April 18, 2016

Via Postal Mail

Robert Waterman
Compliance Specialist
Wage and Hour Division, U.S. Department of Labor
Room S-3510
200 Constitution Ave. NW
Washington, DC 20210


Dear Mr. Waterman:

On behalf of the Section of Public Contract Law (“PCL Section”) of the American Bar Association (“ABA”), I am submitting comments on the proposed rule cited above. The ABA consists of attorneys and associated professionals in private practice, industry, and government service. The ABA and the PCL Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the PCL Section seeks to improve the process of public contracting for needed supplies, services, and public works. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Heather K. Weiner, member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Acquisition Reform and Emerging Issues.”
I. INTRODUCTION

On September 7, 2015, the President signed Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (the “EO”). The EO requires contractors to provide paid sick leave to employees working on or in connection with certain contracts on an accrual basis. According to the EO, the President seeks to improve the economy and efficiency of government procurement by improving benefits for employees so they are more in line with “model” employers. In a statement released the day before issuing the EO, the President pointed to “a body of research [that] shows that offering paid sick days and paid family leave can benefit employers by reducing turnover and increasing productivity. Paid sick days would help reduce lost productivity due to the spread of illness in the workplace. These policies can benefit our economy by fostering a more productive workforce.”

The Department of Labor (“DoL”) released proposed rules on February 25, 2016 (the “Proposed Rule”). In its current form, the Proposed Rule requires contractors holding Service Contract Act (“SCA”)-covered service contracts, Davis-Bacon Act (“DBA”)—covered construction contracts, concession contracts, and contracts “in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public” to provide sick leave to all employees working on those contracts regardless of their exempt status. In addition, the Proposed Rule requires that employees who spend at least 20% of their time working in support of covered contracts be provided sick leave.

The Section appreciates the opportunity to provide comments on the Proposed Rule. While we have no quarrel with the policy motivating the EO and Proposed Rule, the regulatory scheme, as proposed, is unnecessarily burdensome on contractors and will raise the cost of contracts for the federal government. Our comments identify areas of improvement and clarification for the proposed regulatory scheme. These proposed changes seek to assist contractors in complying with the Proposed Rule without conflicting with the goals of the EO. The Section also responds to DoL’s invitation for comments on certain areas of the Proposed Rule, in particular those provisions intended to ensure that the Proposed Rule effectively balances benefits and costs. In light of these comments, we request that DoL revise and re-issue the Proposed Rule for further public comment prior to implementation.

II. COMMENTS

A. DoL Should Require Incumbent Contractors to Disclose Sick Leave Entitlement During Procurements.

The Proposed Rule requires outgoing contractors to disclose the amount of sick leave accumulated by their employees only immediately before a new contractor takes over the work.

4 See proposed 29 C.F.R. § 13.3(a)(1).
5 See proposed 29 C.F.R. § 13.4(e).
More specifically, proposed 29 C.F.R. § 13.26 provides that “[u]pon completion of a covered contract, a predecessor prime contractor shall provide to the contracting officer a certified list of the names of all employees entitled to paid sick leave under” the EO. This arrangement will, unfortunately, lead to a lot of surprises for incoming contractors who may be required to hire the incumbent staff pursuant to Executive Order 13495, Nondisplacement of Qualified Workers Under Service Contracts, and the associated regulations.6 The Section recommends that the Proposed Rule be revised to require, if there are employees eligible for sick leave working on a contract, that the contracting agency make that information (without identifiable information) available to potential offerors to allow all offerors equal access to that information during the solicitation process.7 While this information may change during the procurement process, early disclosure would allow each of the offerors equal access to the information during proposal preparation. Equal access to this information will be especially important in a scenario where the bids are being evaluated on a lowest-priced, technically-acceptable basis.

