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Mr. Robert Waterman, Compliance Specialist
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Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., N.W.
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BY ELECTRONIC SUBMISSION: whdpracomments@dol.gov

Re: "Establishing Paid Sick Leave for Federal Contractors;" Comments regarding compliance burden estimate for DOL/WHD Information Collection Request under the Paperwork Reduction Act; ICR Reference No. 201512-1235-002 (for proposed new information collection clearance) and ICR Reference nos. 1235-0018 and 1235-0021 (revisions to existing information collection clearances)

Dear Mr. Waterman:

The United States Chamber of Commerce ("U.S. Chamber") is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region, with substantial membership in all 50 states. An important function of the Chamber is to represent the interests of its members in federal employment matters before the courts, Congress, the Executive Branch, and independent federal agencies. Many of the Chamber's members are deeply concerned about the impact Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (the "Executive Order", "E.O.") will have on their operations. Consistent with the comments we submitted (in conjunction with the International Franchise Association) on the proposed regulation, we are providing these comments on the Department's proposed Information Collection Request under the Paperwork Reduction Act. We find the Department's submission to be woefully lacking in credible, empirical data and believe it should be withdrawn and redone after the Department has performed the necessary research to develop appropriate data.

Erroneous and Incomplete Information Collection Burden Estimate

The Department's estimates of time and cost burdens associated with the proposed new and revised information collections are not substantiated by empirical evidence. The Paperwork Reduction Act was enacted, in part, because Congress found that agencies systematically ignored the real dimensions of the burdens that were imposed on the public by recordkeeping and

information collection required to comply with Federal regulations**.** The intent of the Act is fulfilled when agencies seek and apply empirical evidence of the time and expense that employers and other citizens experience to comply with paperwork requirements in their calculations of paperwork burden estimates. The intent of the Act is not fulfilled when agencies present the pretense of a burden estimate based on unsubstantiated and overly-optimistic assumptions.

The "Supporting Statement for Paperwork Reduction Act: OMB Control Number 1235-0NEW" prepared by the Department of Labor, Wage and Hour Division (DOL/WHD) for submission to OMB's Office of Information and Regulatory Affairs and the discussion of the information collection burden in Section IV of the Notice of Proposed Rulemaking (81 FR 37, pp. 9633 – 9635) are rife with examples of unsubstantiated and overly optimistic estimates of time and cost parameters. The results are estimates of time and expense burdens that are grossly inaccurate.

The following items are salient examples of the errors and inaccuracies that pervade the DOL/WHD's analysis:

1. The Department has not presented a credible estimate of the number of employees and employers who will be affected. Its estimate is based only on consideration of numbers of employees who may currently lack access to 7 days of paid leave, and it ignores the impact on thousands more employees and their employers because current programs offering 7 or more days of leave fail to match other prescriptive details of the proposed rule. Furthermore, the Department's analysis fails to account for independent contractors who will be treated as equivalent employees under the proposal. The Department has also ignored the numbers of lessees and concessionaires operating on Federal property and their employees whom the proposed would also affect.

These errors and omissions in its regulatory analysis and Paperwork Reduction Act burden estimate could have been avoided by the simple expedient of conducting a baseline survey of a random sample[1] of government contracts or contractors at the outset of the analysis to determine directly the numbers of contractors currently offering 7 days accrual of paid sick leave per year (or its equivalent in paid time off benefits), other leave accrual totals, and conformity of their existing paid leave policies with each of the other 15 or more specific requirements in the proposed rule.

The Department of Labor has presented no credible data about the number of employees whose employers will have to change an existing paid sick leave plan to conform with any one of

[1] A design issue to consider is whether to sample distinct contracts or to sample contractors, some of whom may be found to hold multiple active contracts. The SAM database would provide a basis for the sample frame, but it should be supplemented to include lessees and concessionaires on Federal property. The sampling frame should be partitioned to represent various contract value amounts and industry categories and sample results should be weighted by contract value. Basic questions should include the total employment of the contractor company and the total number of employees whose time was directly billed to a Federal contract charge number during the reference period.

the other 15 or more proposed rule requirements. This means that the Department cannot credibly claim that any employees and their employers are already covered by compliant paid sick leave plans and likely not to incur additional paperwork burden because of the rule. The Department's analysis of the numbers of affected employees and employers suffers from five significant flaws:

First, the Department relied on a convoluted and erroneous method of analyzing available data that was not adequate to answer all of the questions that need to be answered to determine baseline compliance with its complex and overly prescriptive proposed rules. The Department, instead, should have undertaken to conduct a survey of a random sample of actual contractors to determine what proportion had existing plans meeting all of the detailed prescriptions in its proposed regulation. Such a survey could have identified the proportions of employers who would have to make modifications to comply with each of the 15 plus specific elements the Department proposes to require in an acceptable paid sick leave plan. This would have provided a starting point for a credible analysis of the costs (and transfers) associated with each element. This approach would have also allowed the Department to present estimates for alternative formulations of the proposed rule based on whether or not each specific requirement were included or not in a regulation.

