Bacon Act
➢ Service Contract Act
➢ Federal Contractor Paid Sick Leave Executive Order
General Observations on Trump Administration

• Reversal and dismantling of the Obama Administration’s Labor & Employment (“L&E”) priorities and policies
• Slowness in appointment/confirmation process
• L & E legislation not an Administration priority
  ▪ Except the NLRB
• Reassessment of administrative and regulatory framework
## Status of Obama Initiatives

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<thead>
<tr>
<th>Obama Initiative</th>
<th>Agency</th>
<th>Status</th>
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</thead>
<tbody>
<tr>
<td>Overtime rule increased salary exemption levels; provided auto-increase for</td>
<td>DOL Wage &amp; Hour</td>
<td>Rule voided by federal judge but on appeal to clarify use of salary to</td>
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<tr>
<td>exemptions and provided exemption based on salary alone</td>
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<td>determine eligibility. DOL working on new proposal</td>
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<tr>
<td>Persuader rule required disclosure of third-party labor relations consultants</td>
<td>DOL Office of Labor-Management</td>
<td>Rule voided; Trump DOL rescinded on July 17, 2018</td>
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<td>Standards</td>
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<td>Fiduciary rule to regulate advice to retirement savers</td>
<td>DOL Employee Benefits Security</td>
<td>Rule vacated by 5th Circuit</td>
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<td>Administration</td>
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<tr>
<td>Fair Pay and Safe Workplaces</td>
<td>DOL</td>
<td>Rule temporarily enjoined in October 2016; then rescinded by</td>
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<td>Congressional Review Act and Executive Order</td>
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<td>Joint employment (BFI decision)</td>
<td>NLRB</td>
<td>NLRB overturned with Hy-Brand decision but voided decision;</td>
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<td>Now proposing regulations</td>
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<tr>
<td>Tip-sharing with kitchen staff banned</td>
<td>DOL Wage &amp; Hour</td>
<td>Rescinded; new rulemaking expected</td>
</tr>
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</table>
DOL – Slowly Staffing Up

- Secretary of Labor Alex Acosta
- Deputy Secretary Patrick Pizzella
- Solicitor Kate O’Scannlain
- Mine Safety and Health Commissioner David Zatezalo
- Assistant Secretary Congressional Katherine McGuire
- Assistant Secretary EBSA Preston Rutledge

But still many nominees still pending

<table>
<thead>
<tr>
<th>DOL Agency</th>
<th>Nominee</th>
<th>Status</th>
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<tbody>
<tr>
<td>Wage &amp; Hour Administrator</td>
<td>Cheryl Stanton</td>
<td>Pending before Senate</td>
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<tr>
<td>OSHA</td>
<td>Scott Mugno</td>
<td>Pending before Senate</td>
</tr>
<tr>
<td>Bureau of Labor Statistics</td>
<td>William Beach</td>
<td>Pending before Senate</td>
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<tr>
<td>ETA</td>
<td>John Pallasch</td>
<td>Nominated on April 11, 2018</td>
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<tr>
<td>VETS</td>
<td>John Lowry III</td>
<td>Pending before Senate</td>
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<tr>
<td>Policy</td>
<td>Bryan Jarrett</td>
<td>Nominated on July 9, 2018</td>
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<tr>
<td>ODEP</td>
<td>N/A</td>
<td>No nominee</td>
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</table>
Wage & Hour Initiatives

• Issuing opinion letters, including reinstating letters from Pres. George W. Bush Administration
  ▪ New W&H letters issued on August 28
• Initiating a pilot program for self-audit/self-reporting program—Payroll Audit Independent Determination (PAID)
• Guidance on independent contractors and joint employment to replace guidance revoked
• Providing guidance on tip-pooling
• Holding town halls on overtime rule
• Federal Contractor Minimum Wage is currently $10.35
  ▪ January 1, 2019 - Increases to $10.60 per hour

• Applies to workers performing work on or in connection with covered Federal contracts
Some large FY2018 settlements include:

