The Federal Contractor Paid Sick Leave Executive Order and Final Rule

Presented by: Sarah Gorajski



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Presented by:

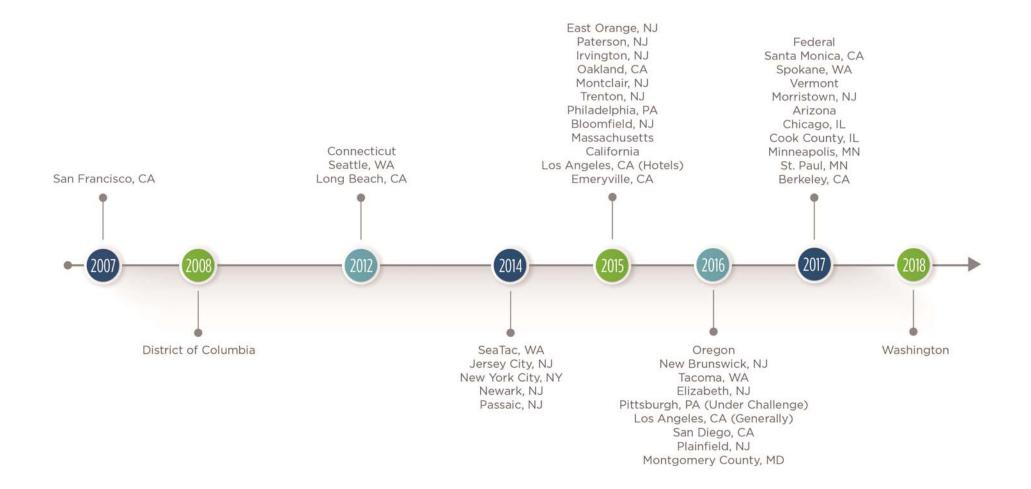


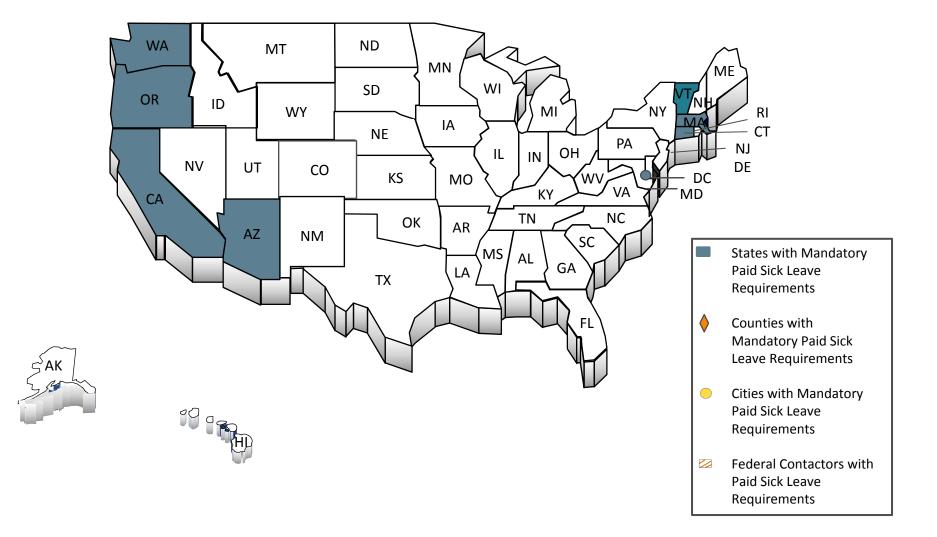
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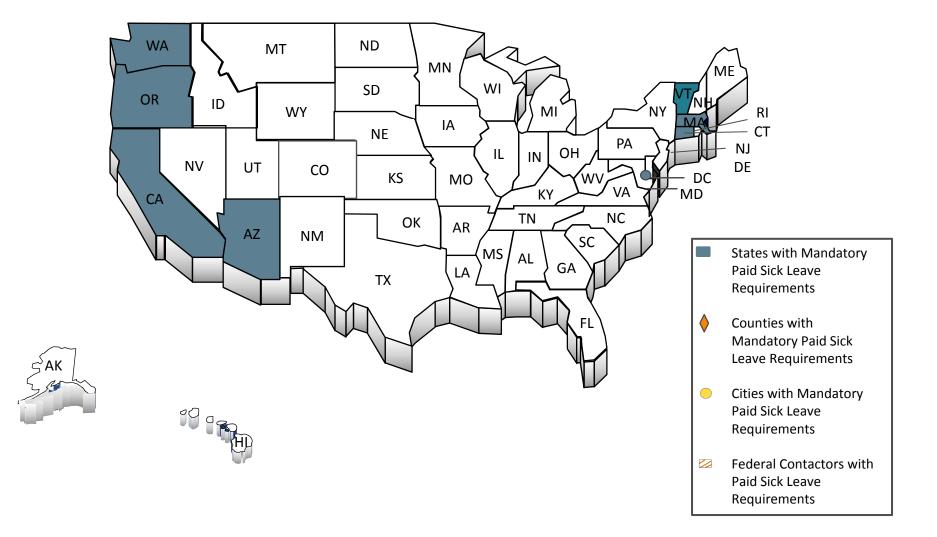
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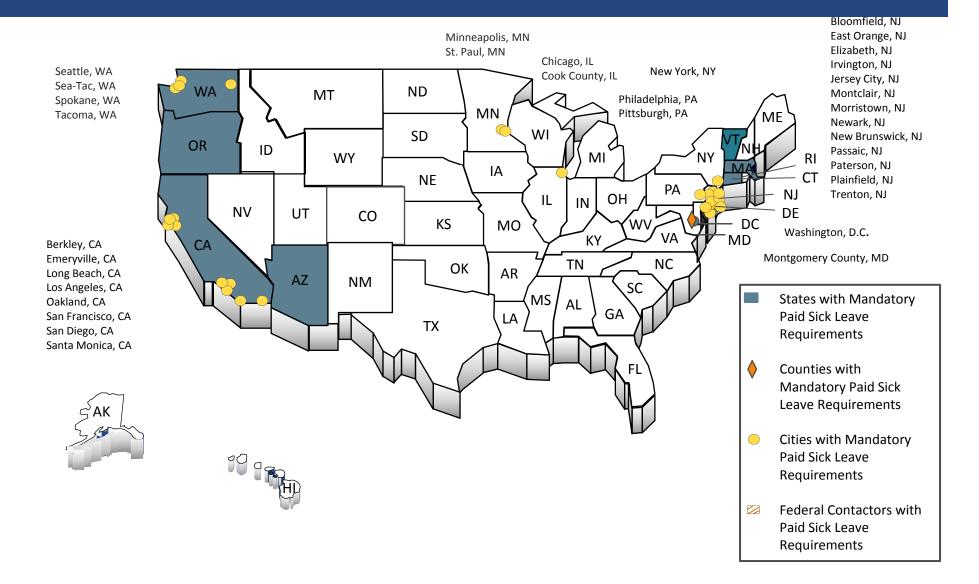
THE PAID SICK LEAVE LANDSCAPE

