U.S. CHAMBER OF COMMERCE

April 12, 2016

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking: Implementing Executive Order 13706 -- Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 9592, February 25, 2016 (RIN 1235-AA13)

Dear Dr. Weil:

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.

The International Franchise Association ("IFA") is the world's oldest and largest organization representing franchising worldwide. IFA works through its government relations and public policy, media relations and educational programs to protect, enhance and promote franchising and the more than 800,000 franchise establishments that support nearly 9.1 million direct jobs, $994 billion of economic output for the U.S. economy and 3 percent of the Gross Domestic Product (GDP). IFA members include franchise companies in over 300 different business format categories, individual franchisees and companies that support the industry in marketing, law, technology and business development. IFA member companies have interest in this rulemaking because they are significant providers of goods and services to the federal sector.

The combined memberships of the U.S. Chamber and IFA include thousands of employers who will be impacted by Executive Order 13706 and its implementing regulations.

The Chamber and the IFA appreciate the opportunity to submit comments in response to the proposed rule issued by the Department of Labor ("Department") on February 25, 2016, to

implement Executive Order 13706 (the "Executive Order", "E.O."). The Executive Order was issued by President Obama on September 7, 2015, and would require federal contractors and subcontractors to provide their employees with at least seven days of sick leave annually. *See* Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 9592 (February 25, 2016) ("Proposed Rule").

The Executive Order uses as its base text the language of the Healthy Families Act (H.R. 932/S. 497 in the 114th Congress), a bill that has been serially introduced by congressional Democrats, but has never moved beyond introduction, even in 2009 when Democrats had strong majorities in both chambers and a receptive president (as evidenced by this E.O.) and the bill could likely have been enacted. To now impose this legislation through the procurement process via executive order circumvents Congress' unique role for enacting legislation.

As further described in the comments below, the Proposed Rule, in conjunction with the Executive Order, is *ultra vires*; is based on a flawed economic analysis; would strongly discourage many of our members to provide services at military bases and other federal locations; would reward unscrupulous contractors at the expense of diligent contractors; would introduce significant compliance uncertainty into the federal contracting process; and would further complicate compliance with an ever-growing web of paid sick leave obligations around the country. As a result, the Proposed Rule and Executive Order should be withdrawn or substantially modified.

I. The Executive Order and Proposed Rule Exceed the Congressional Delegation of Authority.

A. The Executive Order and Proposed Rule Conflict with the Service Contract Act and the Davis-Bacon Act.

Under the Service Contract Act (SCA) and the Davis-Bacon Act (DBA), Congress has established by statute wage and fringe benefits obligations for certain workers on contracts for federal services or contracts for federal construction. Thus, the Executive Order and Proposed Rule must be considered in the context of those statutes. It is clear when doing so that the establishment by executive order of a paid sick leave obligation beyond the fringe benefit provided under the SCA and DBA for these workers exceeds the statutory Congressional delegation of authority to the executive branch.[1]

[1] We understand that the Department's likely Final Rule response to comments such as these will be to lump them together with a descriptor such as "comments addressing issues that are beyond the scope or authority of the proposed rule, such as the propriety of the Executive Order or the validity of establishing a paid sick leave obligation," then dismiss them as such. Nevertheless, we include these comments because the regulated community has had no opportunity to provide input into the Executive Order as would ordinarily be the case when a paid sick leave requirement works its way through the legislative process. By choosing to circumvent Congress and issue a detailed Executive Order that effectively ties the hands of the Department with respect to every significant provision contained in the Executive Order, the only official opportunity to comment on the substance of the Executive Order is through this

The plain language of the SCA and DBA demonstrates that Congress has considered and has established as a matter of law the minimum wages and fringe benefits that must be paid by federal contractors covered by these statutes. The Proposed Rule acknowledges that a specific requirement to provide paid sick leave is beyond the statutorily-specified obligation, stating that the "paid sick leave required by the Order is in addition to a contractor's obligations under the Service Contract Act and Davis-Bacon Act." 81 Fed. Reg. at 9593. This statement confirms that the President and the Department are creating a new requirement in derogation of Congressional intent to establish required wages and fringe benefits via the wage determination process -- a process that has been in place for years without Congressional interference on this issue.