The second major flaw in the Department's burden analysis is the assumption indicated by footnote d of Table 2 on page 9637 of the NPRM: The Department "assumes share of expenditure on contracting is the same as share of employment. Assumes all employees work exclusively on Federal contracts. Thus this may be an underestimate if some employees are not working entirely on Federal contracts." Here the Department has consciously made an assumption that minimizes any estimate of compliance cost, and the Department admits that it knows that this is an unrealistic assumption. It is obvious to even the most casual observer of Federal contract operations that many employees work across a variety of tasks, some directly supporting Federal work and some supporting work for private or non-Federal government clients. The proposed rule, itself, contemplates the dispersion of Federal work among multiple employees by its requirement that the required benefits be extended to employees who work as little as 20 percent of their time to provide necessary, but indirect, support for Federal contracts. At the very least, a fair presentation of compliance costs by the Department would have balanced its extreme assumption that "all employees work exclusively on Federal contracts" with an alternative assumption that the number of potentially affected employees is five times higher.

A third major flaw in the Department's burden analysis is its failure to account for the proposed application of the paid sick leave requirement to concessionaires and businesses leasing space on Federal property. These covered "contractors" are not represented in the "USASpending.gov" source on which the Department relied as a key element for its estimate of potentially affected workers. Concessionaires and lessors of space on Federal property do not receive money from the government; instead, they pay rents and fees to the government. The Department has not provided any credible estimate of the size of this potentially significant group of employers and employees affected by the proposed rule.

A fourth major flaw in the Department's burden analysis is its failure to account for the number of independent contractors for whom the Department intends to require paid sick leave to be provided despite the absence of a true employment relationship between the covered Federal contractor and the independent contractor worker. "In particular, whether a worker is an 'employee' or an 'independent contractor' as those terms are often used in other contexts, is not material to whether that worker is an employee under this proposed definition." (NPRM, p. 9597). The inclusion of such workers under the proposed paid sick leave mandate will add to the compliance cost and economic transfer impacts of the proposed rule, and, therefore, an estimate of the number of such persons is essential for a complete and accurate assessment of these impacts, as required by Executive Orders 12688, 13563, the Paperwork Reduction Act, the Unfunded Mandates Act, and the Regulatory Flexibility Act, but the Department has not provided any credible estimate of this number or of its proportion in relation to available measures of employment levels. In particular, the Department should have known that such workers, who typically identify themselves as self-employed sole proprietors, are not included in the industry employment estimates of the BLS OES data on which the Department based its estimates of affected workers.[2]

The fifth major flaw in the Department's analysis involves the coverage of subcontract workers by the proposed rule. Primary or "upper-tier" Federal contractors will be held responsible for ensuring that the workers employed by or in some other work arrangement relationship with subcontractor companies who directly work on or contribute services necessary to the performance of Federal contracts also receive prescribed paid sick leave benefits. This requirement includes a two-fold cost impact: First, the prime contractor will have the costly obligation to conduct due diligence investigations of the existence and specifications of paid sick leave benefits. The prime contractor presumably will enter into subcontract arrangements only with companies who establish fully compliant leave programs, and this restriction on subcontracting will be reflected in higher subcontract costs. Secondly, after selecting a subcontractor who purports to offer a compliant plan, it will remain incumbent on the prime to monitor the subcontractor's compliance going forward and to be financially liable to reimburse affected employees of the subcontractor in the event that the subcontractor's paid sick leave plan is found to be deficient. This provision adds significantly to the numbers of workers affected by the proposed rule who are unaccounted for in the Department's analysis and to the overall compliance costs that the Department has failed to capture in its estimates.

