



DOL Proposes Rules to Implement Executive Order on Paid Sick Leave for Government Contractors

On February 24, 2016, the Department of Labor (DOL) issued proposed regulations to elaborate on, and implement, President Obama's Executive Order on the provision of paid sick leave by government contractors. Although many of the specifics of the paid sick leave requirements were already outlined in the Executive Order (13706), which was issued in September 2015, the DOL's Proposed Regulations make a number of important additions.

The purpose of this issue paper is to provide SBLC members with a summary of the key provisions of the Executive Order and the Proposed Regulations and identify the issues that the SBLC plans to raise in its comments on the Proposed Regulations. The reason that we have separated out the provisions of the Executive Order and the Proposed Regulations, although they relate to one another, is to make it clear what provisions are already set by the Executive Order (and not subject to modification) and what provisions are in the Proposed Regulations, which can still be modified before they are finalized.

We strongly encourage you to share with us any thoughts or concerns about the Proposed Regulations, or the SBLC's planned comments thereto, as well as any formal comments your association will be submitting, as soon as possible.

KEY PROVISIONS OF EXECUTIVE ORDER 13706

General Provisions:

The paid sick leave requirements will apply to all covered contracts (defined below) entered into or renegotiated after January 1, 2017. All covered contracts, and related subcontracts, will be required to include paid sick leave provisions as a condition of payment.

For the purposes of the Executive Order, covered contracts are (i) procurement contracts of services or construction; (ii) contracts or contract-like arrangements covered by the Service Contract Act; (iii) contract or contract-like arrangements for concessions; or (iv) contracts or contract like arrangement with the Federal Government either in connection with federal property or land, or related to offering services for federal employees, their dependents or the public.

Leave Accrual:

The Executive Order requires employers to provide employees with at least 1 hour of paid sick leave for every 30 hours worked on a covered contract. Thus, for the purposes of calculating

accrual of paid sick leave, the employer only needs to count the hours that the employee worked on a covered contract, not all hours that the employee works for the employer.

Regardless of how many hours the employee works on a covered contract, the employer can cap the aforementioned accrual at 56 hours of paid sick leave per year. However, employees must be permitted to carryover any accrued but unused paid sick leave from one year to the next.

Use of Leave:

Employees must be permitted to use paid sick leave for absences for (i) the physical or mental illness, injury, or medical condition of the employee or his/her 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; (ii) obtaining diagnosis, care or preventative care from a health care provider for the employee or a family member of the group noted in (i); or, in the event the employee or a family member of the group noted in (i) is a victim of domestic violence, sexual assault or stalking, to obtain counseling, seek relocation or assistance from a victim service organization, or take related legal action.

Employers cannot condition an employee's taking of sick leave on the employee finding another employee to cover their work for them.

The Executive Order states that "paid sick leave shall be provided upon the oral or written request of an employee that includes the expected duration of the leave, and is made at least 7 calendar days in advance where the need for the leave is foreseeable, and in other cases as soon as practicable."

Employers can only require employees to provide certification from a health care provider or the minimum documentation needed to verify domestic violence, sexual assault or stalking for paid sick leave absences of 3 or more consecutive days. Employees must be given at least 30 days from the first day of the paid sick leave to provide such documentation. If the employee provides documentation related to domestic violence, sexual assault, or stalking, the Executive Order requires employers to keep this information confidential and not to disclose it unless the employee consents or disclosure is otherwise required by law.

Other Items:

Employers are not required to pay an employee out for any unused sick leave that the employee might have at the time that he or she separates from employment. However, if an employer rehires a former employee within 12 months after the original separation, the employer must reinstate any unused sick leave that the employee had on the date of his or her original separation.

