

Labor and Employment Alert

October 4, 2016

Key Points

- The U.S. Department of Labor issued final rules implementing Executive Order 13706 requiring federal contractors to provide up to seven days of annual paid sick leave, including leave for family care and absences related to domestic violence, sexual assault and stalking.
- Contractors should assess their workforces and leave policies to assess what changes may need to be made to comply with these rules and the growing patchwork of state and local laws requiring paid sick leave.



Mandatory Paid Sick Leave for Federal Contractors Is Final

On September 29, 2016, the U.S. Department of Labor (DOL) issued the **final rules** implementing President Obama's Executive Order 13706 ("Final Rule") requiring federal contractors and subcontractors to provide certain employees with up to seven days of paid sick leave annually, including leave for family care and absences related to domestic violence, sexual assault and stalking. The Final Rule imposes another set of onerous requirements on federal contractors in addition to the many other executive orders issued by the Obama administration over the last several years, including the recent final rules on the **Fair Pay and Safe Workplaces Executive Order**. The Final Rule will apply to certain types of federal contracts and subcontracts entered on or after January 1, 2017. Contractors should review the key aspects of the Final Rule discussed below and consider the practical steps they can take now to come into compliance with the new rule.

Coverage

The Final Rule covers the following four types of federal contracts

- procurement contracts for construction and related services covered by the Davis Bacon Act (DBA)
- service contracts covered by the Service Contract Act (SCA)
- concession contracts, including contracts excluded from the SCA (e.g., restaurants in federal buildings) contracts related to federal property or lands or offering services for federal employees, their dependents, or the general public (e.g., leases in federal buildings for child care centers, credit unions or coffee shops).

The paid leave requirements, however, do not apply to (1) contracts for manufacturing or furnishing of materials, supplies, articles or equipment to the federal government under the Walsh Healey Public Contracts Act; (2) contracts or portions of contracts that are performed outside of the United States; (3) federal grants and cooperative agreements; and (4) contracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act. The requirements of the Final Rule must be flowed down to subcontracts at any tier. Prime contractors and subcontractors are responsible for compliance of their respective subcontractors.

The Final Rule covers any employees performing work on or in connection with any of the four types of covered contracts whose wages are governed by the DBA, the SCA, or the Fair Labor Standards Act (FLSA), including employees exempt from overtime and the minimum wage requirements. According to the Final Rule, employees work “on” a covered contract when they directly perform the specific services called for by the contract. Employees work “in connection with” a covered contract when their activities are necessary to perform the contract, but they are not directly engaged in performing the specific services required by the contract (e.g., security guard patrolling a construction site). Employees who are not directly engaged in performing work called for by the contract and spend less than 20 percent of their hours in any workweek in connection with a covered contract are not entitled to paid sick leave.

Use of Paid Sick Leave

Employees can use paid sick leave to be absent from work on or in connection with a covered contract for any of the following reasons:

- the employee’s physical or mental illness, injury or medical condition
- obtaining a diagnosis, care or preventive care from a health care provider
- caring for the employee’s child, parent, spouse, domestic partner, or anyone related by blood or affinity whose close association with the employee is the equivalent of a family relationship or
- domestic violence, sexual assault or stalking, if the absence is for the purposes described in the first two bullet points above or to obtain additional counseling, seek relocation or assistance from a victim services organization, or take related legal action or assist someone described in bullet point three above in engaging in any of these activities.

The Final Rule notes that paid sick leave can be used for a number of different illnesses and injuries, including for common colds, depressive episodes and sprained ankles. The DOL notes that paid sick leave may be used for many more purposes than permitted by the Family and Medical Leave Act (FMLA). For example, the definition of “child” includes a child of any age as opposed to the much narrower definition of “son or daughter” under the FMLA, which includes only minor children or adult children “incapable of self-care.” Similarly, “physical or mental illness, injury, or medical condition” under the Final Rule is broadly interpreted to include any disease, sickness, disorder or impairment of, or any trauma to, the body or mind regardless of whether it requires a health care provider. “Equivalent of a family relationship” is also expansively defined to include family members and non-nuclear family members who

do not necessarily have a biological or legal relationship to the employee, including a close friend of the family.

Contractors are required to allow employees to use paid sick leave only at times when employees are scheduled to work on a covered contract. For example, if an employee provides security services on a covered contract for 10 hours each workweek and works for the same contractor on a non covered contract for an additional 30 hours each workweek, the contractor would be required to allow that employee to use paid sick leave only during the 10 hours that the employee works on the covered contract.

