FYI®
For Your Information®

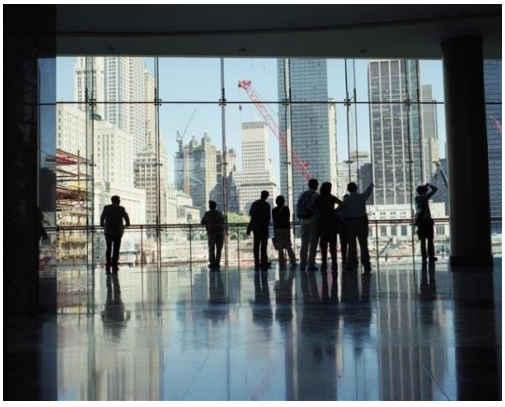
Volume 39 | Issue 34 | March 17, 2016

DOL Proposes Paid Sick Leave Rules for Federal Contractors

On February 25, the DOL published proposed regulations on establishing paid sick leave for federal contractors. The proposal would implement the president's executive order requiring certain government contractors to provide covered employees with up to seven days of paid sick leave annually. Public comments are invited until April 12. As contractors continue to monitor the DOL website for further updates, they should begin to consider what, if any, steps they may have to take to ensure compliance when final regulations take effect.

Background

In September 2015, President Obama issued Executive Order 13706 (EO) extending paid sick leave benefits to employees of federal contractors and subcontractors. The EO called for contractors to provide up to 56 hours of annual paid sick leave to employees who work on covered contracts, and tasked the secretary of labor with issuing final regulations by September 30, 2016. The paid sick leave obligation would extend to contracts and solicitations entered into on or after January 1, 2017.



Proposed Rules

On February 25, the DOL published proposed rules to implement the EO. The DOL estimates that implementation will extend paid sick leave to nearly 437,000 workers employed by federal contractors who currently receive no paid sick leave. A Fact Sheet, FAQs and additional information on the proposal are also available on the DOL's website. The public has until April 12, 2016 to submit comments on the proposal.

> **Comment.** The relatively brief comment period suggests the DOL will be pushing to meet the September 2016 target date for issuing final regulations.

Covered Employers

Both federal contractors and subcontractors performing services on covered contracts will be subject to the proposed paid sick leave requirements. Employers with new contracts, contract-like instruments, and replacements for expiring contracts or contract-like instruments entered into on or after January 1, 2017 (whether through solicitations or otherwise) will be required to provide paid sick leave to their covered employees. Thus, the requirement would apply to a contract in effect prior to January 1, 2017 that is renewed, extended or amended after that date.

As the proposal makes clear, the term "contract" will be interpreted broadly for these purposes, and includes "all contracts and any subcontracts of any tier thereunder." To fall within one of the four major categories of contracts that are covered, the contract or contract-like instrument must be:

FAR Implementation

The Federal Acquisition Regulation (FAR) governs the acquisition of goods and services by executive branch agencies. Once the DOL issues final regulations, the Federal Acquisition Regulatory Council will have 60 days to amend the FAR through the normal rule-making process. The amended FAR will integrate the EO's paid sick leave requirements into the existing procurement rules, adding a new contract clause setting forth those requirements in new contracts or solicitations for covered contracts.

- A procurement contract for construction covered by the Davis-Bacon Act (DBA)
- A service contract covered by the McNamara-O'Hara Service Contract Act (SCA)
- A concessions contract (including certain concessions contracts excluded from coverage under the SCA by DOL regulations)
- A contract in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public (including leases for or licenses to use federally owned space and facilities)

Subcontracts of covered prime or upper-tier contracts will be subject to the proposed rules if the subcontract is one of these four types of contracts, regardless of the value of the subcontract. Contracts for the manufacturing or furnishing of materials, supplies, articles or equipment to the federal government that are subject to the Walsh-Healey Public Contracts Act are not covered by the proposal. Also excluded from coverage are grants, contracts and agreements with and grants to Indian Tribes, procurement contracts for construction that are not covered by the DBA (i.e., procurement contracts for construction under $2,000), and service contracts that are not covered by the SCA.