Layering the Executive Order's paid sick leave requirement on top of the existing SCA and DBA requirements fails to acknowledge that those statutory schemes already include paid sick leave within the fringe benefit requirements. For example, the SCA regulations require that the required health and welfare fringe benefit amounts be determined "based upon the sum of the benefits contained in the U.S. Bureau of Labor Statistics, Employment Cost Index (ECI), for all employees in private industry, nationwide (and excluding ECI components for supplemental pay, such as shift differential, which are considered wages rather than fringe benefits under SCA)." 29 CFR 4.52(a). *The ECI includes within its benefits paid sick leave.*

As a result, under the SCA, the minimum required health and welfare fringe benefit amount is determined by including in the calculation the cost to employers of paid sick leave, but the Executive Order and Proposed Rule would prevent those contractors from satisfying their health and welfare obligations with paid sick leave. An employer who spends $1.00/hour in paid sick leave benefits would see that amount used to increase the Department's calculation of the required amount of health and welfare fringe benefits, but would not be able to use that same $1.00/hour to satisfy its own required health and welfare fringe benefit. This "one-way" use of paid sick leave costs is fundamentally unfair and places those employers who have established paid sick leave policies in the position of completely overhauling their benefits programs to meet the Executive Order's requirements.[2] Indeed, even an employer that already has a paid sick leave program that complies with every element of the Proposed Rule, but used that program to satisfy its obligations under the SCA's health and welfare fringe benefit provisions would need to provide an additional benefit to its covered employees as a result of the Proposed Rule.

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comment process (which is evident by the many comments that have already been submitted to the Proposed Rule's record).

[2] The same is true under the DBA. DBA wage determinations often contain significant fringe benefits obligations. Often, paid sick leave represents a large component of the calculated amount. Under the Department's proposal, a contractor covered by such a fringe benefit obligation would need to meet the new paid sick leave requirement and meet the fringe benefit obligation without the ability to take credit for its existing sick leave benefit.

Neither the President nor the Department has any authority to override acts of Congress by setting a new minimum fringe benefit standard that contractors must pay in a manner that is inconsistent with the statutes that already govern this issue. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson concurring) ("In instances where presidential action is incompatible with the express or implied will of Congress, the power of the President is at its minimum…."); *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996) (striking down executive order conflicting with provisions of the National Labor Relations Act).[3] Yet, that is precisely what is happening here -- despite a long history of paid sick leave plans being used to satisfy contractors' statutorily required fringe benefit obligations under the SCA and the DBA, the Executive Order would no longer permit them to do so. The President and the Department fail to acknowledge this fundamental issue.

B. The Executive Order and Proposed Rule Exceed the Procurement Act's Delegation Authority.

The sole authority for the Executive Order or the Proposed Rule cited by either the President or the Proposed Rule is the Federal Property and Administrative Services Act of 1949 ("FPASA" or the "Procurement Act"), 40 U.S.C. §§ 101, 121(a), cited by the President at 80 Fed. Reg. 54,697 and in the Proposed Rule at 81 Fed. Reg. 9594. The FPASA authorizes the President to "prescribe policies and directives" that [he] considers necessary to carry out the statutory purposes of ensuring "economical and efficient" government procurement and administration of government property. The Procurement Act's authorization to achieve greater economy or efficiency cannot be said to authorize the President to <u>increase</u> the government's costs, as will be the result of requiring government contractors to provide paid sick leave (in addition to already existing health and welfare fringe benefits requirements) to their employees.[4]

The D.C. Circuit considered and rejected a similar claim of Presidential authority to impose new obligations on government contractors under the FPASA in *Chamber of Commerce v. Reich*, 74 F. 3d at 1333. There the court observed that the authority vested in the President under the FPASA is limited:

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[3] *See also* Congressional Research Service Report for Congress, *Presidential Authority to Impose Requirements On Federal Contractors* (CRS Jan. 10, 2012), available at www.crs.gov.

[4] There is no set of circumstances under which the provision of paid sick leave would not increase the cost of contracting. Neither the Executive Order nor the Proposed Rule cites any data that would support a different conclusion. Instead they rely on a supposition that is a mainstay of the rhetoric used to support mandating paid sick leave. There simply is no evidence provided by the Department that the requirement for paid sick leave would improve the economy and efficiency of federal contracting. It is a sweeping and unsubstantiated statement untethered from the realities of economic policy.

> The Procurement Act was designed to address broad concerns quite different from the more focused question of the [issue before the court]. The text of the Procurement Act and its legislative history indicate that Congress was troubled by the absence of central management that could coordinate the entire government's procurement activities in an efficient and economical manner. The legislative history is replete with references for the need to have an "efficient, businesslike system of property management." S.REP. No. 475, 81st Cong., 1st Sess. 1 (1949); *see also* H.R.REP. No. 670, 81st Cong. 1st Sess. 2 (1949).

