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Department of Labor Issues Final Rule Implementing Executive Order Requiring Paid Sick Leave for Employees of Federal Contractors

By **Garen Dodge**, **Ryan Munitz** and **Lindsay Holloman**

On September 29, 2016, the Department of Labor ("DOL") issued regulations (the "final rule") implementing Executive Order 13706, which requires federal contractors to provide paid sick leave to their employees. According to the DOL, federal contractors employ 1.15 million individuals—594,000 of whom do not receive paid sick leave. Thus, for contractors who do not currently provide paid sick leave to their employees, the final rule imposes significant administrative and financial burdens. However, given the nuanced requirements of the final rule, even contractors who currently provide some form of paid sick leave to employees may find the final rule burdensome to comply with. Contractors should act now to either develop paid sick leave policies or determine what changes need to be made to their current paid leave policies to ensure that they are in compliance with the final rule once it becomes effective.

Contracts and Contractors Covered By the Final Rule

Contractors are required to provide paid sick leave to employees who work on or in connection with a "new contract" with the federal government that is performed, in whole or in part, within the United States, if the contract is: (1) a procurement contract for construction covered by the Davis-Bacon Act ("DBA"); (2) a services contract covered by the Service Contract Act ("SCA"); (3) a concessions contract, including those excluded from SCA-

coverage; or (4) a contract in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public. (Supply contracts, including those subject to the Walsh-Healey Public Contracts Act, are not covered by the final rule.) A "new contract" is one that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017. Under certain circumstances, contracts entered into prior to January 1, 2017, may be considered new contracts if they are renewed, extended, or amended on or after January 1, 2017.

The final rule also applies to subcontracts, regardless of their tier and regardless of their value (that is, the final rule applies to a subcontract even if the subcontract does not meet the monetary threshold for SCA or DBA coverage or, for contracts governed by the Fair Labor Standards Act ("FLSA"), the micro-purchase threshold).

Employees Covered By The Final Rule

As described above, paid sick leave is only available to employees who work on (or in connection with) a covered contract. Although it is fairly easy to determine which employees work "on" a covered contract—for example, security guards who provide security services under a services contract—determining which employees work *in connection with* a covered contract is less intuitive and requires an analysis of which employees perform work necessary to the performance of the contract (even though the work is not directly required by the contract). This includes, for example, a human resources professional who recruits and interviews job applicants who are applying for jobs that involve direct work on a covered contract. It also includes a receptionist who, for a portion of his or her workday, supports those who work directly on a covered contract.

The final rule also states that employees whose wages are governed by the DBA, the SCA and the FLSA are eligible for paid sick leave, including those who are exempt from the overtime and minimum wage provisions of the FLSA (such as individuals employed in an executive, administrative, or professional capacity), and regardless of the contractual relationship between the contractor and employee. Thus, an independent contractor whose wages are governed by the SCA or DBA may be entitled to paid sick leave under the final rule.

Exclusions from Coverage

The final rule excludes certain contracts and employees from its coverage. For example, the final rule does not apply to: (1) grants; (2) contracts and agreements with and grants to the Indian Tribes; and (3) construction and services contracts that are exempt from coverage under the DBA or the SCA. The final rule also has an exemption for employees who spend less than 20 percent of their work hours in a given week working *in connection* with a covered contract. (This exemption does not apply to employees who work *directly on* a covered contract.) There is also a limited exemption for employees who are governed by a collective bargaining agreement ("CBA") ratified before September 30, 2016, so long as the CBA provides at least 56 hours (or 7 days) of paid leave that can be used for sickness or health care. Contractors have until the expiration of the collective bargaining agreement or January 1, 2020—whichever is earlier—to comply with the final rule.