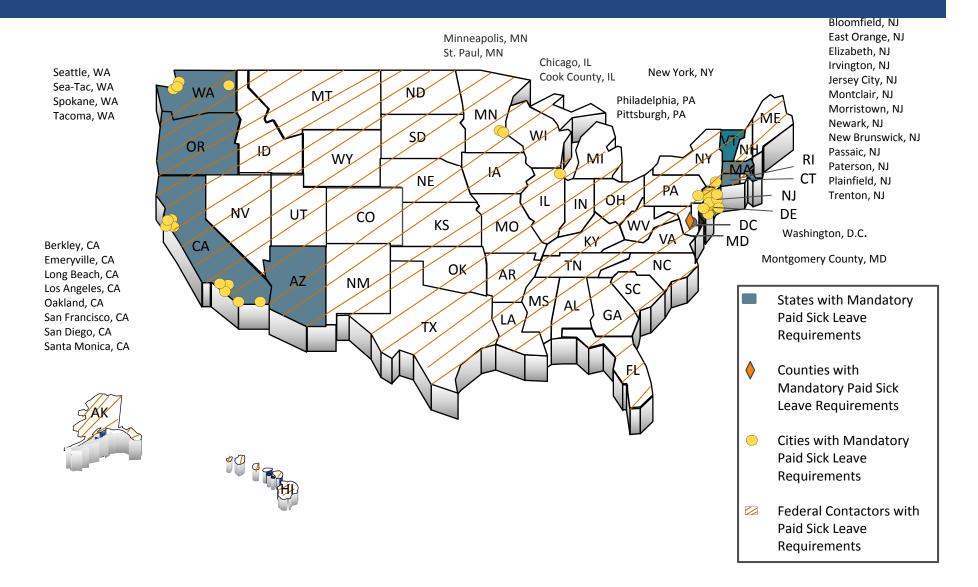
Timeline











FINAL RULE: FEDERAL CONTRACTOR SICK LEAVE

Executive Order: General Overview

- On September 7, 2015, President Obama signed Executive Order 13706 ("EO") requiring that employees working on federal contracts earn at least one hour of paid sick leave for every 30 hours worked
 - The contractor can set a limit for accrual of 56 hours
 - The leave is job-protected
- On September 30, 2016, DOL published final rule implementing EO



