Federal Construction Contractors: 
Get Ready for the New 
Paid Sick Leave Rule!

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Application and Effective Dates

• Rule applies only after FAR Council issues new regulations
  • Not yet issued, but Executive Order requires within 60 days of DOL rule (11/30/16)
  • Applies to new and replacement federal contracts resulting from solicitations issued on or after January 1, 2017
  • Does not automatically apply to task orders under IDIQ contracts from solicitations issued prior to January 1, 2017, but contracting officers are encouraged to modify existing IDIQ contracts to add paid leave requirements
• Four Contract Types (prime contracts)
  • Davis-Bacon Act covered procurement contracts
    • Does not extend to contracts subject only to “Davis-Bacon Related Acts” (i.e., Federal-Aid Highway Acts)
  • Service Contract Act covered contracts
  • Concession contracts, including those excluded from the Service Contract Act
  • Contracts in connection with federal property or lands and related to offering services for Federal employees, their dependents, or the general public
• All subcontracts under covered prime contracts regardless of the dollar value of the subcontract
**Excluded Contracts**

- Procurement contracts for construction excluded from Davis-Bacon Act coverage
- Contracts for services exempt from the Service Contract Act
- Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government
  - Including contracts covered by the Walsh-Healey Public Contracts Act
- Contracts and work performed outside the United States
- Grants
- Contracts and agreements with and grants to Indian Tribes

**Employee Coverage**

- Applies to employees working directly on covered contracts/subcontracts
- Employees indirectly performing work that is necessary for the performance of the contract if 20 percent or more of their time in a particular workweek is spent on work in connection with the contract
  - Same as federal contractor minimum wage rule
- Does not apply to owner-operators or independent contractors who are not otherwise covered by DBA or SCA
Leave Accrual – Accrual Option (1 of 2)

- One hour of paid sick leave for every 30 hours worked on covered contracts
  - Aggregate for each employee across all covered contracts

- May cap accrual and available sick leave use at 56 hours

- Accruals must be calculated at the end of each pay period or each month, whichever is shorter

Leave Accrual – Accrual Option (2 of 2)

- For employers not already required to keep records of a covered employee’s hours, accrual can be calculated either by:
  - Employee’s actual hours worked
  - Assumption that employee works 40 hours on or in connection with covered contracts in each workweek
  - If less than 40 hours per week, based on typical number of hours the employee works on or in connection
    - Must have probative evidence to support the number

- For employees working in connection with covered contracts, the typical number of hours worked in connection with covered contracts per workweek
  - Estimate must be reasonable
  - Based on verifiable information
Leave Accrual – Front Load Option

- An employer can provide 56 hours of paid sick leave at the beginning of each accrual year
- Can be prorated based on number of pay periods remaining in the accrual year for new employees or employees assigned to the contract in the middle of the accrual year
- Must allow employee to carryover unused sick leave accrued from prior accrual year
  - Potential for an employee to accumulate up to 112 hours of paid sick leave
- Accruals must be calculated at the end of each pay period or each month, whichever is shorter

Employee Notifications

- Must inform employee in writing of amount of paid sick leave that the employee has accrued but not used either every period or once a month, whichever is shorter
- Must also provide upon separation and reinstatement
- Existing notifications accompanying employee paychecks or via an online system may be used to meet this requirement
  - Electronic permitted only if contractor customarily corresponds with or makes information available to employees via electronic means
Reinstatement and Payout for Unused Leave

- Reinstatement – Accrued paid sick leave must be reinstated if employee is rehired by the same contractor within 12 months after a job separation
  - Applies even if employee does not return to job on or in connection with a covered contract or if work on covered contracts is interrupted by work for employer on non-covered contracts
- Payout for Unused Leave – No requirement to pay employee for value of unused accrued sick leave upon separation
  - Contractors who do pay for value of unused accrued sick leave upon employee separation are relieved of obligation to reinstate accrued sick leave if employee is rehired

