

# Insight

## IN-DEPTH DISCUSSION

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## DOL Issues Proposed Rule Implementing Paid Sick Leave for Federal Contractors

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On February 25, 2016, the U.S. Department of Labor (DOL) issued its long-awaited proposed rule<sup>1</sup> to implement Executive Order 13706,<sup>2</sup> which requires that covered federal government contractors provide employees with up to seven days of paid sick leave per year, including paid leave for family care. President Obama issued the executive order while renewing his call on Congress to pass federal legislation mandating paid leave for private sector employers.

The move comes as state and local governments are increasingly enacting paid leave policies. According to Secretary of Labor Thomas Perez upon announcement of the proposed rule:

President Obama isn't waiting, either. He's using the power of his pen to ensure that companies that do business with the federal government allow their workers to earn up to 7 days of paid sick leave each year, thereby improving the health and performance of their employees – which is good for taxpayers.<sup>3</sup>

The White House and the DOL explain “providing access to paid sick leave will improve the health and performance of employees of Federal contractors and bring their benefit packages in line with model employers, ensuring that Federal contractors remain competitive employers” and “will lead to improved economy and efficiency in Government procurement...” The DOL estimates the rule would extend paid sick leave to nearly

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1 U.S. Department of Labor, *Establishing Paid Sick Leave for Federal Contractors*, 81 Fed. Reg. 9591 -9671 (Feb. 25, 2016), available at <https://www.federalregister.gov/articles/2016/02/25/2016-03722/establishing-paid-sick-leave-for-federal-contractors>.

2 Executive Order 13706 of Sept. 7, 2015, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697-54700 (Sept. 10, 2015).

3 Labor Secretary Thomas Perez, *A Step Closer to Paid Sick Leave*, U.S. Department of Labor Blog (Feb. 24, 2016), available at <http://blog.dol.gov/2016/02/24/a-step-closer-to-paid-sick-leave/>.

437,000 workers. The ultimate impact on contractors and employees remains to be seen, but the proposed rule would impose substantial new obligations on many employers already facing compliance challenges with the growing number of state and local mandates.

## Overview

The proposed rule identifies the types of contracts and employees the executive order covers and excludes from coverage, provides requirements and restrictions regarding the accrual and use of paid sick leave, prohibits interference with or discrimination for the exercise of rights under the executive order, imposes recordkeeping requirements, and includes a prohibition against waiver of rights. The proposed rule also establishes the federal government's and contractors' obligations under the executive order, and specifies the standards and procedures related to alleged violations of the executive order, including complaint intake, investigations, remedies, and administrative enforcement proceedings related to alleged violations of the executive order.

Because Executive Order 13706 and Executive Order 13658, which imposes minimum wage obligations on federal contractors, are similar in language, structure, and intent, many of the definitions in the proposed rule are identical to or based on definitions promulgated in the final rule implementing the minimum wage executive order. The proposed rule also incorporates existing definitions, procedures, and remedies of the Fair Labor Standards Act (FLSA), the Service Contract Act (SCA), the Davis-Bacon Act (DBA), the Family and Medical Leave Act (FMLA), and the Violence Against Women Act (VAWA).

## Covered Employees and Employers

The executive order applies to covered contracts entered into after January 1, 2017, with the federal government requiring performance in whole or in part within the United States. The proposed rule sets forth four broad categories of covered contracts:

- Procurement contracts for services or construction covered by the DBA;
- Contracts for services covered by the SCA;
- Contracts for concessions, including any concessions contracts excluded by DOL regulations at 29 CFR 4.133(b); and
- Contracts in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.<sup>4</sup>

The proposed rule broadly defines “contract,” stating that the term “includes all contracts and any subcontracts of any tier thereunder.”

As proposed, a covered employee would mean any person engaged in performing work on or in connection with a contract covered by the executive order, and whose wages under such contract are governed by the DBA, SCA, or the FLSA, including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions, regardless of the contractual relationship alleged to exist between the

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<sup>4</sup> Section 13.3(a)(1).

individual and the employer.<sup>5</sup> Thus, the paid sick leave requirements would apply, for example, to employees employed in a bona fide executive, administrative, or professional capacity. In addition, the paid sick time requirements would extend even to independent contractors who are covered by the SCA and the DBA.

### Excluded Contracts and Employees

The proposed rule narrowly excludes from coverage the following types of contracts:

- “Grants” within the meaning of the Federal Grant and Cooperative Agreement Act;
- Contracts and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Procurement contracts for construction, that are excluded from the DBA’s coverage (i.e., those worth under \$2,000); and
- Contracts for services that are exempted from coverage under the SCA.

