

Fact Sheet: Final Rule to Implement Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors

On September 7, 2015, President Barack Obama signed Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors* (EO). The Executive Order requires certain employers that contract with the Federal Government to provide their employees with up to seven days of paid sick leave annually, including for family care and absences resulting from domestic violence, sexual assault, and stalking. The Executive Order directs the Secretary of Labor to issue regulations to implement the Order's requirements. After considering comments to a proposed version of such regulations, the Department published the regulations in a Final Rule on September 30, 2016. This fact sheet summarizes the Final Rule.

*** Key Provisions of the Final Rule ***

The Department estimates that the Final Rule will provide paid sick leave to about 1.15 million workers employed by Federal contractors. The Final Rule specifies the contracts and employees covered by the EO, as well as rules for how sick leave will accrue, when it can be used, and how the Department will ensure that covered employers comply with these new requirements.

Coverage

Executive Order 13706 applies to new contracts and replacements for expiring contracts with the Federal Government that result from solicitations issued on or after January 1, 2017 (or that are awarded outside the solicitation process on or after January 1, 2017). Coverage of contracts and employees under the Final Rule is nearly identical to coverage under the regulations implementing Executive Order 13658, which requires the payment of a minimum wage to employees of Federal contractors, except that the Final Rule also covers employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions and certain contracts with the U.S. Postal Service.

Under the Final Rule, Executive Order 13706 applies to four major categories of contractual agreements:

- (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA);
- (2) service contracts covered by the McNamara-O'Hara Service Contract Act (SCA);
- (3) concessions contracts, including any concessions contracts excluded from the SCA by the Department of Labor's 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.

Furthermore, any subcontract of a covered contract that (like the upper-tier contract) falls into one of these four categories is subject to the paid sick leave requirements.

Procurement Contracts for Construction

Under the Final Rule, any contract covered by the DBA and its implementing regulations is subject to the Executive Order's requirements. The Executive Order does not apply, however, to contracts that are subject only to the Davis-Bacon Related Acts, *i.e.*, Acts under which Federal agencies provide financial and other assistance to construction projects through grants, loans, guarantees, insurance and other methods, but do not directly procure construction services.

Service Contracts

Under the Final Rule, both procurement and non-procurement contracts that are subject to the SCA and its implementing regulations are subject to the Executive Order's requirements.

Contracts for Concessions

The Final Rule defines the term "concessions contract" to mean a contract under which the Federal Government grants a right to use Federal property, including land or facilities, for furnishing services. The term "concessions contract" includes, but is not limited to, a contract whose principal purpose is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, and/or recreational equipment, regardless of whether the services are of direct benefit to the Government, its personnel, or the general public. The Final Rule thus extends coverage of the Executive Order to all concession contracts with the Federal Government, including those excluded from SCA coverage by regulations, such as concession contracts with the Federal Government to operate souvenir shops or to provide food or lodging in national parks.

Contracts in Connection with Federal Property or Lands and Related to Offering Services for Federal Employees, Their Dependents, or the General Public

To the extent that such agreements are not otherwise covered by the SCA, the Final Rule interprets this provision as generally including leases of Federal property, including space and facilities, and licenses to use such property entered into by the Federal Government for the purpose of offering services for Federal employees, their dependents, or the general public.

Contracts that Are Not Covered by the Executive Order and the Final Rule

The Final Rule contains certain narrow exclusions from coverage for the following types of contractual agreements: (1) grants; (2) contracts and agreements with and grants to Indian Tribes under Public Law 93-638, as amended; (3) any procurement contracts for construction that are not subject to the DBA (*i.e.*, procurement contracts for construction under \$2,000); and (4) any contracts for services, except for those otherwise expressly covered by the Final Rule, that are exempted from coverage under the SCA or its implementing regulations. The Final Rule also provides that the Executive Order does not apply to contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the Federal Government, including those subject to the Walsh-Healey Public Contracts Act.

Employees Who Are Entitled to Paid Sick Leave Under the Executive Order

The Final Rule provides that the Executive Order applies to any person engaged in performing work on or in connection with a contract covered by the Executive Order whose wages under such contract are governed by the SCA, DBA, or Fair Labor Standards Act (FLSA), including employees who qualify for an exemption from the FLSA's minimum wage and overtime provisions. The Final Rule includes a narrow exemption from the rule's accrual requirements for employees who perform work duties necessary to the performance of a covered contract (but who are not directly engaged in performing 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 such contracts.

Collective Bargaining Agreements (CBA)

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) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, the requirements of the Executive Order and the Final Rule will not apply to the employee until the date the agreement terminates or January 1, 2020, whichever is first.

If the CBA provides the employee with paid sick time (or paid time off that may be used 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 the EO and Final Rule or the terms and conditions of the CBA.

Contracting Agency Obligations

The Final Rule sets forth the responsibilities of executive departments and agencies that are parties to covered contracts. These contracting agencies are responsible for ensuring that a contract clause setting forth the paid sick leave requirements under the Executive Order is included in any new contracts or solicitations for contracts covered by the Order. Contracting agencies are also responsible for withholding funds when a contractor or subcontractor fails to abide by the terms of the applicable contract clause, such as by failing to provide the required paid sick leave, and for forwarding any complaints alleging a contractor's non-compliance with Executive Order 13706 to the Wage and Hour Division (WHD).