Contractors must allow employees to use paid sick leave in increments of one hour, but they have the option of allowing employees to use leave in increments of less than one hour. In situations where it is physically impossible for an employee to commence or end work during a shift and use paid sick leave (e.g., flight attendant), and no equivalent position is available, contractors can require the employee to use sick leave to cover the entire period of the absence. Contractors are prohibited from requiring employees to find replacement workers while absent on paid sick leave.

Accrual of Paid Sick Leave

The Final Rule allows contractors to use one of the following two accrual methods for paid sick leave:

- employees accrue at least one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract or
- contractors provide employees with 56 hours of paid sick leave at the beginning of the accrual year (referred to as “frontloading”).

An accrual year is any 12-month period that begins either (1) on any date that the contractor establishes (e.g., first of the fiscal year) or (2) when the employee starts to work on a covered contract. If a contractor opts to use a fixed date for the accrual year, it must apply that date to all covered workers working on the contract. Under the frontload method, contractors can provide prorated hours to employees who begin work on or in connection with a covered contract based on the number of pay periods remaining in the accrual year.

Calculation of Hours/Tracking Leave

In a significant change from the proposed rule, the Final Rule clarifies that “hours worked” includes all time an employee spends working for the contractor on or in connection with a covered contract, but it does not include hours when the employee is on paid sick leave or other paid time off. For employees exempt from overtime, contractors may calculate paid leave accrual either by (1) tracking the employees’ actual hours worked or (2) assuming that employees spend 40 hours per week working in connection with a covered contract. If an exempt employee regularly works less than 40 hours per week on a covered contract, the contractor can accrue paid sick leave based on the employee’s typical hours worked on the covered contract per workweek.

Contractors must calculate paid sick leave no less frequently than at the end of each pay period or each month, whichever period is shorter. Contractors do not have to allow accrual of paid sick leave in increments smaller than one hour.

Carry-Over

Accrued and unused paid sick leave must be carried over to the next accrual year, but contractors can limit paid sick leave accrual to 56 hours at any point in time. If the contractor uses the frontload method of providing 56 hours at the beginning of the year, then it must carry over the full amount of unused, accrued paid sick leave to the next accrual year. However, if the contractor allows employees to only accrue leave, then it can cap the carry-over to 56 hours for the year until the employee uses some of the hours before accruing paid sick leave again. For example, if an employee had 30 hours of accrued, unused paid sick leave at the end of the accrual year to carry over, the employee could accrue only 26 more hours in the next accrual year until the employee used some of the hours.

Requesting Leave

Employees can request paid sick leave either orally or in writing, as long as the request is sufficient to inform the contractor of the need to use paid sick leave. Employees are not required to use the words “sick leave” or “paid sick leave” or provide (and contractors cannot request) detail about the circumstances surrounding the need for leave. Rather, employees must provide only information that is sufficient to inform the contractor that the employee is seeking to use paid sick leave and the duration of the leave. If foreseeable, employees must request leave at least seven calendar days in advance of the first day leave is needed, or as soon as practicable if not foreseeable.

Once a request is made, the contractor must respond as soon as practicable, either orally or in writing. If denying the leave request, the contractor must provide the employee with a written reason for the denial. The Final Rule provides the following nonexhaustive list of reasons that a contractor can deny a leave request: (1) there was insufficient information about the reason for leave, (2) the requested leave did not fall under one of the permitted uses for paid sick leave, (3) the employee did not have sufficient paid sick leave accrued to take the leave, or (4) the requested leave was during a time when the employee was not scheduled to perform work on or in connection with a covered contract and the employer had records confirming that the employee’s request occurred during the time when the employee was performing noncovered work. Before denying a leave request for insufficient information, a contractor must offer the employee an opportunity to submit a corrected request.

Certification for Leave

Contractors can require employees taking leave of three or more consecutive workdays for medical reasons to provide a certification issued by a health care provider. The contractor must allow the employee 30 days from the first day of the leave to obtain the certification. The certification needs to confirm only the minimum necessary information establishing the need for leave. Human resources professionals, leave administrators or management officials (but not the employee’s direct supervisor, except in certain instances) can contact the medical provider who provided the certification, but only to authenticate the documentation or clarify its contents. Contractors cannot request additional details or

otherwise question the substance of the documents. For employees requesting to use paid sick leave to care for another person or to assist another person with legal actions related to domestic violence, sexual assault or stalking, contractors can require those employees to provide documentation that reasonably establishes the employee's relationship with the other person, including a written statement from the employee, a birth certificate or a court order. Contractors must keep all certification information confidential.

A contractor can request these certifications only if they inform the employee before he or she returns to work that such certification or documentation is needed. While contractors review the certification/documentation, they must treat the request as valid. Contractors can retroactively deny a request within 10 calendar days of the deadline for receipt of the certification. If the certification is insufficient to verify the need for paid sick leave, the contractor must allow the employee at least five days to provide a new or supplemental certification. If the employee fails to provide sufficient information in that time frame, the contractor may, within 10 calendar days of the employee's deadline for providing sufficient certification or documentation, retroactively deny the employee's request to use paid sick leave. Contractors can recover the value of any pay and benefits the employee received for paid leave when a leave request is retroactively denied, unless otherwise prohibited by law.