If an employer already has a paid leave or PTO policy, such policy may satisfy the requirement of the Executive Order so long as (i) the existing policy provides employees with at least the minimum amount of paid sick leave that they would be entitled to under the Executive Order; (ii) the existing policy permits employees to use the leave for all the reasons covered by the

Executive Order; and (iii) the existing policy complies with the other terms of the Executive Order, including, but not limited to the rules related to rollover of leave and requesting documentation of leave.

The Executive Order requires the federal agencies to take steps to ensure that all contracts comply with the requirements and gives the Secretary of Labor the authority to investigate violations.

KEY PROVISIONS OF EXECUTIVE ORDER 13706 AND RELATED COMMENTS

General Provisions:

The Proposed Regulations clarify that, where the Executive Order states that it will apply to new or renegotiated contracts after January 1, 2017, the Executive Order will not apply to existing contracts that include a unilateral option to renew the contract where the option is exercised by one party with no additional negotiations after January 1, 2017. The Executive Order will, however, apply if a contract is renewed, extended or amended through bilateral negotiations.

Leave Accrual:

The Proposed Regulations reiterates that paid sick leave will accrue on all “hours worked on or in connection with” covered contracts (*i.e.* that if an employee is working on more than one covered contract all hours worked on covered contracts will be aggregated for accrual purposes). The Proposed Regulations elaborate on this concept by stating that “hours worked” means all time that employees are paid for, including both work time and paid leave time. Thus, employees will accrue paid sick leave for hours that they are out on paid sick leave.

In its comments on the Proposed Regulations, the SBLC plans to urge the DOL to change this provision in the final rules and only allow employees to accrue paid sick leave for hours actually worked and not hours spent on paid leave.

While the Executive Order require that employees accrue 1 hour of leave for every 30 hours of covered work and that employees can rollover up to 56 hours, the Proposed Regulations provide that an employer can limit the total amount of leave an employee has available to use at any given time to 56 hours. This means that if an employee rolls over 56 hours of leave the employer can prevent him or her from accruing more leave until he or she has used some portion of that leave. This is a very employer-favorable provision which is not seen in many of the state and local sick and safe leave laws.

The Proposed Regulations provide a few narrow exclusions to the paid sick leave accrual requirements. The only one of these that will apply generally to all contractors, relates to employees who “perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract.” The Proposed Regulations generally provide that all employees who perform work on “or in connection with” covered contracts will be entitled to accrue paid leave. However, the Proposed Regulations also provide that if an employee only performs work in connection with (and not directly on) covered

contracts and does so for less than 20% of his or her total hours in a given workweek, the employee will not be entitled to accrue paid sick leave on that time.

In its comments on the Proposed Regulations, the SBLC intends to make it clear to the DOL how difficult it would be for employers to determine what work would be considered to be “in connection with” a covered contract and request that the DOL modify its definition of covered employees so that employees will only accrue leave for directly performing services called for by the contract. The SBLC will recommend that, if the DOL is not willing to make this change, the 20% threshold be increased to 50% so that employees who spend less than half of their worktime in a given week performing work in connection with covered contracts will not accrue leave on that time. Moreover, the SBLC will advocate that a 50% threshold also be applied to employees working directly on covered contracts so that employees who spend less than half of their worktime in a given week performing work directly on or in connection with covered contracts will not accrue leave on that time.

The Proposed Regulations also go beyond the Executive Order to address how employers should handle paid sick leave accrual for exempt employees whose hours may not typically be tracked. The Proposed Regulations provide that, for exempt employees, an employer may choose to track the hours worked or simply use the assumption that the employee works 40 hours per week on or in connection with covered contracts. Further, in the event that the exempt employee is part-time or splits his or her time between covered contracts and other work, the employer can allow the employee to accrue leave based on the typical number of hours that the employee works on covered contracts.

In its comments, the SBLC intends to offer some positive feedback and encourage the DOL to maintain this provision of the Proposed Regulations in the final rules as, allowing employers flexibility in making calculations for exempt employees will be helpful in limiting the additional steps and administrative procedures that employers will need to implement to comply with the rule.