B. DoL Should Revise the Requirements Applicable to Small Businesses.

There are no exceptions for small businesses under the Proposed Rule despite the fact that small businesses will be disproportionately impacted by it. The Proposed Rule adds to the impact of numerous new requirements related to labor and employment issued in the past few years. Even if small businesses already had policies more generous than what the various rules require, the cost to study, understand, and determine how to implement the proposed rule would unfairly impact small businesses, which have fewer resources available for these activities. To address this issue, we suggest lessening reporting requirements (such as requiring reporting on a less frequent basis) or allowing for a more phased-in approach for contracts set-aside for small businesses (such as beginning in 2018 or later). These changes will allow small contractors sufficient time to develop systems to comply with the Proposed Rule.

C. DoL Should Offer a Safe Harbor For Employees Covered by Other Sick Leave Laws.

As noted above, the Section does not necessarily disagree with the policy behind the EO and Proposed Rule. Indeed, numerous other jurisdictions have implemented sick-leave laws, such as California, Washington, DC, and Montgomery County, Maryland. As a result, some employees will be covered by multiple sick-leave laws. This overlapping coverage will make compliance even more difficult, especially if the sick-leave laws have substantive differences. For instance, Massachusetts’ sick-leave law allows sick leave to be accrued only when an employee is being paid and working, but the Proposed Rule mandates the accrual of sick leave when an employee is being paid, regardless of whether they are working.8 In California,

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7 Indeed, incumbents are often at a competitive disadvantage in this scenario because they would know the sick leave their employees are entitled to while potential contractors may assume that the employees are entitled to less sick leave (or none at all).
8 Compare Proposed 29 C.F.R. § 13.5(a)(1)(i) with Code of Massachusetts Regulations 940 C.M.R. 33.03(5).
employees with qualifying collective bargaining agreements are not impacted.9 The Washington, DC, sick-leave law varies the amount of sick leave depending on the size of the employer.10

Tracking sick leave for employees subject to multiple overlapping sick-leave requirements (with differences in the amount of sick leave, when it can be taken, how it is accrued, and whether it can be maintained after an employee is separated from employment) can be difficult and overly burdensome. Because of this, the Section recommends allowing contractors to receive a waiver from complying with the Proposed Rule if their employees are covered by another sick-leave law. Alternatively, the Section recommends that the Proposed Rule specify that employers that are found to be in compliance with a state/local sick-leave law, but not with the EO and Proposed Rule, would not be subject to penalties outside of providing back sick leave to their employees if the employer did not purposely evade the requirements of the Proposed Rule.

D. DoL Should Carefully Consider and Clarify How Contractors May Use Other Paid Time Off Policies to Satisfy the EO.

Many employers offer paid time off (“PTO”) policies that are more generous than the Proposed Rule and allow employees to take time off for any reason. The new EO may have the unintended effect of limiting employees’ access to such leave. Proposed Section 13.5(f)(5) allows contractors to satisfy the EO’s obligations with an existing PTO if that policy satisfies the EO’s requirements.11 Namely, the existing policy must be made available to all employees covered by the Proposed Rule, must allow for time off for all the reasons listed in the Proposed Rule, offer at least 56 hours (seven days) of paid sick leave, and satisfy the Proposed Rule’s remaining requirements.12

Many contractors already offer PTO plans that are at least as generous as the scheme required by the EO and Proposed Rule. Employees are allotted PTO banks to use for any reason, not just those covered by the Proposed Rule. Employees thus have the choice whether and when to use their time off and for what purpose. The Section recommends that DoL revise the Proposed Rule to clarify that employees be allowed to retain that discretion under existing PTO policies that otherwise satisfy the EO’s requirements.

Without such a revision, contractors may feel obligated to restrict 56 hours of PTO for use only as provided for by the Proposed Rule. Such a restriction would mitigate the risk that DoL would find a contractor wrongly denied an employee sick leave after the employee had already used all allotted PTO during the year for vacation and other discretionary absences. Both the contractor and employee would be worse off in this scenario: the contractor would

10 See D.C. Code 32–131.02.
12 See id.
incur greater administrative costs and the employee would be subject to restrictions on seven
days’ worth of previously unrestricted PTO. Thus, the Section recommends clarifying the
Proposed Rule to state expressly that PTO granted for use for any purpose satisfies the EO’s
and Proposed Rule’s requirements for paid sick leave.

