

Insight

IN-DEPTH DISCUSSION

OCTOBER 3, 2016

DOL Issues Final Rule Implementing Paid Sick Leave for Federal Contractors

BY SARAH GORAJSKI

On September 29, 2016, the U.S. Department of Labor (DOL) issued its long-awaited final rule¹ to implement Executive Order 13706,² which requires covered federal contractors to provide employees with up to seven days (56 hours) of paid sick leave per year, including paid leave to care for family members and family-like individuals. Although the DOL made several minor revisions in its final rule, the substantive provisions of the rule—including accrual and use requirements—remain largely unchanged and will impose substantial new obligations on many employers beginning January 1, 2017.

The implementation of the final rule comes as state and local governments are increasingly enacting mandatory paid leave laws in a piecemeal fashion across the country. According to Secretary of Labor Thomas Perez upon announcement of the final rule:

The next step is a federal earned sick time law such as the Healthy Families Act, and I am confident that it is a question of when, not if. I'm proud to be part of an administration that's getting us closer to that day.³

The DOL explains that the final rule “will . . . improve the health and performance of employees of . . . covered federal contractors and bring benefits packages offered by those companies in line with leading firms,

1 U.S. Department of Labor, *Establishing Paid Sick Leave for Federal Contractors*, 81 Fed. Reg. 67598-67724 (Sept. 29, 2016), available at <https://www.federalregister.gov/documents/2016/09/30/2016-22964/establishing-paid-sick-leave-for-federal-contractors>.

2 Executive Order 13706 of Sept. 7, 2015, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697-54700 (Sept. 10, 2015).

3 Labor Secretary Thomas Perez, *Paid Sick Leave for Federal Contract Workers*, U.S. Department of Labor Blog (Sept. 29, 2016), available at <https://blog.dol.gov/2016/09/29/paid-sick-leave-for-federal-contract-workers/>.

ensuring they remain competitive in the search for dedicated and talented employees.” According to the DOL, “by supporting workers to stay home, paid sick leave protects the public health by keeping fellow employees, customers and clients away from illness.”

The DOL estimates that once fully implemented, the rule will extend paid sick leave to 1.15 million employees, including 594,000 workers who currently do not receive paid sick leave. However, the full impact of the rule remains to be seen as many employers face the challenge of modifying their policies to comply with the myriad state, local, and now federal, paid sick leave mandates, which vary in application.

Covered Employers and Employees

The final rule applies to new covered contracts where either the solicitation has been issued, or the contract has been awarded outside the solicitation process, on or after January 1, 2017, with the federal government requiring performance in whole or in part within the United States. The rule also generally applies to existing covered contracts that will be renewed, extended, or amended on or after January 1, 2017.

The final rule sets forth four broad categories of covered contracts:

- Procurement contracts for services or construction covered by the Davis Bacon Act (DBA);
- Contracts for services covered by the Service Contract Act (SCA);
- Contracts for concessions, including any concessions contracts excluded from coverage under the SCA by DOL regulations at 29 CFR 4.133(b); and
- Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

The rule broadly defines “contract,” stating that the term “includes all contracts and any subcontracts of any tier thereunder.”

A covered employee means any person engaged in performing work on or in connection with a contract covered by the executive order, and whose wages under such contract are governed by the DBA, SCA, or the Fair Labor Standards Act (FLSA), including employees who qualify for an exemption from the FLSA’s minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the individual and the employer. Thus, the paid sick leave requirements would apply, for example, to employees employed in a bona fide executive, administrative, or professional capacity. In addition, the paid sick time requirements would extend even to independent contractors who are covered by the SCA and the DBA.

Excluded Contracts, Employees, and Collective Bargaining Agreements

The rule narrowly excludes from coverage the following types of contracts:

- “Grants” within the meaning of the Federal Grant and Cooperative Agreement Act;
- Contracts with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Procurement contracts for construction that are excluded from the DBA’s coverage (i.e., those worth under \$2,000); and
- Contracts for services that are exempted from coverage under the SCA (i.e., those worth under \$2,500).

