Government Contractor Paid Leave Accrual – Does It Apply to Your Employees? And If So, What Does It Require?

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Regulations implementing Executive Order 13706, which requires affected employers to provide paid sick leave of up to 56 hours per year to certain employees, became effective on January 1, 2017. While it remains to be seen whether the Trump Administration will withdraw or modify the Executive Order and its implementing regulations, it has been in effect now for more than three months. Despite the effective date, many government contractors and subcontractors are not subject to the Order and regulations, and many others who potentially will be, are not currently affected. Let's examine what contracts/subcontracts are not covered. For those that are covered, let's look at which employees are subject to the accrual and use requirement, and what are the parameters of accrual and use of leave.

Coverage

There are broad exclusions of certain arrangements and contracts between the federal government and employers. For example, grants and cooperative agreements are not subject to the requirements. Contracts with an independent regulatory agency of the federal government (e.g. the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, and the Federal Communications Commission) are not covered. Likewise, contracts or subcontracts related to the manufacture and/or supply of materials, contracts normally covered by the Walsh-Healey Public Contracts Act, are not covered. Finally, service contracts and subcontracts that are exempt from coverage under the Service Contract Act (SCA) are also not covered (examples include many contracts for the carriage of freight, vehicle maintenance services contracts, contracts with hotels/motels for conferences, contracts for real estate services, and contracts for transportation of persons by common carrier, if they meet certain criteria).

While most federal contracts/subcontracts for services, construction, or concessions are covered, it's important to remember that if a company has not done one or more of the following on or after January 1, 2017, it has no current sick leave accrual obligations under the regulations: 1) entered into a new contract/subcontract for which solicitations were issued on or after January 1, 2017; 2) for a contract awarded outside the solicitation process, entered into a new contract/subcontract; 3) renewed a contract through bilateral negotiation; 4) extended an existing contract (except through a short term extension provided for in the contract); or 5) modified an existing contract. When a company does any of the above, sick leave accrual applies, but only to employees working on or in

connection with the new, renewed, extended, or modified contract, and not to employees working on or in connection with previously existing contracts/subcontracts.

Even if (or when) a contractor or subcontractor's employees become subject to the regulations, not all employees will be covered. While employees working on covered contracts will always be subject to accrual of sick leave, employees working in connection with covered contracts will only accrue sick leave if they spend 20 percent or more of the hours worked in a workweek in connection with covered contracts. Moreover, if covered work is subject to a Collective Bargaining Agreement (CBA) ratified prior to September 30, 2016, and it provides for sick leave accrual, the requirements will not apply until expiration of the CBA or January 1, 2020, whichever occurs earlier. (If the contract terms provide for less than 56 hours of annual accrual, the regulations require accrual of the difference).

Finally, employers need only allow use of accrued sick leave during periods when the employee is working on or in connection with covered contracts. However, restricting use to such instances is probably more administratively burdensome than is worth it.

Use of Paid Sick Leave

Employees have the ability to use paid sick leave for a wide variety of purposes. Similar to the Family and Medical Leave Act (FMLA), they can take time off for their own illness or other healthcare needs, including preventive care; and for the care of a family member or loved one who is ill or needs healthcare, including preventive care. Paid sick leave expands the definition of "family," however, to also encompass those persons who have a familial-like relationship with the employee, such as a long-time neighbor or close friend. Paid leave can also be used for issues related to domestic violence, sexual assault, or stalking where the employee or a family member or loved one is a victim (such as obtaining counseling, seeking relocation, receiving assistance from a victim services organization, or taking legal action).

The standard for whether an illness, injury, or other event is covered under this rule is very broad. For injury or illness, the rule specifically states that it could include a wide variety of situations such as the common cold, an upset stomach, a headache, a sprained ankle, and similar maladies – well beyond FMLA-covered serious health conditions.

Paid sick leave may be requested verbally by the employee. If the leave requested is three or more consecutive days, employers can require that a certification be issued by a health care provider, but only if the leave is for the physical or mental illness, injury, or medical condition of the employee; obtaining diagnosis, care, or preventive care from a healthcare provider by the employee; or caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity. The employee or person cared for need not have been seen by the healthcare provider for the certification to be valid. If the paid sick leave is used for an absence resulting from domestic violence, sexual assault, or stalking, acceptable documentation or certification could originate from a number of sources. It could come from a healthcare provider, counselor, representative of a victim

a number of sources. It could come from a healthcare provider, counselor, representative of a victim services organization, attorney, clergy member, family member, or even a close friend. In fact, self-certification is also permitted.

