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Department of Labor Issues Final Rule Requiring Federal Contractors to Provide Paid Sick Leave

By Rebecca C. Rizzo, Glenn Sweatt, Julia E. Judish and Richard B. Oliver

On September 30, 2016, the Department of Labor (DOL) published the Final Rule implementing President Obama's 2015 Executive Order 13706, "Establishing Paid Sick Leave for Federal Contractors" (EO 13706) requiring federal contractors and subcontractors to provide their employees working on covered government contracts with up to seven days of paid leave per year for covered purposes. Although the Executive Order title references "sick leave," the paid leave must also be available for absences for family care and absences resulting from domestic violence, sexual assault, and stalking. The DOL estimates that this Final Rule will provide paid sick leave to about 1.15 million workers.

The Final Rule clarifies the coverage of the regulations, the rules for the accrual, carry-over, and use of this required paid leave, and the interplay between the paid leave required under EO 13706 and other laws. Notably, the Final Rule makes clear that the benefits conferred by EO 13706 will be in addition to those benefits that employers are currently required to provide to employees covered by the Service Contract Act (SCA) and the Davis Bacon Act (DBA). The Final Rule applies to new contracts with the federal government that result from solicitations issued on or after January 1, 2017, contracts awarded outside of the solicitation process after January 1, 2017, or existing contracts that are extended or modified after January 1, 2017.

Coverage on Covered Contracts

The Executive Order's paid leave requirements will apply to employees of government contractors and subcontractors working on covered federal contracts.

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 EO 13706 also covers employees who are exempt from the FLSA's minimum wage and overtime provisions and certain contracts with the U.S. Postal Service. Covered contracts are those solicited on or after January 1, 2017 and include:

- procurement and non-procurement services contracts covered by the SCA;
- procurement contracts for construction covered by the DBA;
- a contract or contract-like instrument for concessions, including any concessions contract excluded by DOL regulations at 29 CFR 4.133(b); and
- a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

A subcontract on any covered contract that falls within these categories is also subject to the Executive Order's paid leave requirements.

Covered contracts will *not* include:

- construction-related contracts where the federal government is not directly procuring construction services, such as where federal agencies provide financial and other assistance to construction projects through grants, loans, insurance or other methods rather than through a direct procurement contract;
- construction contracts not subject to DBA (i.e. those valued at less than $2000);
- grants;
- contracts and agreements with and grants to Indian tribes under Public Law 93-638 as amended;
- any contract for services that is exempted from coverage under the SCA, unless the contract falls within a category expressly covered by the Final Rule; and
- any contract for manufacturing or furnishing of materials, supplies, articles or equipment to the federal government, including those subject to the Walsh Healy Public Contracts Act.

Covered Employees

The paid leave requirement applies to all employees performing services on or in connection with the covered contract or any lower-tier subcontract that supports the covered prime contract, if the employee's wages are governed by the DBA, the SCA, or the FLSA (with respect to either exempt or nonexempt employees). Work is "in connection with" a covered contract if the work activities are necessary to the performance of a covered contract, even if the employee is not directly engaged in performing the specific services called for by the contract itself (for example,, a security guard patrolling a construction worksite where DBA-covered work is being performed or a clerk who processes the payroll for SCA contracts). The Final Rule contains a narrow exemption from the paid leave accrual requirements for employees who are

not directly engaged in performing the specific work called for by the contract, and who spend less than 20 percent of their time in a given work week performing work in connection with such contracts.

Accrual of Paid Leave

The Final Rule requires covered federal contractors and subcontractors at any tier to provide all employees working on covered contracts with at least one hour of accrued paid leave for every 30 hours worked for hours worked on or in connection with the four types of covered contracts. Contractors may 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.

Both exempt and non-exempt covered employees are entitled to accrue paid leave. Contractors may cap the annual accrual of paid leave at a minimum of 56 hours per accrual year (i.e., the 12-month period after the employee first becomes entitled to accrue paid leave or another fixed date chosen by the contractor for all similarly situated employees, such as the start of the contractor's fiscal year). Employees must be permitted to carry over their accrued paid leave from one year to the next and, if an employee is rehired by a covered contractor within 12 months after a job separation, the contractor must reinstate the employee's accrued paid leave. Contractors, however, are not required to pay for any accrued but unused paid sick leave upon termination of employment. The Final Rule also creates an option for contractors to frontload compliance by providing employees with at least 56 hours of paid leave at the beginning of the accrual year (or, on a pro-rated basis, when the employee first begins work on or in connection with a covered contract) rather than having the employee accrue leave based on hours worked. If the contractor uses the accrual method, the Final Rule allows contractors to choose between tracking hours for exempt employees or instead allowing exempt employees to accrue leave based on the presumption that the employees were working on or in connection with a covered contract for 40 hours per week.