Employees performing “in connection with” covered contracts for less than 20% of their work hours in a given workweek are also excluded from the paid sick leave requirement under the proposed rule.<sup>6</sup> However, employees performing work “on” covered contracts, regardless of amount, are not excluded from coverage. Employees performing “on” covered contracts are those directly performing the specific services called for by the contract, while those performing “in connection with” a covered contract are performing activities that are necessary to the performance of the contract, but are not directly engaged in performing the specific services called for by the contract.

### Accrual of Sick Leave

The proposed rule provides that a contractor shall permit an employee to accrue not less than 1 hour of paid sick leave for every 30 “hours worked” on or in connection with a covered contract.<sup>7</sup> Alternatively, a contractor may provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year, but still must allow carryover even if the 56 hours is frontloaded.<sup>8</sup> A contractor may not exclude time spent on non-covered work unless the contractor accurately records the employee’s covered and non-covered work hours. “Hours worked” includes all time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or other paid time off provided by the contractor.<sup>9</sup>

Under the proposed rule, a contractor shall calculate an employee’s paid sick leave accrual no less frequently than the end of each workweek.<sup>10</sup> A contractor does not need to allow accrual of paid sick leave in increments smaller than 1 hour. A fraction of hours worked, however, shall be added to hours worked for the same contractor in subsequent weeks, provided the next workweek occurs within the same accrual year.

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5 Section 13.3(a)(2).

6 Section 13.4.

7 Section 13.5(a)(1).

8 Section 13.5(a)(3).

9 Section 13.5(a)(1)(i).

10 Section 13.5(a)(1)(ii).

For exempt employees, a contractor may calculate paid sick leave accrual by tracking the employee's actual hours worked or by assuming the employee works 40 hours on or in connection with a covered contract in each workweek.<sup>11</sup> If the employee regularly works fewer than 40 hours per week on or in connection with covered contracts, the 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. The proposed rule also provides extensive notification requirements regarding the amount of paid leave the employee has accrued but not used, including (a) at least monthly; (b) at any time when the employee makes a request to use sick leave; (c) upon employee's request (but no more often than once a week); (d) upon separation of employment; and (e) upon reinstatement of paid sick leave (on rehire).<sup>12</sup> Existing systems such as a notification accompanying each paycheck or an online system an employee can check at any time, can be used to satisfy or partially satisfy the requirements provided it is written (including electronically) and clearly indicates that amount of sick leave accrued separately from other amounts of paid time off available, unless the paid time off bank is used to satisfy the paid sick leave requirement.

### **Amount of Annual Use**

Under the proposed rules, a contractor may not limit the amount of paid sick leave an employee may use per year or at once.<sup>13</sup> Thus, an employee could use more than 56 hours in a year.

### **Accrual Cap**

Under the proposed rule, the contractor may limit the amount of paid sick leave an employee is permitted to accrue to 56 hours in each accrual year.<sup>14</sup> In addition, the contractor may limit the amount of paid sick leave an employee is permitted to have available for use at any point to 56 hours.<sup>15</sup> Thus, a contractor may put in place two accrual caps: an annual accrual cap of 56 hours and maximum sick leave bank of 56 hours. However, if a contractor "frontloads" the paid sick leave (provides 56 hours at the beginning of each accrual year), the maximum bank may exceed 56 hours. In particular, the contractor must allow an employee to carry over the amount of unused leave and still front load the full 56 hours. Thus, an employee who carries over 16 hours will still have another 56 hours frontloaded for a total of 72 hours in the paid sick leave bank and available for use.

### **Carryover**

Additionally, paid sick leave carries over from one accrual year to the next, and paid sick leave carried over from the previous accrual year shall not count toward the contractor's annual accrual cap under the proposed rule.<sup>16</sup> A contractor, however, may cap the amount of paid sick leave an employee is permitted to have available for use at 56 hours.<sup>17</sup> Thus, a contractor can effectively limit an employee's carryover by setting a limit, as permitted by the proposed rule, on the amount of paid sick leave an employee can have in a paid sick leave bank. If a contractor "frontloads" paid sick leave at the beginning of each accrual year, an employer may limit the carryover from year to year to 56 hours.<sup>18</sup>

<sup>11</sup> Section 13.5(a)(1)(iii).

<sup>12</sup> Section 13.5(a)(2).

<sup>13</sup> Section 13.5(c)(4).

<sup>14</sup> Section 13.5(b)(1).

<sup>15</sup> Section 13.5(b)(3).

<sup>16</sup> Section 13.5(b)(2).

<sup>17</sup> Section 13.5(b)(3), (c)(4).

<sup>18</sup> Section 13.5(a)(3).

