SEYFARTH SHAW

Management Alert

Seyfarth Submits Comments to U.S. DOL Regarding Proposed Regulations Establishing Paid Sick Leave for Federal Contractors

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Seyfarth Synopsis: Seyfarth Shaw submitted comments on behalf of the Firm and its clients responding to the U.S. Department of Labor's proposed regulations seeking to require certain parties that contract with the Federal Government to provide their employees with paid sick leave. Seyfarth also assisted in the preparation of comments on behalf of the U.S. Chamber of Commerce and the International Franchise Association, as well as the American Benefits Council.

On April 12th, Seyfarth Shaw submitted comments responding to the U.S. Department of Labor's (the "Department") notice of proposed rulemaking ("NPRM") to implement Executive Order 13706 (the "Order") and provide paid sick leave benefits to employees of certain federal contractors. Seyfarth submitted comments on behalf of the Firm and its clients, and assisted the U.S. Chamber of Commerce and International Franchise Association, and the American Benefits Council, with the preparation of their comments.

The impact of the Department's NPRM, if finalized, would be substantial. As we previously reported, the NPRM represents a significant departure from most, if not all, of the existing five state[1] and more than 25 municipal[2] paid sick leave ("PSL") laws in several respects, thereby adding unnecessary complexity to an already convoluted legal area. In particular, the NPRM would (1) force covered businesses to incur substantial costs and overcome daunting compliance obligations, (2) cause confusion among both covered employers and employees, and (3) increase the potential for litigation due to lack of clarity and poor interplay between the NPRM and existing mandatory paid sick leave laws. The Department has until September 30, 2016, the target date set by the Order, to issue a final rule.

As noted above, Seyfarth's comments, which are available here, focus on certain substantive requirements of the NPRM that deviate from the existing paid sick leave landscape. Some of these substantive requirements include, but are not limited to, the following:

- Employees will accrue PSL not just for all hours worked on or in connection with a covered contract, but for paid time off too--even for time that an employee should be paid.

1 The existing statewide mandatory PSL laws include: (1) Connecticut; (2) California; (3) Massachusetts; (4) Oregon; and (5) Vermont. For most covered employers, the Vermont law becomes effective on January 1, 2017.
2 The existing municipal PSL laws include: (1) San Francisco, CA; (2) Washington, D.C.; (3) Seattle, WA; (4) Long Beach, CA; (5) SeaTac, WA; (6) New York City, NY; (7) Jersey City, NJ; (8) Newark, NJ; (9) Passaic, NJ; (10) East Orange, NJ; (11) Paterson, NJ; (12) Irvington, NJ; (13) Los Angeles, CA; (14) Oakland, CA; (15) Montclair, NJ; (16) Trenton, NJ; (17) Bloomfield, NJ; (18) Philadelphia, PA; (19) Tacoma, WA; (20) Emeryville, CA; (21) Montgomery County, MD; (22) Pittsburgh, PA; (23) Elizabeth, NJ; (24) New Brunswick, NJ; (25) Spokane, WA; (26) Santa Monica, CA; and (27) Plainfield, NJ. The Santa Monica, CA law becomes effective on July 1, 2016. The Plainfield, NJ ordinance becomes effective on or about July 15, 2016. The Montgomery County, MD law becomes effective on October 1, 2016. The Spokane, WA law becomes effective on January 1, 2017. The Long Beach, CA, Los Angeles, CA, and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh, PA ordinance was enacted on August 3, 2015, however, in December 2015 the law was deemed "invalid and unenforceable" by a Pennsylvania state court (the city's appeal is pending).