- $3.5M by California Cartage Company for SCA violations (Sept. 13, 2018)
- $574,989 by Loyal Government Services for SCA violations (Sept. 7, 2018)
- $649,996 by US Auto Club for SCA and CWHSSA violations (May 1, 2018)
- $1.2M by Macro Companies for SCA and CWHSSA violations (April 11, 2018)
- $1.2M by ManTech International for SCA and CWHSSA violations (March 12, 2018)
DAVIS-BACON ACT
• The Davis-Bacon Act and a number of similar laws require that a “laborer or mechanic”
  ▪ Who is working on a certain kind of contract or subcontract, directly on the site of the work
  ▪ Is entitled to receive the prevailing wage and fringe benefits for the area in which the work is being performed
• Covered workers are also entitled to time-and-a-half if they work overtime
• Applies to direct federal contracts in excess of $2,000 to which the Federal Government or the District of Columbia is a direct party for construction, alteration and/or repair, including painting and decorating, of public buildings or public works
  ▪ Examples:
    ▪ Renovation of VA Hospital
    ▪ Construction on a military base
Davis-Bacon Related Acts

- Extends Davis-Bacon requirements to numerous laws that provide federal assistance
  - Examples:
    - HUD-financed construction of low-income housing projects
    - Federal Highway Administration grants to states for reconstruction of roads and bridges
Who is covered—
Laborers and Mechanics

Defined as workers whose duties are manual or physical in nature

• Examples: laborers, carpenters, electricians, painters, backhoe operators
• Includes apprentices and trainees and helpers
• May include truck drivers

Does NOT include:

• Timekeepers, inspectors, architects, engineers
• Employees who are exempt from overtime requirements of the Fair Labor Standards Act
  ▪ Executive employees (supervisors)
  ▪ Professional employees (architects, engineers, etc.)
  ▪ Administrative employees (business analysts, human relations staff, etc.)
Who is covered—Apprentices

- Must be individually registered in a bona fide apprenticeship program with DOL’s Employment Training Administration (ETA) Office of Apprenticeship (OA) or a State Apprenticeship Agency recognized by OA.
- Is in first 90 days of probationary employment as an apprentice in such a program
- Paid less than the journeyman rate
  - Paid the percentage of hourly rate required by the apprenticeship or training program
Who is covered—Trainees

- Someone who is registered and receiving on-the-job training in a construction occupation under a program approved in advance by the U.S. Department of Labor
- Paid less than the journeyman rate
Who is covered—Truck Drivers

• Covered in the following circumstances:
  ▪ Drivers of a contractor or subcontractor for time spent working on the site of the work
  ▪ Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not *de minimis*
  ▪ Drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site
  ▪ Drivers transporting portions of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the physical place(s) where the building or work called for in the contract(s) will remain
Who is covered—Truck Drivers (cont.)

- **NOT covered:**
  - Material delivery truck drivers while off “the site of the work”
  - Drivers traveling between a Davis-Bacon job and a commercial supply facility while they are off the “site of the work”
  - Drivers whose time spent on the site of the work is *de minimis*, such as only a few minutes at a time merely to pick up or drop off materials or supplies
What is covered—Site of the Work

• Applies only to laborers and mechanics employed “directly upon the site of the work”
  ▪ “Site of the work” is the physical place or places where the building or work called for in the contract will remain; AND
  ▪ Any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project

• Batch plants, borrow pits, job headquarters, tool yards, etc., are part of the “site,” provided:
  ▪ They are dedicated exclusively, or nearly so, to the contract or project; AND
  ▪ Are adjacent or virtually adjacent to the site of the work
What is covered—Site of the Work (cont.)

• Does **NOT** include the locations of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular federal or federally assisted project such as:
  - Permanent home offices
  - Branch plant establishments
  - Fabrication plants, tool yards, etc.
DBA Recordkeeping

• Contractor must maintain payroll and basic records for all laborers and mechanics during the course of the work for four years, or for one year after the DBA project is completed, whichever is later.