The *Reich* court found that the FPASA provided no authority for the President to dictate to government contractors as to matters on which Congress has already spoken. [5]

As in *Reich*, Congress has already made the judgment that the government will achieve its greatest economy and efficiency by requiring government contractors to pay the fringe benefits specified in wage determinations established under the DBA and SCA. Congress has been aware of the process for years, but has not passed any legislation changing it. Indeed, as noted above, the Executive Order largely adopts the terms of the Healthy Families Act. The Act, of course, has not been passed by Congress, indicating an absence of Congressional intent to require these provisions on government contractors or any other employers.

Whether Congress has required certain specified fringe benefits at the most economical or efficient levels for government contractors may be a separate question -- for Congress. Once Congress has made the political judgment necessary to require "fringe benefits," but not specific "paid sick leave" and has acted upon it in the form of legislation (or, in the case of the Healthy Families Act, by inaction on that legislation), however, the President is required by the Constitution to faithfully execute the laws so enacted by Congress.[6] As a result, the Executive Order's establishment of a paid sick leave requirement for government contractors who are already covered

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[5] The *Reich* court specifically held that the FPASA did not authorize the President to prohibit government contractors from hiring strike replacements, in the face of legislation (the National Labor Relations Act) that left such an option to private decision making. *Id*. at 1333. The D.C. Circuit opinion in *Reich* distinguished the only previous case where the Procurement Act had been found to grant authority for an executive order dealing with government contractors' wages: *AFL-CIO v. Kahn*, 618 F. 2d 784 (1979). The *Reich* court found that the executive order in *Kahn* was not inconsistent with any federal statute, where the President acted only to restrict employer wage increases as an emergency anti-inflation measure. *Id*.

[6] The President cannot claim a right to "supplement" the Congressional fringe benefits mandates with his own independent scheme, as has been permitted for state governments under the DBA and SCA. *See Frank Bros., Inc. v. Wisconsin Dept. of Transp.*, 409 F. 3d 880 (7th Cir. 2005) (holding that DBA sets a "floor" that state governments are entitled to supplement because the state minimum wage acts are not preempted by the federal laws). Here, both Congress and the President are part of the same (federal) "scheme," and it is Congress alone that is entitled to make the decision on behalf of the federal government once it has acted through legislation for this explicit purpose.

by the Congressionally-mandated fringe benefits obligations in the DBA and SCA is *ultra vires* and should not be implemented by Department regulation.

II. The Executive Order and Proposed Rule Create Significant Practical and Compliance Issues for the Federal Contracting Community.

A. The Executive Order and Proposed Rule will add significant complications to contractors subject to state and local requirements.

Much as the Executive Order and Proposed Rule cannot be divorced from the DBA and SCA, they similarly cannot be viewed without the lens of the substantial increase in state and local obligations related to paid sick leave. Numerous substantive requirements described in the Proposed Rule significantly depart from most, if not all, of the requirements set forth in existing state and local paid sick leave laws, adding confusion and complexity to this area of law.

The Proposed Rule differs from existing state and local mandatory paid sick leave laws on issues such as employee eligibility, permitted uses, covered family members, accrual rate and caps, year-end carryover, usage caps, reinstatement of unused paid sick leave upon rehire, minimum increments for usage, standards for requesting leave, and documentation requirements. For federal contractors operating in one or more of the states or municipalities, the Executive Order and Proposed Rule create a compliance nightmare. These government contractors must deal with the logistical nightmare of adopting and managing multiple paid sick leave policies for different groups of employees. A covered contractor in San Francisco, for example, would need to ensure compliance with the California paid sick leave requirements, the San Francisco paid sick leave requirements, and the Executive Order's paid sick leave requirements.

Given the Proposed Rule's deviations from many of the paid sick leave principles found in state and local requirements, contractors would not likely take the undesirable step of adopting a one-size-fits-all policy across all of its locations. Such a policy often results in a significant windfall to employees. As described below, however, the Proposed Rule conflicts enough with the existing obligations that a one-size-fits-all policy would simply not work.

This "layering" of the Executive Order's paid sick leave requirements on top of the state and local requirements belies one of the stated reasons for extending these benefits to employees of federal contractors: "improv[ing] the health and performance of employees of Federal contractors and [ ] bring[ing] benefits packages offered by Federal contractors in line with model employers, ensuring they remain competitive in the search for dedicated and talented employees." *See* 81 Fed. Reg. 9595. Many "model" employers already have generous benefits packages that include paid sick leave that complies with the various state and local obligations. The Executive Order would, in many cases, have the perverse effect of requiring these model employers to upend their existing packages to comply with its requirements. Far from being a device through which certain federal

contractors "come into line" with "model" contractors, the Executive Order will force all contractors to substantially rework their leave and benefits packages to comply with this fiat.