Covered Employees

The proposed rules broadly define "employee" as any person working on or in connection with a covered contract whose wages under the contract are governed by the SCA, DBA or FLSA, regardless of the contractual relationship alleged to exist between the individual and the employer. Employees who *work on* such a contract — who are engaged in providing the specific services outlined in the contract — will be entitled to accrue and use paid sick leave regardless of whether they are exempt from the FLSA's minimum wage and overtime provisions or non-exempt. There is, however, a narrow exemption from coverage for employees who perform *work in connection with* a covered

contract — work that is necessary to the performance of the contract but is not specifically called for by the contract — but spend less than 20 percent of their hours worked in a particular workweek performing that work.

> **Comment.** Both the contracts and employees covered under the proposal are nearly identical to those covered under the regulations establishing a minimum wage for federal contractors and subcontractors. Unlike the minimum wage regulations, this proposal also extends coverage to employees who qualify for an exemption under the FLSA including, for example, employees who are employed in a *bona fide* executive, administrative or professional capacity.

Accrual, Use and Carryover

The proposal contains a number of provisions on employees' paid sick leave accrual, use and year-end carryover.

Accrual, Frontloading and Caps. Under the proposed rules, employees accrue paid sick leave at a rate of one hour of sick leave for every 30 hours worked on or in connection with a covered contract, up to a minimum of 56 hours per year. Notably, the paid sick leave required under these rules is in addition to the contractor's prevailing wage and fringe benefit obligations under the DBA and SCA.

For accrual purposes, "hours worked" would include all time for which an employee is or should be paid (including paid sick time or other paid time off). In calculating hours worked by exempt employees, contractors may either track the employee's actual hours or assume the employee works 40 hours each workweek on or in connection with a covered contract. If the exempt employee regularly works less than 40 such hours, the contractor may base accrual on the number of hours the employee typically works on covered contracts each workweek.

Local Accrual Rates and Caps May Differ

While the one hour of leave for every 30 hours worked accrual rate is common in state and local paid sick leave laws, many jurisdictions cap accruals at lower rates. Other jurisdictions, such as San Francisco, Oakland, Washington, D.C., Seattle, and Los Angeles, already require employers to provide employees with at least 56 hours of paid sick leave annually.

Employers are not required to allow employees to accrue paid sick leave in increments smaller than one hour for a full 30 hours worked. If an employee works less than or more than 30 hours on a covered contract during a workweek, the fraction of hours worked would still count toward future accruals within the same accrual year. For example, an employee works 40 hours on a covered contract during the first workweek. Thirty hours would count toward the accrual of one hour of paid sick leave. The remaining 10 would be added to hours worked for the same contractor in subsequent workweeks to reach the next 30 hours worked and accrue another hour of leave.

While contractors cannot set an annual or per event cap on the use of accrued sick leave, they may cap annual accruals at 56 hours and also cap the amount of paid sick leave available for the employee's use to 56 hours at any point in time. Thus, regardless of how much paid sick leave the employee has earned during the accrual year, an employer may suspend additional accruals once the employee's leave bank (accrued leave plus any carryover) totals 56 hours. However, the employer would have to restart accruals if the employee subsequently uses leave and the accrued bank balance dips below that threshold.

Alternatively, employers may altogether avoid accruals by providing at least 56 hours of paid sick leave per employee at the start of each accrual year ("frontloading"). However, unlike employers that accrue leave, frontloaders may not limit the amount of useable paid sick leave an employee has at any point in time.

Use. Employees may use accrued paid sick leave for their own or a covered family member's mental or physical illness, injury or medical condition, preventive care from a health care provider, or for certain reasons relating to domestic violence, sexual assault, or stalking of the employee or covered family member. For these purposes, covered family members include 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. That equivalency is broadly defined as "any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship." Such relationships may include, for example, grandparent and grandchild, brother-in-law and sister-in-law, fiancé and fiancée, cousin, aunt and uncle, other relatives, and close friends.

> **Comment.** The proposed rules would permit the use of paid sick leave for a broader range of reasons than under the federal Family and Medical Leave Act (FMLA). Leave could be used to care for a broader group of individuals including, for example, a child (regardless of age), those in a committed relationship with another adult, and anyone with whom the employee has a significant personal bond (regardless of biological or legal relationships). Unlike the FMLA, leave would be covered regardless of whether treatment by a health care provider was required or a serious health condition was involved.