E. Retroactive Applications Should Be Clarified.

DoL can require retroactive application of the sick-leave requirements upon
determining that an agency or higher-tier contractor failed to include the required sick-leave
clause(s) in a contract or subcontract.\footnote{See proposed Section 13.44(f).} The Proposed Rule does not address the impact of
retroactivity. The Section recommends limiting any contractor obligations to retroactively
accruing sick leave and making such leave available to employees for use going forward.
Covered employees could start using that retrospectively accrued sick leave immediately while
also accruing “new” hours of leave.

As a corollary, the Section recommends that the Proposed Rule expressly state that
contractors need not pay out retrospectively accrued leave in cash. This type of obligation, if
imposed, would not comport with the EO’s goals, which DoL identified as ensuring that
covered employees “have access to paid sick leave rather than its cash equivalent.”\footnote{81 Fed. Reg. at 9613.}
Thus, if DoL maintains that contractors cannot satisfy their sick-leave obligations through cash
equivalents at employee termination and other instances,\footnote{See id.} that same reasoning would argue
against requiring cash equivalents for employee time off taken at a time when the relevant
contract or subcontract did not impose the EO’s requirements. Further, any such payout
obligation would place an undue burden on contractors, who would have to interview
individual employees to analyze each prior instance of asserted unpaid time off—and open the
doors to the risk of alleged fraud and abuse concerning the date, duration, and reason for each
asserted absence.

In making the recommendations above, the Section acknowledges the importance of
ensuring that covered employees receive the sick leave to which the EO entitles them. But the
Section urges DoL to ensure that it strikes an appropriate balance when a contractor or
subcontractor has not shirked its obligations but instead has performed under a contract or
subcontract in which an agency or higher-tier contractor has failed to insert the relevant
clause(s).

F. DoL Should Update the Regulatory Impact Analysis to Reflect the Actual
Costs of the Proposed Rule

The Regulatory Impact Analysis (“RIA”) in the Proposed Rule ignores categories of
costs and minimizes others. The Proposed Rule should acknowledge these costs and take them
into account when re-issuing a proposed rule or issuing a final rule. For example:
• The RIA does not account for the costs of compliance for prospective contractors. The Proposed Rule, as written, would require not only human resources, but cost and pricing teams, to be aware of the intricacies of the Proposed Rule when bidding on federal contracts to ensure that a proposal is priced and staffed to account for the sick-leave requirement. Because of this the RIA should: (i) account for the cost to companies who must learn the requirements of the Proposed Rule before winning a contract and (ii) account for the fact that individuals outside of human resources would have to understand the requirements of the Proposed Rule.

• The RIA underestimates the time required to obtain familiarity with the requirements of the Proposed Rule. The RIA provides that firms would need one hour only to gain familiarization of the requirements of the Proposed Rule in the first year and would incur no familiarization costs in the out years. This estimate is insufficient to allow contractors to review and understand the Proposed Rule and ignores the prospect of new companies’ pursuing and then performing contracts with this requirement in years two through ten.16

• The RIA does not estimate the costs of obtaining legal advice regarding the requirements of Proposed Rule. The RIA should assume that non-lawyer supply-chain and contract-management employees will require at least occasional legal advice regarding the meaning of the Proposed Rule, including for assistance to edit clauses in subcontract agreements impacted by the Proposed Rule.

• The RIA does not address the potential need for new or upgraded accounting systems. The RIA acknowledges that accounting systems would need to be “adjust[ed],” but should address the potential costs of doing so, especially because the Proposed Rule covers exempt workers and workers who only work “in connection” with covered contracts.

Acknowledging and addressing these burdens would better set the context for the burdens imposed by the Proposed Rule.

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16 The RIA bases its time estimate on one human resource manager’s review of unreleased (and yet to be written) FAR clauses that are expected to be no more than two pages in length. This does not account for the fact that human resources managers often have to go beyond the contract clauses to understand the requirements of rules and regulations and others (including those in a company’s legal department or outside counsel) need to be part of the process.
III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
James A. Hughes
Aaron P. Silberman
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Council Members, Section of Public Contract Law
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