



AMERICAN BENEFITS
COUNCIL

April 12, 2016

Submitted via regulations.gov

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

**Re: Notice of Proposed Rulemaking: Implementing Executive Order 13706 --
Establish Paid Sick Leave for Federal Contractors (RIN 1235-AA13)**

Dear Mr. Waterman:

The American Benefits Council (the “Council”) is the nation’s preeminent advocate of employer-sponsored benefit programs. Council members sponsor directly or provide services to retirement, health, and compensation plans covering more than 100 million Americans, and millions of others internationally. Many Council members offer paid leave to employees and have designed their benefits to take into account their paid leave policies.

The Council appreciates the opportunity to submit comments in response to the proposed rule issued by the Department of Labor (the “Department”) on February 25, 2016, to implement Executive Order 13706 (the “Executive Order”). The Executive Order was issued by President Obama on September 7, 2015, and would require federal contractors and subcontractors to provide their employees with up to seven days of leave annually. *See* Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 9592 (February 25, 2016) (the “Proposed Rule”).

As further described in the comments below, our members believe that the Proposed Rule’s entry into an existing patchwork of paid leave laws around the country would significantly complicate compliance with those laws without achieving sufficient additional benefits to employees. As a result, the American Benefits Council respectfully requests that the Proposed Rule be modified in accordance with our comments below.

I. The proposed rule's provisions will cause substantial compliance issues for the federal contracting community.

The obligations established by the Executive Order and Proposed Rule must be viewed in the context of the state and local obligations related to paid leave. As discussed below, many of the substantive requirements described in the Proposed Rule significantly depart from the requirements set forth in existing state and local paid leave laws, exacerbating an already confusing patchwork of obligations in this area of law.

The Proposed Rule creates complexity with existing state and local mandatory paid leave laws. For federal contractors operating in one or more of the states or municipalities, the Executive Order and Proposed Rule add to what is already a substantial compliance burden. Government contractors already manage the logistical challenge of adopting and administering multiple paid leave policies for different groups of employees. For example, a covered contractor in San Francisco would need to ensure compliance with the California paid leave requirements, the San Francisco paid leave requirements, and the Executive Order's paid leave requirements.

Existing paid leave laws, generous paid leave (and paid time off or "PTO") policies, and collectively bargained leave benefits all achieve the goals of the Executive Order. Yet, the Executive Order and Proposed Rule would effectively all but ignore the benefits already provided by contractors unless those benefits are perfectly aligned with the benefits required by the Executive Order. We believe the Department should create exemptions for workers (1) subject to a valid collective bargaining agreement that provides a sufficient amount of sick or PTO leave, (2) working under a written PTO policy that provides a sufficient amount of PTO leave, or (3) subject to a state or local leave law.

If the Department is interested in providing the benefit identified in the Executive Order without adversely affecting the existing paid leave policies of federal contractors, it should give credit to employers' paid leave policies to the extent they are in material compliance with the Proposed Rule, i.e., even if the policy does not necessarily track every aspect of the Proposed Rule. Requiring strict compliance with every term of the Proposed Rule will be challenging for employers in practice and could cause many companies to abandon their existing, generous paid time off policies.

II. Comments on the proposed regulatory text in the proposed rule

A. Proposed Definitions of Covered Family Member and Related Terms

The Proposed Rule defines covered family members as the employee's 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. *See*

Proposed 29 CFR 13.5(c)(1)(iii). “Any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship” is defined as “any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.” *See* Proposed 29 CFR 13.2. The Preamble states that “any other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship” can include, but is not limited to, “such relationships as grandparent and grandchild, brother- and sister-in-law, fiancé and fiancée, cousin, aunt and uncle, other relatives..., and close friend.” *See* 81 Fed. Reg. 9599.

These definitions are more extensive than is necessary to serve the purposes of the Executive Order. Employers effectively have no way to determine whether an employee has a “significant personal bond” with an individual, the individual has the “equivalent of a family relationship” with the employee, or someone is an employee’s “close friend.” As a result, employers will be required to make numerous subjective determinations and could effectively be incapable of challenging employees’ use of paid leave when abuse of such leave is suspected without risking the violation of anti-interference and anti-discrimination provisions of the law.