## Accrual Year

A contractor may select an accrual year, which is a 12-month period as selected by the contractor, so long as it is a consistent option for all employees and is not selected or changed to avoid paid sick leave requirements. If the contractor fails to select an accrual year, the option that provides the most beneficial outcome for the employee will be used.

## Termination and Reinstatement

Under the proposed rule, accrued, unused sick leave does not have to be paid out upon termination of the employment relationship.<sup>19</sup> That said, paid sick leave must be reinstated for employees rehired by a covered contractor within 12 months after a job separation. It is the DOL's position that a contractor must reinstate paid sick leave when it rehires an employee even if the unused leave was paid out at the time of the original separation from employment. Accordingly, contractors who typically pay out unused leave could end up providing a rehired employee with a double benefit. In addition, the reinstatement requirement applies if an employee takes a job with a "successor" contractor.

## Permitted Use of Sick Time

The proposed rule provides that paid sick leave may be broadly used for the following reasons:

1. for an employee's own physical or mental illness, injury, medical condition;
2. when an employee needs to obtain diagnosis, care, or preventative care;
3. to care for a child, parent, spouse, domestic partner, or "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" who has an illness, injury, medical condition, or who needs to obtain diagnosis, care, or preventative care; or
4. for domestic violence, assault, or stalking situations resulting in an illness, injury or medical condition or the need for obtaining diagnosis, care, or preventative care, or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action for the employee or one of the above-listed individuals in domestic violence, assault or stalking situations.<sup>20</sup>

The DOL proposes an expansive definition of "equivalent of a family relationship." Under the proposed rule, employees may take paid sick leave to care for a non-nuclear family member who does not necessarily have a biological or legal relationship to the employee, including a "close friend."

The DOL provides several examples of situations that would be covered under the proposed rule. For example, an employee may use paid sick leave to stay home with a child who has a cold, to accompany a spouse to an appointment at a fertility clinic, or to prepare for a court proceeding related to a domestic violence situation.

Notably, some of the key definitions used in the paid sick leave proposed rule differ from those under the FMLA. The DOL notes that this proposed definition of "child" is "deliberately broader" than the definition of "son or daughter" in the FMLA, which includes only minor children or adult children "incapable of self-care

<sup>19</sup> Section 13.5(b)(5).

<sup>20</sup> Section 13.5(c)(1).

because of a mental or physical disability.” The DOL explains that it is intended that employees be permitted to use paid sick leave for a broader range of purposes than those for which they can use FMLA leave, including time off to care for an employee’s child of any age.

The DOL also proposes to define physical or mental illness, injury, or medical condition as any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind. The DOL interprets the executive order to intend for this term to be understood broadly, to include any illness, injury, or medical condition, regardless of whether it requires attention from a health care provider or whether it would be a “serious health condition” that qualifies for use of leave under the FMLA. Examples the DOL cites include, but are not limited to, a common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode.

The use of paid sick leave cannot be made contingent on the requesting employee finding a replacement to cover any work time to be missed.<sup>21</sup> Use may, however, be limited to time the employee would otherwise have spent working on or in connection with a covered contract, but employers must have adequate records to distinguish between covered and non-covered work.<sup>22</sup>

### **Increment of Use**

Contractors must allow an employee to use paid sick leave in increments of one hour, and may choose to allow increments of less than one hour, but are not required to do so.

### **Request for Leave and Certification**

According to the proposed rule, paid sick leave must be provided upon the employee’s oral or written request that includes information sufficient to inform the contractor that the employee is seeking paid sick leave under the executive order, and to the extent reasonably feasible, the expected duration of the leave.<sup>23</sup> An employee must make a request at least seven calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable.<sup>24</sup> Additionally, the proposed rule provides guidance regarding when a contractor may deny a request, requirements for communicating a request denial, and when a contractor must permit an employee to submit a new, corrected request.<sup>25</sup>

The proposed rule further provides that employers may require that the employee taking leave provide a certification issued by a health care provider only if the sick leave lasted for three or more consecutive full workdays, and the contractor must allow the employee 30 days from the first day of the three or more consecutive absences to obtain the certification.<sup>26</sup> The documentation should contain only “the minimum necessary information establishing a need for the employee to be absent from work.”<sup>27</sup> The proposed rule also addresses confidentiality of the certification, treatment of the absences while waiting for the certification, and contact with the employee’s health care provider.

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<sup>21</sup> Section 13.5(c)(5).

<sup>22</sup> Section 13.5(c)(1).

<sup>23</sup> Section 13.5(d)(1).

<sup>24</sup> Section 13.5(d)(2).

<sup>25</sup> Section 13.5(d)(3)(ii).

<sup>26</sup> Section 13.5(e)(1)(i).

