

Understanding The DOL's Rules On Paid Sick Leave for Federal Contractors

October 3, 2016

Introduction

On September 30, 2016, the U.S. Department of Labor's Wage and Hour Division ("DOL") released a final [Rule Establishing Paid Sick Leave for Federal Contractors](#). The Rule implements Executive Order 13706 which requires contractors working on federal contracts to provide paid sick leave to certain employees.

The new requirements apply to contracts entered into on or after January 1, 2017. Contractors who disregard the new requirements can be subject to debarment, among other penalties.

The Rule in general:

- Requires that employees of contractors, or subcontractors, working on or in connection with federal contracts accrue not less than one hour of paid sick leave for every 30 hours worked.
- Allows contractors to limit sick leave accrual to 56 hours (i.e., 7 days) per year, but requires contractors to carry over an employee's unused leave into the next year.
- Does not require contractors to pay out accrued but unused sick leave when an employee separates employment, but requires contractors to reinstate an employee's accrued sick leave if an employee is rehired by a covered contractor within 12 months of separation.
- Allows employees to use their paid sick leave only when working on a covered contract to care for their own physical or mental health and also to care for sick children, parents, spouses or partners, and for circumstances related to domestic violence, sexual assault, or stalking.

What Contracts Are Covered

The Order applies to four types of contracts with the federal government: (1) procurement contracts covered by the Davis-Bacon Act; (2) service contracts covered by the Service Contract Act; (3) concession contracts; and (4) contracts in connection with federal property that are related to offering services for federal employees, their dependents, or the general public. Within these categories, the Order applies only where the wages paid to the contractor's employees for work related to the contract are governed by the Fair Labor Standards Act, the Davis-Bacon Act, or the Service Contract Act. It includes prime contracts, along with subcontracts.

When Does the New Rule Take Effect

The Rule applied to contracts that:

- Result from a solicitation issued on or after January 1, 2017;
- Are awarded outside the solicitation process on or after January 1, 2017;
- Are renewed other than by the exercise of a unilateral pre-negotiated option by the federal government;
- Are extended by means other than a term in the contract as of December 31, 2016, which provides for a short-term limited extension; or
- Are amended pursuant to a modification that is outside the scope of the contract.

What About Collective Bargaining Agreements? Are There Any Exceptions?

SMACNA filed comments seeking an exemption for employers covered by collective bargaining agreements. While a blanket exemption was not granted, through SMACNA's advocacy the DOL crafted certain provisions from the Executive Order to take into account contractors with a collectively bargained workforce.

Specifically, if a collective bargaining agreement, ratified before September 30, 2016, already provides at least 56 hours of paid time each year, the Rule does not apply to the employee until the earlier of January 1, 2020, or when the CBA terminates. If a collective bargaining agreement, ratified before September 30, 2016, provides some paid leave, but less than 56 hours of leave, the transition relief still applies if the additional leave needed to bring the accrual up to 56 hours per year is provided.

In addition, the Rule allows that employers may satisfy their obligations by making leave benefits for employees covered by a collective bargaining agreement available through a multiemployer plan. For such a plan to satisfy the Rule, the plan's eligibility and payment rules must satisfy the Rule's requirements. That is, the employee must be allowed to use in not less than 1 hour increments, accrue leave at the same rate, and continue to be able to carry-over. Employers continue to remain responsible for meeting the leave requirements under the Rule, even if the benefits are provided through a plan.

Areas with vacation, paid-time-off or other plans which allow employees to receive benefits during times of unemployment may wish to review the terms of the plan to determine whether they meet the obligations of the Rule. In making such a determination, contractors will want to ensure that the requirements to provide sick leave accrual are met by the plan or are incorporated into their payroll system as necessary.

Which Employees Are Entitled to Accrue Paid Sick Leave

The Rule's accrual requirements apply **only** to employees who are directly engaged in performing the specific work called for by the contract or who otherwise spend more than 20% of their hours in a workweek performing work duties in connection with the performance of the covered contract.