B. Proposed Section 13.3 – Coverage of Contracts.

The Executive Order and Proposed Rule will likely have the most significant negative impact on concession contracts, and contracts in connection with federal property and related to services. The Proposed Rule is premised in part on a belief that contractors subject to the Executive Order’s paid leave requirements will have the opportunity to negotiate (or re-negotiate) their contracts, that all of the bids for a particular contract will need to consider the Executive Order’s paid leave requirements, and that the government itself ultimately will pay for the paid leave through increased prices paid to contractors on awarded contracts. In the context of concession contracts and contracts in connection with federal property and related to services, however, that belief is erroneous.

The application of the Executive Order’s paid leave requirements operate as a competitive disadvantage for those contractors conducting business with the federal government. Providing mandatory paid leave will increase costs of doing business, but the requirements – and increased costs – apply *only* to those businesses providing services to the federal government. A business operating in a federal building must provide the paid leave; its competitor down the street need not. This puts the business in the federal building at a financial disadvantage. It cannot simply request that the government pay for the increased costs. In these types of contracts, the contractor remits a portion of its proceeds to the government. The federal building business can increase its prices (although some contracts with the government limit the business’s ability to do so) and hope that the price increase does not drive customers away. The federal building business can cut costs in other ways – decreasing staffing levels or reducing

service options. Or, the federal building business can decide to cease operating in a federal building.

The unintended effect of the Proposed Rule may be lost jobs, decreased service, and reduced payments from these contractors to the federal government. The Proposed Rule unfortunately fails to consider the competitive pressures resulting from the application of the Executive Order to these businesses.

Although the Executive Order itself brings Service Contract Act (SCA)-exempted concession contracts within the purview of the paid leave obligations, no other SCA-exempted contracts are expressly captured by the Executive Order. Accordingly, in response to the Proposed Rule's request for comment on whether the Department should include within the scope of the paid leave requirement those contracts (other than concession contracts) that are excluded or exempted from coverage under the SCA, we believe that it should not. In multiple places throughout the Proposed Rule, the Department identifies a contractor's experience with the SCA as relevant to the Department's choice. Contractors who have been exempted from the SCA have no such experience. Accordingly, these contracts should be excluded or exempted from the paid leave Executive Order.

C. Proposed Section 13.4 – Application of Paid Leave Requirements to Employees Performing “In Connection With” Covered Contract

The Proposed Rule contains a narrow exemption for employees who perform work duties necessary for the performance of the contract, but who do not perform the specific work called for by the contract. In particular, employees are not eligible for paid leave if less than 20 percent of their hours worked in a particular workweek are spent working in connection with covered contracts. *See* Proposed 29 CFR 13.4(e). The Proposed Rule, however, lacks real guidance regarding how covered employers should determine when employees are performing work “in connection with” covered contracts. The Proposed Rule notes that an employee works in connection with covered contracts if the employee is “performing work activities that are necessary to the performance of a covered contract but . . . is not directly engaged in performing the specific services called for by the contract itself.” *See* 81 Fed. Reg. 9607. The Proposed Rule, however, does not explain how employers are to determine which activities “are necessary” to carrying out a covered contract. Without a clear explanation of the phrase “in connection with,” employers cannot accurately assess whether the “20 percent” exception applies to any of their employees. Moreover, employers will struggle to maintain accurate records of when employees are working on a covered federal government contract versus a uncovered private contract.¹

¹ In addition, given the Department's effort to apply the paid leave obligations to FLSA-exempt employees, the “in connection with” standard needs to be fleshed out in far more detail. An exempt employee is not likely to keep track of the time she spends “in connection with” a covered contract with the level of specificity that the Department likely will require. Thus, the Department should provide

D. Proposal to Accrue Paid Leave for Paid Time Off

The Department proposes that “hours worked includes all time for which an employee is or should be paid, meaning time an employee spends working or in paid time off status, including time when the employee is using paid sick leave or any other paid time off provided by the contractor.” Proposed 29 CFR 13.5(a)(1)(i). In the preamble, the Department claims that “basing paid sick leave accrual on all time an employee is in pay status, rather than merely on when the employee is suffered or permitted to work, will be administratively easier (or no more difficult) for contractors to implement.” 81 Fed. Reg. 9609-9610. Extending “hours worked” to situations when an employee is “in paid time off status,” however, does not properly account for the practical consequences of this standard.