Contractors must inform covered employees, in writing, of the amount of paid leave that the employee has accrued, but not used, at least once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid leave.

Contractors who maintain an existing Paid Time Off (PTO) policy that provides employees with the same rights and benefits as the Final Rule will be considered to be in compliance. In other words, if a contractor provides at least 56 hours of PTO (which is accrued and administered in compliance with the Final Rule) then the contractor does not have to give employees an additional 56 hours for paid leave, even if an employee uses all of the original PTO for vacation and none of it for leave. If a contractor's PTO policy provides more than 56 hours of leave: the contractor may choose to either (1) comply with the Final Rule's requirements for all PTO that is used, or (2) track, and make and maintain records reflecting, the amount of PTO an employee uses for the purposes required by the Executive Order, in which case the contractor need only provide up to 56 hours of PTO with all of the Executive Order protections, such as documentation, certification, and recordkeeping, for each accrual year.

Permissible Uses of Paid Leave

Contractors must allow eligible employees to use the paid leave for an absence resulting from: (1) their own physical or mental illness, injury, or medical condition; (2) obtaining diagnosis, care, or preventative care from a health care provider for themselves; (3) caring for a child, a parent, a spouse, a 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 a physical or mental illness, injury, or medical condition or who has a need for diagnosis, care, or preventative care; and (4) domestic violence, sexual assault, or

stalking of the employee, a member of the employee's family, or a person with whom the employee has a familial relationship. The definition of a covered medical condition under the Executive Order is interpreted more broadly than under the Family and Medical Leave Act and does not require attention from a health care provider. Examples include, but are not limited to, a common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode.

Contractors may require a certification issued by a health care provider for paid leave used for the purposes set forth in (1) – (3) above only for absences of three or more consecutive workdays. If requested, employees must provide such certification within 30 days from the first day of the leave. For leave for three or more consecutive work days that is related to domestic violence, sexual assault, or stalking, contractors may require employees to provide documentation from an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work. Contractors are prohibited from disclosing any verification information related to, and they are required to maintain confidentiality about, an employee's medical history and about domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.

To use the paid leave, employees must request the leave, orally or in writing, and provide the expected duration of the leave. The request needs only to contain enough information for the employer to determine whether the absence would be a proper use of paid leave and need not specify all symptoms or details of the need for leave. When the need for leave is foreseeable, such requests must be made at least seven calendar days in advance. When the need for leave is not foreseeable, employees must request leave as soon as practicable. Contractors cannot condition the use of paid leave on the requesting employee finding a replacement to cover any work time he or she will miss. Contractors may condition use of the required paid leave benefits to times the employees would be working on one of the four types of covered contracts.

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

Interaction with other Paid Leave Laws

With a patchwork of other laws governing paid leave and other benefits, the Final Rule explains how the paid leave requirements will interact with contractors' other obligations under other laws. Notably, a contractor may not use the paid leave requirements required by the Final Rule to satisfy its requirements under either the SCA or DBA. The SCA and DBA both provide that fringe benefits furnished to employees in compliance with their requirements do not include any benefits "required by Federal, State, or local law." 41 U.S.C. 6703(2) (SCA); 40 U.S.C. 3141(2)(B) (DBA). Because paid leave provided in accordance with the Final Rule is now required by law, the Department of Labor takes the position that such paid leave cannot count toward the fulfillment of SCA or DBA obligations. However, the Rule does reiterate that to the extent contractors provide leave benefits in excess of those required by the Final Rule, the value of the excess benefit (if not required under another law) may be counted toward SCA or DBA obligations, such as the SCA hourly health and welfare requirements, or a DBA fringe benefit requirement. Accordingly, contractors that already maintain PTO policies that they count towards SCA or DBA fringe benefits must increase the fringe benefits paid to covered employees so that the fringe benefit calculation excludes the 56 hours of accrued paid leave under the Executive Order.

The Final Rule further clarifies that compliance with the Final Rule shall not impact its obligations to comply with the Family Medical Leave Act (FMLA). Paid leave may run concurrently with FMLA leave, and all notices and certifications that satisfy FMLA will also satisfy the request for leave and certification requirements of the Final Rule.

