

DOL Issues Final Rule on Paid Sick Leave for Government Contractors

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SUMMARY: Most federal government contractors (and subcontractors) entering into new or renegotiated contracts on or after January 1, 2017 will be required to provide employees performing work on, or in connection with, the contract with up to 56 hours of paid sick leave per year.

On September 29, 2016, the Department of Labor (DOL) issued final regulations to implement, President Obama's Executive Order on the new obligation requiring government contractors to give employees paid leave. Although many of the specifics were already outlined in the Executive Order (13706), issued in September 2015, the DOL's regulations make a number of important additions.

For those employers in Montgomery County, Maryland a number of the requirements closely resemble those in the County's Sick and Safe Leave Act that went into effect on October 1, 2016.

The provisions of the new rule broadly apply to four different types of contracts or subcontracts: (1) contracts or subcontracts for construction that are covered by the Davis-Bacon Act; (2) contracts or subcontracts for services that are covered by the Service Contract Act; (3) concession contracts or subcontracts; and (4) contracts or subcontracts "in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public."

The paid sick leave requirements set forth in the new regulations apply to new contracts that result from solicitations on or after January 1, 2017 (or that occurred outside the solicitation process and were awarded on or after January 1, 2017) or contracts that are renegotiated or replaced after January 1, 2017. The rule does not apply to existing contracts that are renewed simply by one party exercising a renewal option.

Employer must provide the required leave to employees performing work directly on a covered contract. The employer must also provide leave to employees who spend more than 20% of their time performing work "in connection with" a covered contract. An example of such an employee would be the accounting clerk who is making payments related to the contract. As indicated below, it will require a herculean effort on the part of the employer to keep track of the hours to be counted to determine how much leave is required.

As described further below, under the new rule, covered employers have the choice to either give covered employees leave up front or allow them to accrue it. The same system does not need to be used for all employees or groups of employees.

Accrual Option

Under the accrual option, employees who are performing work on or in connection with any covered contract(s) must earn one hour of paid sick leave for every 30 hours worked on or in connection with covered contracts. Employers can set a cap of 56 hours or higher on the amount of leave that an employee can accrue in a year so long as employees are permitted to carryover at least 56 hours of unused sick leave to the following year and there are no restrictions on how much leave an employee can use in a given year (with the minimum carryover the maximum would be 112 hours).

If the employee is involved with multiple covered contracts, the calculation is based on the total hours the employee has worked on all covered contracts. For exempt employees, whose hours typically aren't tracked, the employer can assume that the employee works 40 hours per week for the purposes of calculating accrual.

Covered employers will be required to calculate employees' leave accruals at the end of each pay period or monthly, whichever is shorter. In states like Maryland, which require most employees to be paid at least twice per month, this will mean calculating the accruals each pay period.

For the purposes of calculating accruals, the regulations make it clear that employers can, but are not required to, award employees fractional leave hours; rather, those hours can be banked until the employee reaches the next 30 hour increment. For example, if an employer's pay period is every two weeks and an employee works 30 covered hours in the first week and 40 covered hours in the next week, the employer will only be required to award the employee 2 hours of leave. The additional 10 hours of work in the pay period will be credited to the employee until the employee works another twenty covered hours at which time the employer can award another hour. Employers who don't want to worry about keeping track of the excess hours that employees must be credited from one pay period to the next can simply choose to award fractional leave every pay period. In other words, in the example above, the employer would simply award the employee 2.33 hours of leave ($70/30$).

Further complicating things, if an employee performs some work that is on covered contract and other work that is not, the employer can exclude those hours of work that are not on a covered contract from the sick leave accrual calculation. However, to do so, the rules require that the employer must track and keep records of the breakdown of which of a non-exempt employee's hours of work are on a covered contract and which are not. The process of excluding hours from the accrual is a bit easier for exempt employees or for employees who are performing work in connection with (rather than on) a covered contract, in which case the employer can estimate the amount of time the employee is working on or in connection with a covered contract.

Up-Front Option

Employers who do not wish to deal with calculating accruals can provide covered employees with at least 56 hours of paid sick leave at the beginning of the year. Unlike, many state and local sick leave laws, under the new regulations, providing all the paid sick leave up-front, does not eliminate the requirement that employees be permitted to carryover at least 56 hours of unused leave from one year to the next. As with the accrual method, the employer can also not place a cap on leave usage.

Under the up-front option, if an employee is hired mid-year, an employer can pro-rate the 56 hours of leave based on the remaining number of pay periods in the year.

Provisions Applicable to Both Options

Regardless of how leave is provided (up-front or through accrual), employees can use their earned paid sick leave to take time off for any of the following purposes:

- Their own physical or mental illness, injury or medical condition;
- To obtain diagnosis or preventative care;
- To care for a child, spouse, domestic partner, "or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship"; or
- To seek services, relocate or take legal actions related to domestic violence, sexual.

If the need to use leave is foreseeable, employees can be required to request leave seven days in advance. If the need to use leave is not foreseeable, employees must request it as soon as practicable. Except for special cases where the employee cannot feasibly take a partial day absence (for example a flight attendant), employers cannot require employees to take leave in increments greater than one hour. Employees who are using sick leave must receive the same pay and benefits that they would receive had they worked those hours. While the employer can cap the rollover of leave from one year to the next (as discussed above), regardless of whether the employee uses an accrual or up-front system, the employer cannot cap the amount of leave an employee may use in a given year.

An employee's use of the paid leave cannot be contingent on the employee finding someone to cover his or her shift. The employer can however, require a health provider certification or other reasonable documentation to verify the use of leave for consecutive absences of more than 3 days.

If the employer is going to deny the use of leave, the employer must do so in writing and provide an explanation of why the leave is being denied.

The regulations do not require employers to pay employees for accrued but unused leave when an employee resigns or is terminated. However, if an employee is re-hired within twelve months, the employer is required to reinstate the employee's leave balance. The exception to this rule is that, if the employer chooses to pay an employee for accrued but unused leave when he or she separates and that employee is re-hired, the reinstatement requirement does not apply.

Concluding Thoughts

For employers who will be subject to these new regulations for some or all of their employees, it is important to remember that a PTO or existing leave policy can satisfy the requirements so long as the policy provides at least the amount of leave required by the regulations and doesn't include any restrictions that would not be permitted under the regulations.

Employers who are not directly subject to the new regulations may still feel an impact from the regulations if they regularly compete with government contractors or subcontractors when recruiting employees. As more and more employers are being required, by state or local law or now these regulations, to provide employees with paid leave, those employers who do not provide paid leave (because they are not mandated to do so) may find themselves at a competitive disadvantage when trying to recruit top candidates.

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