Working on a covered contract means, as the name suggests, employees who are physically working on the job site. This would include such employees as sheet metal workers along with non-bargaining unit personnel who may be working exclusively on a job site, for example a project manager.

Working in connection with a covered contract would include employees not physically on-site, but who are supporting the on-site work. This could include employees fabricating materials for installation on the job site, employees doing drawing or sketching in the office, along with accounting and administrative personnel. Again, the Rule only entitles an employee to accrue paid sick leave if more than 20% of their hours in a week are performed in connection with the covered contract.

How Is Paid Sick Leave Accrued

Under the Rule, covered employees must accrue one hour of paid sick leave for every 30 hours worked by employees on or in connection with covered contracts (*i.e.*, the “accrual method”). Alternatively, contractors could provide an employee with 56 or more hours of paid sick leave at the beginning of each accrual year instead of calculating accrued paid sick leave time based on covered hours worked (*i.e.*, “frontloading”).

Contractors are not required to allow employees to accrue sick leave in increments smaller than one hour, but any fraction of the 30 hours of covered work necessary to accrue an hour of paid sick leave must carry over to subsequent workweeks within the same accrual year. For example, if an employee spends ten hours on covered work each week, he or she would accrue no paid sick leave until one full hour of paid sick leave accrued at the completion of the third workweek.

Accrual Year: An accrual year is any 12-month period beginning (1) when the employee begins to perform covered work; or (2) on any date that the contractor sets. If a contractor opts to select a fixed date (Such as January 1) as the start of its accrual year, it must apply the same date to all employees on all covered contracts.

Calculation of Hours Worked: Contractors must include all “hours worked” on or in connection with the contract. The Rule borrows the definition used by the FLSA for “hours worked” meaning the contractor need not include hours when an employee did not work but was in paid leave status. For employees who work on covered contracts and have duties not covered by the contract, contractors must accurately record the employees’ covered and non-covered hours. For covered employees for whom a contractor otherwise does not have an obligation to track their time, contractors may calculate paid sick leave accrual by tracking the employees’ actual hours worked, or by assuming that the employees spend 40 hours per week working in connection with a covered contract.

Tracking of Accrued Sick Leave: The Rule requires contractors to calculate accrued paid sick leave every pay period or once a month, whichever is more frequent. Additionally, the contractor must inform employees, in writing of their total accrued paid

sick leave on the same basis. Contractors must also provide a written tally of accrued paid sick leave when an employee asks for the tally, requests sick leave, separates from employment, or has his or her paid sick leave reinstated upon rehire.

Caps on Sick Leave: Contractors may cap their employees' paid sick leave accrual at 56 hours in each accrual year. Accrued and unused paid sick leave (or unused frontloaded hours) generally must be carried over to the next accrual year. But contractors may limit the amount available for use at any one point in time to 56 hours.

For example, if an employee carries over 20 hours from year 1, they could be limited to accruing 36 more hours in year 2 unless and until they used some of the then "banked" 56 hours. At such time as an employee did use some of the "banked" hours, the employee would again begin accruing hours for year 2 until once more hitting the 56 hour "bank" cap or have accrued in total 56 hours for year 2.

For contractors following a frontloading method, the employee must always be credited with 56 hours at the beginning of the accrual year regardless of the number of hours carried over.

Reinstatement of Accrued Sick Leave Upon Rehire: Contractors need not pay employees for accrued but unused paid sick leave time upon termination, but they must reinstate all accrued but unused paid sick leave time for any employee who is rehired by the contractor or a successor within 12 months after a job separation.

When Can Paid Sick Leave Be Used

Employees may **only** use paid sick leave to be absent from work on or in connection with a covered contract. It may be used by employees for the following reasons:

- Physical or mental illness, injury or medical condition of the employee;
- Obtaining diagnosis, care, or preventative care from a health care provider;
- Caring for the employee's child, parent, spouse, domestic partner, or anyone else related by blood or affinity whose close association with the employee is the equivalent of a family relationship; or
- Domestic violence, sexual assault, or stalking, provided the time away from work is for the purposes described in the first two bullets above or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action or assist someone described in #3 above in engaging in any of these activities.