Together, these five flaws mean that the Department's estimate on page 7 of the "Supporting Statement" of 322,067 workers who will gain paid sick leave rights during the first three years of implementation of the proposed rule is too small by significant orders of

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[2] See http://www.bls.gov/oes/oes_ques.htm#def : "survey? "Employees" are all part-time and full-time workers who are paid a wage or salary. The survey does not cover the self-employed, owners and partners in unincorporated firms, household workers, or unpaid family workers. It is also important to account for both primary and secondary work arrangement when considering the number of self-employed independent contract workers. These workers include both those whose primary job is identified as self-employment and also those who are wage/salary employees in a primary job, but work as self-employed independent contractors in a second, often part-time, job. About 5% of wage and salary employees in a primary job, also work in a second job, which often is identified as self-employed.

magnitude. The Department failed to conduct the basic research needed to develop full and accurate estimates of this key parameter on which its burden estimates hinge.

2. The Department's analysis is internally inconsistent. Table 2 (NPRM, p.9637) identifies 1.2 million potentially affected employees of Federal contractors,[3] but on page 9641 the Department identifies 543,900 active prime contractor firms identified in August 2015 by the GSA System for Award Management (SAM). These numbers imply that the typical (average) prime contractor employs only (1,157,000 / 543,900) 2.1 employees on government contract work, a result that the Department would have realized is not credible if it had simply selected a sample of Federal contract records available in the government's own files and noted the number of contract workers (or hours) for which the government made cost reimbursement payments or the staffing numbers described in the cost justification documents for fixed price contracts. The inconsistency in the Department's estimates seem even more questionable because employees who are not directly involved in performance of work specified in a Federal contract but who devote at least 20% of their work time to providing essential support services for contract performance are also intended to be covered by the proposal.[4] The inconsistency between these numbers suggests the erroneousness of the Department's assumption embedded in Table 2 (NPRM, p. 9637), that employment related to government contracts is in the same proportion to total employment as contract expenditure is to gross national output.

Alternatively, if government contract work is more labor intensive per dollar expended than non-government activity, then the number of affected employees will be found to be commensurately greater than the numbers estimated by the Department in its analysis. Again, these problems could have been avoided and essential questions answered if the Department had simply taken the time and effort at the outset to conduct a baseline survey of Federal contractors. Indeed, if such a survey had been conducted prior to the drafting of Executive Order 13706, the President would have been better informed himself and perhaps would have produced an Order with different specific requirements more narrowly tailored to the goal the E.O. purports to address.

3. The Department has significantly underestimated implementation costs and failed to include these initial costs properly as a component of the paperwork burden. Implementation costs reflect the labor time and materials required to modify policies, standard operating procedures and automated information systems (such as employee billable time tracking systems) to comply with the regulation. Implementation costs typically involve both allocation of internal labor, equipment and materials and acquisition of services of external specialized consultants, trainers, or software vendors, and all such costs that relate to the recordkeeping aspect of compliance with the rule should properly be included in the information

[3] This is the Departments estimate of total employees across all government contract work before estimating further reductions to identify workers on contract types covered by the proposed rule.

[4] It is notable that data posted by the Small Business Administration at https://www.sba.gov/advocacy/firm-size-data shows that according to the 2011 Economic Census, the 5,684,424 private firms with one or more employees had a total of 113,425,965 employees, for an average of 20 employees per firm, ten times the number implied by the inconsistent data used in the Department's analysis.

collection burden calculated under the Paperwork Reduction Act. The Department omitted most of these costs from its burden estimates in Section 12 of the Supporting Statement submitted to OMB.

The Department's estimates of $41.8 million in one-time implementation cost for year one and of $4.2 million in recurring implementation costs each year over the five year phase-in of covered contracts (which are presented under the Executive Order 12866 discussion but omitted from the paperwork burden estimate) are fundamentally flawed. The flaw is the Department's erroneous assumption that 81 percent of contractors will have minimal implementation burden because, according to the Survey cited, these contractors already have "some form of paid sick leave policy" in place. For these 457,000 firms the Department assumes that one hour of labor time by a single non-managerial human resources worker would be sufficient for making any minor changes needed in information systems and procedures to comply with the proposed rule. The Department has not provided any explanation or empirical data to justify this arbitrary assumption. It has no basis for the implicit presumption that changes needed for these contractors would be minor.

The fundamental flaw in the Department's thinking is to imagine that having already in place some form of paid leave policy is equivalent to having in place the full and exact panoply of requirements embedded in the proposed rule. While some companies may have in place a policy that satisfies all 15 or more specific requirement of the proposed rule, it is likely that many will not. For those who do not already have in place all of the requirements, in their existing paid leave policy the implementation cost may vary significantly depending on what elements and how many elements require modification. Some contractors may find the need to scrap the existing system entirely and start over. The Department seems to have created its "one hour" burden estimate for 81 percent of contractors without a foundation of any research to determine how many contractors will need to undertake various extents of modifications. The estimate seems arbitrary and capricious.