Employees performing “in connection with” covered contracts for less than 20% of their work hours in a given workweek are also excluded from the paid sick leave requirement under the rule. However, employees performing work “on” covered contracts, regardless of amount, are not excluded from coverage. Employees performing “on” covered contracts are those directly performing the specific services called for by the contract, while those performing “in connection with” a covered contract are performing activities that are necessary to the performance of the contract, but are not directly engaged in performing the specific services called for by the contract.

In a significant change from the proposed rule, the final rule also provides a temporary but limited exclusion for employees whose covered work is governed by a collective bargaining agreement (CBA). Under the proposed rule, paid sick leave requirements of the executive order could not be waived in a CBA. The final rule, however, provides that some of the executive order and final rule’s requirements do not apply to employees covered by a CBA ratified before September 30, 2016, until the date the CBA terminates or January 1, 2020, whichever date is earlier, as long as employees are provided at least 56 hours per year of paid time off that may be used for reasons related to sickness or health care.

Specifically, if the CBA already provides covered employees with at least 56 hours of paid sick time each year, the final rule’s other requirements temporarily do not apply. If the CBA provides paid sick time but the amount is less than 56 hours, then the final rule’s other requirements temporarily do not apply as long as the contractor provides the employees with the difference between 56 hours and the amount provided under the existing CBA in a manner consistent with either: (1) the final rule; or (2) the terms and conditions of the CBA. Thus, if a CBA allows an employee to use up to 50 hours of paid time off in a year if the employee is sick but not to care for family members, the contractor is temporarily in compliance with the final rule as long as it provides employees with an additional six hours of paid time off that can be used for the employee’s own sickness. The contractor does not need to expand the permissible reasons for use of paid time off until the CBA expires or January 1, 2020, whichever date is earlier. If, however, the CBA does not provide any paid time off that can be used for being sick or seeking health care, the temporary exclusion does not apply and the contractor will be responsible for full compliance with the final rule.

Accrual of Sick Leave

The rule provides that a contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 “hours worked” on or in connection with a covered contract. A contractor may not exclude time spent on non-covered work unless the contractor accurately records the employee’s covered and non-covered work hours. For employees performing work in connection with—rather than on—covered contracts, a contractor may estimate the portion of the employee’s hours worked in connection with covered contracts provided the estimate is reasonable and based on verifiable information.

“Hours worked” under the final rule has the same meaning as it does under the FLSA: employees will accrue sick leave only when they are actually working. This rule will be less costly for employers than the proposed rule, which defined “hours worked” to include all time an employee spends working or in paid time off status.

Under the rule, a contractor shall calculate an employee’s paid sick leave accrual no less frequently than at the conclusion of each pay period or each month, whichever interval is shorter. This requirement will be less administratively burdensome on contractors than the proposed rule, which would have required the calculation at the end of each workweek.

A contractor does not need to allow accrual of paid sick leave in increments smaller than 1 hour. A fraction of hours worked, however, shall be added to hours worked for the same contractor in subsequent weeks, provided the next pay period occurs within the same accrual year.

If a contractor is not obligated by the SCA, DBA, or FLSA to keep track of an employee's hours worked, including because the employee is exempt, the contractor may calculate paid sick leave accrual by tracking the employee's actual hours worked or by assuming the employee works 40 hours on or in connection with a covered contract in each workweek. If such an employee regularly works fewer than 40 hours per week on or in connection with covered contracts, the contractor may allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on covered contracts per workweek, provided the contractor has evidence to support the number it uses.

Notification of Accrual

The rule also provides extensive written notification requirements regarding the amount of paid leave the employee has accrued but not used, including (a) at least once each pay period or each month, whichever interval is shorter; (b) upon separation of employment; and (e) upon reinstatement of paid sick leave (on rehire). Existing systems such as a notification accompanying each paycheck or an online system an employee can check at any time, can be used to satisfy or partially satisfy the requirements provided it is written (including electronically) and clearly indicates that amount of sick leave accrued separately from other amounts of paid time off available, unless the paid time off bank is used to satisfy the paid sick leave requirement.

