

October 23, 2015

## Employees of Federal Contractors Entitled to Paid Sick Leave Under New Executive Order

Adding to the ever-increasing collection of sick time legislation across the country, on Labor Day President Barack Obama signed an [Executive Order](#) (the “Order”) mandating that federal contractors provide all employees, “in the performance of the contract or any subcontract”, with paid sick leave and protecting such employees from discrimination for taking, attempting to take, or assisting other employees with asserting their right to take, paid sick leave. Contracts where the solicitation for the contract has been issued, or where the contract has been awarded outside the solicitation process, on or after January 1, 2017 must comply with this new Order.

The Order provides for 56 hours of paid sick leave annually. Like the vast majority of other state and local sick leave legislation, the Order requires sick leave to accrue at a rate of one hour of paid leave for every 30 hours worked. The Order is silent, however, on when an employee must be able to begin using the accrued leave. Paid sick leave under the Order may be used for the following reasons:

- 1) The employee’s physical or mental illness, injury, or medical condition;
- 2) Obtaining diagnosis, care, or preventative care from a health care provider;
- 3) Caring for 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” and who needs diagnostic care, preventive care, has a physical or mental illness, injury, or medical condition, or is otherwise in need of care;
- 4) For an absence related to domestic violence, sexual assault or stalking if the time off is for the purposes described in points 1 and 2, to obtain additional counseling, to seek relocation, to seek assistance from a victim services organization, to take related legal action (including preparing for a civil or criminal legal proceeding), or to assist a relative (as defined above) in engaging in these activities.

Notably, the Order does not define “child”, “parent” or what would constitute an applicable “affinity” relationship.

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Paid sick leave under the Order must be carried over from one year to the next; however, contractors may cap accrual at 56 hours. Employees who leave employment with the federal contractor and who are rehired within 12 months of separation are entitled to reinstatement of their previously accrued, unused sick leave. This reinstatement period is twice as long as under the New York City Earned Sick Time Act (“ESTA”), which generally requires reinstatement of accrued, unused sick leave if the employee is rehired within 6 months.

The Order does have many similarities with ESTA. Like ESTA, the Order prohibits federal contractors from requiring employees to find a replacement worker to cover their shift as a precondition to using sick time. Additionally, both ESTA and the Order permit employers to require 7 days’ notice for a foreseeable need to use sick time (though the Order states “at least 7 days”), and notice as soon as practicable in other circumstances. ESTA, however, permits employers to require foreseeable notice in writing, while the Order allows for a written *or oral* request and notes that the request should include the expected duration of the leave. Unlike ESTA, which prohibits an employer from requiring the employee to provide certification from a health care provider to justify an absence lasting fewer than 4 consecutive days, the Order permits employers to require such certification after 3 or more consecutive days of absence. This information must be provided within 30 days from the first day of the leave.<sup>1</sup> For leave due to domestic violence, sexual assault, or stalking, the Order permits the contractor to require documentation after 3 or more consecutive days of absence from “an appropriate individual or organization with the minimum necessary information establishing a need for the employee to be absent from work.” The contractor must keep this information confidential, unless the employee consents or disclosure is otherwise required by law. Unlike [ESTA](#), the Order does not appear to provide for an employee, rather than a health care provider, to verify him- or herself that sick leave was used for authorized purposes.

As with other sick leave legislation generally, the Order does not require payment of accrued but unused sick leave upon separation from employment. The paid sick leave mandated by the Order supplements, rather than replaces, a contractor’s obligations under the Service Contract Act and the Davis Bacon Act. Contractors may not receive credit toward their prevailing wage or fringe benefit obligations under these laws for

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<sup>1</sup> The 30-day requirement is only noted in the provision regarding sick leave (bullets 1 – 3 above), but may also apply to leave due to domestic violence, sexual assault, and stalking.

sick leave provided under the terms of the Order. Because many Contractors already have sick leave policies in place, it is important to note that an existing paid leave policy providing benefits in addition to the fulfilment of Service Contract Act and Davis Bacon obligations will comply with the Order if employees are eligible for at least 56 hours of paid sick leave annually and if the leave may be used for the same purposes and under the same conditions as required by the Order.

The Order contemplates that the Secretary of Labor will issue implementing regulations by September 30, 2016. Ideally, these regulations will resolve the areas of ambiguity present in this Order, such as those described above, as well as address the absence of guidance on issues such as the minimum increments in which sick leave may be used, employer notice provisions, and document retention.

This Order is yet another piece of the complex puzzle that has become the provision of paid sick leave to employees. All employers, particularly those with offices located in one of the approximately 25 jurisdictions with paid sick leave legislation, and now, federal contractors, should review their sick leave policies and consult with qualified counsel to ensure continued compliance with these multiple and sometimes inconsistent laws. If you have any questions or concerns regarding this new Order and how it may affect your sick leave policy, please contact Kristina Grimshaw at (212) 758-7792, or any other attorney at the Firm.

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