• Records must include:
  ▪ Name, address, and Social Security number of each employee
  ▪ Each employee’s work classification(s)
  ▪ Hourly rates of pay, including rates of contributions or costs for fringe benefits or cash equivalents
  ▪ Daily and weekly numbers of hours worked
• Records must also include:
  ▪ Deductions made
  ▪ Actual wages paid
  ▪ If applicable, detailed information about fringe benefit plans, including records showing that the plan has been communicated in writing to the affected employees and that contributions are made at least quarterly
  ▪ If applicable, detailed information regarding approved apprenticeship or trainee programs
• Employer must track:
  ▪ Prevailing Wage (PW) work vs. non-PW work
  ▪ Work under 2 classifications

• Deductions from wages
  ▪ Typically, cannot deduct from wages if would reduce wages below PW
    – Limited Exceptions:
      • Authorized by law
      • Voluntary
      • Certain costs for board, lodging and facilities
      • CBA
SERVICE CONTRACT ACT
The Service Contract Act (SCA) covers contracts in excess of $2,500 entered into with:

- Federal government and the District of Columbia
- The principal purpose of which to furnish services
- In the U.S.
- Through use of “service employees”
Service Contract Act Overview (cont.)

• Contracts not covered by SCA:
  ▪ Contracts primarily for something other than services such as construction
  ▪ Contracts for leasing for space
  ▪ Contracts for professional services
  ▪ Federally-assisted contracts for services entered into by state governments such as Medicaid or Medicare
Who is covered—Service Employees

• Service employees are defined as:
  ▪ Any person engaged in performance of contract except employees who are exempt under Fair Labor Standards Act
    ▪ Executive employees
    ▪ Professional employees
    ▪ Administrative employees
  ▪ Coverage does not depend on contractual relationship
What are Required Clauses

- SCA contracts must contain a labor standards clauses and
  - Minimum monetary wages and fringe benefits determined by DOL
  - Recordkeeping/Posting requirements
  - Safety and health provisions
  - Statement of rates paid to federal employees
SCA Recordkeeping

- Employer must track wages and benefits separately
  - Different from Davis-Bacon Act requirements
  - SCA does not require PW and FB to be separately identified on pay stub, but watch out for state laws
- Proportionality:
  - Only pay PW and FB for hours worked and paid on SCA-covered contracts.
    - PW paid for all hours
    - FBs paid only for hours up to and including 40
DBA/SCA Overlapping Concepts
DBA and/or SCA?

- SCA does not apply to any contract principally for construction subject to DBA but can apply to “maintenance” contracts as opposed “repair” contracts covered by DBA.

- Some contracts may have both DBA and SCA components:
  - Contracts “principally” for services that also have specific requirements for substantial amounts of construction, alternation or repair work or are physically or functionally separate from other work called for.
  - SCA contracts that require **substantial** and **segregable** amounts of construction must also include DBA.
Prevailing Wages

- Wages and fringe benefits are determined by the U.S. Department of Labor
  - General Wage Determinations
    - In most cases, general wage determinations are applicable; include wages and fringe benefits
  - Project Wage Determinations
    - Issued at request of contracting agency if no general WD in effect or where virtually all the work on a contract will be performed by a classification that is not listed in the general WD
• Correctly classifying workers is critical for paying required wages and benefits
  ▪ In most cases, the correct classification is listed in the WD
  ▪ If classification is not listed in the WD, contracting agency must seek a “conformance” from Department of Labor
  ▪ Where WD is unclear (two or more classifications listed on the WD may perform the same work), DOL or contracting agency may conduct “area practice” survey
Wage Determinations

WDOL.gov is moving to beta.SAM.gov. This change is part of an effort to bring together 10 federal award systems into a single website. Later in FY2019, WDOL.gov will redirect people to beta.SAM.gov to find wage determinations. For more information, please visit beta.SAM.gov or check out this video. (https://youtu.be/5ucjZ431AGo)

