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Sick Leave

DOL Proposes Paid Sick Leave Mandate For Federal Contractors, on Obama's Order

Federal contractors would be required to provide workers with up to seven days of paid sick leave per year under a proposed rule unveiled by the Labor Department (DOL) Feb. 24.

Acting on an executive order signed in September, the DOL's Wage and Hour Division (WHD) proposed mandating that government contractors offer one hour of paid leave for every 30 hours of work. Employees could use the time to care for themselves or a family member and for absences resulting from sexual assault, domestic violence or stalking.

In an accompanying fact sheet, the WHD estimates the rule would extend paid sick leave to nearly 437,000 workers who currently don't receive it.

The rule implements President Barack Obama's executive order by defining terms and specifying the types of contracts and employees that are covered. A paid leave requirement would apply to new or renewed contracts beginning in 2017.

The agency rulemaking comes as federal legislation to establish paid leave for much of the overall workforce faces bleak prospects in the Republican-controlled Congress, while state and local initiatives are gaining traction in parts of the country. Vermont, following passage of a bill this month, is poised to become the fifth state, plus Washington, D.C., to enact paid sick leave legislation.

The DOL rule, "as proposed, is a tremendous advance for employees of federal contractors," Vicki Shabo, vice president of the National Partnership for Women and Families, told Bloomberg BNA Feb. 24. "As the rule makes clear, it will affect close to a million workers by the time it is implemented, and that is substantial because it impacts workers' health and their economic security, and the health and well-being of their families."

Kris Meade, a partner at Crowell & Moring and chairman of its Labor and Employment Group, said the DOL proposal includes a "fairly expansive definition" of what would qualify for paid time off.

Meade said the proposed definition of which contractor employees would be covered under the proposal could shift over time since it would cover employees "who work on or in connection" with a contract.

"It's a little bit tricky," he said, as employees' status could change month to month or even day to day. For the sake of regulatory certainty, Meade predicted that

smaller and mid-size firms that currently don't offer paid sick leave might apply it to all employees at once rather than trying to determine whose work might be connected to a federal contract at any given time.

The DOL said that within five years, once more new contracts are reached, the rule would aid 828,000 employees, nearly 400,000 of whom already receive some paid sick leave and would become eligible for more.

Following a 30-day public comment period, the WHD will have until Sept. 30 to issue a final rule, as required by the terms of the executive order. The proposal is scheduled for a Feb. 25 publication in the Federal Register.

Broad Coverage of Contracts. "The term contract broadly includes all contracts and any subcontracts of any tier thereunder," the WHD stated in the rule.

This includes four major categories of government contracts: construction contracts covered by the Davis-Bacon Act; service contracts under the McNamara-O'Hara Service Contract Act; concessions contracts; and contracts connected to federal property.

"From that standpoint, they're clearly trying to get as far into the private sector as they can without having passed a law."

MARC FREEDMAN, U.S. CHAMBER OF COMMERCE

The proposal also contains "narrow exclusions from coverage" for a few categories of contractual agreement, including federal grants, arrangements with Indian tribes and construction contracts under \$2,000.

Further exempted from paid leave would be contractor employees who perform work on a federal contract but also spend at least 80 percent of their weekly work hours on work not connected with that contract.

The agency said it largely followed the coverage parameters that the WHD already determined in its 2014 regulation requiring government contractors to pay a minimum wage of \$10.10 per hour (102 FCR 416, 10/7/14).

The contractor minimum wage rulemaking also derived from an Obama order (101 FCR 154, 2/18/14).

Accruals. Contractors also will have to be aware that under the proposal, paid sick leave would carry over from year to year. "You can build up some pretty significant paid sick leave banks," Meade said. That's a liability contractors will have to account for, he said.

Another potential area for comment is the type of contracts covered, which include those covered by the Service Contract Act and concession contracts. “There’s a long list,” he said. The fact that the proposal covers subcontractors also will generate extra comment, he said.

The Crowell & Moring partner also added that the fact that Obama issued the executive order rather than wait for Congress to pass a law is “pretty much par for this White House” when it comes to labor mandates. “It’s an extraordinary exercise of executive power,” he said. Meade also described the proposal as “more of the same” in terms of the White House trying to expand employee rights.