Leave Usage

Available for Absences Resulting From:

- 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
- Caring for the employee’s child, parent, spouse, domestic partner, or any other individual related by blood or affinity whose close association with employee is the equivalent of a family relationship who has:
  - Physical or mental illness, injury or medical condition of the employee
  - Need for diagnosis, care, or preventive care from a health care provider by the employee
- Domestic violence, sexual assault, or stalking, if the time absent from work is for the purposes of:
  - 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
  - Obtaining counseling, seeking relocation, seeking assistance from a victim services organization, taking legal action, or assisting an individual related by blood or affinity whose close association with employee is the equivalent of a family relationship in engaging in any such activities
Leave Usage

Duration, Requests, and Denials

- Duration – employees must be allowed to use leave for increments as small as one hour
  - Exception for employees whose work makes it physically impossible to leave or return to the job during a shift
- Employee Requests
  - May be made orally or in writing
  - At least 7 calendar days in advance when the need for leave is foreseeable; otherwise, as soon as is practicable
  - Employers must respond to a request as soon as practicable
- Employer Denials of Leave Request
  - Must be in writing, with an explanation for the denial
  - Acceptable reasons for denial are: insufficient information from employee about need for leave, reason given is not consistent with permitted uses under the Rule, employee did not indicate when the leave is needed, employee has not accrued/will not accrue sufficient leave to cover the absence, or request is to use leave when employee is performing non-covered work.

Leave Usage

Certification/Documentation

- Employers may require certification of absences to confirm use of leave is valid
  - Only if absence is for three or more consecutive full days
  - Must notify employee of requirement for certification/documentation before the employee returns to work
- Must be issued by a health care provider for absences related to physical or mental illness, injury or medical condition and care related to the same
- If used for absences related to domestic violence, sexual assault, or stalking, it can come from:
  - Health care provider
  - Counselor
  - Representative of a victim services organization
  - Attorney
  - Clergy member
  - Family member
  - Close friend
- Documentation must be maintained as confidential records
Interaction with Other Laws

• Davis-Bacon Act Obligations
  • Paid sick leave required under the rule cannot count as a Davis-Bacon Act fringe benefit
  • Contractors may need to reprice contracts accordingly

• Other Paid Leave Laws
  • State and local laws – Compliance with state or local sick leave laws do not excuse compliance with rule
  • FMLA – Paid sick leave granted under rule may count toward FMLA leave if absence is used for a reason covered by the FMLA

Collective Bargaining Agreements

• What if there is an existing CBA in effect on 1/1/17 when the new requirements take effect?
• DOL modified the proposed language to include a temporary exception for employees covered by a CBA
  • If a CBA, ratified before 9/30/16, provides the employee with at least 56 hours or 7 days of paid sick time (or other paid time off that can be used for reasons related to sickness or healthcare), this new Paid Sick Leave regulation would not apply until the earlier of 1/1/2020 or the date the existing CBA expires
  • If the CBA provides for less than 56 hours, the employer must be able to “top up” the leave
  • If the CBA applies only to some employees, but not all employees on a covered contract, the provisions of the new regulation apply to such non-CBA covered employees
  • If the CBA lists the reasons why an employee can take leave, and those are narrower than the regulatory list, the CBA list governs until CBA expiration or 1/1/2020
Multiemployer Arrangements

- DOL added new Sec. 13.8 in response to AGC comments (among others)
- Contractors can satisfy Paid Sick Leave obligations through contributions to a multiemployer plan
  - “Multiemployer plan” defined as a plan to which multiple employers are required to make contributions under a CBA
  - All contributing employers are treated as a single employer for satisfying Paid Sick Leave obligations
    - Example: Contractor A and Contractor B are signatories to same CBA with a multiemployer plan. Employee works 60 hours for A and accrues 2 hours of paid sick leave. Employee finishes work for A and goes to work for B. Employee starts working for B with 2 accrued hours that he/she can use while working for B. As employee continues to work for B (assuming B has covered contracts), the employee will continue to accrue until he/she reaches 56 hours.
    - Each employer remains separately responsible for violations that occur while the employee is working for it
- Outside CBAs, contractors can still delegate administrative functions to a fund, plan, or program. TPA may play a role in tracking accrual, notify employees of the amounts accrued but not used, respond to leave requests, etc., but employer remains responsible for compliance with the rule.