- Employers must provide employees written notification of their available PSL balance often, including at least monthly, any time an employee requests to use PSL, and upon separation of employment.
- Although the NPRM allows employers to frontload 56 hours of PSL each year in lieu of accrual, it also expressly states that frontloading does not remove an employer's year-end carryover obligations.
- Employers must comply with both "annual" and "point in time" PSL accrual caps.
- Employers cannot set an annual cap on the amount of PSL employees can use.
- If an employer chooses to cash out an employee's accrued, unused PSL upon separation of employment, the employer still must reinstate the employee's unused sick leave if the employee is rehired within 12 months of separation.
- Employees can use PSL for an expansive, vague, unmanageable list of covered family members, even "close friends," that goes far beyond comparable lists in existing PSL laws.
- Employers must comply with burdensome recordkeeping obligations.

Below are specific highlights from Seyfarth's comments, starting with employers being subjected to too many inconsistent state, local and now federal laws:

> [A] major concern companies have with current PSL compliance is a lack of uniformity and consistency from law to law. The patchwork of existing PSL laws adds an incredible load on employers, especially those with nationwide operations…With new laws seemingly enacted on a monthly basis, the situation is only getting worse. The federal government needs to step in and remedy this problem. However, absent a current solution, the Department should not enter this arena and inflict greater compliance obligations on an already afflicted employer population. Instead, we strongly urge the Department to consider deferring to existing state and/or municipal PSL laws so that the PSL patchwork does not become even more perplexing.
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> **The Department Should Not Allow Paid Sick Leave To Accrue For Time That An Employee Spends In Paid Time Off Status**
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> Allowing employees to accrue PSL when they are not actually performing work is a major departure from state and municipal PSL laws. In fact, to our knowledge *no* existing state or local PSL law imposes such a strict burden on covered businesses…[This requirement] also will undoubtedly result in employees reaching the NPRM's 56-hour annual PSL accrual cap much faster than they otherwise would. Paid time off status is not just limited to sick leave, and instead could include a multitude of leaves and paid absences -- sick, vacation, and personal leave, paid time off ("PTO"), paid family leave, short-term disability, workers' compensation, jury duty, witness duty, voting/election time, and holidays -- depending on the relevant jurisdiction and the employer's policies. Employees who are in paid time off status for several weeks during a year, which is often greater for federal contractors than for many other businesses given the vacation and holiday pay obligations that accompany the prevailing wage statutes, will accrue at least several days of PSL faster than they would under state and local PSL laws.
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> **Frontloading The Required 56 Hours of Paid Sick Leave Each Year Should Remove An Employer's Year-End Carryover Obligations**
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> The NPRM expressly states that frontloading employees with an annual lump grant of at least 56 PSL hours will not excuse the employer's year-end carryover obligations. In other words, employers must allow employees to carryover up to 56 hours of unused PSL from one year to the next, even if the employer provides employees with 56 PSL hours at the start of each year.
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> There are several issues and ambiguities created by the NPRM's frontloading provision. First, only one existing state or local PSL law -- Tacoma, WA -- states that frontloading a lump grant of sick leave does not get rid of the employer's carryover obligations, and this language appears in the law's nonbinding administrative guidance rather than in the actual law itself. Second [ ], a primary purpose for requiring employers to carryover unused PSL from year to year is so that employees have some PSL available in case

they need it for a covered absence at the start of the new year. The carried over hours supplement the employee's lack of accrued hours at this time because it takes several weeks of work for employees to earn even a few PSL hours at a one hour for every 30 hours worked accrual rate. However, this rationale does not exist when an employer frontloads employees a lump grant of PSL at the start of each year that is equal to the PSL law's required accrual cap [b]ecause the lump grant…is available for immediate use.

Third, the Department's statement that the NPRM's frontloading provision "provides employees with the full amount of paid sick leave contemplated by the Executive Order at the beginning of each accrual year" is clearly inaccurate. If an employee has ***any amount of unused PSL, up to 56 hours, at year end*** and the employer frontloads that employee 56 hours of PSL each year, the employee will receive ***more PSL than the full amount contemplated by Executive Order 13706***. Any such employee ***will receive between 57 and 112 PSL hours*** at the start of the new year -- ***not 56 hours as contemplated by the Executive Order*** -- and will have each hour available for immediate use for the remainder of that year.