<sup>27</sup> Section 13.5(e)(1)(ii).

## Interaction with Existing Leave Policies and Other Laws

A contractor's existing paid time off policy (if provided in addition to the fulfillment of the SCA or DBA obligations, if applicable) will satisfy the requirements of the executive order and the rule only if various conditions are met. Under the proposed rule, employers may continue to maintain other paid leave policies, such as vacation, sick, or other paid time off policies, and satisfy the requirements of the executive order, as long as the paid time off is made available to all covered employees and the paid time off is accrued and may be used in a manner that meets or exceeds the requirements of the executive order and its implementing rule.<sup>28</sup> Furthermore, the paid time off must be provided pursuant to policies sufficient to comply with the rules and restrictions regarding use of paid sick leave, requests for leave set forth in § 13.5(d) of the proposed rule, and certification and documentation set forth in proposed rule.

Paid sick leave required by Executive Order 13706 is in addition to a contractor's obligations under the SCA and DBA.<sup>29</sup> Thus, a contractor may not receive a credit toward its prevailing wage or fringe benefit obligations under those Acts for paid sick leave provided in satisfaction of the executive order or the rules.

Paid sick leave may run concurrently with unpaid FMLA leave under the same conditions as other paid time off.<sup>30</sup> The proposed rule also clarifies that a contractor's compliance with state or local paid sick leave laws must also comply with the executive order.<sup>31</sup>

## Prohibited Acts and Enforcement

Covered employers are prohibited from interfering with or discriminating against an employee for taking, or attempting to take, paid sick leave, or for assisting any other employee in asserting his or her rights to sick leave.<sup>32</sup> The Secretary of Labor is charged with investigating potential violations of and obtaining compliance with the executive order, and the proposed rule identifies remedies available for violations.<sup>33</sup> Depending on the violation, relief may include compensation for unpaid leave, liquidated damages, employment, reinstatement, promotion, restoration of leave, lost pay and benefits, debarment, civil actions, and retroactive inclusion of the contract clause.<sup>34</sup> Disputed matters will be resolved in proceedings before the Office of Administrative Law Judges.<sup>35</sup>

## No Waiver of Rights

The proposed rule provides that employees cannot waive, and contractors may not induce employees to waive, their rights under the executive order. Presumably, this waiver prohibition means that the paid sick leave requirements of the executive order may not be waived in a collective bargaining agreement (CBA), which is a significant departure from many local paid sick leave laws. As a result, covered contractors with CBAs that are already in effect on January 1, 2017, may need to provide paid sick leave benefits in excess of the benefits negotiated in the CBAs.

<sup>28</sup> Section 13.5(f)(5).

<sup>29</sup> Section 13.5(f)(2).

<sup>30</sup> Section 13.5(f)(3).

<sup>31</sup> Section 13.5(f)(4).

<sup>32</sup> Section 13.6(a)-(b).

<sup>33</sup> Section 13.11(b)-(e), 13.41-44.

<sup>34</sup> Section 13.44.

<sup>35</sup> Section 13.55.

## Contract Clause

Covered contracts and subcontracts entered into after January 1, 2017, must contain a clause in which the contractor certifies that all of its employees, in the performance of the contract or any subcontract thereunder, “shall earn not less than 1 hour of paid sick leave for every 30 hours worked.” Covered contractors must abide by the terms of the paid sick leave contract clause as a condition of payment.<sup>36</sup>

## Other Compliance Obligations

Additionally, the proposed rule details covered contractors’ recordkeeping and notice obligations.<sup>37</sup> Covered contractors must post a notice provided by the Department of Labor in a prominent and accessible place at the worksite.<sup>38</sup> Electronic postings may satisfy this requirement.

## Next Steps

The Department of Labor is allowing the public until March 28, 2016, to submit comments.<sup>39</sup> This accelerated comment period reflects the DOL’s determination to publish the final rule by September 30, 2016, as required by the executive order. The DOL has affirmatively requested comments regarding many sections of the proposed rule, but given the short timeframe for comment, it remains to be seen whether the final rule will be radically different. Of course, the paid sick leave executive order is subject to repeal by future occupants of the White House. Nonetheless, employers should begin reviewing their policies and collective bargaining agreements to ensure that they are ready to comply with the executive order and its implementing rule. Companies wishing to make comments regarding the proposed rule should contact their employment counsel.

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<sup>36</sup> Sections 13.11, .21.

<sup>37</sup> Section 13.25.

<sup>38</sup> Section 13.27(a).

<sup>39</sup> For more information about providing comments on the proposed rule, please contact [Ilyse Schuman](#), Co-Chair of Littler’s [Workplace Policy Institute](#).