

PAID SICK LEAVE RULE LEAVES ROOM FOR ABUSE

INTRODUCTION

As [previously discussed](#), President Obama signed an [executive order](#) on September 7, 2015, requiring federal contractors to provide their workers with a **paid sick leave** benefit. Although the Secretary of Labor will have a chance to provide guidance and clarifications when it issues the corresponding federal regulation sometime before September 30, 2016, the potential for employee abuse of the paid sick leave regulation is high under the current provisions of the Executive Order.

KEY PROVISIONS

The Executive Order mandates that employees under federal contracts shall earn 1 hour of paid sick leave for every 30 hours worked, for “up to 7 days or more of paid sick leave per year.” The minimum cap on accrued sick leave will be 56 hours. Under the new mandate, employees may take paid sick leave to care for themselves, a family member, or someone **related by affinity** whose “close association is the equivalent of a family relationship;” employees may take leave to cover an absence for situations including physical or mental illness, injury, or medical conditions, diagnosis or preventative care from a doctor, or domestic violence, assault, or stalking.

BROAD PROVISIONS LEAVE DOOR OPEN TO ABUSE

The provisions of the Executive Order, in its current form, provide an **increased opportunity for employees to abuse a federal contractor’s paid sick leave policy**. The overly-broad provisions that are potentially troublesome include the lack of requirement of medical certification for absences of less than 3 days, that the sickness does not need to be serious, and that leave may be taken for care of someone “related by affinity.”

Note that “affinity” is synonymous with the words empathy, sympathy, attraction, and like-mindedness; also note that a “family relationship” does not require living under the same roof. Therefore, the broad mandate would presumably not be restricted to covering a cohabitating but unmarried couple.

EXAMPLES OF POTENTIAL ABUSE

Accordingly, **employee abuse of the new paid sick leave mandate could look like this**: an employee on a federal construction project has a roommate, close friend, whom he “loves like a brother,” and considers to be family. The friend suffers from bouts of depression, and the employee takes every Friday off of work to care for his friend by offering emotional support as they sit in the local pub throwing back cold ones (assuming the employee has accrued enough paid sick leave).

Essentially, this employee can have a 3-day weekend each week until his paid sick leave is used up. No medical certification is required, and the employer runs the risk of a lawsuit if it questions the employee’s reason for taking sick leave. In fact, under Section (k) of the Executive Order, a contractor may not interfere with or discriminate against an employee for taking, **or attempting to take**, paid sick leave under this

mandate.

Summer A. Davis aptly summarized that, “The new federal mandate attempts to apply a one-size-fits-all policy to diverse companies in unrelated industries just because they happen to contract with the U.S. Government.”¹ Consequently, several questions about the Executive Order remain, and will hopefully be answered when the final regulation is issued:

- Does the mandate apply to all employees regardless of his or her tenure with the company? What about temporary or probationary employees?
- What about joint employees? For example, if an employee’s salary is dually funded by two federal contractors, does the employee get to “double-dip” and accrue paid sick leave from each employer?
- Although the mandate does not create a private right of action by the employee against the employer for the denial of paid sick leave, would denial be considered an adverse employment action or a material change in the terms and conditions of employment.
- Can employers require employees to use accrued paid sick leave time in conjunction with leave taken under the Family and Medical Leave Act (FMLA) or leave provided as an accommodation under the Americans with Disabilities Act (ADA)?²

Similar paid sick leave regulations implemented on the state level have caused issues and led to increased employee abuse. For example, Massachusetts’ mandatory paid sick leave law [has employers worried](#) about their ability to deny – or even question – a request for sick leave, without incurring the risk of a lawsuit. Some have hypothesized that under that state’s law, an employee could walk in an hour late, say “I’m sick,” and the employer would have to forgive it and apply that time to the employee’s allotted sick leave.³ Employers in Michigan have similarly [recognized](#) the potential for employee abuse in their state.

CONCLUSION

Undoubtedly, implementation of the new paid sick leave regulations will translate into increased costs for the contractor. While employee abuse rates may potentially increase above current rates, contractors should take extra care to account for this increase in labor burden in their bids, to ensure that the costs are passed on to the Government.

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

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¹ Summer A. Davis is an associate at Bradley Arant Boult Cummings LLP in Alabama. The article cited can be found on her firm’s website.

² <https://www.law360.com/articles/705089/anticipate-abuse-of-paid-sick-leave-for-govt-contractors>

³ <http://businesswest.com/blog/implementation-of-sick-leave-law-frustrates-employers/>