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ALERT

DOL Proposes Rule Implementing Paid Sick Leave Executive Order

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Yesterday, the Department of Labor (DOL) published its proposed rule implementing Executive Order (EO) 13706, Establishing Paid Sick Leave for Federal Contractors. *See* 81 Fed. Reg. 9591 (Feb. 25, 2016). The proposed rule will likely have a significant impact on federal contractors and their employees; DOL estimates that the EO and proposed rule will provide additional paid sick leave to an estimated 828,000 employees of federal contractors, including an estimated 437,000 employees who currently receive no paid sick leave. And all covered contractors, whether they already offer paid sick leave or not, will be required to shoulder extensive recordkeeping and administrative burdens—which have expanded in the proposed rule, as explained in this alert.

The proposed rule adheres to the framework established by EO 13706, which we discussed here. *See* 80 Fed. Reg. 54,697 (Sept. 10, 2015). In brief, EO 13706 and the proposed rule require covered contractors to allow covered employees to accrue at least one hour of paid sick leave for every thirty hours worked on covered contracts, subcontracts, and contract-like instruments (collectively, "contracts"). This accrual rate equates to a minimum total of 56 hours per year for employees that work 40 hours per week on covered contracts. Covered contracts include service contracts covered by the Service Contract Act (SCA); construction contracts 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.

Authors

Craig Smith
Partner
202.719.7297
csmith@wiley.law

Practice Areas

Government Contracts

EO 13706 and the proposed rule set forth a variety of permissible uses for the leave, including illnesses; preventive care; preventive and treatment care for family members; seeking or providing assistance for instances of domestic violence, sexual assault, or stalking; and certain related activities. EO 13706 and the proposed rule then set forth detailed requirements for accrual, use, and tracking of those paid sick-leave hours. These basic requirements are discussed in further detail in our prior alert.

The proposed rule also adds several new or expanded requirements warranting contractors' attention:

Interaction with the SCA, DBA, and Other Laws: The proposed rule expressly states that contractors cannot count the required sick leave as bona fide fringe benefits under the SCA or DBA. Any sick leave provided above the minimum (1 hour per 30 hours worked on covered contracts) *can* count as bona fide fringe benefits. Regarding other laws, the EO and proposed rule do not lessen the obligations of other laws imposing greater sick-leave obligations. Note, though, that if a contractor's regular paid-time off (PTO) plan meets all the requirements in the proposed rule for sick leave, then PTO hours *may* be used to fulfill sick leave obligations under the proposed rule. We note, however, that the proposed rule's lengthy administrative requirements may make doing so too burdensome to offer efficiencies to covered contractors.

Covered Employees: As expected, the proposed 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. The proposed rule requires applying the 20% threshold on a workweek-by-workweek basis. Contractors should find these requirements similar to those imposed by the contractor federal minimum-wage executive order and implementing regulations.

Further, the proposed rule covers employees exempt from the Fair Labor Standards Act (FLSA) overtime and minimum-wage requirements. This coverage means that bona fide administrative, executive, and professional employees also must accrue sick leave even if they are not entitled to other compensation required by the FLSA, SCA, and DBA. The proposed rule does not require employers to track time for these exempt personnel. Instead, employers may assume that the personnel spend 40 hours per week working on or in support of covered contracts—or a percentage of the workweek if the employee regularly spends time on non-covered work.

Carryover, Payout, and Reinstatement: The proposed rule requires contractors to allow employees to carry over accrued sick-leave balances from year to year—something not permitted under the SCA for vacation. Any carried-over hours cannot count against the next year's accrual (based on the minimum accrual rate of 1 hour per 30 hours worked on covered contracts). But the proposed rule does allow contractors to limit an employee's total accrued hours available at any one time (the limit must be no lower than 56 hours). For example, if an employee carries over 36 hours of sick leave, then accrues 20 hours of sick leave during the next year (for a total of 56), the employer could have a rule stopping the accrual until the employee used some of the sick leave. The employee would then begin accruing sick leave again after using some leave.

In addition to allowing accrual caps, the proposed rule also expressly states that contractors are not required to pay out sick-leave balances upon an employee's termination. Contractors are required to reinstate an employee's sick-leave hours if the employee returns within 12 months, however. Similarly, an employee's sick-leave balance will carry forward when the employee moves from a predecessor contractor to a successor contractor, a significant consideration for contracts covered by the non-displacement rule.

