

ALERT

# DOL Issues Final Rule Requiring Contractors To Provide Paid Sick Leave

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October 3, 2016

**WHAT:** The Department of Labor (DOL) has published its final rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors.

**WHEN:** The final rule will take effect November 29, 2016, and applies to new contracts and replacements for expiring contracts with the federal government that result from solicitations issued on or after January 1, 2017 (or that are awarded outside the solicitation process on or after January 1, 2017).

**WHAT DOES IT MEAN FOR INDUSTRY:** Although DOL made some changes, the final rule remains largely as proposed and will likely have a significant impact on federal contractors and their employees (both exempt and non-exempt). The final rule will require certain contractors that have not been providing paid sick leave to employees to create systems and processes to track the accrual of sick leave, track the use of sick leave, administer leave requests, and undertake significant recordkeeping obligations, among other responsibilities. For contractors that already provide paid sick leave, the final rule will require a compliance review to assess whether and how current policies are consistent with the final rule's requirements.

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**OUR ANALYSIS:** As a refresh, the final rule requires covered contractors to allow covered employees to accrue at least one hour of paid sick leave for every thirty hours worked on or in connection with covered contracts, subcontracts, and contract-like instruments. This accrual rate equates to a minimum total of 56 hours per year for employees that work 40 hours per week on or in connection with covered contracts. Covered contracts generally include service

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## Practice Areas

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Employment & Labor  
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contracts covered by the Service Contract Act (SCA); procurement contracts for construction covered by the Davis-Bacon Act (DBA); concessions contracts; and contracts with the federal Government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public. Those contracts are subject to the paid sick leave requirements if employee compensation on the contract is subject to the SCA, DBA, or the Fair Labor Standards Act (FLSA), including FLSA-exempt employees.

Although DOL made some changes, the final rule remains largely as proposed, with no changes making a significant dent in the rule's compliance burdens. For example, the final rule continues to cover employees exempt from the FLSA overtime and minimum-wage requirements. This provision means that covered contracts will require accrual of sick leave for certain bona fide administrative, executive, and professional employees even if those employees are not entitled to other compensation required by the FLSA, SCA, and DBA. In addition, the final rule covers not only employees performing services directly under covered contracts, but also employees who spend at least 20% of their workweeks performing services "necessary to the performance" of covered contracts—with the 20% threshold measured on a workweek-by-workweek basis. Likewise, the onerous recordkeeping requirements are substantially the same. Contractors must retain records as detailed as copies of all hours notices; copies of all requests to use leave, whether written or reduced to writing after the fact; and copies of all written denials. Accordingly, contracts can expect to shoulder substantial compliance burdens.

The final rule does include, among others, the following relatively minor changes and clarifications from the proposed version published in February 2016 (and discussed here):

- **Clarifications for Estimating Hours for Exempt and Indirect-Charge Employees.** The final rule adds that if the employee performs work in connection with a covered contract, instead of directly on the contract, a contractor may estimate the share of the employee's hours spent in connection with (but not on) covered contracts. These estimates must be reasonable and based on verifiable information. Furthermore, the final rule adds a caveat to the provision that a contractor may allow the employee to accrue paid sick leave based on the employee's typical number of hours worked on covered contracts per workweek if the contractor is not obligated to keep records of the employee's hours worked (e.g., because the employee is FLSA exempt) and the employee regularly works fewer than 40 hours per week on or in connection with covered contracts. The final rule adds that contractors may allow the employee to accrue paid sick leave based on the typical number of hours worked *if the contractor has probative evidence to support the number it uses*. Also, if a contractor estimates the time that an employee spends performing in connection with covered contracts, the contractor must permit the employee to use paid sick leave during any work time for the contractor.
- **Less Frequent Employee Notices.** Contractors will have to inform employees, in writing, of the paid sick leave that the employee has accrued but not used at least once each pay period or each month, whichever interval is shorter, as well as at separation from employment and at reinstatement of paid sick leave. The final rule removed a proposed requirement to update employees essentially on demand.