Similarly, the Department's assertion that the 19 per cent of companies that would presumably need to create complete new policies will each require only 10 hours of a single human resource worker's time to do so is without any foundation in fact. The Department has presented no evidence to support this. The number seems to be derived with no actual experience in the subject.

The recurring cost component of the Department's implementation cost estimate is flawed by both the lack of research to substantiate the assertion of one hour of time per added employee each year and by the Department's underestimation of the numbers of affected employees, as described above.

A serious flaw affecting both the one-time and recurring cost estimates is the untenable assumption that a single, non-manager human resources worker would be capable and authorized to design and construct a totally new or modified paid sick leave program of policies and procedures. The assumed wage of $18.74 per hour and total compensation of $27.30 per hour including fringe benefits shows that the Department assumes that a clerical level worker would

be authorized to make decisions and modifications of a company's leave policies, payroll and information systems and standard operating procedures that may have tremendous financial and legal liability implications.

If done wrongly, the work to adjust or create compliant policies and procedures could result in the company being debarred from the Federal contracting market. It is not conceivable that such authority would be entrusted totally to a worker at the level of skill implied by the Department's compensation assumption. The reality is that the work of modifying existing paid sick leave policies and procedures or of creating totally new ones to comply with the requirements of the proposed rule will require the effort of a team drawn from across the range of expertise and authority within the company, and internal resources will likely require augmentation by external consultants, attorneys, information technology specialists and others. The appropriate compensation rate to use for calculation of internal labor costs is a blended rate based on analysis of the time that each of several categories of workers will need to devote to the task. The time requirements, the types of labor and the resulting blended labor compensation rate will vary with the extent and types of policy modifications needed.

Training also will be an important part of implementation costs for the proposed regulation and should be included as an initial cost for the paperwork burden calculation. Training cost will be a particularly important burden for companies that perform both contracts covered by the proposed rule and also do work that is not covered. Both managers and line employees will require careful training to understand the differences in employees' sick leave accrual and leave taking procedures in relation to time spend on covered contract work and time spent on other work. Training is potentially the most costly element of implementation costs, because both those who give and those who receive training will be in "one the clock" paid status during training and will be removed from their normal productive, revenue generating work while undergoing training. The Department has not recognized this important element of implementation cost in any way in its analysis.

Furthermore, all of these implementation costs can be expected to be significantly higher for lessees and concessionaires (a population the Department has failed to identify) who have no prior experience dealing with the requirements of being a federal contractor. These employers are not just being directed to add a new employee benefit, they are being directed to develop a whole new way of conducting their operations.

4. The Department has significantly underestimated the annual (recurring) administrative burden. Annual administrative burden is the recurring time and expense of operating a paid sick leave program once it has been designed and implemented. This burden is at the heart of the recordkeeping burden that the Department is required to accurately show to comply with the Paperwork Reduction Act. The Department's estimate of annual recurring administrative burden suffers from flaws similar to those described for initial implementation costs: The fifteen minutes per affected employee per year parameter relied on by the Department is not supported by any empirical data or other reasonable evidence. It appears to have been selected without any rationale.

Also the number of affected employees to which this parameter is applied is an underestimate of the affected population, as discussed previously. The wage factor applied to the calculation is also questionable: Administration of the system will require labor input from a variety of human resource and management workers, and the arbitrary application of a wage rate for a human resource clerk does not sufficiently represent the blending of labor rates needed to model this collaboration.

The Department has also neglected to consider that operation of the system will require time from each affected worker to enter time on government contract work properly in order to accrue paid leave benefits. This is a part of the recordkeeping burden because the employer must pay for each employee's time and the time diverted to this task reduces the productive time each day that each employee may devote to productive labor. The negative productivity impact may adversely affect individual workers' earnings.

The calculation of applicable time worked and leave accrual for support workers who devote 20 percent or more of their time to covered government contractors will be an additional time-consuming and costly element of recurring administrative costs that the Department has not considered in its analysis. In companies that do both covered and non-covered work it may be necessary to maintain separate hours tracking and leave accrual records for each employee if leave accrual rates or any other aspect of the leave policy for non-covered work is different from policies required by the proposed rule for covered contract work.

