

Proposed Regulations Issued for Paid Sick Leave Executive Order

As previously reported in the [September 10, 2015 Labor and Employment Law Report](#), President Obama signed [Executive Order 13706](#) in September 2015, requiring certain federal contractors and subcontractors to provide at least seven paid sick days per year to employees (both hourly and salaried) working on federal contracts. Recently, on February 25, 2016, the United States Department of Labor (DOL) issued a [Notice of Proposed Rulemaking \(NPRM\)](#), setting forth its proposed regulations to implement this executive order. Interested parties can now submit comments on these proposed regulations, but must do so quickly. Comments must be received by the DOL by midnight on March 28, 2016 (although several commentators have already requested that the deadline be extended.)

First, the basics. Contractors will be required to allow paid sick time to be used not only for an employee's own illness or medical appointments (including preventative care), but also for the illness and medical appointments of a family member (defined quite broadly) or for absences related to domestic violence, sexual assault or stalking. The leave cannot be tracked in increments greater than one (1) hour. While unused time must be carried over into a new calendar year, the contractors will be permitted to cap accrual of new time until the employee's time drops below 56 hours.

Compliance with Executive Order 13706 will not be as easy as confirming your existing paid time off policies include seven sick days and cover the right types of absences. The proposed regulations create a regulatory scheme similar in complexity to the Family and Medical Leave Act (FMLA), with detailed notice and recordkeeping rules. For example:

- Contractors must notify employees in writing of the amount of paid sick leave they have accrued no less than monthly, as well as each time they request sick leave, and each time they request the information (but no more than once a week), and again upon separation.
- Contractors may only require medical certification or documentation for absences of three or more days. Significantly, the employee has up to 30 days *after* the first day of the absence to provide the documentation. During those 30 days, the contractor must treat the request for paid leave as valid. If the contractor does not receive the documentation, or if it is insufficient, the contractor may retroactively deny the employee's request for use of paid sick leave, and may deduct any sums paid, but only if those deductions are lawful under state wage payment laws. (Given the intricacy of New York's wage payment law and its restrictions on deductions, the practical impact may be that New York employers rarely, if ever, seek to recoup this pay.)
- An employee may make a request for paid sick leave orally or in writing, and must make the request seven days in advance if possible. If advance notice is not possible, the employee need only make the request when he or she becomes aware of the need for leave or the next business day.
- If the contractor approves the use of paid sick leave, it can do so orally as long as it also provides a written statement of how much leave is available. If the contractor denies the use of paid sick leave, however, it must do so *in writing with an explanation of the denial*. If the denial is based on insufficient documentation, the employee must be given an opportunity to submit a new, corrected request.
- The contractor's response to the employee's request must be made "as soon as is practicable." Notably, the proposed regulations state that in many instances, the contractor should be able to respond to a request "immediately or within a few hours."

- Contractors need only apply the paid sick time off policy to employees actually working on the covered contract, and only for the hours they are working on the covered contract. However, if the contractor intends to make such a distinction, it must keep records reflecting when the employee is and is not working on the covered contract.
- At the completion of a covered contract, a prime contractor must provide to the contracting officer a certified list of all employees entitled to paid sick leave under the Executive Order at any time during the twelve months preceding the end of the contract, the date each employee separated if prior to the completion of the contract, and the amount of paid sick leave each employee had available for use.
- Finally, contractors must keep records of the following available for inspection by the DOL:
 - Name, address, Social Security number, and occupation for each employee;
 - Wage rates, hours worked, deductions made, and total wages each pay period;
 - Copies of notifications to employees of the amount of paid sick leave accrued;
 - Copies of employee leave requests, and if requests are not made in writing, other records reflecting those oral requests;
 - Dates and amounts of paid sick time used;
 - Copies of written denials of requests;
 - Copies of certifications and other documentation provided by employees;
 - Any other records showing tracking or calculations of accrual and time used;
 - Copies of any certified list of employees' unused paid sick leave provided to or received from a contracting officer; and
 - The relevant covered contract.

Similar to the FMLA, contractors are prohibited from interfering with an employee's use of leave or discriminating against an employee for requesting or using leave. There is no private right of action, but employees may file complaints with the DOL. The DOL may order penalties, including back pay, reinstatement and liquidated damages, and debarment.

Given the impact of this proposed regulatory scheme, contractors should consider submitting comments on how this will impact their business and/or how the rules should be modified or clarified to the DOL before the March 28, 2016 deadline. Comments can be easily submitted online by clicking "Submit a Formal Comment" on this [page](#).

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