SEYFARTH SHAW

Management Alert

DOL Publishes Proposed Rules Requiring Paid Sick Leave for Federal Contractors

By Joshua D. Seidman, Ann Marie Zaletel, Tracy M. Billows, and Alexander J. Passantino

Following up on Executive Order 13706 from September 2015 (the "Order"), earlier today the United States Department of Labor ("DOL") took a major step toward extending paid sick leave benefits to employees of federal contractors when it released a set of Proposed Rules to implement the Order. The public has until March 28, 2016 to submit comments on the Proposed Rules. This is a considerably short timeframe indicating the DOL's desire to meet the Order's September 30, 2016 target date for issuing final regulations, which has not always been the case on other executive orders. Once the DOL issues final regulations, the Federal Acquisition Regulatory Council will have 60 days to issue regulations in the Federal Acquisition Regulation ("FAR") to be included in certain covered government contracts.

The Proposed Rules represent a significant departure from most, if not all, of the existing five state[1] and more than 25 municipal[2] paid sick leave laws in several respects, including:

- Employees will accrue paid sick leave not just for all hours worked on or in connection with a covered contract, but for all time that an employee is or should be paid for such work, meaning time an employee spends working or in paid time off status.
- Employers must provide employees written notification of their available sick leave balance at various points, including at least monthly, any time an employee requests to use sick leave, and upon separation of employment.
- Although the Proposed Rules allow employers to frontload 56 hours of paid sick leave each year in lieu of accrual, they also expressly state that frontloading does not remove an employer's year-end carryover obligations.
- Employers must comply with both "annual" and "point in time" sick leave accrual caps, which are explained in more detail below.
- Employers cannot set an annual cap on the amount of paid sick leave employees can use.
- If an employer chooses to cash out an employee's accrued, unused sick leave 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.

Many of the Proposed Rules' key provisions, which clarify and expand on many of the topics addressed in the Order, are

1 The five states with paid sick leave laws are Connecticut, California, Massachusetts, Oregon, and Vermont. On February 17, 2016, Vermont's legislature passed a statewide paid sick leave law. Governor Peter Shumlin has stated that he will sign the bill. Once signed, the Vermont law will become effective on January 1, 2017.
2 The current municipal mandatory paid sicl leave 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, NJ; and (26) Santa Monica, CA. The Montgomery County, MD law becomes effective on October 1, 2016. The Elizabeth, NJ ordinance becomes effective on March 2, 2016. The Santa Monica, CA law becomes effective on July 1, 2016. The Long Beach, Los Angeles, and SeaTac, WA ordinances only apply to hospitality and/or transportation employers. The Pittsburgh ordinance was enacted on August 3, 2015, however, the law was recently deemed "invalid and unenforceable" by a Pennsylvania state court.

summarized below.

Which Employers Are Covered?

The Proposed Rules explain that both federal contractors and subcontractors are covered businesses. The requirements specifically will apply to new contracts or "contract-like instruments" or replacements for expiring contracts or contract-like instruments entered into, whether or not through solicitations, after January 1, 2017. To those contractors familiar with the DOL's rules implementing Executive Order 13658, Establishing a Minimum Wage for Contractors (the "Minimum Wage EO"), the definitions will be quite familiar. The Proposed Rules contain a lengthy definition of "contracts or contract-like instruments." Notably, the definition states that "[t]he term contract shall be interpreted broadly."

To be covered, the contract or contract-like instrument must be one of the following:[3]

- a procurement contract for construction covered by the DBA;
- a contract for services covered by the SCA;
- a contract for concessions, including any concessions contract excluded from coverage under the Service Contract Act by DOL regulations at 29 CFR 4.133(b), or
- a contract in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Proposed Rules also contain certain exclusions from coverage, which include (a) grants, (b) contracts and agreements with and grants to Indian Tribes, (c) procurement contracts for construction that are not covered by the DBA, and (d) contracts for services that are not covered by the SCA.

Which Employees Are Covered?

The Proposed Rules define "employee" as "any person engaged in performing work on or in connection with a contract covered by the Executive Order, and whose wages under such contract are governed by the Service Contract Act, the Davis-Bacon Act, or the [FLSA]." As is the case with the Minimum Wage EO regulations, the Proposed Rules contain a narrow exemption for employees who perform work duties necessary to the performance of the contract but who do not perform the specific work called for by the contract and who spend less than 20 percent of their hours worked in a particular workweek performing work in connection with covered contracts.