<table>
<thead>
<tr>
<th><strong>Service Contract Act</strong></th>
<th><strong>Davis-Bacon Act</strong></th>
<th><strong>Related Information</strong></th>
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<tr>
<td>Selecting SCA WDs</td>
<td>Selecting DBA WDs</td>
<td>Agency Labor Advisors</td>
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<td>e98</td>
<td>Archived WDs</td>
<td>Library</td>
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<td>Archived WDs</td>
<td>WDs due to be revised</td>
<td>DOL Wage and Hour Website</td>
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<tr>
<td>WDs due to be revised</td>
<td>Rollover Crosswalk</td>
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<tr>
<td>PACT (Price Adjustment Calculation Tool)</td>
<td>NEW!</td>
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</table>
General Decision Number: DC180002 09/28/2018 DC2
Superseded General Decision Number: DC20170002

State: District of Columbia
Construction Type: Building

County: District of Columbia Statewide.

BUILDING CONSTRUCTION PROJECTS (does not include single family homes or apartments up to and including 4 stories).

Note: Under Executive Order (EO) 13658, an hourly minimum wage of $10.35 for calendar year 2018 applies to all contracts subject to the Davis-Bacon Act for which the contract is awarded (and any solicitation was issued) on or after January 1, 2015. If this contract is covered by the EO, the contractor must pay all workers in any classification listed on this wage determination at least $10.35 per hour (or the applicable wage rate listed on this wage determination, if it is higher) for all hours spent performing on the contract in calendar year 2018. The EO minimum wage rate will be adjusted annually. Please note that this EO applies to the above-mentioned types of contracts entered into by the Federal government that are subject to the Davis-Bacon Act itself, but it does not apply to contracts subject only to the Davis-Bacon Related Acts, including those set forth at 29 CFR 5.1(a)(2)-(6). Additional information on contract requirements and worker protections under the EO is available at www.dol.gov/whd/govcontracts.

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ASBESTOS WORKER/HEAT & FROST INSULATOR ................. $35.13 16.22

Includes the application of all insulating materials, protective coverings, coatings and finishes to all types of mechanical systems.
States: District of Columbia, Maryland, Virginia

Area: District of Columbia Statewide
Maryland Counties of Calvert, Charles, Prince George’s
Virginia Counties of Alexandria, Arlington, Fairfax, Falls Church, Fauquier,
Loudoun, Manassas, Manassas Park, Prince William, Stafford

**Fringe Benefits Required Follow the Occupational Listing**

<table>
<thead>
<tr>
<th>OCCUPATION CODE - TITLE</th>
<th>RATE</th>
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<tr>
<td>01000 - Administrative Support And Clerical Occupations</td>
<td>18.64</td>
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<tr>
<td>01011 - Accounting Clerk I</td>
<td>20.91</td>
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<tr>
<td>01012 - Accounting Clerk II</td>
<td>23.48</td>
</tr>
<tr>
<td>01013 - Accounting Clerk III</td>
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Note: Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors, applies to all contracts subject to the Service Contract Act for which the contract is awarded (and any solicitation was issued) on or after January 1, 2017. If this contract is covered by the EO, the contractor must provide employees with 1 hour of paid sick leave for every 30 hours they work, up to 56 hours of paid sick leave each year. Employees must be permitted to use paid sick leave for their own illness, injury or other health-related needs, including preventive care; to assist a family member (or person who is like family to the employee) who is ill, injured, or has other health-related needs, including preventive care; or for reasons resulting from, or to assist a family member (or person who is like family to the employee) who is the victim of, domestic violence, sexual assault, or stalking. Additional information on contractor requirements and worker protections under the EO is available at www.dol.gov/whd/govcontracts.