The Department Should Set An Annual Limit On The Amount Of Paid Sick Leave Employees Can Use

An unlimited annual PSL usage cap, as set forth in the NPRM, is unnecessary and would overburden covered federal contractors…The Department provides no explanation of why it seeks to enforce an unlimited usage cap. It is not required by Executive Order 13706. It also is not necessary for employees to receive and use a full 56 hours of PSL each year. Additionally, the Department lacks support from existing PSL laws for imposing this cap because an unlimited PSL usage cap appears in only a few of the more than 30 existing state and municipal PSL laws… If the Department's final rule contains an unlimited PSL usage cap, covered businesses would be expected to shoulder the cost of anywhere from 56 PSL hours to several weeks of PSL depending on an employee's carryover balance from the prior year and hours accrued in the current year. As noted in prior comments, this cost is magnified for employers that are covered by one or more of the existing PSL laws… For these reasons, the Department should set an annual PSL usage cap -- either at 56 hours (the number most likely anticipated by Executive Order 13706) or, less preferably, 80 hours (the annual usage cap imposed by the Montgomery County, MD PSL law, which conveniently also imposes a 56-hour annual PSL accrual cap) -- in its final rule.

The Department Should Add An Exemption For Employees Covered By A Valid Collective Bargaining Agreement

Unlike many of the existing state and local PSL laws, the NPRM does not include an exemption for employees covered by a collective bargaining agreement ("CBA"). Without some form of exemption for these employees, the Department will be ignoring the tradeoffs, compromises and effort that come with executing a CBA, and will be undermining the entire bargaining process.

To lessen the already substantial compliance obligations on covered federal contractors, the Department can craft an exemption for employees covered by a CBA in several ways. First, the Department can add an exception to the definition of "Employee," which can state that employees covered by a CBA are excluded from coverage under the Department's final rule. The California statewide PSL law contains such a provision that the Department can use as a template.[3] Second, the Department can add language, similar to that of many existing PSL laws, which states something along the lines of "[a]ll or any portion of the applicable requirements of the Order and this part shall not apply to Employees covered by a collective bargaining agreement, to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms."[4] Third, the Department can delay subjecting covered employers' union employees to its final rule until after the expiration of the existing CBA, assuming the CBA is in effect on or before January 1, 2017.[5]

3 Cal. Lab. Code § 245.5(a)(1) (2015) ("'Employee' does not include…[a]n employee covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid leave or paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate").
4 Seattle Mun. Code, § 14.16.120 ("The provisions of this chapter shall not apply to any employees covered by a bona fide collective bargaining agreement to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms"); Newark Mun. Code, tit. XVI, ch. 18, § 16:18-2(1) (Ord. No. 13-2010) ("All or any portion of the applicable requirements of this Ordinance shall not apply to Employees covered by a collective bargaining agreement, to the extent that such requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms").
5 N.Y.C. Admin. Code, tit. 20, ch.8., Local Law 7, § 14 ("This local law shall take effect on April 1, 2014, provided that in the case of employees covered by a valid collective bargaining agreement in effect on such date, this local law shall take effect on the date of the termination of such agreement").

Next Steps

As noted above, the Department has until September 30, 2016 to publish a final rule implementing the Order. Once the Department issues its final rule, the Federal Acquisition Regulatory Council will have 60 days to issue regulations in the Federal Acquisition Regulation to be included in certain covered government contracts. In the meantime, covered employers should take steps now to ensure that they are aware of what will need to be done to comply with the Order and are in position to execute on those changes and update their policies when the final rule is issued.

If you would like further information, please contact your Seyfarth attorney, Joshua D. Seidman at jseidman@seyfarth.com, Ann Marie Zaletel at azaletel@seyfarth.com, Tracy M. Billows at tbillows@seyfarth.com, Alexander J. Passantino at apassantino@seyfarth.com, or Dana Howells at dhowells@seyfarth.com.