What Contracts Are Covered?

- The EO applies to "new" covered contracts:
 - solicited on or after January 1, 2017
 - awarded on or after January 1, 2017, if awarded outside the solicitation process
- "Contract" is broadly defined and includes contract-like instruments
 - E.g., procurement actions, lease agreements, cooperative agreements, provider agreements, intergovernmental services agreements, service agreements, licenses, permits, etc.
 - Verbal or in writing
- "New contracts" include existing contracts if through <u>bilateral</u> negotiations, on or after January 1, 2017, the contracts are:
 - Renewed
 - Extended
 - Amended (pursuant to modification outside scope of existing contract)

Which Contracts Are Covered?

- Four Contract Types Covered:
 - 1. Procurement contracts for construction covered by the Davis-Bacon Act (DBA)
 - 2. Service contracts covered by the Service Contract Act (SCA)
 - 3. Concessions contracts
 - 4. Contracts in connection with Federal property or lands and related to offering services for federal employees, their dependents, or the general public
- <u>If</u> the wages of employees under such contract or contract-like instrument are governed by the DBA, the SCA, or the FLSA
- Performance in whole or in part in the United States

(1) DBA Procurement Contracts for Construction

"Procurement contracts for construction" includes:

- Contracts in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings or public works, and which requires or involves the employment of mechanics or laborers; and
- 2. Any subcontract of any tier thereunder



DBA: Determining Coverage

- 1. Federal Government or District of Columbia is party to contract
 - a. Subcontracts with non-governmental entities may be covered if the prime contract is with the Federal Government or the District of Columbia
- 2. Agreement is "contract for construction"
- Contract is for construction of "public building or public work" of United States or District of Columbia



DBA: "Building or Work"

Includes without limitation: "buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping."

29 C.F.R. § 5.2(i).

Not Covered: Davis-Bacon Related Act Contracts

- Contracts subject to <u>only</u> to the <u>Davis-Bacon Related</u>
 <u>Acts are not</u> covered by the EO
 - DBA Related Acts extend DBA provisions to Federal agencies that provide financial assistance for public works construction through grants, loans, loan guarantees, and insurance
- Coverage Determination:
 - Is the Federal Government or DC a party to the contract?
 - If yes \rightarrow DBA (EO may apply)
 - If no \rightarrow DBA Related Acts (no EO coverage)
 - No EO coverage where Federal Government or DC is providing only financial assistance and is not a party

Davis-Bacon Related Act Contracts Examples

- State highway department signs contract for construction of roads and bridges as part of interstate highway project funded (in part) by Federal Highway Administration grant
- Local housing authority or city or town signs contract for construction of low income residences, and project is financed by U.S.
 Department of Housing and Urban Development (HUD)
- Other construction assistance through grants, loans, loan guarantees and insurance from federal agencies, including Departments of Health and Human Services, Education, and Environmental Protection Agency (EPA)
- Local public works/water-sewer authority signs construction contract for sewer project funded by EPA

* Above examples would not be covered <u>unless</u> contract also covered by DBA



(2) SCA Procurement Contracts for Services

- SCA likely applies if the contract: (1) is in excess of \$2,500; and (2) the principal purpose of the contract with the federal government to provide services using service employees.
- SCA does not generally apply to:
 - Contracts for services to be performed exclusively or essentially by persons who are not service employees, i.e., persons who qualify as bona fide executive, administrative, or professional employees under FLSA regulations (if the use of service employees is only a minor factor in contract performance, the contract is likely not covered by the SCA);
 - Contracts for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect;
 - Contracts for the furnishing of services by radio, telephone, telegraph, or cable companies;
 - Contracts for public utility services, including electric light and power, water, steam and gas;
 - Employment contracts providing for direct services to a Federal agency by an individual; or
 - Contracts with the United States Postal Service, the principal purpose of which is the operation of postal contract stations.
- Contracts for goods and products are generally not covered as long as they involve only a minor or incidental use of service employees ("minor" is generally considered to be 10-20%).

