



HESSE | MARTONE
Attorneys & Counselors

10 Things Federal Contractors Need To Know About Paid Sick Time

© 2016 by Andrew J. Martone, Hesse Martone, P.C.

On December 29, 2015 the United States Department of Labor issued its final rule to implement Executive Order 13706 requiring federal contractors to provide employees with paid sick leave. Executive Order 13706 imposes substantial new obligations on federal contractors beginning January 1, 2017.

Here are 10 things that federal contractors need to know:

1. **The basic premise.** Executive Order 13706 requires covered federal contractors to provide their covered employees with up to 56 hours of paid sick leave each year. Employees are entitled to use this leave not only for their own sickness, but also to provide care for family members and “family like individuals”.

2. **Which Employers are Covered?** The Rule applies to employers with “covered contracts” that have been awarded (or where the solicitation has been issued) on or after January 1, 2017 and to existing contracts that are renewed/extended/amended on or after January 1, 2017.

A. **Covered contracts.** The Rule defines covered contracts very broadly to include both contracts and subcontracts of any tier in the following areas:

1. Contracts for construction or services covered by the Davis Bacon Act;
2. Service contracts covered by the Service Contract Act; and
3. Other contracts for concessions, in connection with federal property or lands or related to offering services for federal employees and their dependents.
4. All covered contracts and subcontracts entered into after January 1, 2017 are required to contain the sick leave contract clause published by the United States Department of Labor. Among other things, this clause specifies that providing paid sick leave to covered employees is a condition of payment on the federal contract.

3. **Which Employees are Covered?** Employees are eligible to accrue sick pay if: (1) they perform work on or “in connection with” a covered contract; (2) if the terms of their

compensation are covered by the Davis Bacon Act, the Service Contract Act or the Fair Labor Standards Act. Even employees who are “exempt” under the Fair Labor Standards Act are covered.

- A. What does “in connection with” mean? An employee is considered to be performing work “in connection with” a covered contract if at least 20% of their work hours in a given work week are spent working in connection with the covered contract. Work is “in connection with” a covered contract if it is an activity necessary to the performance of that contract, even if not performing the specific services called for by the contract.
- B. Employees working “on” covered contracts are covered, regardless of the percentage of their time spent working on the covered contract.

4. The Effect of Union Collective Bargaining Agreements. If a union contract already provides covered employees with at least 56 hours of paid sick time each year, the Rule will not require the employer to add additional sick time (until 2020). To qualify, a collective bargaining agreement must allow employees to use the paid time off as sick time and/or to seek health care, and if the collective bargaining agreement does not allow such time to be used by the employees as sick time, this exception does not apply. If a union contract provides an amount of sick time less than 56 hours, the Rule requires the employer to make up the difference.

This exception only applies to collective bargaining agreements ratified before September 30, 2016 until the date that the contract terminates or January 1, 2020, whichever is earlier and federal contractors do not receive credit toward their prevailing wage or fringe benefit obligations for providing this paid sick leave.

5. How is the Sick Time Accrued?

Covered employees accrue sick time at the rate of one (1) hour of paid sick leave for every 30 hours worked either on or in connection with a covered contract. Employees only accrue sick leave when they are actually working. Employers do not have to track accrual rates and may simply front load the system and provide covered employees with a lump sum of 56 hours paid sick leave at the beginning of each accrual year.

- A. An employer may only exclude time spent on non-covered work if the employer keeps accurate records recording the employee’s covered and non-covered work hours.
- B. For employees performing work “in connection with” rather than “on” a covered contract, the employer may estimate the percentage of the employee’s hours worked in connection with the covered contract as long as the estimate is reasonable and based on documented or verifiable information.
- C. Employers are required to calculate employees’ accrual of sick leave either at the conclusion of each pay period or each month, whichever is shorter.

- D. Exempt employees will normally accrue sick time based on actual hours worked or by assuming the employee works 40 hours each work week. If an exempt employee regularly works fewer than 40 hours per week, the contractor may apply the accrual rate based on the employee's typical number of hours worked as long as the employer has documentary evidence to support its numbers.

6. Notification requirements. The Rule requires employers to regularly notify employees of the amount of sick time they have accrued. This notice has to be provided at least once each pay paid or each month (whichever is shorter), upon separation of employment and upon reinstatement of paid sick leave on rehire. Employers can provide this notification online, on the employee's paycheck or regularly in writing.

7. Carry over and sick leave banks. Paid sick leave carries over from one accrual year to the next, and although an employer can cap the amount of paid sick leave an employee is permitted to accrue to 56 hours in each accrual year, paid sick leave carried over from the previous year does not count toward the employee's maximum carry over. The Rule does permit employers to maintain two caps – an annual accrual cap of 56 hours and a maximum sick leave bank of 56 hours.

- A. Employers may not limit the amount of paid sick leave an employee may use per year (or all at once), and an employee can use more than 56 hours in a year if the employee carried over hours from the previous year.
- B. Under the Rule, unused sick leave does not have to be paid out on termination. Any unused, accrued paid sick leave must be reinstated for employees rehired by a covered contractor within 12 months after termination.

8. When Can Employees Use Their Sick Time? The Rule is very broad and permits paid sick leave to be used for a number of reasons:

- A. An employee's own physical or mental illness, injury or medical condition;
- B. When an employee needs to obtain a diagnosis, routine medical care or preventative medical care;
- C. To care 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" for a purpose listed in A and B above;
- D. For domestic violence/stalking related situations that would otherwise qualify under A through C above and/or to seek counseling, relocation, legal assistance or assistance from victim services organizations

9. How do Employees Use Their Sick Time? An employer must allow covered employees to use their paid sick leave in increments of no larger than one (1) hour and must pay employees for their sick leave on the next pay period after they use their sick leave.

- A. Employees may request sick leave orally or in writing and only need to let the employer know that the employee is seeking paid sick leave and (to the extent feasible) the expected duration of the sick leave. The employee does not need to specifically use the words “sick leave.”
- B. An employer cannot require the employee to provide extensive or detailed information about their need to be absent.
- C. If the sick leave lasts three (3) or more consecutive full work days, the employer may require certification or documentation if the employer informs the employee of the requirement before the employee returns from leave.
- D. Employees have 30 days from the first day of their sick leave to obtain the certification, which only has to provide “the minimum necessary information establishing the need for the employee to be absent.”

10. Does the New Requirement Increase an Employer’s Potential Legal Exposure?
Yes. Covered employers are prohibited from interfering with an employee’s accrual or use of paid sick time and forbidden from discriminating against employees for exercising their rights under the Order.

- A. Penalties for violating the prohibitions against interference and retaliation include not only typical damages in a civil case (lost pay and benefits, reinstatement, liquidated damages, etc.), but also involve suspension or withholding of pay on the government contract involved and potential debarment as a federal contractor.
- B. Disputes under the rule relating to allegations of interference or retaliation will be resolved before the Office of Administrative Law Judges.