Prohibitions

- Interference
  - Includes (but is not limited to) miscalculating accrued leave, denying or unreasonably delaying a response to a request to use the leave, reducing accrued paid sick leave by more than the amount used, transferring the employee to non-covered contracts to prevent accrual (!!), disclosing confidential information submitted in support of the leave, or making use of the leave contingent on the employee finding another worker to fulfill his or her job duties
  - It is lawful (and not a violation) to question an employee’s potential abuse or fraudulent use of leave
- Discrimination – Contractor may not consider permitted use of this leave in any employment decisions; contractors may not count use of this leave under a no-fault attendance policy
- Waivers – Employees cannot waive these rights
Permitted Deductions from Pay and Benefits of Employee Using Paid Sick Leave

- Deductions required by federal, state, or local law
  - Such as tax withholding
- Deductions made to third parties pursuant to a court order
- Deduction directed by a voluntary assignment of the employee or his or her authorized representative
- Deduction for determined reasonable cost or value of furnishing employee with “board, lodging, or other facilities” under 29 U.S.C. 203(m) and 29 CFR Part 531
- To recoup pay and benefits for paid sick leave that was denied or based on a fraudulent request

Recordkeeping

- Must maintain detailed records during course of covered contract and preserve them for at least 3 years thereafter
- 15 Items:
  1. Name, address, and SS# of each employee
  2. Employee’s occupation(s) and classification(s)
  3. Rate of wages paid (including all pay and benefits provided)
  4. Number of daily and weekly hours worked
  5. Any deductions made
  6. Total wages paid (including all pay and benefits provided) each pay period
  7. Copy of notifications to employees of the amount of paid sick leave the employees have accrued
  8. Copy of any written employee paid sick leave requests or, if no written request, records reflecting each employee request
Recordkeeping

• 15 Items (continued):
  
  9. Dates and amount of paid sick leave (or PTO, if applicable) used by employees
  10. Copy of any written responses to employee paid sick leave requests, including required explanation of request denials by employer
  11. Records related to certification and documentation that the contractor required from an employee
  12. Any other records showing tracking of or calculations related to employee accrual and/or use of paid sick leave
  13. Relevant covered federal contracts
  14. The regular pay and benefits provided to an employee for each use of paid sick leave
  15. Any financial payment made for unused accrued paid sick leave upon employee termination

Other Details

• Flow Down Requirements and Subcontractor Liability
  
  • Prime and all upper-tier contractors must flow down clause in Appendix A
  • Prime is responsible for subcontractor and lower-tier compliance
  • Consider reviewing/revising indemnification clauses in covered subcontracts

• Posting/Notice Requirements
  
  • Must post DOL notice to employees in prominent, accessible place at jobsite
  • Electronic notice is acceptable

• Timing of Pay – No later than one pay period following the end of the pay period in which paid sick leave was used

• Paid Time Off (PTO) Policies – Employers can use generic paid time off in lieu of paid sick leave if such policy otherwise meets all the requirements of the rule (i.e., accrued leave, permitted uses, carryover, reinstatement, documentation, employee notifications, etc.)

• Anti-Kickback – Leave used must be paid free and clear and without subsequent non-permitted deduction, rebate, or kickback on any account
DOL Resources

- Web Portal: https://www.dol.gov/whd/govcontracts/eo13706/
  - Fact Sheet
  - Overview of the Final Rule
  - Frequently Asked Questions
  - and more

Questions?

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