Administration of Sick Leave Requests: The proposed rule requires quick responses to employees' requests for sick leave. Although the rule expressly states that timing is a matter of individual facts and circumstances, the rule does state that in many instances contractors should be able to respond "immediately or within a few hours." The proposed rule lists detailed examples of permissible bases for denying a request, such as the employee's failure to provide enough information about when and where the absence will occur or the employee's hours balance being too low. The proposed rule requires contractors to communicate all denials of leave requests in writing with an explanation for the basis of the denial. The proposed rule states expressly that contractors may not condition leave requests on the employee's finding a replacement employee for the time or otherwise making up what could be called lost productivity from the absence.

One permissible basis for denying leave is notable for contractors with employees that perform for multiple customers. The proposed rule expressly allows contractors to deny paid sick leave because the employee is scheduled to perform non-covered work, such as work on commercial contracts, on the day(s) of requested leave. Contractors denying leave requests on this basis will be required to document the schedule-related basis for this denial—and should be certain to do so in a way that shows the employee's schedule was not intentionally set to provide a basis for denying the leave request.

Employee Notices: The proposed rule will require contractors to update employees on their accrued sick-leave balances on almost a rolling basis. Contractors must provide written notices at least once a month; any time an employee requests to use sick leave; any time an employee requests a balance update (up to once per week); when a covered employee terminates employment; and when an employee's sick-leave balance is reinstated. Under the proposed rule, contractors must retain these notices as described below.

Recordkeeping: Recordkeeping requirements stretch far beyond those required by the FLSA, SCA, and DBA. Contractors must retain, for three years after a covered contract, wage and timekeeping records; copies of all hours notices; copies of all requests to use leave, whether written or reduced to writing after the fact; records showing dates and amounts of sick leave used; copies of all written denials; copies of accrued-leave balance records that predecessors must prepare for successors; and more. The proposed rule also requires contractors to maintain confidentiality of medical records, police or court records, and similar sensitive records subject to one or more layers of statutory or regulatory protection.

Conditions of Payment: The proposed rule makes compliance a condition of contract payments, potentially setting up False Claims Act (FCA) liability or other liability for noncompliant contractors. Indeed, the proposed rule states expressly that nothing in the EO or proposed rule precludes a civil FCA action or a prosecution under the False Statements Act (18 U.S.C. § 1001). Contractors should be aware that any type of non-compliance liability could extend up the contracting chain because the proposed rule expressly makes prime

contractors and higher-tier subcontractors responsible for lower-tier subcontractors' compliance, even if the relevant subcontracts omit the applicable DOL or FAR clause. Contractors should note that the proposed rule does not create an independent private right of action; enforcement will be administered by DOL through procedures familiar to contractors covered by the SCA, DBA, non-displacement rule, and contractor minimum-wage rule.

Definitions: The proposed rule adds numerous provisions expanding on the EO's provisions for the circumstances in which employees can use sick leave, how sick-leave requests must be processed, and how records must be kept. These provisions show that DOL intends for contractors to apply the proposed rule's requirements in ways not required by other federal and state laws and regulations. For example, employers must grant sick leave so employees can care for an ill child, among other people. The proposed rule defines "child" to include a biological, adopted, step, and foster child; a legal ward; "a person for whom the employee stands *in loco parentis* or stood *in loco parentis* when that individual was a minor or required someone to stand *in loco parentis*"; and any such person of the employee's spouse or domestic partner. Other definitions, including "spouse" and "domestic partner," are given similarly broad and flexible definitions. Contractors should expect these types of definitions to require case-by-case analysis instead of straightforward application of existing company definitions and policies (which may themselves have been based directly on state or federal law or regulation).

At bottom, this proposed rule is another in a series of rules implementing executive orders issued by the Obama administration. Others include the proposed rule implementing EO 13673, Fair Pay and Safe Workplaces, which would impose obligations on contractors to disclose violations of employment and labor laws, and the final rule implementing EO 13658, Establishing a Minimum Wage for Contractors, which raised the minimum wage for workers on federal construction and service contracts. The impacts of each of these rules have been (or in some cases will be) felt by all federal construction and service contractors regardless of size.

All potentially covered contractors should begin preparing to shoulder these and all other sick-leave obligations beginning with contracts solicited on or after January 1, 2017, or awarded outside the solicitation process on or after January 1, 2017. The EO directs DOL to publish final rules by September 30, 2016; the FAR Council must follow with its own rules within 60 days of DOL's final rule. In light of the Obama administration's emphasis on these labor issues, and the upcoming administration change, contractors should plan for DOL and the FAR Council to meet or beat their publication deadlines. Contractors and other groups interested in commenting on these obligations and burdens must act quickly, because comments are due March 28, 2016.