

Required Paid Sick Leave Will Weigh Heavily on Government Contractors under Labor Department Proposal

By Patricia Anderson Pryor, Leslie A. Stout-Tabackman, Francis P. Alvarez and Laura A. Mitchell

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Government contractors may have reason to feel uneasy at what awaits them from the Administration's latest effort to mandate worker benefits. U.S. Department of Labor's [Notice of Proposed Rulemaking](#) provides a glimpse into how the Department of Labor intends paid sick leave ("PSL") to affect federal contractors' and their employees under Executive Order 13706. (See our article, [U.S. Labor Department Publishes Proposed Regulations Implementing Executive Order on Government Contractor Paid Sick Leave](#).) Significant burdens lie ahead, if the regulations are adopted as drafted.

The Executive Order adds to the impositions of more than 25 different state and local laws providing for paid sick leave across the country. (See our blog post, [The Evolving Paid Sick Leave Patchwork: 2016 Update](#).) Vermont is poised to become the fifth state to enact state-wide legislation. (See our article, [Vermont Governor to Sign Paid Sick Leave Bill](#).)

Accrual

The Executive Order allows employees to accrue at least one hour of PSL for every 30 hours worked in the performance of covered contracts. The NPRM explains that "worked" includes any time for which an employee is paid, including vacation, paid time off and PSL, and includes time worked on or in connection with a covered contract. The NPRM also suggests that its reach may cover individuals otherwise designated as independent contractors.

The NPRM appears to assume that all work is covered unless the employer can prove otherwise. This places the onus on the employer to prove with accurate, detailed records when an employee works on non-covered projects.

Employers must calculate each week how much PSL each employee has accrued. Alternatively, the NPRM suggests that employers can provide employees with 56 hours of PSL at the beginning of each year.

Employees must be allowed to carry over unused PSL at the end of the year, but an employer that chooses the accrual rate, rather than providing the full 56 hours at the start of the year, may limit the amount of accrual up to 56 hours at any time.

Employers are not required to pay out unused PSL upon termination. Indeed, employers should not do so as employees are entitled to have their unused PSL reinstated upon being rehired within 12 months, *even if they were paid out on termination*.

Similarities to FMLA

The process for requesting and taking leave under the NPRM has some similarities to the process under the Family and Medical Leave Act. However, some important distinctions exist. While PSL can run concurrently with FMLA leave, there will be many situations in which PSL will be available when FMLA is not, and even when FMLA certification is not timely returned, PSL may be available in some cases, allowing employees to gain an extra seven days of protected leave. Like FMLA, PSL can be taken intermittently and can be used in hour increments.

Serious Health Condition Not Required

Meet the Authors



[Patricia Anderson Pryor](#)

Principal and Office Litigation
Manager
Cincinnati 513-322-5035
[Email](#)



[Leslie A. Stout-
Tabackman](#)

Principal
Washington, D.C. Region 703-483-
8345
[Email](#)



[Francis P. Alvarez](#)

Principal
New York Metro
White Plains 914-872-6866
[Email](#)

While PSL may be used to care for oneself or a family member, PSL does not require a serious health condition. Instead, any medical condition or appointment would qualify, including for preventative care. Time away from work due to domestic violence, sexual assault, or stalking also is covered.

In addition, under the Executive Order, covered family members include child, parent, spouse, *and domestic partner or any other individual related by blood or affinity whose close relationship with the employee is equivalent to a family member*. The NPRM suggests that this could include an elderly neighbor, in-law, fiancé, close friend, grandparent, and so on. In addition an individual's child qualifies regardless of the child's age.

Employers Can Direct to Whom Requests are Made

Unlike requests for leave under the FMLA, employers can require employees to direct requests for PSL to appropriate personnel designated in the employer's policy. However, like the FMLA, the notice can be oral or written, does not have to use any specific, magic words, and is sufficient if it informs the employer that the employee seeks to be absent for a qualifying reason.

Shorter Notice Requirements

Like the FMLA, an employee must provide notice of the need for PSL either seven calendar days in advance (compared to the 30 days' advance notice required by the FMLA for foreseen absences) or as soon as practicable. Similar to the FMLA's eligibility notice requirement, an employer who receives a request for PSL must inform the employee in writing how much PSL is available.