- **Clarification, But No Real Change, Regarding Existing Paid Time Off Policies.** DOL clarified that a contractor satisfying the final rule with a paid time off policy that provides more than 56 hours of leave per accrual year may choose to either (1) provide all paid time off consistent with the rule's requirements or (2) track, and keep records showing, the paid time off an employee uses for the purposes identified in the final rule. If selecting the second option, the contractor need only provide, for each accrual year, up to 56 hours of paid time off the employee requests to use for such purposes covered by the final rule.
- **New Exclusion for Collective Bargaining Agreements.** The final rule adds a new, temporary exclusion for employees whose covered work is governed by a collective bargaining agreement (CBA) that already provides 56 hours of paid sick time per year. If a CBA ratified before September 30, 2016, applies to an employee's work performed on or in connection with a covered contract and provides the employee with at least 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, the final rule does not apply to the employee until either January 1, 2020, or when the CBA terminates, whichever is earlier.  
If a CBA would meet these requirements but provides for less than 56 hours/7 days per year, the temporary exclusion can still apply if the contractor provides additional sick leave needed to bring the accrual rates to 56 hours/7 days per year.
- **No Transition of Accrued Balances to Successor Contractors.** Both the proposed and final rule provide that paid sick leave shall be reinstated for employees rehired by the same contractor within 12 months of job termination. But the final rule eliminates the proposed rule's requirement for successor contractors to reinstate paid sick leave to employees who worked on the predecessor contract.
- **Payout at Termination Can Eliminate Reinstatement Requirement.** If a contractor pays out unused sick leave at termination, the contractor does not have to reinstate leave if the employee returns within 12 months. Note, though, that the final rule emphasizes that payouts are not required.
- **Limits on Hours Counted Towards Sick Leave Accrual.** DOL changed the definition of hours worked so that it does not include paid time off, such as vacation or time using sick leave provided under the final rule.
- **Longer Periods for Calculating Accruals.** The final rule modifies how often employers must calculate employees' accrual of paid sick leave. The final rule permits a contractor to calculate an employee's accrual of paid sick leave by the end of each pay period or each month, whichever interval is shorter. The proposed rule had set the required frequency as weekly.
- **Notices via Payroll and Online Portal.** The final rule clarifies that a contractor's existing procedure for informing employees of their available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy the requirement to inform employees of the amount of accrued but unused leave. These notices must be

written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).

- **Leave Requests Do Not Have to Refer to the Rule.** The final rule clarifies that employees' request to use paid sick leave need not refer to the rule or even use the words "sick leave" or "paid sick leave." The rule also prohibits contractors from requiring details about the absence.
- **Another Recordkeeping Requirement.** If a contractor estimates covered hours worked by an employee who performs work in connection with covered contracts as permitted by the final rule, the contractor must keep records or other proof of the verifiable information on which the estimates are reasonably based.
- **Additional Details on Certification or Documentation for Leave.** A contractor may require a certification issued by a health-care provider to verify the need for paid sick leave for particular purposes only if the employee is absent for 3 or more consecutive full workdays. The final rule adds that if the employee provides certification or documentation insufficient to verify the need for the absence, the contractor must notify the employee and allow the employee at least 5 days to provide new or supplemental certification or documentation. The contractor may retroactively deny the employee's request to use paid sick leave in the following circumstances: (a) if after 30 days the employee has not provided any certification or documentation, or (b) if after the 5 or more days allowed for resubmission the employee has either provided no new or supplemental certification or documentation or the new certification or documentation is still insufficient to verify the employee's need for paid sick leave. The contractor must complete the retroactive denial within 10 calendar days of the applicable employee deadline.
- **New Provision for Multiemployer Plans.** Under the final rule, a contractor may fulfill its sick leave obligations through a multiemployer plan that provides paid sick leave in compliance with the final rule. Each contractor remains responsible for any violation of the final rule that affects particular personnel covered by a multiemployer plan while the contractor employs the affected personnel.

The final rule will likely have a significant impact on federal contractors and their employees. The rule will require certain contractors that have not been providing paid sick leave to employees to create systems and processes to track the accrual of sick leave, track the use of sick leave, administer leave requests, and undertake significant recordkeeping obligations, among other responsibilities. For contractors that already provide paid sick leave, the final rule will require a compliance review to assess how current policies are consistent with the final rule's requirements.

Finally, a reminder that the final rule, like the proposed rule, provides that contractors cannot count the required sick leave as bona fide fringe benefits (i.e., "Health & Welfare" payments) under the SCA or DBA, but any sick leave provided above the minimum (1 hour per 30 hours worked on covered contracts) can count as bona fide fringe benefits. Wiley Rein can assist with this particular issue and more broadly with implementing the final rule.

