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Labor & Employment/Government Contracts ADVISORY ■

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Department of Labor Issues Final Rule Establishing Paid Sick Leave for Federal Contractors

On September 30, 2016, the U.S. Department of Labor (DOL) released the Final Rule Establishing Paid Sick Leave for Federal Contractors. The Final Rule requires some federal contractors and subcontractors to provide up to seven days of paid sick time for certain employees. The Final Rule lays out the details implementing Executive Order 13706, which President Barack Obama issued on September 7, 2015.

What Contracts Are Covered?

There are four types of contracts the Final Rule covers:

- Procurement contracts covered by the Davis–Bacon Act (DBA), which generally speaking are procurement contracts for the construction, alteration or repair (including painting and decorating) of public buildings or public works that require or involve the employment of mechanics or laborers.
- Services contracts covered by the Service Contract Act (SCA), which generally speaking are contracts whose principal purpose is to furnish services to the U.S. through the use of service employees.
- Concessions contracts (including those excluded from the SCA by the DOL's regulations at 29 CFR 4.133(b)), which generally speaking are contracts under which the federal government grants a right to use federal property, including land or facilities, for furnishing services, including contracts whose principal purpose is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands and/or recreational equipment, regardless of whether the services are of direct benefit to the government, its personnel or the general public.
- Contracts pertaining to federal property or lands and relating to offering services for federal employees, their dependents or the general public.

Any subcontract under a covered contract that falls into one of these four categories is also subject to the paid sick leave requirements.

The following are excluded from coverage under the Executive Order and Final Rule:

- Grants within the meaning of the Federal Grant and Cooperative Agreement Act.
- Contracts and agreements with and grants to Indian tribes under the Indian Self-Determination and Education Assistance Act.
- Any procurement contracts for construction that are not subject to the DBA (i.e., those worth under $2,000).
- Any contracts for services that are not subject to the SCA (i.e., those worth under $2,500).
- Contracts for the manufacturing or furnishing of materials, supplies, articles or equipment to the federal government, including those that are subject to the Walsh–Healey Public Contracts Act, which covers contracts of more than $10,000 for the manufacturing or furnishing of materials, supplies, articles or equipment to the U.S. government or the District of Columbia.

What Is the Effective Date?

The Final Rule applies to new covered contracts if the solicitation has been issued or the contract has been awarded outside the solicitation process on or after January 1, 2017. The rule also applies to existing covered contracts that are renewed, extended or amended on or after January 1, 2017.

Temporary delay for collective bargaining agreements

There is a temporary but limited exclusion for employees whose work is governed by a collective bargaining agreement (CBA). The temporary delay applies to agreements that were ratified before September 30, 2016, and provide employees with at least 56 hours of paid time off for sickness or health care each year. The requirements of the Executive Order and Final Rule will not apply until the date the CBA terminates or January 1, 2020, whichever is earlier. If the CBA provides less than 56 hours of sick leave, then the Final Rule's requirements temporarily do not apply as long as the employer provides the employees with the difference between 56 hours and the amount provided under the existing CBA in a manner consistent with either the Final Rule or the terms and conditions of the CBA.

Which Employees Are Covered?

A covered employee is any person engaged in performing work on or in connection with the covered contracts and whose wages are governed by the SCA, DBA or Fair Labor Standards Act (FLSA). This includes workers who are exempt from the FLSA's minimum wage and overtime provisions. The Final Rule makes an important distinction between working "on" and "in connection with" a covered contract. An employee who is working on a covered contract is "perform[ing] the specific services called for by the contract." Working in connection with a covered contract means that "the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract." Employees performing work on covered contracts are covered by the requirements of the Executive Order any time they perform such work, regardless of the amount. An employee working in connection with a covered contract, however, is only entitled to accrue sick leave "if that employee spends 20 percent or more of her hours worked in a given workweek in connection with covered contracts." It is up to the employer to identify which of its employees are covered and to keep track of the percentage of hours worked in connection with covered contracts. The Final Rule states that employers are permitted to use an estimate of the time their employees work in connection with a covered contract, as long as the estimate is reasonable and based on verifiable information.