(3) Contracts for Concessions

- Concession contracts = contracts under which Federal Government grants right to use Federal property, including land and facilities, for furnishing services
- The EO covers even those concession contracts exempted from coverage under SCA.
- Concession contracts may include, but are not limited to, contracts for furnishing of food, lodging, automobile fuel, souvenirs, newspaper stands, and recreational equipment to general public
- Examples:
 - Souvenir shops at national monuments
 - Boat rental facilities and fast food restaurants at National Parks

(4) Contracts in Connection with Federal Property or Land

- Contracts with the Federal Government in connection with Federal property or lands <u>and</u> related to offering services for Federal employees, their dependents, or general public.
- Generally includes leases of Federal property, including space and facilities, and licenses to use such property for purpose of offering services to Federal employees, their dependents, or general public
- Examples:
 - Private fast food restaurant that rents space in Federal building and serves food to general public
 - Contractor operating child care center, credit union, gift shop, barber shop, health clinic, or fitness center in leased space in Federal building and serves Federal employees or general public

Other Contracts and Transactions with the Federal Government

- Walsh-Healey Public Contracts Act ("PCA"), 41 U.S.C. 6501 et seq.:
 - Contracts for manufacturing or furnishing of materials, supplies, articles, or equipment to Federal Government subject to PCA are generally not covered
 - But PCA-covered contract may involve construction work that is subject to DBA and then would be covered
- <u>Purely</u> financial transactions with Federal Government are generally not covered
 - Financial institution holding deposits insured by Federal Deposit Insurance Corporation or National Credit Union Administration?
 - Contracts with hospitals for patient care participating in Medicare or Medicaid programs?

Excluded Contracts

- "Grants" within the meaning of Federal Grant and Cooperative Agreement Act
- Contracts with and grants to Indian Tribes under Indian Self-Determination and Education Assistance Act
- Procurement contracts for construction that are excluded from DBA's coverage (i.e., those worth under \$2,000)
- Procurement contracts for services that are exempted from coverage under SCA (i.e., those worth under \$2,500)

Cautionary Notes

- Entities not subject to federal affirmative action requirements may be subject to paid sick pay requirements because standards differ
 - Paid sick pay requirement triggered at lower dollar values
- "Contract" includes "all contracts and any subcontracts of any tier thereunder"
 - Determining which subcontracts are subject to new requirement may be difficult

• Contract clause required in all covered contracts and subcontracts

- Absence of required paid sick leave clause from contract may not be dispositive as to coverage
- Erroneously omitted clauses must be incorporated retroactive to commencement of performance under contract
- Contracting agency may be required to pay any necessary additional costs

Covered Subcontracts

- EO paid sick leave obligations apply to subcontract of covered prime contract if subcontract:
 - 1. Is a contract or contract-like instrument; and
 - 2. Is one of the 4 types of contracts covered by EO
- Only covered subcontracts of covered prime contracts are subject to EO requirements
- <u>Example</u>: A subcontract to supply napkins and utensils to covered prime contractor operating fast food restaurant on a military base is <u>not</u> covered subcontract for purposes of EO
 - The prime contract is covered contract
 - <u>But</u> subcontract is not one of 4 types of covered contracts (because EO does not apply to PCA contracts for manufacturing or furnishing of materials, supplies, articles, or equipment)

Which Workers Are Covered?

Workers performing on covered contracts

 Meaning directly performing specific services call for by the contract

Workers performing *in connection with* covered contracts

- Meaning performing other duties necessary to the performance of the contract, <u>unless</u> less than 20 percent of their hours in given workweek are related to covered contracts
- Analysis on workweek-by-workweek basis



CBA Temporary Exclusion

- Temporary and limited exclusion for employees whose work is governed by collective bargaining agreement (CBA) until CBA expires or January 1, 2020, whichever is earlier, if CBA was ratified before September 30, 2016
- Applies to any paid sick time policy or other paid time off policy under CBA that allows employees to take leave for reasons related to sickness or health
 - Sick leave
 - PTO
 - Vacation?
 - Personal holiday?
- Paid time off policy does not need to permit employee to be absent for all reasons required under the EO

