

The Final Paid Sick Leave Rule's Complexity May Leave Some Federal Contractors Feeling a Bit under the Weather

On September 30, 2016, the Department of Labor's ("DoL") Wage and Hour Division published its [final rule](#) requiring covered federal contractors to provide employees with up to seven days (56 hours) of paid sick leave per year. There are a lot of details, but we have distilled some key points below. For convenience, and because this rule can apply to both contractors and subcontractors, we refer to both categories collectively as "contractors" or "contracts."

Effective Date:

The new paid sick leave requirements apply to the below four types of covered contracts and associated subcontracts originating from solicitations issued on or after January 1, 2017.

Covered Contracts:

- Procurement contracts for construction covered by the Davis-Bacon Act ("DBA");
- Services contracts covered by the Service Contract Act ("SCA");
- Concessions contracts, including any concessions contract excluded from the SCA by the DoL's regulations at 29 C.F.R. § 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.

Subcontracts serving covered contracts are normally covered, except when a relevant limit or exclusion (listed below) applies. The rule will also apply to existing contracts renewed, extended ("unless the extension is made pursuant to a term in the contract as of December 31, 2016 providing for a short-term limited extension"), or amended pursuant to a modification that is outside the scope of the contract.

Coverage Limits and Exclusions:

There are three limits on coverage:

- Contracts not meeting the thresholds specified in the appropriate covered category law, such as the SCA or the DBA, are not covered.
- Portions of a contract performed outside the United States are not covered.
- Supplies contracts, most notably those subject to the Walsh-Healey Public Contracts Act, are not covered.

There are also six exclusions from coverage:

- Grants issued under the Federal Grant and Cooperative Agreement Act.
- Contracts and agreements with, and grants to, Indian Tribes.
- Procurement contracts for construction that are excluded from coverage of the Davis-Bacon Act.
- Contracts for services that are exempted from coverage under the Service Contract Act.
- Employees performing work in connection with covered contracts for less than 20 percent of their work hours in a given workweek.
- Employees whose covered work is governed by a collective bargaining agreement that already provides 56 hours of paid sick time.

Covered Employees:

Any worker, whether full-time or part-time, engaged in performing work on or in connection with a covered contract whose wages under the contract are governed by the SCA, DBA, or the Fair Labor Standards Act (“FLSA”) including employees who are exempt under the FLSA.

As noted above, there is a narrow exception from the requirements for workers who perform duties necessary to the performance of a covered contract, but who are not directly engaged in performing the work specified by the contract, and who spend less than 20% of their hours worked in any work week performing work in connection with such contract. And, there is also a temporary exception for employees whose work is governed by a collective bargaining agreement (“CBA”) ratified before September 30, 2016 that grants them at least 56 hours of paid sick leave (or paid time off each year). Contractors employing these workers need not implement the new paid sick leave requirements until the CBA terminates or January 1, 2020, whichever is earlier.

Using PTO:

Employers may use existing paid time off (“PTO”) policies to comply with the paid sick leave requirements so long as the employer provides at least 56 hours of PTO. Employers need not provide separate paid sick leave, even if the employee uses all of the PTO time for vacation.

Recordkeeping:

Employers must track the number of hours employees spend on, or in connection with, covered contracts. Additionally, they must track employee accrual and use of paid sick leave. Contractors are allowed to estimate the amount of time spent “on” or “in connection with” a covered contract.

Accrual, Notice of Accrual, and Carryover Year-to-Year:

The rule allows employees to accrue one hour of paid sick leave for every 30 hours worked on, or in connection with, a covered federal contract, up to 56 hours or 7 days in a year. “Hours worked” means time spent working on a covered contract and does not include PTO.

Contractors must provide the employee with written notification of the amount of paid leave the employee has accrued but not used including (a) at least once each pay period or each month, whichever interval is shorter; (b) upon separation of employment; and (c) upon reinstatement of paid sick leave (on a rehire within 12 months of separation).

Carryover of paid sick leave from year to year must be allowed, but contractors need not allow carryover to result in the availability of greater than 56 hours unless the contractor “frontloads” paid sick leave. “Frontloading” is where the contractor provides all 56 hours to the employee at the beginning of the accrual year rather than requiring gradual accrual of hours. When the contractor “frontloads” the paid sick leave, the contractor may limit carryover to no less than 56 hours and may not deprive the contractor of additional paid sick leave hours during the subsequent accrual year per the regular requirements (minimum 1 hour for every 30 or 56 total hours). Hence, under a “frontloading” design, the employee may have well above 56 available paid sick leave hours during a subsequent accrual year.

Request for Leave and Certification:

Employees must request sick leave, orally or in writing, at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as practicable. Contractors may require certification of the reason for the use of paid sick leave only if the employee is absent for 3 or more consecutive full workdays.

Incremental Use:

Contractors must allow employees 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. However, there is an exception, borrowed from the Family Medical Leave Act (“FMLA”): “If it is physically impossible for an employee using paid sick leave to commence or end work mid-way through a shift, such as if a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ‘clean room’ during a certain period of time, and no equivalent position is available, the entire period that the employee is forced to be absent constitutes paid sick leave.”

Payout upon Termination:

Contractors are not required to pay out unused paid sick leave on termination. But, contractors must reinstate unused paid sick leave if the employee is rehired within 12 months.

Prohibited Interference and Discrimination:

Contractors may not in any manner interfere with an employee's accrual or use of paid sick leave, nor may a contractor discriminate against an employee in relation to this rule. Anyone who knows of a violation—not only employees—may file a complaint with any office of the DoL’s Wage and Hour Division.

Recommendations:

With January 1—the final rule’s effective date—less than a month away, now is the time to prepare. Here are some tips:

- Where this new rule becomes particularly messy is accounting for employees who don’t spend their entire time on a covered contract. Contractors and subcontractors who choose not to employ the “frontloading” method must ensure their internal accounting systems will provide an automatic calculation of paid sick leave accrued based on the number hours an employee works that are billable to a covered contract.
- There is a notice of rights requirement in this rule. Don’t forget to inform covered employees of their paid sick leave rights under the new rule.
- This rule leaves a fair amount of discretion in the employee’s hands about when to take leave, which makes it a likely basis for workplace disagreements. It is vital that contractors train supervisors on the rule’s requirements so that contractors are not interfering or discriminating with an employee’s right to paid sick leave.