Paid Sick Leave Required

Under the final rule, employees accrue one hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. (In this context, "hours worked" refers to hours actually worked and does not include paid or unpaid leave.) The contractor can limit the number of paid sick leave hours an employee can accrue per year to 56 hours (the "annual accrual limit"). Employees must be permitted to carry over accrued, unused sick leave from one year to the next, and the sick leave carried over cannot count towards the annual accrual limit. However, a contractor can limit the amount of paid sick leave an employee has available for use to 56 hours (the "availability limit"). Thus, if the contractor sets the availability limit at 56 hours and an employee carries over 20 sick leave hours from the previous year, once the employee accrues 36 hours in the current year, the employee will have to utilize his or her paid leave before accruing additional paid sick time.

Contractors are also permitted to "frontload" employees with 56 hours of paid sick leave. (If an employee is hired, or starts work on or in connection with a covered contract, after the beginning of the accrual year, this amount can be prorated.) If, however the contractor chooses to do this option, it is prohibited from establishing an availability limit (as described in the preceding paragraph). The contractor can, however, limit the number of hours that an employee can carry over from the previous year to 56 hours.

Although the frontloading option will likely result in more paid sick leave being provided to employees than required under the final rule, contractors may find this option easier to administer because they will not be required to

track (or, when permitted, estimate) how many hours an employee spends working on or in connection with a covered contract.[1]

Use of Paid Sick Time

Employees may use sick leave for their own medical needs, as well as to care for a child, parent, spouse, domestic partner, or an individual with whom the employee has a close, familial-like relationship. Paid sick leave may also be used for reasons related to domestic violence, sexual assault, or stalking.

The contractor can limit an employee's use of paid sick leave to times during which the employee would have been working on or in connection with a covered contract. If, however, the contractor chooses to estimate the number of hours an employee works in connection with a covered contract, the employee must be allowed to use his or her paid sick leave at any time.

An employee cannot be required to use more paid leave than is needed by the employee, and a contractor cannot require the employee to take leave in more than 1 hour increments. There is an exception for situations in which it would be physically impossible for an employee to start or end work in the middle of a shift or workday (for example, a flight attendant working on an airplane). Further, a contractor cannot limit how much paid sick leave an employee uses in a year, or at one time, so long as the employee does not exceed the amount of paid sick leave he or she has available.

[1] Contractors are only permitted to estimate the number of hours that an employee worked *in connection with* a covered contract; if an employee performs direct work *on* a covered contract, the contractor must track the actual number of hours worked. The final rule also provides specific guidance for how to track hours for exempt employees under the FLSA.

Additional Requirements for Contractors

All contractors are required to include in any covered subcontracts, the exact language found in Appendix A of the final rule (the "Contract Clause"). Contractors must also require, as a condition of payment, that any subcontractors include the Contract Clause in any lower-tier subcontracts. The prime contractor (and any higher-tier subcontractor) is responsible for a subcontractor's compliance with the paid sick leave requirements.

Also, contractors must notify all employees under the covered contract by posting a notice provided by the DOL in a prominent and accessible place at the workplace where employees can easily read it. Contractors that customarily post notices to employees about the terms and conditions of their employment electronically may post the paid sick leave notice electronically as long as the posting is displayed prominently on any internal or external website maintained by the contractor.

There are also detailed recordkeeping requirements in the final rule. The contractor and each subcontractor must maintain and preserve the following records for each employee for three years after the start of the contract and must make the records available for inspection, copying, and transcription by the DOL[2]:

1. The name, address, and social security number of each employee;
2. The employee's occupation(s) or classification(s);
3. The rate(s) of wages paid (including all pay and benefits);
4. The number of daily and weekly hours worked;

[2] Records relating to medical histories or domestic violence, sexual assault, or stalking whether pertaining to the employee or a family member should be maintained in a separate confidential file (in compliance with the Genetic Information Nondiscrimination Act of 1973 and the Americans with Disabilities Act).

