SEYFARTH SHAW

Management Alert

DOL Publishes Final Rule on Federal Contractor Paid Sick Leave Requirements

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Seyfarth Synopsis: *On September 29, 2016, the United States Department of Labor ("DOL") published its much anticipated Final Rule extending paid sick leave benefits to many employees of certain federal contractors and subcontractors. The Final Rule effectively implements Executive Order 13706 from September 2015 (the "Order").*

In advance of the Final Rule, more than 35,000 individuals and entities, including Seyfarth Shaw, submitted comments on the DOL's earlier Proposed Rule[1] for federal contractor paid sick leave. While the Final Rule remedies certain shortcomings from the Proposed Rule, a number of provisions that likely will create complex compliance challenges for covered companies remain.

Below are some of the highlights from the Final Rule. A more detailed client alert analyzing the nuances, and practical effects of the Final Rule, and offering compliance suggestions, will follow.

- **Covered Employers.** As expected, the Final Rule's requirements will apply to any "new contract," which is defined to cover both new and replacement contracts entered into, whether or not through solicitations, on or after January 1, 2017. Contracts and any level of associated subcontracts are covered. To be covered, a contract must fall into one of the four categories set forth in the Order and Proposed Rule.[2]
- **Covered Employees.** The scope of potentially covered employees is notably broad as the Final Rule extends benefits to any individual who performs "work on or in connection with" a covered contract.[3] Similar to the DOL's rules implementing Executive Order 13658, Establishing a Minimum Wage for Contractors, the Final Rule contains a narrow exemption for employees who perform work "in connection with covered contracts" for less than 20 percent of their hours worked in a particular workweek. Notably, and as urged in Seyfarth Shaw's comments on the DOL's Proposed Rule, the DOL added an exclusion for certain employees covered by collective bargaining agreements (CBA). More specifically, if a CBA ratified before September 30, 2016 applies to an employee's work performed on or in connection with a covered contract, and the CBA provides the employee with at least 56 hours (or 7 days, if the CBA refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, the Final Rule does not apply to the employee until the date the agreement terminates or January 1, 2020, whichever is first. If such a CBA provides the employee with paid sick time (or paid time off that may be used

1 For a detailed summary and analysis of the DOL's Proposed Rules on federal contractor paid sick leave requirements, see our prior Alert.
2 These categories include: (1) procurement contracts for construction covered by the Davis-Bacon Act ("DBA"); (2) contracts for services covered by the Service Contract Act ("SCA"); (3) contracts for concessions, including any concessions contracts excluded from coverage under the SCA by DOL regulations at 29 CFR 4.133(b); and (4) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.
3 Employees' wages from the covered contract must also be governed by the SCA, DBA, or Fair Labor Standards Act.

for reasons related to sickness or health care) each year, but the amount provided under the CBA is less than 56 hours (or 7 days), the contractor must provide covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing CBA in a manner consistent with either the Order and the Final Rule or the terms and conditions of the CBA.

- **Paid Sick Leave Accrual Rate and Annual Accrual Cap**. Covered employers must allow eligible employees to accrue paid sick leave at a rate of at least one hour for every 30 hours of work on or in connection with a covered contract, up to at least 56 hours per year. Importantly, and at the suggestion of several commenters, including Seyfarth Shaw, the Final Rule does not require that employers allow paid sick leave to accrue during time when an employee is not working but otherwise is or should be paid, e.g., PTO or vacation. The Final Rule also seeks to benefit employers by permitting them to "estimate the portion of an employee's hours worked" that are in connection with a covered contract as long as the estimate is reasonable and can be verified.
- **"Point in Time" Accrual Cap**. The Final Rule also imposes a 56-hour "point in time" accrual cap, meaning that employers can limit the amount of paid sick leave available for use at any point in time to 56 hours.
- **Frontloading Option**. The Final Rule expressly allows employers to avoid the accrual rate requirement by frontloading employees at least 56 hours of paid sick leave at the start of each accrual year.
- **Year-End Carryover.** Significantly, an employer must allow up to 56 hours of earned, unused paid sick leave to carryover at year-end, regardless of whether the employer uses an accrual or frontloading system.
- **No Annual Usage Cap**. The Final Rule expressly states that employers cannot set an annual or per event cap on paid sick leave usage.
- **Reasons for Use**. In addition to using paid sick leave for certain expected family members (e.g., child, parent, spouse, etc.), employees can use earned paid sick leave for any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.
- **Available Balance Notification**. In an important departure from the DOL's Proposed Rule, and heeding comments from multiple entities, including Seyfarth Shaw, employers are not required to notify employees of their available sick leave balance upon employee request or when the employee requests to use paid sick leave. Instead, employers only must provide this notice once each pay period or each month (whichever is shorter), upon separation of employment, and if the employee is rehired by the employer within 12 months of separation.
- **Reinstatement Upon Rehire**. An additional noteworthy deviation from the Proposed Rule, which also was a point raised by Seyfarth Shaw's comments to the DOL, is that the Final Rule does not require employers that opt to cash out an employee's earned, unused paid sick leave upon separation of employment to nonetheless reinstate the unused balance if the employee is rehired by the employer within 12 months of separation.

Stay tuned for our upcoming comprehensive analysis and suggestions for compliance. To stay up-to-date on Paid Sick Leave developments, **click here to sign up for Seyfarth's Paid Sick Leave mailing list**.

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