The Proposed Regulations provide that employers who would prefer not to deal with calculating accrual may choose to simply provide employees who work on covered contracts with 56 hours of paid sick leave at the beginning of the year. However, such employer will still be required to allow employees any accrued but unused leave from one year to the next.

In its comments, the SBLC plans to recommend that the DOL change this provision in the final rules and, instead, provide that, if an employer provides 56 hours of paid sick leave at the beginning of the year, they will not be subject to the rollover requirement. While it is administratively easier, employers do take on a risk of incurring extra costs when they provide employees with the maximum amount of leave at the beginning of the year. Specifically, the employer is committing to provide the employee with the leave even though the employee may work enough hours to earn that amount of leave under the accrual schedule, or the employee may use all the leave and separate his or her employment before he or she would have otherwise accrued the leave. Two of the primary motivators behind allowing for a rollover is to ensure that employees are given a fair amount of time to use leave after they accrue it and to allow employees who know that they may need leave early in the year before they have accrued much

leave to plan by saving leave in the prior year. Providing employees with leave upfront addresses both of these issues and is generally more favorable for employees. Eliminating the rollover for employers who provide leave upfront would encourage more employers to take this employee-favorable approach and is an approach that a number of states and localities that have paid leave laws have adopted.

Additionally, the SBLC intends to request that employers be permitted to pro-rate the 56 hours for part-time exempt employees or for exempt employees who split their time between covered contracts and other work based on the typical number of hours that the employee works on covered contracts. This approach would be consistent with the above described section of the Proposed Regulations allowing employers to determine accrual rates for exempt employees.

Finally, the SBLC intends to request that the Final Rules also give employers the option to provide employees with 14 hours of paid sick leave per quarter, rather than 56 hours at the beginning of the year. Under this option, employees would be allowed to rollover unused leave from one year to the next. This would option would maintain the government's interest in allowing employees sufficient time to use their leave and the opportunity to plan for future needs, while allowing the employer to avoid having to calculate accrual while not taking on the risk of someone using all their leave and resigning early in the year.

Use of Leave:

The Proposed Regulations make it clear that employees can only use paid sick leave accrued pursuant to the Executive Order to cover time that they would have otherwise been working on a covered contract. Employees cannot use paid sick leave to cover time away from work not on a covered contract. In light of this provision, the Proposed Regulations prohibit employers from interfering with the use and accrual of paid sick leave and make it clear that interference includes transferring employees from covered to non-covered projects to prevent the accrual or use of leave.

The Proposed Regulations further provide that employees cannot be required to use paid sick leave at increments greater than one hour. For example, if an employee requests to use three hours of paid leave the employer cannot require them to take a full day of paid leave. The DOL has specifically requested comments on whether it should include a physical impossibility exception to this requirement, like that which exists under the Family and Medical Leave Act regulations. In the Proposed Regulations the DOL articulates that such an exception would provide “in situations in which an employee is physically unable to access the worksite after the start of a shift or to depart from the workplace prior to the end of the shift [for example, they work on a mode of transportation such as a plane or train, or they work in a sealed workspace such as a clean room], a contractor would be permitted to require the employee to continue to use paid sick leave for as long as the physical impossibility remains.”

In its comments, the SBLC will respond to the DOL by encouraging it to adopt the suggested physical impossibility exception. The SBLC will also encourage the DOL to adopt another exception for situations in which the employee has requested to use leave to be out for most, but not all, of the hours that he or she is schedule to work in a given day. Frequently, when an

employee is out for a substantial part of the day the employer will find another employee to cover the shift. Even if another employee has not been brought in to cover for the employee using the leave, in many situations, an employee will not be able to complete beneficial work for an employer if they are only coming in for one or two hours in a given day. We therefore, intend to recommend that the proposed exception be crafted to provide that, in situations where the employee has requested to be out for 75% or more of his or her workday, the employer can require the employee to use a full day of paid leave.

