

CLIENT ALERT

DOL Issues Final Rule Establishing Paid Sick Leave for Federal Contractors

OCTOBER 3, 2016

On September 29, 2016, the United States Department of Labor's Wage and Hour Division (DOL) issued a Final Rule implementing Executive Order 13706 (EO 13706 or EO), *Establishing Paid Sick Leave for Federal Contractors*. EO 13706, signed by President Barack Obama on September 7, 2015, requires that certain parties contracting with the federal government provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care. See our client briefing, *President Obama Issues Executive Order Establishing Paid Sick Leave for Federal Contractors*. The DOL's final rule applies to new or renewed contracts beginning in 2017.

According to the DOL, EO 13706 and the final rule will provide additional paid sick leave to an estimated 1.5 million employees of federal contractors and subcontractors, including an estimated 594,000 employees who currently receive no paid sick leave. The rule, FAQ, and overview regarding the rule are available [here](#). A summary of the rule's key provisions also follows below.

Covered Contractors

EO 13706 applies to new federal contracts and replacements for expiring contracts that result from solicitations issued on or after January 1, 2017, or that are awarded outside the solicitation process on or after January 1, 2017. Coverage of contracts and employees is nearly identical to coverage under the regulations implementing the Minimum Wage Executive Order, however, the final rule also covers employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions.

The rule applies to four categories of federal contracts and subcontracts:

1. Procurement contracts for construction covered by the Davis-Bacon Act (DBA);
2. Service contracts covered by the McNamara-O'Hara Service Contract Act (SCA);
3. Concessions contracts, including any concessions contracts excluded from the SCA by DOL regulations; and
4. Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.

Covered Employees

The rule applies to any covered person engaged in performing work “on or in connection with” covered contracts, and whose wages under such contracts are governed by the SCA, DBA, or FLSA, including employees who qualify for an exemption from the FLSA’s minimum wage and overtime provisions. The proposal includes a narrow exemption from coverage for employees who are not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with such contracts.

Paid Sick Leave Entitlements

Accrual

Under the rule, covered employees must accrue at least one hour of paid sick leave for every 30 hours worked, up to 56 hours (seven days) of total paid sick leave. Additionally, the rule creates an option for covered contractors to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year, rather than allowing the employee to accrue the leave based on hours worked.

Maximum Accrual, Carryover, Reinstatement, and Payment for Unused Leave

The rule provides that contractors may limit the amount of paid sick leave employees may accrue to 56 hours each year. Contractors must allow employees to carry over accrued, unused paid sick leave from one year to the next, but can limit the maximum amount of paid sick leave accrued/carried over to 56 hours. Contractors will also be required to reinstate an employee’s accrued, unused paid sick leave if the employee is rehired by the same contractor or a successor contractor within 12 months after a job separation. Contractors are not be required to “cash-out” employees for accrued, unused paid sick leave at the time of a job separation.

Usage

A covered employee may use paid sick leave for absences while working on or in connection with a covered federal contract for:

1. The employee’s physical or mental illness, injury, or medical condition;
2. The employee’s need to obtain diagnosis, care, or preventive care from a health care provider;
3. Care for the employee’s 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 any of the conditions or need for diagnosis, care, or preventive care; or
4. Domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described above, or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, including assistance of individual related to the employee as described in (3) in engaging in any of these activities.

Covered employees are permitted to use as little as an hour of paid sick leave (with a narrow exception for employees whose work makes it physically impossible to leave or return to the job during a shift), or up to the full amount of accrued, unused sick leave at a time. Contractors must provide an employee who uses paid sick leave with the same pay and benefits the employee would have received had the sick leave not been used, except that the employee need not earn additional paid sick leave while on sick leave.

Notification & Certification

The rule requires that contractors provide paid sick leave following the employee’s oral or written request. An employee’s request for leave must provide an estimate of timing and amount of leave needed. If the need to use

paid sick leave is foreseeable, the employee's request would need to be made at least seven calendar days in advance. If the leave is not foreseeable, the request must be made as soon as is practicable. After the request for leave is made, a contractor is required to respond as soon as is practicable. The contractor may communicate its grant of a request to use paid sick leave orally or *in writing*, but must inform the employee in writing of the amount of paid sick leave the employee has available for use. In addition, any denial of a request to use paid sick leave must be communicated in writing, and must be accompanied by an explanation for the denial.

Under the rule, a contractor may require certification from a health care provider only for absences of three or more consecutive days. If the paid sick leave is used for an absence resulting from domestic violence, sexual assault, or stalking, the documentation may be provided by a health care provider, counselor, representative of a victim services organization, attorney, clergy member, family member, close friend, or by self-certification. Records relating to medical histories must be maintained as confidential records. The contractor is prohibited from disclosing any verification information and would be required to maintain the confidentiality of information relating to any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

Coordination with Paid Time Off (PTO) Policies

The rule does not supersede any applicable federal, state, municipal ordinance, or collective bargaining agreement requiring greater paid sick leave or rights. Contractors need not provide an additional 56 hours of leave (or a separate paid sick leave benefit) on top of their existing PTO plans—as long as their policies “are equivalent to or more generous than those described in the Order and [the rule].” For contractors that have PTO policies providing 56 or more hours of leave, the contractor may choose to either (1) provide that all PTO used pursuant to the purposes described in the rule in compliance with all of the rule's requirements, or (2) track, make, and maintain records reflecting the amount of PTO an employee uses for the purposes described in the rule, in which case the contractor need only provide, for each accrual year, up to 56 hours of PTO the employee requests to use for such purposes that complies with the rule's requirements.

Collective Bargaining Agreements

In response to comments on the proposed rule, the final rule provides a grace period for collective bargaining agreements that: (1) were ratified before September 30, 2016, (2) apply to work performed on or in connection with a covered contract, and (3) provide the employee with at least 56 hours (or seven days) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year. Such contracts will be excluded from coverage of the EO until the date the agreement terminates or January 1, 2020, whichever is first. If the collective bargaining agreement provides the employee with paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, but the amount provided under the agreement is less than 56 hours (or seven days), the contractor must provide covered employees with the difference between 56 hours (or seven days) and the amount provided under the existing agreement.

Anti-retaliation & Discrimination

Under the rule, a contractor may not interfere with the accrual or use of paid sick leave, and may not discriminate or retaliate against any employee for the exercise of rights pursuant to the EO or the proposed rule.

Enforcement

The DOL is responsible for enforcement of the EO and the final rule. The procedures for enforcement are based primarily on the existing mechanisms for enforcing prevailing wage laws and the Minimum Wage Executive Order.

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