

REAL \$\$\$ AT STAKE: PAID SICK LEAVE RULE

PART III: DOL ISSUES FINAL RULE FOR MANDATORY PAID SICK LEAVE

FINAL RULE ON PAID SICK LEAVE

The United States Department of Labor (DOL) recently released its [Final Rule](#) implementing President Obama's Executive Order 13706, which requires federal contractors to give their employees at least seven days of paid sick leave each year. As discussed in [Part I – Executive Order](#), the Final Rule will apply to federal contracts issued on or after January 1, 2017, and will require federal contractors to give federal employees at least **one hour of paid sick leave for every 30 hours of work**, up to **seven days (56 hours) of paid sick leave per year**.

DIRECT COST IMPACT TO CONTRACTORS

Before discussing the impacts and risks involved with the new Rule, we use a brief hypothetical to illustrate the potential cost impacts that all contractors should take into consideration. This hypothetical assumes that a laborer working on a federal contract after January 1, 2017 earns \$40 per hour, and accrues 7 days of paid sick leave (56 hours), by working more than 1,680 hours. The contractor must now pay this laborer **\$2,240 for seven days in which the laborer is not producing**. This is the additional cost to maintain the same level of production. In other words:

$$\text{\$40 per hour} \times \text{56 hours} = \text{\$2,240 per year}$$

Now, in order to replace the production that would have been performed by this laborer during those 7 days of leave, the contractor must pay another comparable laborer \$40 per hour to perform 56 hours of work, which results in **\$2,240 per year**. This represents the additional cost of complying with the new Rule while maintaining full production rates. For added perspective, the additional cost on a project employing 100 laborers at \$40 per hour (assuming all employees used 7 days of sick leave) would be:

$$\text{\$2,240} \times \text{100 employees} = \text{\$224,000 per year}$$

If the contractor accounts for the additional costs (or even potential additional costs) stemming from the new Rule, it can pass these costs along to the government; if these costs are not accounted for, the contractor will of necessity absorb them.

EFFECTS OF IMPLEMENTING THE NEW RULE

Contractors should be prepared to include the paid sick leave time in their bids, most likely under labor burden. Contractors should also be prepared to properly administer the new Rule, given the [potential for abuse](#) of the rule by employees, as previously discussed [here](#) in *Part II – Potential for Abuse*.

EMPLOYEES WHO ARE ENTITLED TO LEAVE UNDER THE NEW RULE

Contractors will undoubtedly raise questions as to which employees will be entitled to Paid Sick Leave under the New Rule. **Does the Rule apply to foreign nationals working on an international job?** The DOL addressed this question in its released Fact Sheet:

“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, Davis Bacon Act (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.”

Accordingly, even federal contractors working at foreign job sites need to evaluate its labor force to determine which of its employees, U.S. citizens and foreign nationals alike, are entitled to paid sick leave. Notably, field and home office personnel may be included under this Rule.

ADMINISTRATION AND RISKS OF NON-COMPLIANCE

Adequate administration will also be necessary to prevent contractor violations of the Rule, such as interference with employees’ attempts to use their leave, or discrimination against employees that use the leave. Notably, the DOL has authority to **investigate alleged violations** of the Rule, *the consequences of which can include suspension from federal contracting for up to three years, or possible debarment*, according to the Final Rule.

Therefore, contractors who will enter into a contract or renew a contract after January 1, 2017, or those who have an **O&M contract** or **Option contract** that will extend into 2017 and beyond should beware. Notably, O&M and Option contracts in this scenario will be subject to a constructive change due to implementation of the new Rule, and may pursue a Change Order to adjust its pricing under the Changes Clause of the FAR.

Contractors in these situations should at a minimum: (1) review their current sick leave policy to determine compliance with the Final Rule, (2) review their current payroll system to ensure that it can adequately track the amount of sick leave accrued and taken, and advise employees of the same in a timely manner, and (3) become familiar with the Final Rule’s detailed requirements to ensure compliance on future contracts.

Knowledge of this new Rule and adequate preparation for the resulting impacts will allow contractors to meet the demands in stride.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

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