5. Any deductions made;
6. The total wages paid each pay period (including all pay and benefits);
7. A copy of the notifications to employees of the amount of paid sick leave accrued as required under the final rule;
8. A copy of the employee's requests to use paid sick leave, if in writing, or if not, any other record reflecting the employee's request;
9. The dates and amounts of paid sick leave used by employee (unless a contractor's paid time off policy satisfies the requirements of the final rule);
10. A copy of any written responses to employee's requests to use paid sick leave, including any explanations for any denials of requests;
11. Any records pertaining to certification and documentation a contractor may require an employee to provide pursuant to the final rule, including copies of any certification or documentation provided by an employee;
12. Any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave;
13. The relevant covered contract;
14. The regular pay and benefits provided to an employee for each use of paid sick leave; and
15. Any financial payment made for unused paid sick leave upon the separation from employment.

If a contractor fails to comply with the recordkeeping requirement, the DOL can takes steps to suspend further payments on the contract.

Finally, please note that contractors must pay employees for the time during which they used paid sick leave no later than the following pay period after the paid sick leave was used.

Enforcement

Anyone (any employee, contractor, labor organization, trade organization, contracting agency, or other person or entity) who believes a violation of the final rule has occurred may file a complaint with the DOL. The complaint may be oral or in writing and may be submitted in any language, and the identity of the complainant will not be publically disclosed without the prior consent of the individual. The DOL may also investigate possible violations independently.

If the DOL determines that a contractor has *interfered* with an employee's accrual or use of paid sick leave or *discriminated* against an employee in violation of the final rule, the DOL will notify the contractor and request that the contractor remedy the violation. If the contractor does not remedy the violation, the DOL will issue an "investigative findings letter," and therein direct the contractor to provide the appropriate relief. For *interference*, such relief may include any pay and/or benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation, or appropriate equitable or other relief. Liquidated damages may also be required in the amount of the monetary damages; however, the DOL may reduce the liquidated damages amount if it finds the contractor acted in good faith because the contractor had reasonable grounds for believing it had not violated the final rule.[3] For *discrimination*, such relief may include

[3] The DOL may also direct that payments due on the contract (or any other contract between contractor and the Federal Government) are withheld as necessary to provide any appropriate monetary relief and that those funds are transferred to the DOL for disbursement.

employment, reinstatement, promotion, restoration of leave, or lost pay and/or benefits.

If the contractor fails to comply with the requirements of the final rule and the DOL ultimately finds that the contractor disregarded its obligations under the final rule, the contractor, its responsible officers and any firm, corporation, partnership, or association in which the contractor or responsible officers have any interest will be ineligible to be awarded any contract or subcontract subject to the final rule for up to three years from the date of publication of the name of the contractor or responsible officer on the excluded parties list maintained on the System for Award Management website.

Other Notable Aspects of the Final Rule

- Employees who are rehired within 12 months after a job separation must have their paid sick leave reinstated, unless the contractor paid the employee for his or her unused paid sick leave upon separation (which is not required under the final rule).
- The final rule provides guidance on how and when employee requests to use sick leave must be made, how and when contractors must respond to these requests, and when a contractor can request a certification from the employee's medical provider to substantiate the sick leave.
- The final rule does not supersede compliance with any federal, state, or local rule, or collective bargaining agreement that provides greater paid sick leave or leave rights.

- A contractor may not receive credit toward its prevailing wage or fringe benefit obligations under the DBA or SCA for any paid sick leave provided to satisfy its requirements under the final rule.
- An employee cannot be disciplined for using paid sick leave under a contractor's "no-fault" attendance policy.
- A contractor's current paid time off policy may satisfy the requirements of the final rule, so long as it substantially complies with various aspects of the final rule.

In light of these changes to existing law, those affected are strongly encouraged to review their policies and practices and contact their counsel with any questions or concerns. The final rule was published in the Federal Registrar on September 30, 2016, and can be accessed at https://www.federalregister.gov/documents/2016/09/30/2016-22964/establishing-paid-sick-leave-for-federal-contractors.

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