Rules Regarding Compensation for Use of Sick Leave: Employees' use of paid sick leave time must be calculated in increments of at least one hour. Contractors cannot reduce an employee's accrued paid sick leave by more than the amount of time the employee *actually* takes off and would have worked absent the need for leave, however. Contractors cannot require employees to take more leave than necessary to address the circumstances justifying the leave. Employees on leave are entitled to

receive the same pay and benefits they would have received were it not for the leave. Contractors must compensate employees for time spent on paid sick leave no later than one pay period after the end of the regular pay period in which the paid sick leave was used.

How are Requests for Paid Sick Leave Handled

Requests to use paid sick leave may be oral or written. They must include information sufficient to inform the contractor that the employee is seeking leave for an appropriate reason. Employees must request leave seven days in advance or as soon as practicable, which the Rule explains is generally the day the employee learns of the need to take leave or the following business day.

Contractors must respond to requests as soon as practicable under the circumstances, which the Rule indicates will often be within a few hours of the request. The Rule contemplates, however, that in some instances a contractor may not be able to respond for a few days. For example, a contractor may need a few days to verify whether the employee will be working on or in connection with a covered or non-covered contract during the requested time.

Contractor Responses – Form and Criteria

A contractor may communicate its approval of the employee's request orally or in writing. Contractors must communicate the denial of a paid sick leave request in writing with an explanation for the denial. Although the Rule does not provide an exhaustive list, denial is appropriate if, for example, the employee:

- Did not provide sufficient information about the need for paid sick leave;
- Provided a reason that is inconsistent with the appropriate uses;
- Did not indicate when the need for paid sick leave would arise;
- Requested leave during a time when the employee is scheduled to perform non-covered work; or
- Will not have accrued sufficient paid sick leave time by the requested date of leave.

If an employee will not have sufficient paid sick leave available by the requested date, the contractor should only deny the request to the extent that it exceeds the employee's available paid sick leave time. A denial for insufficient information must also provide the employee an opportunity to submit a corrected request. Finally, if a contractor denies a request because the employee was scheduled to work on non-covered work during the requested time, the contractor must support its denial by records adequately segregating the employee's time spent on covered and non-covered work.

Certification and Supporting Documentation

The contractor may only require certification from a health care provider to verify the medical need for paid sick leave if an employee requests three or more consecutive full

days of paid sick leave. The contractor must keep such information confidential, however. For requests related to domestic violence, sexual assault, or stalking, contractors may only require documentation containing the minimum information necessary to establish a need for the leave. Contractors may also require reasonable documentation to establish that the individual for whose benefit the employee is requesting leave is sufficiently related to the employee to warrant the use of leave under the Order. This documentation may, for example, take the form of a simple written statement, a birth certificate, or a court order.

Interference and Discrimination

The Rule prohibits contractors from interfering in any manner with an employee's accrual or use of paid sick leave time. Specific examples of prohibited interference include:

- Miscalculating the amount of paid sick leave an employee has accrued;
- Denying or unreasonably delaying a response to a proper request to use paid sick leave;
- Discouraging an employee from using paid sick leave;
- Reducing an employee's accrued paid sick leave by more than the amount of such leave used;
- Transferring the employee to work on non-covered contracts to prevent the accrual or use of paid sick leave;
- Disclosing confidential information provided in certification or other documentation provided to verify the need to use paid sick leave; and
- Making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the contractor's operational needs.

The Rule also prohibits contractors from discriminating against any employee for: (1) using or attempting to appropriately use paid sick leave under the Order; (2) filing a complaint, initiating a proceeding, or otherwise asserting any right or claim under the Order; (3) cooperating in an investigation or testifying in a proceeding under the Order; or (4) informing anyone else about his or her rights under the Order. The Rule specifically prohibits contractors from considering the use or attempted use of paid sick leave time under the Order as a negative factor in employment actions such as hiring, promotions, disciplinary actions or a no fault attendance policy.

