



Federal Contractor Paid Sick Leave Rules Finalized

CHANGES EFFECTIVE JANUARY 1, 2017

Insights

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The U.S. Department of Labor (USDOL) unveiled final regulations yesterday that will require federal contractors to provide up to 56 hours of paid sick leave to those employees performing work on or in connection with certain contracts issued on or after January 1, 2017. President Obama issued an Executive Order to mandate this requirement in September 2015, but the regulations themselves create a whole set of new specific responsibilities. Contractors will want to familiarize themselves with these rules as soon as possible.

What types of contracts are impacted?

Not all federal contractors are covered. Generally, if the federal contractor is also subject to the federal contractor minimum wage regulations, they will also be covered, as the definition of covered contractor has purposely paralleled those regulations for the paid sick leave rules.

Employers should confirm whether their government contracts or subcontracts are covered by the Service Contract Act (SCA) or Davis Bacon Act (DBA), so that they may determine whether they will be required to comply with the new paid sick leave requirements.

What is the effective date?

These new requirements will only apply to those contracts entered into on or after January 1, 2017.

What is covered under paid sick leave?

Workers will have the ability to use paid sick for a wide variety of purposes. Similar to the Family and Medical Leave Act (FMLA), workers can receive this benefit for their own illness or other health care needs, including preventive care; and for the care of a family member or loved one who is ill or needs health care, 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.

The federal contractor leave goes further than FMLA by also permitting paid leave 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 life event is covered under this rule is very broad. 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.

What certification options exist?

Paid sick leave may be requested verbally by the employee. If the leave requested is three or more consecutive days, contractors 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 health care provider by the employee; or caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity.

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 health care 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, contractors should be aware that any records it receives relating to medical histories need to be maintained as confidential records. Furthermore, contractors 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.

What accrual options do contractors have?

The final rule creates an option for contractors 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, contractors 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 contractor 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 contractor risks allowing leave to be taken by an employee who subsequently terminates employment prior to having actually accrued the full amount of leave taken. Nevertheless, many employers will likely select the option of awarding the 56 hours of paid sick leave at the beginning of the accrual year.

How does this rule interplay with existing laws?

A contractor may not use paid sick leave required by the final rules toward the fulfillment of its SCA

A contractor may not use paid sick leave required by the final rules toward the fulfillment of its SOA or DBA 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, the 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.

How does the new rule interplay with existing PTO policies?

A contractor's existing PTO policy can fulfill the paid sick leave requirements of the rule as long as it provides employees with at least the same rights and benefits as the new law requires. In other words, if a contractor provides 56 hours of PTO that meets the requirements described in the rule but employees can use the leave for any purpose, the contractor 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 contractor may choose to either provide all PTO used for the purposes in compliance with all of the rule's requirements, or track and maintain records reflecting the amount of paid time off an employee uses for the purposes described in the rule. In that case, the contractor need only provide, for each accrual year, up to 56 hours of PTO the employee requests to use for such purposes that complies with the rule's requirements, such as for certification, documentation and recordkeeping.

What should contractors do now?

You should carefully review your 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 are permitted to comply with this paid sick leave requirement under the letter of the law, 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 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.

Next, 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 with 1 hour for each 30 hours worked on or in connection with a covered contract, as the regulations provide as another option. A

third option would be to allow accrual for all hours worked, whether or not 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, you should consider whether you want to provide the paid sick leave to employees who are not working on or in connection with the covered contract(s), 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 law.

If you have any questions about this development or how it may affect your business, please contact any member of our Affirmative Action and Federal Contract Compliance Practice Group, or your regular Fisher Phillips attorney.

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