CBA Temporary Exclusion

Amount of Sick Time CBA Currently Provides	Contractor Requirements	
56 hours	 Contractor not required to expand reasons for use No additional requirements until CBA expires or January 1, 2020, whichever is earlier 	
1-55 hours	 Contractor must provide the difference between 56 hours and the amount of sick time provided by CBA Contractor not required to expand reasons for use No additional requirements until CBA expires or January 1, 2020, whichever is earlier 	
No sick time	 Contractor must comply with <u>all</u> requirements of EO and final rule 	

Accrual of Paid Sick Leave

Accrual: Employees working on covered federal contracts earn at least one hour of paid sick leave for every 30 hours worked on or in connection with covered contract

- Hours worked = time employee spends working
- No waiting period on accrual or use

Frontload/Lump Sum: Alternatively, contractor may provide employees with at least 56 hours of paid sick leave at beginning of each accrual year

 Prorate for employees starting mid-year based on number of pay periods remaining in accrual year



Accrual Method: Accrual Rate

Non-Exempt Employees:

- All hours worked on or in connection with covered contract, including overtime

Exempt Employees:

- A contractor may track actual hours worked or assume 40 hours in each workweek
- If employee regularly works fewer than 40 hours per week on or in connection with covered contracts, accrual may be based on employee's typical hours per workweek on or in connection with covered contracts

CAUTION: To exclude time worked on non-covered work, contractor must keep accurate records

 For employees performing work in connection with—rather than on—covered contracts, contractor may estimate covered hours provided estimate is reasonable and based on verifiable information

Accrual Calculation

- Accrual must be calculated no less frequently than end of each pay period or monthly, whichever is shorter
- Accrual does not does not need to be allowed in increments smaller than 1 hour
- But fraction of hours worked shall be added to hours worked for same contractor in subsequent weeks, provided next workweek occurs within same accrual year

Accrual, Carry Over & Use

- Annual Accrual Cap: Contractor may cap accrual to 56 hours in each accrual year
- Carryover Required:
 - <u>Accrual method</u>: Paid sick leave carries over from one accrual year to next
 - <u>Frontload method</u>: An employer may limit the carry over from year to year to 56 hours
- Maximum Leave Bank Cap:
 - <u>Accrual method</u>: Contractor may limit the amount of paid sick leave an employee is permitted to have available for use at any point to 56 hours
 - <u>Frontload method</u>: Leave bank may reach 112 hours based on carryover
- No Use Cap: Contractor may <u>not</u> limit amount of paid sick leave employee may use per year or at once

Accrual vs. Frontloading Method

	1 for Every 30	Frontloading
Year 1	After 1,680 hours of work on or in connection with covered contract, employee will have earned 56 PSL hours (assuming employee does not use any)	56 hours available for use on January 1
	<u>Assume</u> : Employee accrues 56 hours but then uses 40 hours	Assume: Employee uses 40 hours
Year 2	 Jan. 1: Employee starts year with 16 PSL hours (carried over from year one) Employee can accrue until PSL bank is 56 hours Once employee has 56 PSL hours, employee cannot accrue more until employee uses 	Jan. 1: Employee carries over 16 PSL hours ; employee also receives 56 hours frontloaded, for a total of 72 PSL hours
	some PSL <u>Assume</u> : Employee has 56 PSL hours year end	<u>Assume</u> : Employee uses no PSL and has 72 PSL hours at end of year
Year 3	Jan. 1: Employee starts the year with 56 PSL hours and cannot accrue more until employee uses some PSL; if employee uses 56 PSL hours, employee can accrue up to another 56 hours .	<u>Jan. 1</u> : Employee carries over 56 PSL hours, and receives another 56 PSL hours frontloaded, for total of 112 PSL hours

Paid Sick Leave Use

- Cannot Require Replacement: Contractor may not make employee's use of paid sick leave contingent on employee finding replacement
- Use Limited to Covered Work: Use may be limited to time employee would otherwise have been spent working on or in connection with covered contractor, but contractor's records must distinguish covered and non-covered work
- Increment of Use:
 - May not require employee to take more leave than is necessary
 - Must allow employee to use paid sick leave in increments of no greater than one hour
 - Exception: Physical impossibility
 - May allow employee to use leave in smaller increments but not required to do so