Frontloading

As an alternative to having employees accrue sick time based on hours worked, a contractor may provide an employee with a lump sum of at least 56 hours of paid sick leave at the beginning of each accrual year. If the contractor hires an employee or newly assigns the employee to work on or in connection with a covered contract after the beginning of the accrual year, the contractor may provide a prorated amount of paid sick leave.

Carryover

All paid sick leave carries over from one accrual year to the next.

Accrual and Sick Leave Bank Caps

If the contractor uses the accrual method, the contractor may limit the amount of paid sick leave an employee is permitted to accrue to 56 hours in each accrual year, but paid sick leave carried over from the previous accrual year shall not count toward the contractor's annual accrual cap. A contractor may also limit the amount of paid sick leave an employee is permitted to have available for use at any point to 56 hours. Thus, a contractor may put in place two caps: an annual accrual cap of 56 hours and a maximum sick leave bank of 56 hours. In doing so, a contractor can effectively limit an employee's carryover by setting a sick leave bank limit, as permitted by the rule.

Example: An employee accrues 56 hours in the first year but does not use any of that time. All 56 hours carry over to the second year. In the second year, the employee may not accrue any more time until the employee uses some of the 56 hours. If the employee uses all 56 hours in the second year, the employee may accrue up to another 56 hours by the end of the second year. The employee never carries over more than 56 hours in a year.

If a contractor "frontloads" paid sick leave at the beginning of each accrual year, an employer may limit the carryover from year to year to 56 hours, but it must still front load the full 56 hours. Thus, the maximum bank may exceed 56 hours when using the frontloading method.

Example: An employee receives 56 hours at the beginning of the first year and uses 40 hours over the course of that year. The employee would then carry over 16 hours to the second year and will receive another 56 hours at the beginning of the second year for a total of 72 hours in the paid sick leave bank and available for use.

Amount of Annual Use

Under the rule, a contractor may not limit the amount of paid sick leave an employee may use per year or at once. Thus, an employee could use more than 56 hours in a year if the employee carries over hours from the previous year.

Accrual Year

A contractor may define an accrual year, which is a 12-month period as selected by the contractor, so long as it is a consistent option for all or similarly-situated employees and is not selected or changed to avoid paid sick leave requirements.

Termination and Reinstatement

Under the rule, accrued, unused sick leave does not have to be paid out upon termination of the employment relationship. That said, paid sick leave must be reinstated for employees rehired by a covered contractor within 12 months after a job separation. The final rule removes the proposed rule's requirement that a contractor must reinstate paid sick leave when it rehires an employee even if the unused leave was paid out at the time of the original separation from employment. Thus, employers may avoid the reinstatement requirement by paying out unused sick leave at the time of termination.

Permitted Use of Sick Time

The rule provides that paid sick leave may be broadly used for the following reasons:

1. for an employee's own physical or mental illness, injury, medical condition;
2. when an employee needs to obtain diagnosis, care, or preventative care;
3. 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 an illness, injury, medical condition, or who needs to obtain diagnosis, care, or preventative care; or
4. for domestic violence, assault, or stalking situations resulting in an illness, injury or medical condition or the need for obtaining diagnosis, care, or preventative care, or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action for the employee or one of the above-listed individuals in domestic violence, assault or stalking situations.

Notably, the DOL intended that employees be permitted to use paid sick leave for a broader range of purposes than those for which they can use FMLA leave. The final rule retained the expansive definition of "equivalent of a family relationship." As such, employees may take paid sick leave to care for a non-nuclear family member who does not necessarily have a biological or legal relationship to the employee, including a "close friend."

Moreover, some of the key definitions used in the paid sick leave rule differ from those under the FMLA. For instance, the rule's definition of "child"—which includes children of any age—is "deliberately broader" than the definition of "son or daughter" in the FMLA, which includes only minor children or adult children "incapable of self-care because of a mental or physical disability."

The sick leave rule defines physical or mental illness, injury, or medical condition as any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind, regardless of whether it requires attention from a health care provider or whether it would be a “serious health condition” that qualifies for use of leave under the FMLA. Examples the DOL cites include, but are not limited to, a common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode.