ALL OCCUPATIONS LISTED ABOVE RECEIVE THE FOLLOWING BENEFITS:

HEALTH & WELFARE: $4.41 per hour or $176.40 per week or $764.40 per month

HEALTH & WELFARE EO 13706: $4.13 per hour, or $165.20 per week, or $715.87 per month*
Example: Working Multiple Jobs

Example: During a workweek, employee works 20 hours as a spray painter and 20 hours as a general laborer

**Spray painter rates:**
$40.28/hour (BHR) + $19.98/hour (FB) = $60.26/hour

**General laborer rates:**
$29.35/hour (BHR) + $23.07/hour (FB) = $52.42/hour

20 hours @ $60.26/hour = $1,265.46
20 hours @ $52.42/hour = $1,048.40

Total for 40 hours $2,313.86
• Employer has to “map” employee duties to a classification on the Wage Determination or seek a conformance from the DOL
  ▪ For SCA Service Contract Act Directory of Occupations provides a list of SCA job classifications and attendant duties
  ▪ Contracting Officer has obligation to provide Wage Determination
• Prime contractor must flow down to subcontractors
• WDs updated regularly
• Prevailing wage includes
  ▪ the basic hourly rate
  ▪ contractor contributions irrevocably made to a trustee or third party pursuant to bona fide fringe benefit fund, plan or program (FB)
  ▪ the rate of costs contractor reasonably anticipates in providing bona fide FB’s where certain conditions are met
Fringe Benefits

Fringe benefits component of “prevailing wage”

• Obligation to pay may be satisfied by:
  ▪ Payment of Basic Hourly Rate (BHR) and Fringe Benefit (FB) in cash
  ▪ Contributing payments to a bona fide plan; or
  ▪ Any combination of the two

• Must be paid weekly for all hours worked
  ▪ Unless paid into bona fide FB plan and then paid no less than quarterly

• Fringe benefits proportional to hours worked
Fringe benefits under DBA:

- Cash wages paid in excess of BHR may offset or satisfy FB obligation

• Examples of allowable FBs:
  - Life insurance
  - Health Insurance
  - Pension
  - Vacation
  - Holiday
  - Sick Leave
Fringe Benefits (cont.)

• Under SCA Contractor gets credit for cost of FBs, not value to employees

• Contractor’s SCA fringe benefit obligations not satisfied by:
  ▪ Benefits otherwise required by law
  ▪ Paid Sick Leave per under EO 13706 and related regulations

• Paid Sick Leave must be paid in addition to SCA fringe benefits
  ▪ Excess may count towards SCA FB obligation

• Fringe benefits on a WD include:
  ▪ Health and welfare (H&W) payments
  ▪ Vacation
  ▪ Holidays
OVERTIME AND OTHER BENEFITS
• Governed by Contract Work Hours and Safety Standards Act (“CWHSSA”)
  ▪ Laborers, mechanics, guards and watchmen must be paid 1½ times the basic hourly wage for all hours worked over 40 in a workweek
  ▪ DBA/SCA contracts in excess of $150,000
• On contracts to which CWHSSA does not apply overtime pay requirements may apply to a contractor or subcontractor under the FLSA
  ▪ Contracts to which CWHSSA applies FLSA may also apply
Holidays

• Specific paid holidays are listed in the Wage Determination

• Contractor or subcontractor can substitute other holidays

• Under SCA employees entitled to holiday pay if works holiday weekend
Vacation Days

- Wage Determination specifies paid vacation requirements
  - May specify that contractor or subcontractor contribute a certain % of basic hourly rate based on years of service
  - May specify that contractor provide a specific number of paid vacation days, based on how long the employee has been working
- Under SCA vacation becomes vested and due after employees’ anniversary date
  - Must be paid before next anniversary date, completion of contract or employee’s termination
PAID SICK LEAVE
Paid Sick Leave: Covered Contracts

• Covered contracts include:
  ▪ Procurement contracts under Davis-Bacon (DBA)
  ▪ Contracts under Service Contract Act (SCA)
  ▪ Contracts for concessions including those excluded from coverage under SCA or
  ▪ Contracts in connection with federal property or lands related to offering services for federal employees, their dependents or the general public
• “New contracts” include new contracts, replacements to expiring contracts, renewed contracts, and contract extensions or modifications of an existing contract entered into on or after January 1, 2017

• Contractors and subcontractors are required to “flowdown” the requirement
Paid Sick Leave: Covered Employees