Payment upon Termination

Contractors are not required to pay employees for accrued, unused sick leave upon termination of their employment. However, if an employee is rehired by the contractor or a "successor" contractor within 12 months after his or her separation, the contractor must reinstate any accrued, unused paid sick leave remaining at the employee's separation date. In a significant change from the proposed rules, paid sick leave does not need to be reinstated if the contractor paid the employee for the leave upon termination.

Notifications

The Final Rule requires contractors to provide various notifications to employees about their paid sick leave. In a departure from the proposed rules, contractors will not be required to notify employees of their available paid sick leave balance when employees request to use paid sick leave or each time they request to know the balance. Instead, contractors will have to notify employees of their paid sick leave balances only (1) once each pay period or each month, whichever period is shorter, (2) upon separation from the contractor, and (3) upon rehire within 12 months of separation. Contractors can provide these notices electronically if they customarily correspond with, or make similar information available to, employees by electronic means. Contractors must also post a notice about the Final Rule in a prominent place that is accessible to all employees. This notice can be posted electronically if the contractor customarily posts such notices electronically and it is prominently displayed.

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Recordkeeping Requirements

Contractors will be required to make and maintain records under the Final Rule, including:

- copies of notifications to employees of the amount of paid sick leave accrued
- denials of employees' requests to use paid sick leave
- dates and amounts of paid sick leave that employees use and
- other records tracking employees' accrual and use of paid sick leave.

Contractors must keep any medical records or records relating to domestic violence, sexual assault and stalking separate from other personnel records and treat them as confidential.

Interaction with Other Paid Leave Laws and Existing Paid Leave Policies

The Final Rule does not excuse compliance with or supersede any federal, state or local law or collective bargaining agreements providing greater paid sick leave amounts or rights. For example, paid sick leave cannot count toward the fulfillment of leave required by the SCA and DBA. As a result, contractors must comply with whichever paid leave law is more generous. Paid sick leave, however, may run concurrently with unpaid leave under the FMLA.

Existing paid leave policies will be compliant with the Final Rule as long as they provide equivalent or greater paid leave entitlements and rights than required by the Final Rule for all covered employees. Contractors can also meet their obligations under the Final Rule if they make contributions with other employers to a multiemployer plan (maintained pursuant to one or more collective bargaining agreements) on behalf of employees who receive access to paid sick leave required by the Final Rule.

Enforcement

Contractors are prohibited from discriminating against, or interfering with, employees' use or attempted use of paid sick leave. The DOL's Wage and Hour Division is responsible for investigating violations of the Final Rule, even investigating suspected violations without a formal employee complaint. Violations of the rules, including interference and discrimination claims, can result in significant fines, penalties and debarment.

Significant Implications

Contractors should assess how the Final Rule will affect their workforces and existing policies. Obviously, the Final Rule imposes significant compliance burdens and costs on federal contractors. It will be particularly onerous for small or midsize contractors, given the administrative costs for tracking and complying with the complex regulatory requirements, especially for contractors that must provide paid sick leave for the first time. Contractors already offering paid sick leave will have to assess and update their existing policies to ensure that they meet the minimum leave entitlements and uses required by the Final

Rule. Contractors should pay special attention to the key definitions in the Final Rule that are much broader than under the FMLA and some state and local paid leave laws.

Contractors should also consider how to comply with the Final Rule in light of the growing patchwork of state and local leave laws. Over the last several years, more than 20 states and localities have passed laws requiring some form of paid sick leave, including California, the District of Columbia, Massachusetts, and Montgomery County, Maryland. The Final Rule does not exempt employers from complying with this growing patchwork of laws, but instead requires contractors to apply the more generous leave entitlements to the extent that they differ. As a result, contractors with operations in multiple jurisdictions will need to weigh the pros and cons of implementing (1) one comprehensive paid sick leave policy that provides leave to all employees under the most generous leave requirements applicable to their workforce or (2) separate leave policies that comply with the various applicable paid sick leave laws.

Contractors should also train human resources personnel, managers and frontline supervisors on these requirements so they understand how to handle paid sick leave requests (including identifying verbal requests not using the words “paid sick leave”), the permitted uses for paid sick leave, required certifications if any and interaction with other forms of paid sick leave the contractor offers.

Contact Information

If you have any questions regarding this alert, please contact the Akin Gump Strauss Hauer & Feld lawyer with whom you usually work or:

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