Because of the tight 30-day comment window, Meade predicted that the proposal would be adopted by the Sept. 30 deadline — or at least before the election. At the same time, he didn’t rule out the possibility of a lawsuit from the contracting industry to challenge the proposal, though he said legal action addressing the proposal likely isn’t at the top of the priority list for the contracting community.

Other Proposal Provisions. The department’s proposal also established that federal agencies would be responsible for placing a clause in their contracts that describe the paid sick leave requirements. The agencies would be tasked with withholding funds from contractors that don’t comply, and then would need to inform the WHD of any noncompliance complaints.

Leave accrual would be calculated on a weekly basis, with one hour of paid sick leave offered for every 30 hours worked. Or, employers could abandon the week-by-week system in favor of offering a minimum of 56 hours of paid leave at the start of each year, the DOL said.

Acceptable reasons for employees to use paid sick leave would include personal — physical or mental illness, injury, medical condition — and to care for family members — child, parent, spouse, domestic partner, blood relative or “any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship,” the agency said.

Will Congress Follow? Rep. Rosa DeLauro (D-Conn.), in a Feb. 24 statement, called the DOL proposal “great news for more than 800,000 American workers and their families.” She then urged Congress to pass a bill she sponsored called the Healthy Families Act (H.R. 932), which would require employers with 15 or more workers to provide up to seven days of paid sick leave.

“As the only developed country that does not require employers to offer paid sick days, we must do better for hardworking families,” DeLauro said.

Capitol Hill opponents of a paid leave requirement, such as Sen. Deb Fischer (R-Neb.), have said they would prefer to offer tax and other incentives for employers that choose to offer paid leave to their workers. Fischer and Sen. Angus King (I-Maine) introduced legislation in December (S. 2354) that would provide a tax credit to employers offering paid family and medical leave.

The 15-employee threshold in DeLauro’s bill was not included in the DOL regulation for contractors, which Marc Freedman, executive director of labor law policy at the U.S. Chamber of Commerce, criticized as evidence that the agency “is not even trying to protect small employers.”

Freedman told Bloomberg BNA Feb. 24 that by following the minimum wage rule’s definition of federal contractor, the DOL is capturing “anybody with a lease or a physical nexus to government property, as opposed to the traditional concept of somebody providing goods and services to the federal government.”

“From that standpoint, they’re clearly trying to get as far into the private sector as they can without having passed a law,” he added.

To justify the rulemaking, the DOL said paid sick leave improves “the health and performance of employees of Federal contractors” and will “bring their benefits packages in line with model employers, ensuring that Federal contractors remain competitive employers.” This will lead to “improved economy and efficiency in Government procurement,” the DOL rule added.

To spread paid leave beyond the contractor workforce, the DOL has tried to facilitate state and local initiatives. Speaking engagements by Labor Secretary Thomas Perez across the country have regularly highlighted the need for local and state governments to take action, and in its latest budget request, the department asked for \$2 billion in grants to help states develop family leave insurance programs.

Sense of Urgency. By allowing the public 30 days to submit comments, rather than the more typical 60 days, the WHD rulemaking showed a sense of urgency to finalize the rule before the Sept. 30 deadline set by the president.

The rule could be rendered moot if the next administration were to repeal Obama’s order.

Even if it takes effect on Jan. 1 as the DOL proposed, the paid sick leave executive order — and therefore, the regulation implementing it — could be undone if a Republican is in the White House next year, Judy Conti, federal advocacy coordinator at the National Employment Law Project, told Bloomberg BNA Feb. 24. It’s unclear at this stage where the paid leave regulation will stack up compared with other workplace initiatives disliked by Republicans, Conti added. The need “to ensure that these kind of advances stay enshrined” is “one of the reasons why advocates find it so important” for a Democrat to be elected president this year, she said.

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Text of the proposed rule is available at <http://src.bna.com/cpg> and of a DOL fact sheet at <http://src.bna.com/cpn>.