In addition, similar to the FMLA's designation requirement, an employer must communicate in writing any denial of PSL with an explanation for the denial. While the FMLA allows a couple of days for these notices, the NPRM states that such notices for PSL should be as soon as practicable, *usually within a few hours*.

In addition to informing employees how much PSL they have when the employee requests to use PSL, employers must inform employees in writing the amount of PSL available:

- At least monthly;
- At an employee's request (no more than once a week);
- Upon an employee's separation of employment; and
- Upon an employee's reinstatement.

Certification

Like the FMLA, employers are allowed to require certification. Unlike the FMLA, however, certification may be requested only if the employee is absent three or more *consecutive workdays*. The employer must inform the employee of this requirement before the employee returns to work and the employee has 30 days to provide the certification (that is twice the amount of time allowed for an employee to provide FMLA certification). An employer must pay for the employee's time off, even while waiting for the certification, and may later attempt to recover the pay and benefits provided to the employee if the certification is insufficient.

Certification for purposes of PSL can be *any document* created or signed by a health care provider *or* his or her representative. And the employee does not have to have seen the health care provider. An employer can contact the individual who signed or created the certification, similar to its ability under the FMLA, only to authenticate the document or clarify it. An employer cannot request additional information, cannot require a second opinion, and cannot question the substance of the certification.

Interference, Discrimination Prohibited

Like the FMLA, the proposed regulations prohibit employers from interfering with an employee's use (or accrual) of PSL or discriminating against an employee who uses PSL, files a complaint, participates in an investigation, or informs others of their PSL rights.

Prohibited interference includes miscalculating the amount of PSL an employee has accrued, denying or delaying a response to a request for PSL, discouraging employees from using PSL, reducing an employee's PSL by more than what was actually used (or needed to be used), transferring an employee to work on non-covered contracts to prevent accrual or use of PSL, disclosing an employee's confidential information, or making PSL contingent on finding a replacement.

Under the proposed regulations, employers cannot count PSL as an absence under a no-fault attendance policy.

Recordkeeping

The NPRM's proposed recordkeeping requirements are extensive. Employers would have to keep the



Laura A. Mitchell

Principal
Denver 303-225-2382
Email

following records for three years:

- Name, address, and social security number of each employee
- Employee's occupation(s) or classification(s)
- Rate or rates of wages paid
- Number of daily and weekly hours worked
- Deductions made
- Total wages paid each pay period
- Copy of notifications to employees of the amount of PSL the employees have
- Copy of employees' requests to use PSL or other records reflecting such employees' requests
- Dates and amounts of PSL used by employees
- Copy of any written denials of employees' requests to use PSL, including explanations for such denials
- Records relating to the certification and documentation a contractor may require an employee to provide
- Other records showing any tracking of or calculations related to an employee's accrual or use of PSL
- Copy of any certified list of employees' unused PSL provided to a contracting officer at the conclusion of a covered contract
- Certified list of employees' unused PSL received from the contracting agency in connection with a predecessor contractor
- Relevant covered contract
- Records or other proof to distinguish between an employee's covered and non-covered work

Implications

The requirements of the Executive Order and the proposed regulations unquestionably will place an extra burden on covered federal contractors. Not only will federal contractors bear the cost of paying employees for seven sick days each year, but the administrative cost of tracking and complying with the regulations also will be burdensome, particularly for smaller and midsize companies who do not have the infrastructure or administrative staff available. In addition, the proposed regulations will make it difficult for contractors to enforce any attendance policy.

One question left open by the NPRM is what, if anything, an employer can do to prevent employees from abusing the system. Under the proposed regulations, the employer has few options for ensuring the employee is using the protected leave for one of its intended purposes. It appears that in many cases the employer is left to take the employee's word, essentially giving employees 56 hours of protected absence or tardiness before an employer can address it under any attendance policy.

Please contact a Jackson Lewis attorney with any questions about the proposed regulations or other workplace developments.

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