Paid leave must be offered to part-time employees. Paid leave must also be offered to some independent contractors. Independent contractors, notwithstanding their label under the FLSA, are covered under the Final Rule if they are "service employees" under the SCA or "laborers" or "mechanics" under the DBA. An independent contractor who is not an employee under the FLSA, not a service employee under the SCA nor a laborer or mechanic under the DBA is not covered under the Final Rule.

What Are the Requirements?

The Final Rule requires that workers accrue one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, for up to 56 hours (or 7 days) of leave a year.

Hours worked

A noticeable change between the proposed rule and the Final Rule is the definition of "hours worked" in the calculation of required sick leave accrual. In the proposed rule, hours worked included all time for which an employee should be paid, including hours on paid leave. In response to comments, this definition has been narrowed in the Final Rule to include only actual hours worked.

Recordkeeping

Employers must 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. Instead of accruing leave as hours are worked, a contractor may provide an employee with a front-loaded lump sum of at least 56 hours of paid sick leave at the beginning of each accrual year.

Permitted use of sick time

The final regulations allow covered employees to take paid leave for the following reasons:

> (i) Physical or mental illness, injury, or medical condition; (ii) obtaining diagnosis, care, or preventive care from a health care provider; (iii) caring for a child, a parent, a spouse, a 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 needs for diagnosis, care, or preventive care described in (i) or (ii) or is otherwise in need of care; or (iv) domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes described in (i) or (ii), to obtain additional counseling, to seek relocation, to seek assistance from a victim services organization, or take related legal action, … or to assist an individual related to the employee as described in (iii) in engaging in any of these activities.

The DOL intended to permit employees to use paid sick leave for a broader range of purposes than those for which they can take leave under the Family and Medical Leave Act (FMLA). The FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. Notably, under the FMLA, employees may take unpaid family leave to care only for an immediate family member (spouse, child or parent) with a serious health condition, while under the Final Rule, employees may take paid leave to take care of individuals with close associations "equivalent of a family relationship." Covered employees can accrue paid sick leave to care for non-nuclear family members without any biological or legal relationship to them. The Final Rule also makes clear that the physical or mental illness, injury or medical condition does not have to be a "serious health condition" as defined under the FMLA. There is no requirement that the illness or injury needs attention from a health care provider. Examples of the types of illness and injuries for which paid sick leave must be allowed include a common cold, upset stomach, headache, sprained ankle, broken arm and depressive episode.

Increment of use

Employees must be permitted to use paid sick leave in increments of no larger than one hour. Employers may choose to allow increments of less than one hour but are not required to do so.

Requests for leave

Employees must make a request of leave at least seven calendar days in advance if the leave is foreseeable. In cases where leave is unforeseeable, the request must be sent in as soon as is practicable. Employees are not required to specifically reference the Final Rule, use the words "sick leave" or "paid sick leave," or provide detailed information about the need for leave.

Supporting documentation

The Final Rule only requires supporting documentation if employees take three or more consecutive full work days off. The employer may require employees to provide this documentation only after sufficient notice. The employee has 30 days from the first day of the three or more consecutive absences to obtain the documentation. The documentation need only contain "the minimum necessary information establishing a need for the employee to be absent from work." If the supporting documentation is deficient, the employee must be given at least five days to correct the deficiency. For leave related to physical or mental illness, injury or medical condition of the employee; obtaining diagnosis, care or preventive care; or caring for the employee's child, parent, spouse, domestic partner or any other individual equivalent of a family relationship, an employer may require certification issued by a health care provider. For leave related to domestic violence, sexual assault or stalking, an employer may require certification issued by an appropriate individual or organization. The source of documentation may be from any person involved in providing or assisting the care, counseling, relocation, assistance of a victim services organization or related legal action. Self-certification is also permitted for leave related to domestic violence, sexual assault or stalking.