Under the proposed rules, contractors would have to account for usage in maximum increments of one hour. They would also have to provide employees using leave with the same pay and benefits they would have received if not on leave. Notably, the proposed rules would prohibit contractors from penalizing employees under a no-fault attendance policy for taking paid sick days.

Carryover and Cashouts. While contractors may limit accruals to 56 hours each year, they must allow employees to carry over any accrued but unused paid sick leave from one accrual year to the next. The carryover would not count toward the employee's annual accrual limit. Employers that opt to frontload paid sick leave must also allow employees to carry over unused leave from one accrual year to the next, but may limit the carryover to 56 hours.

There is no requirement to pay employees for accrued, unused sick leave upon separation — unless required by other federal, state or local law, collective bargaining agreement or otherwise. However, the contractor or a "successor" contractor would be required to reinstate any accrued sick leave for rehires within 12 months of separation. Importantly, the proposed rules state that an employer must reinstate the entire accrued, unused sick leave balance even if it cashed out the employee's accrued, unused sick leave upon termination of employment.

Notice and Certification Requirements

Covered contractors will have to regularly — but no less than monthly — inform employees in writing of the amount of leave they have accrued. Employers must also provide written notice of available sick leave: whenever the employee requests to use paid

Conflicting Carryover Provisions

Contractors must already comply with state or local paid sick leave laws that may potentially run afoul of new federal requirements. For example, both Oregon's and Massachusetts' paid sick leave laws allow employers to cap carryover from one year to the next at 40 hours. (See our **July 1, 2015** *FYI In-Depth*.) California, for example, requires no carryover and allows unused sick time to expire at year end if it was frontloaded. (See also our **August 4, 2015** *For Your Information*.) As the patchwork of leave laws continues to grow, employers that operate in multiple locations face ever greater compliance challenges.

sick leave; upon request (but no more often than once per week); on separation of employment; and upon rehire by the same contractor or a successor contractor within 12 months of separation.

According to the proposed rules, covered businesses must allow employees to use accrued sick leave upon request. Requests for foreseeable leave must be made at least seven calendar days before the leave begins. For leave that is unforeseeable, the request must be made as soon as practicable. Employers must respond to an employee's leave request as soon as is practicable, but may deny a request if it provides the employee a written explanation for the denial. Grounds for denial may include, for example, insufficient information from the employee, use of paid sick leave for non-permitted reasons, no indication when the need would arise, lack of accrued leave, insufficient amount of paid sick leave to cover the request, or leave planned for when employee is scheduled for non-covered work.

Employers may only require documentation of the need for paid sick leave if the employee has been absent for three or more consecutive full workdays and is informed about the requirement before the employee returns to work. Employers can require employees to provide such documentation within 30 days of the beginning of the absence. Information relating to domestic violence, sexual assault, or stalking would have to be maintained confidentially unless the law requires, or the employee consents to, its disclosure. Under certain circumstances, an employer may retroactively deny an employee's leave request based on non-compliance with the employer's documentation requirement.

Enforcement

Under the proposed rules, persons or entities that believe a contractor has violated the EO or its implementing regulations may file a complaint with the DOL's Wage and Hour Division (WHD). The rules provide a mechanism for WHD investigations and informal complaint resolution. In addition, they establish remedies and sanctions for violations including damages and debarment. The proposal also sets out an administrative process (including hearings) for dispute resolution.

Interaction with Other Laws

If a contractor's existing leave policy makes paid sick leave available to all covered employees at or above the minimum required by the EO, it would satisfy the new federal requirements. However, compliance with the proposed rules and the EO will not "excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights."

Covered businesses subject to any existing state or municipal paid sick leave laws will also need to comply with the most generous aspects of the EO, its implementing rules, SCA, DBA, FMLA, and applicable state or local laws. Further, as the proposed rules clarify, contractors would not receive credit toward their prevailing wage or fringe benefit obligations under the SCA or the DBA for any paid sick leave required by the EO or its implementing rules. They may, however, count the value of any paid sick leave that is provided in excess of EO requirements toward their obligations under the SCA or DBA.

In Closing

Employers should begin to consider what, if any, steps they will have to take to ensure compliance when final regulations are issued. At this juncture, contractors will want to review their sick leave and/or PTO policies in light of the EO's minimum requirements while they continue to monitor the DOL and FAR Council websites for updates and final regulations.

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