The rule encourages employees to make reasonable efforts to schedule foreseeable paid sick leave so as not to unduly disrupt the contractor’s operations, but 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. Use, however, may be limited to time the employee would otherwise have spent working on or in connection with a covered contract, but employers must have adequate records to distinguish between covered and non-covered work.

Increment of Use

Contractors must allow employees to use paid sick leave in increments of one hour, and may choose to allow increments of less than one hour, but are not required to do so. In response to many comments, the final rule includes a physical impossibility exception to the one-hour minimum increment requirement, analogous to the exception under the FMLA. Therefore, when an employee is physically unable to access the worksite after the start of the shift or to depart from the workplace prior to the end of the shift, a contractor may require the employee to continue to use paid sick leave for as long as the physical impossibility remains. The DOL cited examples that arise in the FMLA context, including flight attendants whose scheduled flight departs, train conductors whose scheduled train departs, and laboratory technicians who work in “clean rooms” that must remain sealed.

Timing of Pay

A contractor must compensate an employee for time during which the employee used paid sick leave no later than one pay period following the end of the regular pay period in which the paid sick leave was used.

Request for Leave

Paid sick leave must be provided upon the employee’s oral or written request that includes information sufficient to inform the contractor that the employee is seeking paid sick leave under the executive order, and to the extent reasonably feasible, the expected duration of the leave. Some of the changes in the final rule will make it easier for employees to request sick leave. For instance, the employee does not need to specifically reference the executive order or use the words “sick leave” or “paid sick leave,” and a contractor may not require extensive or detailed information about the need to be absent from work or the employee’s family or family-like relationship with an individual for whom the employee is requesting care.

An employee must make a request at least seven calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable. Additionally, the rule provides guidance regarding when a contractor may deny a request, requirements for communicating a request denial, and when a contractor must permit an employee to submit a new, corrected request.

Certification or Documentation

The rule further provides that employers may require that the employee taking leave provide a certification issued by a health care provider or other appropriate supporting documentation only if the sick leave lasted for three or more consecutive full workdays. In addition, a contractor, may require certification or documentation only if the contractor informs the employee of the requirement before the employee returns

from leave. A contractor may provide sufficient notice through a general policy if it provides actual notice, but simply including an explanation of the requirement in a lengthy handbook will generally not be sufficient.

The contractor must allow the employee 30 days from the first day of the three or more consecutive absences to obtain the certification. The documentation should contain only “the minimum necessary information establishing a need for the employee to be absent from work.” If the certification or documentation is deficient, the contractor must notify the employee of the deficiency and allow the employee at least five days to correct the deficiency. The contractor may retroactively deny the request for leave when the employee fails to provide certification or documentation within 30 days or when the employee’s documentation is insufficient and the employee fails to correct the deficiency within five days. The rule also addresses confidentiality of the certification, treatment of the absences while waiting for the certification, and contact with the employee’s health care provider.

Interaction with Existing Leave Policies and Other Laws

A contractor’s existing paid leave policies—such as vacation, sick, or other paid time off policies—may be used to satisfy the requirements of the final rule if various conditions are met. The paid time off must be made available to all covered employees, the paid time off must accrue, and employees must be able to use it in a manner that meets or exceeds the requirements of the executive order and its implementing rule. Furthermore, the paid time off must be provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave, employee requests for leave, and certification and documentation, as set forth in the final rule.

Paid sick leave required by Executive Order 13706 is in addition to a contractor’s obligations under the SCA and DBA. Thus, a contractor may not receive a credit toward its prevailing wage or fringe benefit obligations under those laws for paid sick leave provided in satisfaction of the executive order or the rules.

Paid sick leave may run concurrently with unpaid FMLA leave under the same conditions as other paid time off. A contractor’s compliance with state or local paid sick leave laws must also comply with the executive order.