• “Employee” includes individuals who work “on” or “in connection with” a contract covered by the EO
  ▪ “On” the contract – look to statement of work
  ▪ “In connection with” – necessary to the performance of the contract
• Includes ALL employees, even employees exempt under FLSA white collar exemptions
Paid Sick Leave: Accrual vs. Front-Load

• Contractor must allow employees to:
  ▪ Accrue 1 hour of paid sick leave for every 30 hours of work on/in connection with covered contract (Accrual method) or
  ▪ Provide employees with 56 hours of leave at beginning of each accrual year (Front-load method)

• Contractors must calculate sick leave accrual at the end of each pay period or once a month, whichever is shorter

• Contractors can estimate hours worked for employees working “in connection with” contract
  ▪ Must be reasonable and based on verifiable information
Paid Sick Leave: Accrual

- Contractors do not have to accrue paid sick leave in increments smaller than 1 hour.
- Contractors must inform employees in writing of the amount of paid sick leave accrued no less than once each pay period but no less than once a month whichever is shorter.
Paid Sick Leave: Carry-Over

• Employees MUST be permitted to carryover unused time
  - Can be limited to 56 hours annually
  - Contractor cannot use the carryover leave to offset the amount accrued

• Accrual method:
  - Employees can accrue more than 56 hours but it may not be available to use
    - Ex. Employees carries over 20 hours from Year 1 to Year 2. In year 2, once the employee accrues 36 hours (giving her 56 hours) – she will continue to accrue but the time will not be available for use until she reduces her bank
Paid Sick Leave: Carry-Over (Cont.)

• Front-load method:
  ▪ Contractor cannot limit the amount to time available to use
    – Ex: Employee is frontloaded 56 hours in year 1. In year 2, the employee carries over 20 hours and is frontloaded 56 hours. That employee will have 76 hours of sick leave available to use in year 2.
Paid Sick Leave: Permissible Uses

- Regulations contain a broad array of permissible uses that are more expansive than standard sick leave policies. Examples:
  - Care for child, parent, spouse, domestic partner, or any other individual related by blood or *affinity equivalent to a family relationship* who has any of the above or needs diagnosis, care or preventative care
  - Absences related to domestic violence, sexual assault, or stalking – including time to relocate, seek assistance and/or participation in legal proceedings
Questions?
Elizabeth B. Bradley has over fifteen years of experience representing employers and federal contractors in litigation and mediation matters before state and federal agencies and courts, as well as counseling and training private, public, and non-profit employers in all aspects of employment law.

Specifically, Ms. Bradley has extensive knowledge and experience in counseling federal contractors in matters relating to OFCCP. She has represented U.S. corporations in successfully defending against OFCCP’s review of the contractor’s utilization rates and compensation practices. She has also represented major companies during OFCCP compliance reviews and defended contractors undergoing investigation by the OFCCP for alleged discrimination and related record-keeping practices.

Ms. Bradley also has experience in advising employers on wage and hour compliance under federal and state laws; litigating discrimination and retaliation claims advanced under Title VII, ADA, ADEA, and comparable state and local statues; counseling on ADA and FMLA compliance; conducting internal investigations involving discrimination complaints; performing wage and hour compliance reviews; and drafting and negotiating employment agreements including non-compete and non-solicitation provisions.
Nita Beecher, Of Counsel to Fortney & Scott, LLC and Consultant with WorkPlace HR, advises clients on a wide range of employment and human resources issues. She has more than 30 years of experience in labor and employment law.

Ms. Beecher served as an in-house counsel in major corporations for more than 20 years where she advised in-house clients on labor and employment law issues including OFCCP “Glass Ceiling” audits, EEOC class age investigations, the ADA, and FLSA Wage and Hour audits. She also developed a self-audit tool used by McDonnell Douglas Corporation and The Boeing Company. Ms. Beecher also worked as in-house counsel for E. I. duPont de Nemours & Co., Consolidation Coal Company and Arch Coal Company.

Ms. Beecher graduated from the University of North Carolina at Chapel Hill and from the University of North Carolina School of Law.
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