First, allowing employees to accrue paid leave when they are not working is a departure from state and municipal paid leave laws. No existing state or local paid leave law imposes this requirement. Instead, employers track an employee’s actual hours worked and use that information to determine the employee’s entitlement to paid leave. Employers in the more than 30 local jurisdictions that require some form of paid leave already have developed their systems based on an hours worked accrual. Updating these systems to track accrual based on hours actually worked *and* hours spent in paid time off status would be expensive and inefficient.

Another important practical challenge for covered businesses created by the Department’s broad “hours worked” provision would be determining whether an employee on paid time off status would have been working on or in connection with a covered contract, such that the employee’s time off should be counted for paid leave accrual. The Proposed Rule does not explain with sufficient clarity how to track and differentiate between employees’ work on covered versus non-covered contracts or employees’ leave on covered versus non-covered contracts. As discussed elsewhere, this issue is exacerbated by the Department’s decision to require paid leave for exempt employees.

For these reasons, paid leave should accrue based on actual hours worked, rather than both hours worked and time in paid time off status.

E. Proposal Regarding Employee Notification of Leave Balance

Under the Proposed Rule, a covered contractor must provide written notification of an employee’s available paid leave balance in the following five situations: “(i) No less than monthly; (ii) At any time when the employee makes a request to use paid sick leave; (iii) Upon the employee’s request for such information, but no more often than

additional guidance on how to determine “in connection with” with respect to an exempt employee who does not track time and who works on a wide variety of matters.

once a week; (iv) Upon a separation from employment; and (v) Upon reinstatement of paid sick leave.” See Proposed 29 CFR 13.5(a)(2). We are concerned about the breadth of this requirement because less sweeping notification requirements under other paid leave laws have created significant administrative challenges for employers.

The proposed notification requirements, which allow employees to request this information on a weekly basis, will impose a significant burden on employers.² Moreover, the number of situations in which an employer must provide written notice of leave balances means that even comprehensive existing systems may need to be modified. For example, a system that is set up to allow employees to check their own leave balance electronically whenever the employee desires that information, but which does not automatically send notice to the employee on a monthly basis, would not comply with the Proposed Rule. Thus, despite the employee’s ability to be notified of the leave allotment on demand, the employer would need to change its system to send written notice on a monthly basis.

Satisfying the Department’s concern that “employees be able to determine whether absences will be paid” does not require notice to be provided at every one of the stated intervals. Employers should be permitted to rely upon existing notice systems, particularly systems such as the one described above. The Department should reduce the load on employers by limiting the number of situations when an employer must provide employees with paid leave balance information.

F. Proposal with Respect to Frontloading Leave

The Proposed Rule provides that covered federal contractors can avoid the accrual rate requirement if they “choose to provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year.” See Proposed 29 CFR 13.5(a)(3). The Proposed Rule, however, expressly states that frontloading will *not* excuse the employer’s year-end carryover obligations. Rather, employers must allow employees to carryover up to 56 hours of unused leave from one year to the next, even if the employer provides employees with 56 leave hours at the start of each year. This is not consistent with existing paid leave laws and will cause sufficient confusion in its application to render frontloading useless to most contractors.

Many existing state and local paid leave laws allow employers to “frontload” paid sick time. Frontloading means providing the time up front, upon hire, or at the beginning of each calendar year rather than requiring employees to accrue the paid leave over time, based on hours worked throughout the year. The benefit for employees

² The burden is increased by the Department’s proposal to require the leave information on a real-time basis. For example, an employer with a biweekly payroll may not have the most updated information on a weekly basis. The Department should, to the maximum extent possible, permit employers to rely upon their existing systems to manage leave balances.

is substantial: They do not have to work to “earn” the paid leave. They may use the leave immediately -- even if they have worked for the company for only one day, or if it is only the second day of the year. As a trade-off, these laws eliminate the requirement for employers to track leave accrual *and* do not require that carryover of unused paid leave be allowed if the leave is provided up front. Accurate tracking of accrual and carryover is cumbersome and this type of tracking and record keeping is not currently part of the time recording process used by most employers for their employees working on federal contracts.