Interaction with More Generous Leave Policies

The final rule also addresses generous paid time off policies that provide more than 56 hours of paid time off per accrual year. This addition to the final rule and the DOL’s corresponding comments answer some of the questions that the proposed rule left unanswered. Under the final rule, contractors with generous paid time off policies may allow employees to use all of paid time off for sick time and other uses permitted by the rule. Alternatively, for each accrual year, the contractor may allow employees to use only up to 56 hours of the paid time off for reasons permitted by the rule as long as the contractor tracks, and makes and maintains records reflecting, the amount of paid time off an employee uses pursuant to the executive order and rule.

Contractors must comply with the rule’s carryover requirements, which means that employees must begin the subsequent year with as much leave as they would have been entitled to under the final rule, but need not be permitted to carryover more than 56 hours.. Similarly, only up to 56 hours of paid time off must be reinstated to an employee rehired within 12 months of a job separation, even if the employee had greater amounts of leave upon separation. In its discussion of the rule, the DOL also clarifies that if employees use their entire paid time off balance for vacation, they are not entitled to any additional paid time off, as long

as the paid time off policy does not create any significant barriers to their using the time for purposes described in the rule.

Multiemployer Plans

A contractor may fulfill its sick leave obligations jointly with other contractors—that is, as though all the contractors are a single contractor—through a multiemployer plan. However, each contractor remains responsible for any violation of the executive order or the rule that occurs during its employment of the employee. A contractor may satisfy its obligations under the executive order by providing paid sick leave through a fund, plan, or program.

Prohibited Acts and Enforcement

Covered employers are prohibited from interfering with an employee's accrual or use of paid sick leave, or discriminating against an employee for taking, or attempting to take, paid sick leave; filing a complaint, initiating any proceeding, or otherwise asserting any right or claim under the executive order or rule; cooperating in any investigation or testifying in any proceeding under the executive order or rule; or assisting any other employee in asserting his or her rights to sick leave. The DOL's Wage and Hour Division is charged with investigating potential violations of and obtaining compliance with the executive order, and the rule identifies remedies available for violations. Depending on the violation, relief may include, but is not limited to, compensation for unpaid leave, liquidated damages, employment, reinstatement, promotion, restoration of leave, lost pay and benefits, other actual monetary relief, liquidated damages, suspension or withholding payment on the contract, debarment, civil actions, and retroactive inclusion of the contract clause. Disputed matters will be resolved in proceedings before the Office of Administrative Law Judges.

Contract Clause

All covered contracts and subcontracts entered into on or after January 1, 2017, except for procurement contracts subject to the Federal Acquisition Regulation ("FAR"), must contain the sick leave contract clause set forth in Appendix A of the rule. The required contract clause directs, as a condition of payment, that contractors shall provide paid sick leave to all employees performing work on or in connection with covered contracts as required by the executive order and the rule. For procurement contracts subject to the FAR, contracting agencies must use the clause set forth in the FAR developed to implement the rule. The rule details consequences for failing to include the required contract clause in covered contracts.

Other Compliance Obligations

Additionally, the rule addresses covered contractors' recordkeeping and notice obligations. Covered contractors must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite. Electronic postings may satisfy this requirement.

Recommendations

Employers with federal government contracts should consider the following actions:

- Identify government contracts that may be awarded or be renewed, extended or amended on or after January 1, 2017, to determine if the contract is covered by the sick leave executive order and rule.
- Ensure all covered contracts contain the required contract clause located in Appendix A to the rule.

- Review and revise sick time or PTO policies and procedures that apply to covered workers to determine whether they satisfy the requirements of the executive order and rule, including those requirements pertaining to accrual, use, carryover, and all other provisions.
- Review attendance and other disciplinary policies to ensure that adverse actions are not taken against employees for using sick leave.
- Post the DOL's Workers Rights Under Executive Order 13706 poster, which is available on the DOL's website.
- Review and update timekeeping, payroll and benefits systems to verify that they will comply with the law's recordkeeping requirements.
- Review CBAs of covered employees to determine whether their leave provisions will satisfy the requirements of the executive order, and provide additional leave as required.
- If the CBA does not fully comply with all requirements of the rule, prepare for negotiating changes to CBAs before the CBA expires or January 1, 2020, whichever date is earlier.