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IS PAID SICK LEAVE HERE TO STAY?

By: Janelle Edwards-Stewart

THE BACKGROUND

It is here now, but for how much longer? The "It" refers to President Barack Obama's Executive Order 13706, which requires all federal contractors to give their employees at least seven days of paid sick leave annually. At its inception, Executive Order 13706 was intended to "increase efficiency and cost savings in the work performed by parties that contract with the federal government." The idea was that offering paid sick leave would improve employee performance. The leave would also serve as an incentive that enabled federal contractors to attract more talented employees. With the impending end of the Obama Administration, it is unclear whether these theories will have the opportunity to be tested.

THE RULE

If the rule remains, it is imperative that businesses that contract with the federal government gain a clear understanding of its requirements. The new rule permits employees to earn one hour of paid sick leave for every 30 hours of work on covered contracts. Under this arrangement, employees may accumulate up to 56 hours of paid sick leave each year and carry forward any unused sick leave at the end of each year. If an employee leaves the company, the employer need not pay out any unused sick leave. However, if the employee returns to the company within 12 months of the separation, the employer must reinstate the employee's paid sick leave. In verifying the need for paid sick leave, an employer may only require certification by a health care provider, if the employee is absent for three or more consecutive workdays.

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The Department of Labor ("DOL") has been charged with overseeing the new rule's enforcement. Should an employer violate the rule by interfering with an employee's accrual

or use of sick leave or by discriminating or retaliating against an employee for the use or attempted use of sick leave, the employer would be subject to monetary damages, liquidated damages, and/or equitable relief. The employer may also be suspended from federal contracting.

The rule will apply to employers with federal contracts issued on or before January 1, 2017.

THE IMPLEMENTATION AND IMPLICATIONS

The rule is far reaching. It applies to employers with federal contracts, including contracts covered by the Fair Labor Standards Act, the Service Contract Act ("SCA"), and any contracts where employee wages are governed by the SCA. It also applies to any *contract-like* instruments. Therefore, employers who lease federal property, including space and facilities, and those with licenses to use such properties from the Federal Government for the purpose of offering services to federal employees, their dependents, or the general public, are covered.

The rule is broadly applicable. Paid sick leave can be used for an employee's own physical or mental illness, injury, or condition. It can also be used in instances of domestic violence or stalking and/or to address the consequences of these, including receiving counseling, taking legal action, and seeking to relocate. In addition, an employee may use paid sick leave to care for a family member. A family member is broadly defined as 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*. According to the DOL, the rule would cover approximately 1.15 million employees, including roughly 600,000 who receive no paid sick leave.

The rule could have irregular impacts that may be cumbersome to address. For instance, some contractors have businesses where only a portion of their activities deal with federal contracts or have employees for whom only minor aspects of their work address federal contracts. It is unclear what actions should be taken regarding these employees.

Finally, the rule is costly. Federal contractors are slated to spend approximately \$380 million annually to cover paid sick leave costs.

THE BOTTOM LINE

It is all but impossible to have a President's Executive Order overturned by the Supreme Court or through an act of Congress. However, new presidents routinely rescind existing Executive Orders upon assuming office -- particularly when there has been a change in party. Given his pro-business, anti-regulatory stance, it would seem that Executive Order 13706 would be ripe for rescission by President-elect Donald Trump.

While many employers would welcome such an action, it may not be enough to place employers in the clear. Even absent federal imposition, several states have implemented laws mandating paid sick leave. Seven states, 29 cities, two counties, and Washington D.C. have implemented paid sick leave laws. In the northeast alone, Connecticut, New York City, Philadelphia, Pittsburg, and various cities within New Jersey (e.g., Newark, Irvington, Passaic, East Orange, Paterson, Trenton, Montclair, Jersey City, Elizabeth, Plainfield, and Morristown) have already adopted such laws.