No matter the level of certification received, an employer should be aware that any records it receives relating to medical histories need to be maintained as confidential records. Furthermore, employers are prohibited from disclosing any verification information, and are similarly required to maintain confidentiality about domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

Accrual Rates

Employers must provide for one hour of sick leave accrual for every 30 hours of covered work, to a maximum of 56 in a year. The final rule creates an option for employers to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue leave based on hours worked. Providing all of the 56 hours at the beginning of the accrual year may be easier administratively. That way, employers need not worry about tracking fractions of hours and providing the leave balance status required by the regulations is also easier. Awarding the leave all at once also means that the employer does not need to invest time and energy into tracking which hours are worked on the specific contracts that would qualify the employee for the leave. However, the employer risks allowing leave to be taken by an employee who subsequently terminates employment prior to having actually accrued the full amount of leave taken. It also provides more paid leave than would be required for employees working less than 80% of the time on or in connection with covered contracts. Nevertheless, many employers will likely select the option of awarding the 56 hours of paid sick leave at the beginning of the accrual year. A contractor may not use paid sick leave required by the regulations toward the fulfillment of its SCA or Davis Bacon Act obligations. Further, a contractor's obligations have no effect on its obligations to comply with, or ability to act pursuant to, the FMLA. Paid sick leave may be substituted for (that is, may run concurrently with) unpaid FMLA leave, and all notices and certifications that satisfy FMLA requirements will satisfy the request for leave and certification requirements of the new rules. Although FMLA certifications may satisfy the paid sick leave certifications, paid sick leave is available under circumstances where the FMLA is not. Therefore, employers cannot simply rely on the FMLA certification process and must institute new procedures for certifying paid sick leave if they intend to require certifications for sick leave that does not fall within the FMLA.

An employer's existing Paid Time Off (PTO) policy can fulfill the paid sick leave requirements of the regulations as long as it provides employees with at least the same rights and benefits as the regulations require. In other words, if an employer provides 56 hours of PTO that meets the requirements described in the regulations and employees can use the leave for any purpose provided in the regulations, the employer does not have to provide separate paid sick leave even if an employee uses all of the time for vacation. If an existing PTO policy provides more than 56 hours of leave, the employer may choose to either provide that all PTO may be used for purposes in compliance with the regulations' requirements, or track and maintain records reflecting the amount

compliance with the regulations' requirements, or track and maintain records reflecting the amount of paid time off an employee uses for the purposes described in the regulations. In that case, the employer need only provide, for each accrual year, up to 56 hours of PTO the employee requests to use for purposes that comply with the regulations' requirements.

Action Steps

You should carefully review your paid leave policies to confirm whether leave may be used for the purposes covered in the paid sick leave regulations. If not, the paid sick leave covered reasons should be added to your policies.

It will be important to train managers and frontline supervisors to know that paid sick leave may be requested verbally. Further, although some of the FMLA certifications are similar, the certification for paid sick leave is not identical, nor is the certification requirement identical. While FMLA certifications will comply with the paid sick leave requirement, the FMLA certification should not be required unless it is for a qualifying FMLA reason. It is easy to foresee a scenario where a manager or supervisor without proper training hears a verbal request for sick leave and responds by telling the employee he or she must fill out an FMLA certification form. This would be proper under the FMLA, but not necessarily true for paid sick leave unless the leave is for 3 or more consecutive work days and is for an FMLA qualifying reason.

You should consider whether you want to award the 56 hours at the beginning of the accrual year, which is an option, or whether you prefer to allow the accrual of 1 hour for each 30 hours worked on or in connection with covered contracts, as the regulations provide, as another option. A third option would be to allow accrual for all hours worked, whether or not they are on or in connection with covered contracts, to make recordkeeping easier. While the first option may be easier from an administrative standpoint, it may also be ripe for abuse. The third option will allow for faster accrual for employees who work on more than covered contracts but is administratively easier to manage.

Finally, if you do not already do so, you should consider whether you want to provide paid sick leave to employees who are not working on or in connection with covered contracts, in the interest of employee relations, balancing that interest with the cost of awarding additional paid sick leave to those workers not necessarily entitled to such leave under the new regulations.

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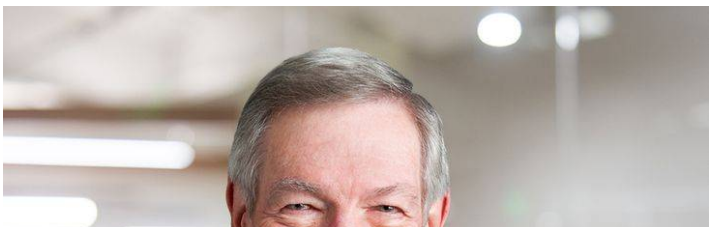

Thomas Paul Rebel
Senior Counsel
404.240.4255
Email