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Final Sick Leave Rule Offers Little Relief For Contractors

By **Daniel Wilson**

Law360, Nashville (September 29, 2016, 8:59 PM EDT) -- Despite some minor tweaks, the U.S. Department of Labor's final rule requiring federal contractors to provide paid sick leave to employees still imposes a significant burden on those companies, attorneys said, especially in combination with a slate of other recently introduced labor rules.

The rule, unveiled on Thursday, requires federal contractors to give employees at least one hour of paid sick leave for every 30 hours of work on covered contracts, up to 56 hours a year, with up to 56 hours able to be carried over from year to year if unused.

The rule applies to federal contracts and "contract-like instruments" for services, construction and concessions; contracts that are covered by the Service Contract Act; and contracts where wages of employees are governed by the SCA, Davis-Bacon Act or Fair Labor Standards Act. According to a statement by the DOL, the rule will cover about 1.15 million workers, including 594,000 who currently receive no paid sick leave.

The proposed version of the rule issued in February had attracted thousands of comments, with labor and workers' rights groups generally supporting the rule, and contractors and industry groups generally arguing against the rule, saying it would impose significant compliance burdens.

But although the DOL made several tweaks and clarifications in its final rule, contractors will find little in those changes to assuage their concerns, attorneys said, with the core of the rule remaining unchanged.

"Things changed a little bit, but there's nothing radical; no radical change — [the DOL] didn't reduce the number of hours or anything like that," Proskauer Rose LLP partner Guy Brenner said.

Changes in the final rule that will be welcomed by contractors include two changes to a requirement that contractors reinstate up to 56 hours of accumulated sick leave to an employee who is rehired within 12 months of leaving.

The first of those tweaks will eliminate that requirement if the balance of sick leave had been paid out at the time of separation, and the second drops a requirement for successor contractors to reinstate leave accumulated by a worker when with a predecessor contractor.

"By getting rid of those obligations, that really was a great benefit, because it really will enable employers to harmonize these requirements with their existing [paid time off] policies," Ogletree

Deakins Nash Smoak & Stewart PC shareholder Jim Murphy said.

Other positive changes for employers include an adjustment to allow sick leave to accumulate in line with their pay periods, rather than weekly, and a tweak that ensures paid sick leave is not accumulated when workers are out on other paid time off, attorneys claimed.

But the major provisions of the rule, including its effective implementation date — it applies to contracts awarded on or after Jan. 1, 2017 — and the amount of sick leave that must be provided remain unchanged, posing a significant burden to many federal contractors.

Part of that is the direct monetary burden of providing sick leave where they had previously provided less, or none, while part of it is administrative, having in some cases to set up systems to keep track of sick leave where those systems had previously not existed, attorneys said.

"This is still very broad rule and will have sweeping effects," Littler Mendelson PC shareholder Sarah Gorajski said. "I think the DOL has grossly underestimated the costs employers are going to incur in implementing the rule."

The DOL has stated that it expects the total cost of compliance with the rule across all federal contractors to run to close to $380 million each year over the next decade.

One group of contractors who is particularly likely to suffer headaches applying the rule are those where only part of their business involves working on covered contracts, attorneys claimed. The necessary calculations get particularly complicated for employees whose work responsibilities rotate and for support staff such as receptionists and human resources workers whose work is spread across the whole of a company’s business.

Small contractors, who have limited resources and thus also typically have the least flexibility to cover staff who may go on leave at short notice, may also be hit particularly hard, attorneys said.

"They don't have the systems or controls, or compliance staff in place, to handle what they've been subjected to," Murphy said. "Most of my clients are medium to larger size and [even] they're having a rough time getting their heads around all of these requirements."

Another significant issue is the broad applicability of a requirement that employers allow employees to take time off to care for family — which includes family-like "close relationships" — combined with the fact that employees are only required to provide supporting documentation if they take three or more consecutive workdays off, a requirement that may invite abuse from unscrupulous employees, attorneys argued.

"What I think what we're going to see is, in employee populations that are prone to abuse — certainly not every employee is abusing their policies — but there are some groups of workers who do tend to view these sick leave policies as extra vacation," Gorajski said.

Further, the rule must also be viewed in light of cumulative burdens of other requirements federal contractors must follow, such as state and local labor laws, as well an increasing number of regulations imposed by the Obama administration on federal contractors over time — especially over the past few years, according to attorneys.

With a hostile Congress rejecting proposed labor regulations, the administration has effectively used the one group of employers it has unilateral authority to impose new requirements on, federal contractors, as a test bed for policies the administration would like to see imposed more broadly, attorneys said.

These policies range include the contentious Fair Pay and Safe Workplaces rule requiring disclosures of labor law violations, minimum wage and wage transparency requirements, and anti-discrimination rules covering sexual orientation and gender identity, with a string of new rules having been imposed in a short period of time, attorneys claimed.

"Even if you agree [politically], the number of changes that have been imposed lead to a feeling that with those new burdens ... the compliance costs keep going up and there's a frustration," Brenner said.

Although federal contractors and potential federal contractors have yet to throw in the towel in any visible way, there is definitely a rising level of concern about having to comply with the growing slate of rules that apply to them, according to several attorneys.

"I can't say we've had any clients who have said, 'I'm done with the federal government; I'm never going there again,' but I do think there is increasing concern about the idea of shifting burdens to contractors," Covington & Burling LLP government contracts practice co-chair Jennifer Plitsch said.

--Editing by Katherine Rautenberg and Patricia K. Cole.