The Proposed Regulations provide that an employer needs to pay employees for time when they were out on paid sick leave no later than “one pay period following the end of the regular pay period in which the paid sick leave was used.”

Leave Calculations and Notices:

The Proposed Regulations provide that employers would be required to calculate leave accrual at the end of each workweek. The Proposed Regulations make it clear that paid leave does not need to be awarded in increments smaller than 1 hour but that if the employee has worked hours on a covered contract for which paid leave is not awarded in a given week, those hours will be added to the hours worked in the next week. For example, if an employee works 35 hours on a covered contract the employer need only award the employee 1 hour of paid leave. However, the additional 5 hours over 30 that the employee worked on the covered contract will carry over to the next week so if the following week the employee only works 25 hours on a covered contract, those 5 hours from the prior week would be added in and the employee would be awarded 1 hour of sick leave.

In its comments, the SBLC intends to highlight for the DOL the additional administrative burden that weekly calculations will create for most covered employers. The SBLC will highlight the fact that the majority of employers pay employees either every two weeks or twice monthly and that requiring weekly calculations will add another level of administration for these employers. In order to maintain the DOL’s interest in ensuring that employee’s leave calculations are up to date when they need to know how much leave they have but also addressing the administrative burden on employers, the SBLC will urge the DOL to change the requirements in the final rules to allow employers to calculate leave in accordance with their normal payroll schedule, but no less than twice per month, unless an employee has requested to use leave or requested to know his or her leave balance in which case the employer will calculate the leave through the last completed week of work. This will allow employers to integrate regular leave calculations with their normal payroll efforts and will be consistent with the notice requirements set forth in the Proposed Rule (as discussed below).

The Proposed Regulations require that employers provide written notice to the employees of how much paid sick leave they have available monthly or (i) when the employee requests the information; (ii) when the employee requests to use leave; or (iii) when the employee is separated from employment or reinstated. Under the Proposed Regulations, employees can request their leave balances no more than once per week.

In its comments, the SBLC intends to point out that, if employees can request their leave balances weekly as under the Proposed Regulations, employers may end up spending a great deal of time responding to individual inquiries. The SBLC will request that Final Rules provides that, so long as an employer notifies an employee of his or her leave balance each time he or she is paid (for example on the employee's paycheck), the employer will be exempt from having to respond to weekly balance requests from employees.

Other Items:

The Proposed Regulations make it clear that employees cannot waive their rights to paid sick leave as provided by the Executive Order.

As noted above, the Executive Order specifically states that employers are not required to pay employees for accrued unused leave at the time of their separation of employment and provides for the reinstatement of such unused leave for an employee who is rehired within 12 months. The Proposed Regulations provide, however, that if an employer chooses to pay an employee out for unused leave at the time of his or her separation and the employee is rehired within 12 months, the employer will still be required to restore the unused leave to the rehired employee (even though it was paid out). The DOL has specifically requested comments on this element of the Proposed Regulations.

The SBLC will respond to the DOL's request for comment on this specific issue to encourage the DOL to eliminate the reinstatement of leave requirement for situations in which the leave was paid out at the time of separation. The SBLC will emphasize that employers who choose to be generous and pay employees for unused leave should not be penalized by essentially having to pay for that leave twice if the employee is later rehired.

The Proposed Regulations do provide that contractors will be required to create, make available to certain parties, and retain (for the course of the covered contract and three years thereafter), records related to the employees who work on covered contracts and the paid sick leave they accrue.

The Proposed Regulations expand upon the enforcement and penalties related to the sick leave requirements. These provisions are rather technical and extensive and we will therefore not go into them at length in this summary. However, the Proposed Regulations make it clear that if a contractor violates the paid sick leave rules, depending on the nature of the violation, the contractor may be subject to serious penalties including withholding of payment on the contract, debarment or civil action by the DOL to recover the underpayments.