Sick Leave Pay and Benefits

- Employee using paid sick leave must receive <u>same</u> regular pay and benefits as employee would have received had employee not been absent from work
 - Employees paid on salary basis: No deduction in pay
 - Employees paid hourly: Receive same hourly rate of pay they would have earned had they been present at work
 - But rule distinguishes voluntary overtime from mandatory overtime
 - Employee's pay rate at time accrued paid sick leave is not relevant
- "Regular pay" includes only payments that would be included in calculation of employee's regular rate for hours worked under FLSA
- Employee shall be compensated no later than one pay period following end of the regular pay period in which paid sick leave was used

Accrual Year, Termination & Reinstatement

• Accrual Year:

- Any 12-month period as long as it is consistent for all employees and is not selected or changed to avoid paid sick leave requirements
- If contractor fails to select accrual year, option most beneficial to employee will be used
- Termination: Accrued, unused sick leave does not need to be paid out
- Reinstatement: Paid sick leave must be reinstated for employees rehired by covered contractor within 12 months after job separation
 - No reinstatement required if unused leave was paid out at time of original separation

Permitted Use of Sick Time

Absences relating to:

- The employee's own illness (physical or mental, injury, medical condition), including diagnosis, care or preventative care
- A family member's illness (physical or mental, injury, medical condition), including diagnosis, care or preventative care
- Domestic violence, sexual assault, or stalking suffered by employee or family member:
 - For medical purposes
 - To obtain counseling
 - To seek relocation
 - To seek assistance for a victim services organization
 - To take legal action



Broad Coverage

Paid sick leave rule broader than FMLA coverage:

- May use paid sick leave for employee's child of any age
- **"Family member":** A 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"
 - "Equivalent of a family relationship" may include non-nuclear family member with no biological or legal relationship, including "close friend"
- "Physical or mental illness, injury, or medical condition" includes any disease, sickness, disorder, or impairment of, or any trauma to, the body or mind, regardless of whether it requires attention from health care provider
 - Broader than FMLA's "serious health condition"
 - E.g., common cold, ear infection, upset stomach, ulcer, flu, headache, migraine, sprained ankle, broken arm, or depressive episode



Examples of Covered Situations

- To stay home with child home from school with cold
- To accompany spouse to appointment at fertility clinic
- To provide grandparent, who has dementia, unpaid assistance with bathing, dressing and eating, if grandparent's usual paid personal care attendant is unable to keep her regular schedule
- To obtain prescription for antibiotics at health clinic
- To attend appointment with psychologist
- To have annual physical or gynecological exam
- To receive teeth cleaning from dentist's assistant
- To meet with attorney related to domestic violence situation
- To prepare for court proceeding related to domestic violence
- To find and use services of counselor or victim services organization
- To identify and move to different residence to avoid being victim



Coordination with Other Laws and Existing Leave Policies

- Existing paid leave policies may satisfy EO provided existing benefit is:
 - In addition to fringe benefit obligations under SCA or DBA
 - Not credited toward prevailing wage obligations under SCA or DBA
 - Made available to all covered employees
 - Available for "same purposes" and "under the same conditions"
 - Meets or exceeds all requirements of EO and implementing regulation
- Paid sick leave may run concurrently with FMLA leave
- Contractor's compliance with state or local paid sick leave laws must also comply with EO
- No waiver of rights



PTO & Generous Leave Policies

- **Use of PTO:** Contractor may allow employees to use:
 - All PTO for sick time and other uses permitted by rule; or
 - Only up to 56 hours of PTO, for each accrual year, for reasons permitted by rule as long as contractor tracks and maintains records reflecting PTO used pursuant to EO
- **Carryover:** Employees must begin year with as much leave as would have been entitled under EO
 - May limit carryover to 56 hours
 - No carryover required if employee starts each year with 112 hours of leave
- **Reinstatement:** Only up to 56 hours of PTO must be reinstated to employee rehired within 12 months of separation (no reinstatement required if PTO paid out at termination)
- No Additional PTO: Employees who use their entire PTO balance for vacation are not entitled to additional PTO, as long as PTO policy does not create significant barriers to using PTO for sick time purposes

Multiemployer and Other Plans

- Contractor may fulfill its sick leave obligations jointly with other contractors—as though all contractors are single contractor—though multiemployer plan
 - "Multiemployer plan" = Plan to which more than one employer is required to contribute and which is maintained pursuant to one or more CBAs between one or more employee organizations and more than one employer
 - Each contractor remains responsible for any EO violation that occurs during its employment of employee
- Contractor may satisfy its obligations under EO by providing paid sick leave through fund, plan, or program