The Department’s position on the issue of frontloading should be revised. Requiring employers to carryover unused leave from year to year ensures that employees have some leave available in case they need it for a covered absence at the start of the new year. The carried-over hours supplement the employee’s lack of accrued hours at this time because it takes several weeks of work for employees to earn even a few hours of leave. When an employer frontloads employees’ leave at the start of each year, there is no need for carried-over hours. Accordingly, the Department should remove employers’ accrual tracking and year-end carryover obligations where employers frontload their employees’ 56 leave hours each year.

Absent that removal, the Proposed Rule technically allows employers to frontload paid leave by providing all leave to employees up front, but provides no benefit to that choice. Employees may carry over up to 56 hours of unused paid leave at the end of the year. Employers who require employees to accrue their time need not allow any accrual until the employee uses some of the accumulated paid leave. By contrast, employers who frontload *must* provide an additional 56 hours on January 1, resulting in the employee having 112 hours (14 days) of paid sick leave that they may use at any time. This result is inconsistent with the apparent purpose of the Executive Order.

G. Proposal Regarding Minimum Increments of Leave

The Proposed Rule would require employers to allow paid leave in increments of 1 hour, even if their attendance tracking systems (“ATS”) do not permit such small increments. *See* Proposed 29 CFR 13.5(c)(2). For example, where an employer’s ATS only allows leave to be taken in increments of half-days, the resulting changes to the ATS will cost tens of thousands of dollars (if not hundreds of thousands of dollars). This is an excessive burden on such employers, and serves only to preserve an extra 3 hours of paid leave for the employee.

H. Proposal Regarding Designation of Leave

The Proposed Rule underestimates the amount of time necessary to respond to a request for paid leave in many large, multi-state companies. The Department claims as follows: “Although the determination of when it is practicable for a contractor to provide a response will take into account the individual facts and circumstances, it

should in many circumstances be practicable for the contractor to respond to a request immediately or within a few hours." See Proposed 29 CFR 13.5(d)(3)(iii). As noted elsewhere, employees covered by the Executive Order may also be working in one of the approximately 30 local jurisdictions across America requiring paid leave. The employee may or may not qualify for paid leave under the laws of those jurisdictions. The leave may or may not be subject to the FMLA and/or a state equivalent. Making an assessment of eligibility often requires the coordination of human resources, payroll, and legal departments. As a result, a response may take a few hours (if it is simple), but it also may take a few days if it is not. Although the Proposed Rule acknowledges this possibility, the final rule should simply state that the determination of "as soon as practicable" should be based on the facts and circumstances, without placing the Department's position on a belief that the response should take a few hours.

I. Proposal Forbidding Annual Usage Cap

The Proposed Rule prohibits employers from implementing an annual paid leave usage cap. See Proposed 29 CFR 13.5(c)(4). Under the Proposed Rule, employees would be entitled to use as much leave as they have available in their bank, whether they have accrued that time in the current year or carried it over from prior years.

The Department provides no explanation of why it is prohibiting a usage cap. The Executive Order does not require it, nor is an unlimited usage necessary for employees to receive and use a full 56 hours of paid leave each year. Not surprisingly, the Department's position is inconsistent with all but two of the more than 30 state and local paid leave laws.

As a result, the Proposed Rule negatively impacts the paid leave plans of those contractors subject not only to the Executive Order's requirements, but also to a state or local paid leave law. As the Department itself notes, "[b]ecause the requirements of State and local laws and the Order and part 13 will rarely be identical, to satisfy both, a contractor will likely need to comply with the requirements that are more generous to employees." See 81 Fed. Reg. 9620. Accordingly, and to avoid violating their federal obligations, these employers will be forced into extending unlimited leave usage to employees who otherwise would have been limited to using a finite amount of leave each year; for an employee who works on both federal and non-federal contracts, trying any other method of allocating leave usage could result in unfair treatment of many of these employees.

For these reasons, the Department should set an annual usage cap at 56 hours (the number most likely anticipated by Executive Order 13706).

J. Proposal Regarding Reinstatement of Leave After Termination and Cash-Out

The Proposed Rule deviates from all existing laws in requiring that employers reinstate the previously separated employee's accrued, unused leave balance if rehired within 12 months, *even if the employer cashes out the employee's accrued, unused paid leave upon separation of employment.* See Proposed 29 CFR 13.5(b)(5). The Department believes that this condition is "consistent with...the Executive Order [which] is meant to ensure that employees of Federal contractors have access to paid sick leave rather than its cash equivalent." See 81 Fed. Reg. 9613.