5. The Department has significantly underestimated the fully loaded economic opportunity cost associated with allocation of labor time to familiarization, implementation and recurring administrative costs. The Department's regulatory impact analysis uses selected wage rates based on BLS OES data and adds a "load" of 46 percent to account for employee fringe benefits and payroll taxes, e.g., \$18.74 x 1.46 = \$27.30.[5] The Department failed to account in its computations for the full economic opportunity cost of mandating actions that reallocate private labor from its normal productive and revenue generating use to an alternative use to satisfy a Federal government regulatory compliance or information collection requirement. The appropriate load factor to fully load the wage rates used throughout the Department's regulatory impact analysis computations would be significantly greater than the 1.46 factor used by the Department. That 1.46 load factor accounts only for the fringe benefits and payroll taxes part of direct compensation of an employee, and it does not include indirect overhead (which includes equipment, facilities, and indirect labor overhead, such as facilities maintenance, human resources services, payroll/accounting services and management supervision services that support the direct labor units identified) and foregone interest payments and profit contributions of the associated with the foregone production of the diverted worker's time. The appropriate full economic opportunity cost load factor may vary by industry, affected worker occupation, and other factors. A practical approximation may be provided by the indirect overhead and

[5] The Department has not fully described how it derived this 1.46 load factor, but it appears to account for both voluntary and legally required benefits such as health insurance, retirement plan employer contributions, life and disability insurance, required workers compensation insurance, unemployment insurance payroll taxes and employer's required contribution to FICA payroll taxes.

profit mark-ups relative to direct labor cost that government contracts permit for contractor billing as reimbursement of costs of labor services provided to the government. Examination of a sample of GSA Government Wide Contract (GWAC) vehicles for management, information technology, professional services and similar labor services revealed typical full load factors of 3.1 to 3.5 times direct wages, with an average of 3.25 times direct wages. Applying a 3.25 load factors would increase Department's calculations of familiarization, implementation and recurring administrative costs by a scale factor of 2.2 (= 3.25/1.46) without considering the additional effects of correcting any of the other errors and omissions described above. For example, applying a 3.25 full load factor instead of the 1.46 partial load factor used by the Department would increase the Department's estimate of regulatory familiarization cost from $45.1 million to $100.4 million and total first year costs shown in Table 9 (NPRM, p. 9643) would increase from $92.1 million to $204.5 million.

6. Other Unsubstantiated and Overly Optimistic Assumptions. The following items highlight additional items in the Department's Paperwork Reduction Act analysis that are unsubstantiated and optimistically given values that underestimate the true recordkeeping burden of the proposal.

- The estimate on page 7 of the Supporting Statement that workers covered by the proposed rule will "on average use 4 days of sick leave per year" is based on an erroneous application of data from the National Compensation Survey (NCS). The NCS average reflects only paid leave for personal sickness, but the proposed rule will provide paid leave for other purposes as well. The Department should revise its estimate of leave use (which impacts certification and other recordkeeping burdens) to include all leave reasons covered. In addition, the NCS data reflects sick leave taken by employees under employer benefit plans that may not be consistent with all 15 specific requirements of the proposed rule. The Department has not conducted sufficient research to determine the extent to which the proposed program specifications may contribute to increased leave taking.

- The Department's recordkeeping burden assumption of one minute per employee per leave day taken (Supporting Statement page 9) is not substantiated by any empirical evidence. The Department could have conducted experiments, surveys or other research to substantiate a reasonable and accurate value.

- The Department's estimate on page 10 of the Supporting Statement of five minutes per employee for creation of a certified list under Section 13.26 of the proposed rule is similarly not based on any empirical evidence or credible reasoning.

- The Department's estimate on page 11 of the Supporting Statement of one minute per employee to provide the required monthly notice of leave balance is similarly unsubstantiated.

- The Department asserts without evidence or reasoning that 10 percent of employees covered by the rule will ask for more frequent leave balance reports, or will separate

from employment annually or will be reinstated annually. The assumption of 10 percent for each of these very different parameters is evidence that the Department is simply guessing. The Paperwork Reduction Act requires the Department to make a reasonable and evidence-based estimate. Guesswork is not sufficient.

The Department should withdraw this ICR request and conduct the necessary empirical field research to present a credible analysis and reasoned burden estimates. The Department's analysis of the burden of recordkeeping required by the proposed rule bears none of the hallmarks of a serious submission intended to satisfy the Paperwork Reduction Act. It appears to have been constructed with the expectation that it would not be discovered or reviewed, rather than giving affected parties a legitimate understanding of the burdens about to be imposed on them, as the Paperwork Reduction Act intends.

Sincerely,

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