Paid Sick Leave

Accrual

Under the Final Rule, employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract. As to employees for whom contractors are not already required to keep records of hours worked pursuant to the DBA, SCA, or FLSA (such as employees who are employed in a bona fide executive, administrative, or professional capacity under FLSA regulations), contractors can use the assumption that the employees are working on or in connection with covered contracts for 40 hours each week. Contractors are also permitted to use an estimate of time their employees work in connection with (rather than on) a covered contract as long as the estimate is reasonable and based on verifiable information.

The Final Rule also 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.

Accrual is calculated, and employees are to be notified in writing of the amount of paid sick leave they have available, at the end of each pay period or each month, whichever interval is shorter.

Maximum Accrual, Carryover, Reinstatement, and Payment for Unused Leave

The Final Rule provides that contractors may limit the amount of paid sick leave employees may accrue to 56 hours each year and must permit employees to carry over accrued, unused paid sick leave from one year to the next. The Final Rule also allows contractors to limit the amount of paid sick leave employees have accrued to 56 hours at any point in time. Furthermore, contractors are required to reinstate employees' accrued, unused paid sick leave if the employees are rehired by the same contractor within 12 months after a job separation unless contractors provide payment to employees for accrued, unused paid sick leave upon separation. Contractors are not required to pay employees for accrued, unused paid sick leave at the time of a job separation ("cash-out"); however, if they do provide cash-out, they will not be required to reinstate unused leave.

Use

The Executive Order explains that an employee may use paid sick leave for an absence resulting from: (i) physical or mental illness, injury, or medical condition of the employee; (ii) obtaining diagnosis, care, or preventive care from a health care provider by the employee; (iii) caring for 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 who has any of the conditions or need for diagnosis, care, or preventive care described in (i) or (ii); or (iv) domestic violence, sexual assault, or stalking, if the time absent

from work is for the purposes described in (i) or (ii) or to obtain additional counseling, seek relocation, seek assistance from a victim services organization, take related legal action, or assist an individual related to the employee as described in (iii) in engaging in any of these activities. The Final Rule provides definitions of these terms.

Under the Final Rule, contractors must allow employees to use paid sick leave in increments as small as one hour (with a narrow exception for employees whose work makes it physically impossible to leave or return to the job during a shift). Contractors may only limit the amount of paid sick leave an employee uses at once or per year on the basis of how much paid sick leave the employee has available. When employees use paid sick leave, contractors must provide them with the same regular pay and benefits they would have received if they had not used the leave, except that they need not earn additional paid sick leave during that time.

Requests to Use Leave

Under the Final Rule, an employee's request to use paid sick leave may be made orally or in writing. A leave request must be made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as is practicable. A contractor is required to communicate any denial of a request to use paid sick leave in writing, with an explanation for the denial—which cannot be based on whether the employee has found a replacement worker or on the contractor's operational needs.

Certification or Documentation of the Need to Use Leave

Under the Final Rule, a contractor may require certification only for absences of three or more consecutive full days, and the employee must have received notice of the requirement to provide certification or documentation before he or she returns to work. If paid sick leave is used 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, certification must be issued by a health care provider. If the paid sick leave is used for an absence resulting from domestic violence, sexual assault, or stalking, documentation could be from a health care provider, counselor, representative of a victim services organization, attorney, clergy member, family member, or close friend; and self-certification is also permitted. Records relating to medical histories shall be maintained as confidential records, and contractors are prohibited from disclosing any verification information and are required to maintain confidentiality about domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

Interaction with Other Laws and Paid Time Off (PTO) Policies

The Final Rule explains how the paid sick leave requirements interact with contractors' obligations under other laws. It explains that a contractor may not use paid sick leave required by the Order and Final Rule toward the fulfillment of its SCA or DBA obligations. It also explains that a contractor's obligations under the Executive Order and Final Rule have no effect on its obligations to comply with, or ability to act pursuant to, the Family and Medical Leave Act (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 Final Rule. With respect to state or local paid sick time laws, the Final Rule explains that contractors must comply with both any such law that applies as well as the Order and Final Rule, but contractors may satisfy their EO obligations by providing paid sick time that also fulfills the requirements of a State or local law provided that the paid sick time is accrued and may be used in a manner that meets or exceeds all of the requirements of the EO and Final Rule. Where the requirements of an applicable state or local law and the Final Rule differ, satisfying both will require a contractor to comply with the requirement that is more generous to employees.

The Final Rule also explains that a contractor's existing PTO policy can fulfill the paid sick leave requirements of the Executive Order as long as it provides employees with at least the same rights and benefits as the Final

Rule requires. In other words, if a contractor provides 56 hours of PTO that meets the requirements described in the Order and the Final 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. The Final Rule also addresses PTO policies that provide more than 56 hours of leave: a contractor may choose to either (1) provide all PTO used for the purposes described in the Final Rule in compliance with all of the rule's requirements or (2) track, and make and maintain records reflecting, the amount of paid time off an employee uses for the purposes described in the rule, in which 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.

Multiemployer Plans

The Final Rule also permits a contractor to fulfill its obligations under the Order jointly with other contractors who make contributions to a multiemployer plan (maintained pursuant to one or more CBAs) on behalf of employees who receive access to paid sick leave that complies with the Order.

Enforcement Procedures

Under the Final Rule, complaints may be filed with the WHD by any person or entity that believes a violation of the Executive Order or its implementing regulations has occurred. The Final Rule contains a mechanism for WHD investigations and informal complaint resolution, as appropriate; it also specifies remedies and sanctions for violations of the Executive Order and its implementing regulations, including the payment of damages and debarment. The Final Rule also includes an administrative process, including administrative hearings, to resolve disputes of fact or law.

For additional information, visit our Wage and Hour Division Website, www.wagehour.dol.gov, and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

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