How Much Paid Sick Leave Can Employees Accrue, Use, and Carryover?

The Proposed Rules contain a number of updates regarding employees' paid sick leave accrual, use, and year-end carryover. The Proposed Rules state that employers must allow employees to accrue paid sick leave at a rate of one hour of sick leave for every 30 hours of work on or in connection with a covered contract,[4] up to at least 56 hours per year.[5] Alternatively, the Proposed Rules expressly allow 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.

While the frontloading option may seem attractive, the Proposed Rules state that employers who frontload paid sick leave

---

3 The wages of employees under such agreements also must be governed by the Davis-Bacon Act ("DBA"), the Service Contract Act ("SCA"), or the Fair Labor Standards Act ("FLSA"). Consistent with the Order, the Proposed Rules note that employees who are exempt from the FLSA's minimum wage or overtime provisions are included in the "employee" definition.
4 Importantly, the Proposed Rules state that "hours worked includes all time for which an employee is or should be paid, meaning time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or any other paid time off provided by the contractor."
5 "An accrual year is a 12-month period beginning on the date an employee's work on or in connection with a covered contract began or any other fixed date chosen by the contractor, such as the date a covered contract began, the date the contractor's fiscal year begins, a date relevant under State law, or the date a contractor uses for determining employees' leave entitlements under the [Family and Medical Leave Act]" ("FMLA").

nevertheless must allow employees to carryover at least 56 hours of earned, unused paid sick leave from one year to the next (which is different from how many other existing paid sick leave laws handle this issue). Assuming an employee carries over some earned, unused sick leave to the next year, it is unclear from the Proposed Rules whether an employer must frontload the full 56 hours of paid sick leave at the start of the year, or if the employer can just frontload employees the difference between the 56 hours and the amount of carried over time. The Proposed Rules note that any carried over paid sick leave will not count toward the employee's annual 56-hour accrual limit, meaning that even if the employee carries over 56 hours of paid sick leave from the prior year, the employee can still accrue up to 56 hours in the current year, subject to the below limitations.

Significantly, the Proposed Rules expressly state that employers **cannot** set an annual or per event cap on paid sick leave usage.[6] Instead, the Proposed Rules declare that an employer can limit the amount of paid sick leave available for use at any point in time to 56 hours, i.e., set a "point in time" accrual cap. As a result, an employer can freeze employees' paid sick leave accrual if the combination of accrued and carried over sick leave in the employee's bank is 56 hours, even if the employee has accrued less than 56 hours of paid sick leave since the start of the accrual year.

Consider the following illustrative example: *Employee carries over 30 hours of accrued, unused sick leave from Year 1 to Year 2. By June of Year 2, Employee has accrued an additional 26 hours of sick leave, bringing Employee's total sick leave balance to 56 hours (Employee has not taken any sick days in Year 2). At that time, Company is not required to allow Employee to accrue any additional sick leave, even though Employee has only accrued 26 hours in Year 2 because Employee's sick leave balance is now at the maximum 56-hour "point in time" accrual cap. However, as soon as Employee uses some paid sick leave and drops below the 56-hour "point in time" cap, sick leave accrual resumes immediately until Employee again reaches the 56-hour "point in time" cap.*

Assume, for example, Employee uses 40 hours of sick leave in July of Year 2, leaving her bank with 16 remaining hours. Under the Proposed Rules, Employee now resumes accruing sick leave and may accrue an additional 30 sick leave hours in Year 2, at which point Employee will have reached the 56-hour "annual" accrual cap. If Employee accrues the full 30 sick leave hours by December of Year 2, and gets sick before the end of the year, Employee can use as many of her available 46 sick leave hours as needed, even though Employee may wind up using more than 56 hours of sick leave in Year 2, which is permitted under the Regulations' unlimited usage cap.

Under What Circumstances May Employees Use Sick Leave?

Employees can use accrued paid sick leave for the employee's or the employee's covered family member's mental or physical illness, injury or medical condition, or need to obtain diagnosis, care or preventive care from a health care provider, or for certain reasons relating to domestic violence, sexual assault, or stalking of the employee or the employee's covered family member. Covered family members include the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, the latter of which is broadly defined as "any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship."

Guidance in the Proposed Rules note that "any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship" can include, but is not limited to, "such relationships as grandparent and grandchild, brother- and sister-in-law, fiancé and fiancée, cousin, aunt and uncle, other relatives…, and close friend."

Do Employers Need to Notify Employees of Their Available Sick Leave Balance?