Caps on accruals, carryover and sick leave banks

An employer may cap the amount of paid sick leave an employee is permitted to accrue in an accrual year to not less than 56 hours. If the employee accrued less than the cap, then in the following accrual year, the employer need only provide additional paid leave to meet the cap. All paid sick leave must be carried over from one accrual year to the next. Hours carried over from the previous accrual year do not count toward a cap on accrual set by the employer. An employer may also limit the amount of paid sick leave an employee is permitted to use at any point to 56 hours. Therefore, if the employer has an annual accrual cap and a limit on the amount of paid sick leave available for use, then even with the hours carried over, the employee's paid sick leave available for use would never exceed more than 56 hours. Alternatively, an employer may choose to provide a covered employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time. This is called front-loading. If the employer front-loads the 56 hours at the beginning of the year, the employee will have the full 56 hours and any hours carried over. Therefore, the maximum hours of sick leave that an employee can take under the front-loading method may exceed 56 hours.

Timing of pay

A contractor must compensate an employee for time 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.

Payout upon separation

Employers are not required to pay out accrued but unused leave when an employee leaves the company. However, the unused paid sick leave must be reinstated if the employee is rehired within 12 months. If the employer pays out unused leave to the employee upon termination, then the leave does not need to be reinstated upon rehire.

Notification of accrual

The Final Rule requires employers to provide written notification to covered employees about the amount of paid leave they have accrued but not used at least once each pay period or each month, whichever interval is shorter. Notification of accrual is also required upon separation of employment and upon reinstatement of paid sick leave on rehire.

Prohibition on interference and discrimination

An employer may not in any manner interfere with a covered employee's accrual or use of paid sick leave. Interference includes miscalculating the amount of paid sick leave an employee has accrued, denying or unreasonably delaying a response to a proper request to use paid sick leave or discouraging an employee from using paid sick leave. An employer may not discharge or in any other manner discriminate against any employee for using or attempting to use paid sick leave, filing any complaint, initiating any proceeding or otherwise asserting any right under Executive Order 13706; cooperating in any investigation or testifying in any proceeding under Executive Order 13706; or informing any other person about his or her rights.

Notice

Employers must notify all employees performing work on or in connection with a covered contract of the paid sick leave requirements of Executive Order 13706 and the Final Rule by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite.

Interplay with Existing PTO Policies

An employer may use its existing paid time off (PTO) policy to comply with the Final Rule as long as the existing policy complies with all of the requirements of the Final Rule, including the purposes for which paid leave may be taken; the rules and restrictions regarding the accrual of paid sick leave, maximum accrual, carryover, reinstatement and payment for unused leave; the process for requesting and documenting leave; and the prohibitions against interference and retaliation.

Interplay with State and Local Laws

The Final Rule does not exempt an employer from any state or local law requiring paid leave. A handful of states have passed paid sick leave laws, with more expected in the future. Cities and counties such as Washington, D.C., New York City and San Francisco have also enacted paid sick leave requirements. Generally, a federal contractor should comply with the applicable legal requirements that are most generous to employees, but because of the possibility of inconsistent requirements across the jurisdictions, it is important for employers to consult legal counsel to ensure that all applicable requirements are met.

Recommendations

- Employers should identify any covered contracts that may be awarded on or after January 1, 2017.
- Employers should determine if any existing covered contracts will be renewed, extended or amended on or after January 1, 2017.
- Employers should determine whether existing collective bargaining agreements comply with the requirements of the Final Rule.
- Employers should revisit their classifications of independent contractors and employees if they have not done so recently.
- Employers should carefully distinguish between employees who work "on" covered contracts and those who work "in connection with" a covered contract. They must also determine which employees work in connection with a covered contract less than 20 percent of their weekly hours worked.
- To the extent that employers intend to rely on existing PTO policies to comply with the Final Rule, they should carefully review such policies to ensure they comply with the requirements of the Final Rule.
- Employers should confer with counsel to ensure they are in compliance with all applicable federal, state and local laws regarding paid sick leave.
- Employers should provide a clear, user-friendly policy to all covered employees that adequately covers all of the requirements of the Final Rule, including how and when sick leave should be requested, what documentation is required and how sick leave will be approved.
- Employers should provide training to supervisors and managers about the importance of diligent recordkeeping and nondiscriminatory methods of sick leave approval. Because of the broad language of the Final Rule, there is potential for leave abuse by employees. Employers should encourage open dialogue with supervisors so that they can provide guidance when faced with such problems.

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