



Sick daze: Obama orders federal contractors to give employees paid sick leave

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Employers still reeling from the U.S. Department of Labor's (DOL) new proposed rule that will amend the Fair Labor Standards Act's "white collar" exemptions likely spent Labor Day trying to forget about labor and employment laws. But that was not the case at the White House. President Barack Obama signed an executive order (the Order) on Sept. 7, 2015, requiring federal contractors and subcontractors to offer paid sick days to their employees and urged Congress to pass legislation that would provide family and medical leave to private-sector workers.

This executive action was the latest in a series of Obama's administrative efforts to impose new requirements on companies that contract with the U.S. government and advance his labor and employment agenda—prior actions that include raising the minimum wage for employees under federal contracts, making it tougher for federal contractors who have violated labor laws to do business with the government, and protecting gay and transgender workers from discrimination. The Order will reportedly give about 300,000 employees of federal contractors the ability to accrue at least seven days of paid sick leave per year, including paid leave allowing for family care.

The president cites an improved economy and efficiency in governmental procurement as the benefits of mandatory paid sick leave: "Providing access to paid sick leave will improve the health and performance of employees of federal contractors and bring benefits packages at federal contractors in line with model employers, ensuring that they remain competitive employers in the search for dedicated and talented employees."

Covered federal contracts

The Order is meant to ensure that new federal contracts include a clause, which the contractor and any subcontractors must incorporate into lower-tier subcontracts, specifying, as a condition of payment, that all employees, in the performance of the contract or any subcontract thereunder, will earn paid sick leave. Although the Order is effective immediately, the paid sick leave obligations will apply to covered federal contracts solicited or awarded on or after Jan. 1, 2017. The Order defines "covered contracts" to include:

- Procurement contracts for services or construction.
- Contracts or contract-like instruments for services covered by the Service Contract Act.
- Contracts or contract-like instruments for concessions.
- Contracts or contract-like instruments "with the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public."

Additionally, to be covered by the Order, the wages of employees under the above categories of contracts or contract-like instruments must be governed by the Davis-Bacon Act, the Service Contract Act, or the Fair Labor Standards Act, including employees who qualify for an exemption from its minimum wage and overtime provisions.

Accrual of sick leave

The Order requires that all employees, in the performance of the covered contract or any subcontract thereunder, earn at least one hour of paid sick leave for every 30 hours worked—up to a minimum of 56 hours a year. The Order applies to both full-time and part-time employees who work on a covered contract. Covered employees must be permitted to carry sick time over from year-to-year, although the Order does not require a contractor to "pay out" accrued-but-unused sick time upon termination. Rehired employees must have their accrual reinstated if they return within 12 months after a job separation.

The paid sick leave required by the Order is in addition to a contractor's obligations under the Service Contract Act and the Davis-Bacon Act and contractors may not receive credit toward their prevailing wage or fringe benefit obligations under those acts for any paid sick leave provided in satisfaction of the requirements of the Order. A contractor's existing paid leave policy provided in addition to the fulfillment of Service Contract Act or David-Bacon Act obligations, if applicable, and made available to all covered employees will satisfy the requirements of the Order if the amount of paid leave is sufficient to meet the requirements and if it may be used for the same purposes and under the same conditions of the Order.

Use of paid sick leave

The Order is not limited to absences caused by an employee's personal illness, but rather, allows covered employees to use paid sick leave for a variety of reasons. Specifically, the Order allows employees to use paid sick leave for an absence resulting from:

- Personal physical or mental illness, injury, or medical condition—including obtaining diagnosis, care, or preventive care from a healthcare provider.
- Caring for a child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship who has a physical or mental illness, injury, or medical condition or needs for diagnosis, care, or preventive care.
- Recovering from or dealing with matters related to domestic violence, sexual assault, or stalking.

Paid sick leave must be provided upon the oral or written request of an employee—made at least seven calendar days in advance where the leave is foreseeable, and in other cases as soon as practicable—and should include the expected duration of the leave. Use of paid sick leave cannot be made contingent upon the requesting employee finding a replacement

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to cover the work to be missed.

If an employee is absent for three or more consecutive work days on paid sick leave, the employer is permitted to request certification from a healthcare provider (if the absence is related to a medical condition) or documentation from the appropriate individual or organization containing the minimum information necessary to establish a need for the employee to be absent from work (if the absence is related to domestic violence, sexual assault, or stalking). The employer shall not disclose any verification information and shall maintain confidentiality about any domestic violence, sexual assault, or stalking unless the employee consents or if disclosure is required by law.

Other provisions

The Order does not supersede any applicable federal or state law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under the Order. Additionally, the Order prohibits discrimination and retaliation—a covered contractor may not interfere with or in any manner discriminate against an employee for taking, or attempting to take, paid sick leave under the Order or in any manner asserting, or assisting any other employee in asserting, any right or claim related to the Order.

Regulations and implementation

The Order directs the secretary of labor to issue implementing regulations by Sept. 30, 2015. These regulations will define the terms used in the Order and set forth recordkeeping obligations for employers. The Order grants the DOL with the authority to enforce the Order by investigating potential violations and ensuring compliance with the Order. Within 60 days of the secretary of labor issuing implementing regulations, the Federal Acquisition Regulatory Council will issue regulations in the Federal Acquisition Regulation to provide for inclusion in federal procurement solicitations and contracts subject to the Order.

Next steps

The Order may pose significant financial and administrative burdens on federal contractors and subcontractors. Coverage needs to be evaluated and once determined, a covered employer is wise to be proactive in assessing the impact compliance with the Order will have on its business. Thorough review of leave policies and recordkeeping procedures, as well as job bid pricing and contract language, is recommended.