6 An employer shall account for an employee's use of paid sick leave in increments of no greater than one hour.

As noted above, the Proposed Rules require that employers inform their employees, in writing, of the employee's available sick leave in various circumstances, including: (a) no less than monthly; (b) any time when the employee requests to use paid sick leave; (c) when the employee requests such information (but no more often than once per week); (d) upon separation of employment; and (e) when an employee is rehired by the employer within 12 months of separation of employment.

What Notice Must Employees Provide When Using a Sick Day?

The Proposed Rules confirm that covered businesses must allow employees to use accrued sick leave upon the employee's oral or written request. If the need to use sick leave is foreseeable, the request must be made at least seven calendar days before the date the leave is to begin. If the need to use sick leave is unforeseeable, the request must be made as soon as is practicable.[7]

Employers must respond to requests to use paid sick leave as soon as is practicable. Notably, the Proposed Rules allow employers to deny an employee's paid sick leave request if the employer provides a written explanation for the denial to the employee. Denial is appropriate if, for example, (a) the employee did not provide sufficient information about the need for paid sick leave, (b) the reason given is not consistent with the permitted uses of paid sick leave, (c) the employee did not indicate when the need would arise, (d) the employee has not accrued, and will not have accrued by the date of leave anticipated in the request, a sufficient amount of paid sick leave to cover the request, or (e) the request is to use paid sick leave during time the employee is scheduled to be performing non-covered work.

Can Employers Require Certification or Documentation of Proper Use?

Employers generally can require an employee to provide documentation or certification of the need for sick leave only if the employee has been absent for three or more consecutively scheduled full workdays. Employers can only require such documentation if employees are informed about the requirement before the employee returns to work. Employers can require that the documentation be provided within 30 days of the first day of the employee's absence. The Proposed Rules list certain circumstances when an employer can retroactively deny an employee's sick leave request based on a failure to comply with the employer's certification/documentation requirement.

Must Unused Sick Leave Be Paid Upon Employment Separation?

Consistent with the Order, the Proposed Rules confirm that when an employee's employment relationship ends, whether by termination, resignation, retirement, or otherwise, the covered business has no obligation to reimburse the employee for accrued, unused sick leave. However, any accrued sick leave must be restored to an employee who is rehired within 12 months of separation from employment. Importantly, the Proposed Rules state that an employer must reinstate the employee's accrued, unused sick leave balance even if it cashes out an employees accrued, unused sick leave upon termination of employment.

How Do the Proposed Rules Interact With Other Laws?

The Proposed Rules contain detailed information about how the Order and the Proposed Rules interact with other laws, including the SCA, DBA, FMLA, and state and local paid sick leave laws.[8] The Proposed Rules state that compliance with it and the Order shall not "excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights." As a result, covered businesses subject to any of the existing state or municipal paid sick leave laws, likely will need to comply with the most generous aspects of the Order/Rules and the applicable state or local laws.

7 "As soon as is practicable" means as soon as both possible and practical, taking into account all of the facts and circumstances of the individual case.
8 The leave required under the Order and Proposed Rules is in addition to any vacation requirements under the DBA and SCA. In addition, sick leave provided under the Order and Proposed Rules cannot be used to satisfy a contractor's and health and welfare fringe benefit obligations.

The Proposed Rules note that an employer's existing paid time off policy will satisfy it and the Order if the policy meets a number of criteria, including the requirements for employee eligibility, permitted uses of sick leave, accrual, carryover, reinstatement upon rehire, payment of sick leave, minimum increments for use, requests for using sick leave, reasonable documentation, and the prohibitions against interference, discrimination, and recordkeeping violations. The key is the existing policy must meet all of the requirements of the Order and proposed (and ultimately, final) Rules, a process that will be extremely challenging for employers in practice.

What Should Employers Do Now?

Employers should take steps now to ensure that they comply with the Proposed Rules and the Order, and that they are in position to update their policies when final regulations are issued. These are among the actions to consider:

- Review sick leave or PTO policies and procedures to ensure that they meet at least the minimum requirements of the Order and Proposed Rules;
- Develop and submit comments on the Proposed Rules, specifically explaining why certain aspects of the Proposed Rules are flawed;
- Determine the expiration date of existing federal government contracts and, if necessary, start developing paid sick leave policies that comply with the Order and Proposed Rules for any employees who are not covered under existing paid sick leave or PTO policies; and
- Monitor the DOL and Federal Acquisition Regulatory Council websites for updates on final regulations.

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