Contractors must also be aware of, and comply with, any applicable state or local laws requiring paid leave, which are on the rise. As of the date of this Alert, at least five states and Washington, DC, plus at least 29 cities[1] across the United States require paid sick leave. Contractors may satisfy their obligations under the Executive Order by providing leave that fulfills the requirements of a state or local law, provided that the leave is paid, accrued and administered in a manner that meets or exceeds all of the requirements of the Final Rule. Where the requirements of EO 13706 differ from state and local law requirements, contractors must comply with the requirement that is more generous to the employees.

Other Nuances for Contractors with Special Employment Situations, Including Multi-Employer Plans and Collective Bargaining Agreements

The Final Rule also clarifies a handful of situations that apply to smaller numbers of contractors. These include the clarification that contractors will be allowed to fulfill paid leave obligations jointly with other contractors through a multi-employer plan. Also, the Final Rule has been modified from the proposed version by allowing some leniency to contractors with collective bargaining agreements (CBAs) that already require at least 56 hours of paid sick leave per year. If the union contract was signed before September 30, 2016, then the Executive Order will not apply until the earlier of the date the CBA expires or January 1, 2020. In addition, unlike the proposed rule, the Final Rule does not require successor contractors to reinstate paid leave to workers on a predecessor contract.

Next Steps for Federal Contractors and Subcontractors

Federal contractors and subcontractors should take steps immediately, if they have not already done so, to ensure that they are prepared to comply with the Final Rule once it becomes effective for contracts entered into on or after January 1, 2017. As a practical matter, many contractors may opt to put in place a single paid leave policy that is compliant with the Final Rule as of January 1, 2017, rather than having multiple policies which would be applied to different employees throughout the year.

As a first step, contractors should review their paid leave policies to determine whether or not they need to revise those policies to come into compliance with the Final Rule. If the contractor's existing policies are sufficiently flexible to cover all purposes covered by the Final Rule and provide for accrual and carryover of paid leave in amounts sufficient to meet the Final Rule's requirements and is administered consistent with the Final Rule, no additional changes may be needed. On the other hand, contractors will need to expand their paid leave policies if they limit the paid leave benefits to full-time employees, require a waiting period before the paid leave is accrued, exclude temporary employees from paid leave benefits, or do not extend paid leave to absences related to care of family members, domestic violence or sexual assault.

[1] Connecticut, California, Massachusetts, Oregon, Vermont, Washington, DC, San Diego, San Francisco, Los Angeles, Santa Monica, Emeryville, Berkeley, and Oakland, CA, Chicago, IL, Montgomery County, MD, Minneapolis and St. Paul, MN, Elizabeth, Plainfield, Morristown, Jersey City, Newark, Passaic, East Orange, Paterson, Irvington, Trenton, Montclair, and Bloomfield, NJ, New York City, NY, Philadelphia, and Pittsburgh, PA, Seattle, Spokane and Tacoma, WA.

Lessons for All Employers

Employers should further monitor the paid leave requirements in the jurisdictions in which they have employees to ensure they are in compliance with any and all overlapping paid leave policies. Further, employment practices that are mandatory only in the government contract sector frequently become viewed as the new normal by employees, who come to expect all employers to have policies that match the standards of government contractor employers. On the state level, legislatures frequently model employment legislation applicable to all employers after federal standards for government contractors.

To that point, the federal government may well have intended for this rule to become the new standard, recognizing that many federal contractors will apply this policy to all of their employees, not just the ones directly working on covered contracts, simply because of the substantial administrative burden of managing multiple overlapping policies, especially with a workforce that may move between assignments on covered and non-covered contracts. In a *New York Times* article Secretary of Labor Thomas Perez conceded that aspiration, saying "if that's one of the benefits, the effects of this rule, I will be thrilled." (Paid Sick Leave for Federal Contractors Is Mandated by Labor Department, by Noam Scheiber, *New York Times*, September 29, 2016.) If employers outside the government contractor sector do not follow suit, however, government contractors may find that they have an advantage in recruiting employees due to the additional benefits and protections their employees enjoy.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Rebecca C. Rizzo (bio)
Washington, DC
+1.202.663.9143
rebecca.rizzo@pillsburylaw.com

Glenn Sweatt (bio)
Silicon Valley
+1.650.233.4031
glenn.sweatt@pillsburylaw.com

Julia E. Judish (bio)
Washington, DC
+1.202.663.9266
julia.judish@pillsburylaw.com

Richard B. Oliver (bio)
Los Angeles
+1.213.488.7102
richard.oliver@pillsburylaw.com