Notwithstanding the Department's belief that paying a terminated employee is somehow inconsistent with the Executive Order, employees should not receive the double-payment windfall anticipated by the Department. Many employers would not want to carry a balance of unused leave on its books when an employee has been terminated. Carrying such leave operates as an added potential liability on an employer's books, which can reduce the employer's line of credit and will reduce the contractor's bonding capacity.³

The Department's position on cashing out leave also is inconsistent with its statements that employers can satisfy the paid leave requirements through a PTO policy. In some states, employers must pay out any accrued, unused vacation time or PTO at separation. Similarly, under the SCA, any unused vacation must be paid out at separation. If an employer attempted to use a PTO policy to satisfy its obligations, any employee who separated from the company and was rehired within one year would presumably have his paid leave reinstated. This, of course, means that the employer would need to specifically track paid leave usage, which defeats one of the key purposes of having a unified PTO policy.

Thus, the Department should not require covered employers to reinstate employees' accrued, unused paid leave upon rehire where the employers pay employees for that time upon separation.

³ Also problematic is the Department's proposal to require successor contractors to "reinstatement" leave upon hiring an employee of a predecessor contractor. Particularly with respect to those employees performing "in connection with" a covered contract, it is difficult to see how to properly account for this "reinstatement." Moreover, if a successor contractor hires someone to work "in connection with" a different (*i.e.*, non-successor) covered contract, would the successor need to "reinstatement" the leave balance for that employee immediately, upon working on the successor contract, or some other time? Absent very specific guidance on these issues, the Department's proposal is unworkable for all but the most straightforward contracts.

K. Proposed Section 13.25 -- Recordkeeping

The recordkeeping obligations in the Proposed Rule are onerous. Federal contractors will be required to maintain records for the length of a covered contract plus three years after the contract is complete. *See* Proposed 29 CFR 13.25(a). Because some federal government contracts can span several years, maintaining records for three years beyond the life of a covered contract could be viewed as unduly burdensome on its own. The Department's stated recordkeeping requirements certainly become unreasonable when the duration of employers' obligation is combined with the 15-item list of records that employers must preserve for *each* employee. *Id.* Indeed, the Proposed Rule requires employers to make and maintain copies of all notifications provided to employees. These notifications must be provided at least monthly, and, for many employees, on a weekly basis. The information the Department requires employers to keep will ultimately involve thousands upon thousands of pages of records.

The Department believes that these requirements are justified because "they require the maintenance and preservation of records necessary to investigate potential violations of and obtain compliance with the Order." *See* 81 Fed. Reg. 9625. For employers with many hundreds or thousands of eligible employees, maintaining these records for each employee for at least three, and more likely upwards of five years, will result in an administrative burden. Additionally, because of ambiguities in determining when work is being performed "in connection with" a covered contract, employers' burden increases as they must be over-inclusive in determining which employees' records they should retain.

III. The Department should delay implementation of the rule.

It appears that the regulated community will be expected to understand the regulations in order to properly compete on contracts that will be bid in less than four months after the final rule. Among other issues identified in these comments, the carryover and notification requirements make compliance burdensome and disruptive to regular operations of large, national employers. System programmers have advised that the capability for tracking and regular, periodic notification exists, but substantial modifications would typically be required to implement that capability.

Accordingly, we urge the Department to provide a grace period of one year to allow the regulated community ample opportunity to familiarize itself with the rule and for employers to make necessary modifications to their electronic systems to enable compliance with the extensive tracking and notification requirements currently proposed.

IV. Conclusion

As described above, the Proposed Rule's complicated definitions and unprecedented expansion of covered workers would introduce significant compliance uncertainty - and costs - into the federal contracting process. Thus, The Council respectfully recommends that the Proposed Rule be substantially modified in accordance with the comments above.

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If you have any questions or would like to discuss further, please contact me or Diann Howland, Vice President, Legislative Affairs, at (202) 289-6700.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley". The signature is written in black ink and is positioned above the typed name and title.

Lynn D. Dudley,
Senior Vice President,
Global Retirement and Compensation Policy
American Benefits Council