Employees cannot waive their rights under the Order, and the Rule specifically prohibits contractors from inducing employees to do so.

Other Contractor Requirements

Contract Clause

The Rule requires adherence to the Order as a condition of payment for all covered contracts. Contractors must include the applicable contract clause in all covered

subcontracts and must require subcontractors as a condition of payment to include the clause in any lower-tier subcontracts. Contractors and subcontractors are responsible for their respective subcontractors' compliance.

Recordkeeping

Contractors and covered subcontractors must maintain records during the course of covered contracts and for three years thereafter. These records must contain the following information for each employee who performed work in connection with a covered contract:

1. Notifications of the employee's accrued amount of paid sick leave;
2. Requests to use paid sick leave;
3. Dates and amounts of paid sick leave used;
4. Written denials of employee's requests to use paid sick leave, with explanations;
5. Records related to certification and documentation;
6. Any other records showing any tracking of or calculations related to accrual or use;
7. Any certified list of the employee's unused paid sick leave provided to a contracting officer;
8. Any certified list of the employee's unused paid sick leave received from the contracting agency; and
9. The covered contract.

Additionally, contractors who intend to distinguish between an employee's covered and non-covered hours work must keep records or other proof reflecting those distinctions. Without these records, a contractor may not deny requests or prevent an employee from accruing paid sick leave time on the basis that the requested leave time or hours spent accruing paid sick leave are not covered work. Contractors need not keep records of hours worked by employees for whom the contractor is both: (a) not otherwise required to keep such records; and (b) relying on the optional assumption that the employee spends 40 hours per week working in connection with a covered contract.

Documentation Upon Completion of Contract. Upon completion of a covered contract, contractors must provide to the contracting officer a certified list of all employees entitled to paid sick leave under the Order who worked on or in connection with the covered contract or any covered subcontract at any point during the 12 months preceding the completion date. The list must include three pieces of information:

- The employees' names;
- Date of each employee's separation from the contract or subcontract, if applicable; and
- Amount of paid sick leave each employee had available as of the date of completion or the date the employee separated from the covered contract or subcontract.

Interaction with Current Paid Time Off Policies and Other Laws

Federal contractors with existing paid time off policies (if provided in addition to the fulfillment of Service Contract Act or Davis-Bacon Act obligations) will satisfy the proposed regulations if paid time off is available to all covered employees, may be used for all of the purposes covered by the proposed regulations, and is provided in a manner and an amount sufficient to comply with the accrual, carryover, reinstatement, payment for unused leave, and other rules set forth above. Federal contractors should carefully review existing paid time off policies to ensure compliance with the proposed regulations' numerous technical rules.

Compliance with the proposed regulations will not excuse noncompliance with or supersede any applicable federal, state or local law or collective bargaining agreement providing greater paid sick leave or other leave rights. For example, paid sick leave provided pursuant to the proposed regulations will have no effect on a contractor's obligations under the Family and Medical Leave Act ("FMLA"), but paid sick leave may be substituted for, and run concurrently with, unpaid FMLA leave under the same conditions as other paid time off pursuant to FMLA regulations.

Bottom Line

Figuring out how to comply with this new rule can be complicated, especially if you are also subject to a state or local paid sick leave ordinance. SMACNA strongly suggests that contractors who work on federal projects work with their counsel to ensure that policies and procedures are in place that comply with this Rule, the collective bargaining agreement and any other obligations it might have to provide paid leave.

In addition, SMACNA counsel will address the requirements in the context of collective bargaining and considerations in satisfying the requirements through a multiemployer plan at the Chapter of Council Representatives Meeting (December 4-6, Amelia Island, FL) as well as at the Collective Bargaining Orientation (February 23, Dallas TX).