Request for Leave

- Oral or written request, including expected duration, to extent reasonably feasible
- Request should include information sufficient to inform contractor that employee is seeking paid sick leave under EO
 - Foreseeable: Seven days in advance
 - <u>Unforeseeable</u>: As soon as practicable
- Employee does not need to reference "sick leave" or "paid sick leave"



Denial of Request for Leave

- Contractor may deny request if:
 - Employee provided insufficient information about need for leave
 - Reason given is not consistent with permissible uses of paid sick leave under EO
 - Employee did not indicate when need would arise
 - Employee will not have sufficient amount of paid sick leave to cover request (partial denial may be appropriate)
 - Request is to use leave during non-covered work time
- Denial must be in writing with explanation
- If denial is based on insufficient information, contractor must permit employee to submit new, corrected request
- Contractor shall respond as soon as practicable

Certification/Documentation

- Only after absence of **3 or more consecutive full workdays**
- Must allow employee **30 days** from first day of leave to obtain certification
- Contractor must request certification before employee returns to work
 - General policy may be sufficient if actual notice is provided
- Documentation must contain <u>only</u> "the minimum necessary information establishing a need for the employee to be absent from work"
- Must allow employees **5 days** to cure deficiencies
- Leave request may be retroactively denied when employee fails to provide certification or documentation within 30 days or when employee's documentation is insufficient and employee fails to correct deficiency within 5 days
- Confidentiality obligations
- Contact with health care provider restricted



Notification Requirements

- Contractor must notify employees regarding amount of paid leave employee has accrued but not used:
 - Each pay period or monthly, whichever is shorter;
 - Upon separation of employment; and
 - Upon reinstatement of paid sick leave (on rehire)
- Existing systems may satisfy or partially satisfy notification requirements
 - Paycheck
 - Online system that employee can check any time

Other Compliance Obligations

- Recordkeeping obligations: 3 years
- **DOL Notice:** Must be posted in prominent and accessible place at worksite
 - Electronic posting may satisfy this requirement
 - <u>https://www.dol.gov/whd/regs/compliance/wh1090.pdf</u>
- Contract Clause: Covered contracts and subcontracts entered into after January 1, 2017, must contain clause set forth in Appendix A certifying compliance with EO, and that compliance is condition of payment
 - Prime and upper-tier contractors are responsible for compliance by any subcontractor or lower-tier subcontractor subject to the EO regardless of whether contract clause was included in subcontract

Interference and Discrimination Prohibited

Covered contractors may not:

- Interfere with employee's accrual or use of paid sick leave; or
- Discriminate against employee for:
 - taking, or attempting to take, paid sick leave;
 - filing complaint, initiating proceeding, or otherwise asserting right or claim under EO;
 - cooperating in any investigation or testifying in any proceeding under EO; or
 - assisting any other employee in asserting rights to sick leave

Enforcement & Liability for Non-Compliance

- The Secretary of Labor is charged with investigating potential violations and obtaining compliance with EO
- Depending on violation, relief may include:
 - Compensation for unpaid leave
 - Liquidated damages
 - Employment, reinstatement, promotion
 - Restoration of leave
 - Lost pay and benefits
 - Other actual monetary relief
 - Suspension or withholding of payment to contractor
 - Debarment
 - Civil Action
 - Retroactive inclusion of the contract clause
- Disputed matters will be resolved in proceedings before DOL's Office of Administrative Law Judges



Recommendations

- Identify government contracts that were or will be awarded, renewed, extended or amended on or after January 1, 2017, to determine if contract is covered by EO
- 2. Ensure all covered contracts contain required contract clause located in Appendix A.
- 3. Review and revise sick time/PTO policies to determine whether they satisfy EO requirements, including those pertaining to accrual, use, carryover, and all other provisions
- Review attendance and other disciplinary policies to ensure that adverse actions are not taken against employees for using sick leave



Recommendations

- 5. Post the DOL's Workers Rights Under Executive Order 13706 poster
- Review and update timekeeping, payroll and benefits systems to verify they will comply with EO's recordkeeping requirements
- 7. Review CBAs of covered employees to determine whether their leave provisions will satisfy EO requirements, and provide additional leave as required
- If the CBA does not fully comply, prepare for negotiating changes to CBAs before CBA expires or January 1, 2020, whichever is earlier



Questions?





The Federal Contractor Paid Sick Leave Final Rule

May 2017

