

CLIENT ALERT: DOL Publishes Final Rule Implementing Paid Sick Leave Requirements for Federal Contractors - By Shane R. Goodrich

On September 7, 2015, President Obama signed Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors* (the "Order"), which requires certain employers that contract with the Federal Government to provide their employees with up to seven days (56 hours) of paid sick leave annually, including paid leave allowing for family care. The Department of Labor (DOL) published a final rule on September 30, 2016 (the "Final Rule") to implement the Order. The Final Rule describes the categories of contracts and employees covered by the Order, rules and restrictions regarding accrual and use of sick leave, obligations of contracting agencies, and remedies and enforcement procedures to implement the Order's requirements.

Which employers and contracts are covered?

The Order applies to employers entering into new contracts with the Federal Government that result from solicitations issued on or after January 1, 2017. The Final Rule explains that there are four major categories of covered contracts under the Order, including (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, and (4) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents or the general public. Any employee engaged in performing work on or in connection with one of these covered contracts, whose wages under the contract are governed by the SCA, DBA, or Fair Labor Standards Act (FLSA), will be entitled to accrue paid sick leave pursuant to the Order. This includes employees who qualify for an exemption under the FLSA's minimum wage and overtime provisions.

Contracts with the Federal government that will generally be covered by the Order include: contracts in excess of \$2,000 for the construction, alteration or repair of public buildings or public works; contracts over \$2,500 for the principal purpose of providing services in the U.S., but excluding certain radio, telephone, cable, public utility and postal services; and contracts granting employers a right to use Federal property, land or facilities, for furnishing services (i.e. for furnishing food, lodging, automobile fuel, souvenirs, recreational equipment, etc.). Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal government are *not* covered by the Order.

How is paid leave earned and accrued?

Under the Final Rule, covered employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. Alternatively, employers may provide a covered employee with at least 56 hours of sick leave at the beginning of each accrual year. For employees who are not required to keep records of hours worked pursuant to the DBA, SCA or FLSA, employers may operate under the assumption that the employees are working on or in connection with covered

contracts 40 hours each week. Employers are also permitted to reasonably estimate the time a covered employee is working “in connection with” (rather than on) a covered contract. Employees must be notified at the end of each pay period or each month, whichever is shorter, of the paid sick leave they have accrued.

Employers may limit the amount of paid sick leave covered employees may accrue to 56 hours each year, but must permit employees to carry over accrued, unused paid sick leave from one year to the next. Employers are not required to pay covered employees for accrued, unused paid sick leave at the time of a job separation. Where an employee who separates from employment is rehired by an employer within 12 months after the separation, the employer must reinstate the employees’ accrued, unused sick leave, unless the employer provided a cash-out at the time of the employee’s separation.

What types of absences are covered by the Order?

The Order explains that an employee may use paid sick leave for an absence resulting from: (1) the employee’s physical or mental illness, injury or condition; (2) obtaining diagnosis, care, or preventative care; (3) caring for a child, parent, spouse, domestic partner or other individual with a family relationship; or (4) for circumstances related to domestic violence, sexual assault, or stalking. Employers must provide employees who use paid sick leave their regular pay and benefits had they not used the leave.

What are the notice and certification requirements?

An employee may request to use paid sick leave orally or in writing at least 7 calendar days in advance, or as soon as practicable. An employer must communicate any denial of a request in writing. For absences of three or more consecutive full days, an employer may require that an employee provide certification or documentation before he or she returns to work. For physical or mental illness, injury or conditions, certification must be issued by a health care provider. For domestic violence, sexual assault, or stalking nearly any kind of certification is permitted, including self-certification.

How does the Order interrelate with other leave laws?

The Final Rule explains that the Order does not change any of an employer’s obligations related to SCA, DBA or the Family and Medical Leave Act (FMLA). Paid sick leave may be substituted for unpaid FMLA leave, and all notices and certifications that satisfy FMLA requirements will satisfy a paid sick leave request. It is important to remember that employers must satisfy state and local paid sick leave law requirements in addition to the Order. An employer’s current paid time off (PTO) policy may fulfill the requirements of the Order, as long as it provides employees with at least the same rights and benefits as the Final Rule requires.

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