B. The Department of Labor should exempt employees with already existing paid sick leave benefits.

Despite repeated statements throughout the Proposed Rule that the Executive Order does not impact state and local law compliance, collective bargaining agreements, and existing PTO policies, the Executive Order is clearly a significant complicating factor in compliance with state and local laws. It also will render numerous PTO policies for SCA-covered contracts invalid,[7] and will cause massive problems with respect to collective bargaining agreements. Accordingly, if the goal of the Proposed Rule is to provide a baseline of paid sick leave benefits for employees, we strongly recommend that the Department create exemptions for those 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 sick leave law. Carving out these types of scenarios would dramatically reduce the problems anticipated by the Proposed Rule's framework, while not sacrificing any of the reasons underlying the Executive Order.

For example, as does California, the Department could define "Employee" as excluding employees covered by a collective bargaining agreement. Or it could simply delay the effective date of the paid sick leave obligation to employees under a collective bargaining agreement until after the expiration of the current collective bargaining agreement. Either method will maintain the benefit of the bargain with respect to employees receiving paid sick leave under a collective bargaining agreement without in any way negatively impacting the goals of the Executive Order. And, at the very least, delaying implementation will allow the Department to address the complications created by the paid sick leave obligations in the context of section 4(c) wage determinations under the Service Contract Act. For example, if a section 4(c) wage determination includes paid sick leave as an element of the collective bargaining agreement, how will that leave be treated once the Executive Order paid sick leave requirement is applicable? At what point does the amount of sick leave required by the collective bargaining agreement "become" sick leave required by the Executive Order, and, therefore, no longer included in the required amounts under section 4(c). If the paid sick leave in the collective bargaining agreement is deemed to be insufficient to qualify for the Executive Order paid sick leave on one point—for example, due to carryover provisions that are less than required—but in excess of the Executive Order paid sick leave obligations on others—for example, providing 15 sick days per year—what is a successor contractor's obligation? Would the section 4(c) wage determination require 15 paid sick days (or an

[7] As discussed in more detail below, the Proposed Rule's "must carryover" provision with respect to sick leave and the SCA's "must cashout" provision with respect to vacation renders, for all intents and purposes, any existing PTO policy invalid.

equivalent), and the contract also require a windfall of eight additional days compliant with the Executive Order? Would it be eight Executive Order days and seven additional days? If the predecessor succeeded itself, would it be provided some grace period in which to renegotiate its collective bargaining agreement to achieve compliance with what the Department dictates?

A similar exemption for employees already subject to a state or local paid sick leave law would eliminate some of the difficulties created by the layering of the federal obligation onto those provisions while achieving the goals of the Executive Order. If the Department wanted to ensure a certain minimum level of paid sick leave (rather than simply exempting all employees subject to a state or local law), it could, for example, identify those state and local provisions that it deemed "compliant," then exempt only those employees subject to the "compliant" laws.

Similarly, if the Department is truly interested in providing the benefit identified in the Executive Order without wreaking havoc on the existing paid time off policies of federal contractors, it would scale back its requirement that any paid time off policy must be compliant with every aspect to the Proposed Rule. Eliminating compliance with items such as the unlimited usage cap or the carryover provisions for a PTO policy that is otherwise compliant with the Proposed Rule would go a long way to minimizing the disruptive impact of the Executive Order. Compliance with the strict terms of the Proposed Rule will be extremely challenging for employers in practice and will cause most companies to abandon their existing paid time off policies, thereby reducing employee benefits—the leave provisions of the Executive Order will become a ceiling rather than a floor. We request that the Department review which of the Proposed Rule's substantive provisions it deems most significant and only require that employers' existing paid time off policies satisfy those provisions.

III. Comments with Respect to the Proposed Regulatory Text in the Proposed Rule.

The Proposed Rule itself has numerous areas in which the Department should revisit its language and/or provide significantly more guidance to the regulated community. Due to the breadth of the coverage of the Proposed Rule, many employers may now find themselves to be "government contractors." Many of the definitional and coverage issues were raised by the regulated community in the context of the Executive Order establishing a minimum wage, but the final rule implementing that Executive Order did not adequately address many of the concerns raised. As the Department indicates frequently, this proposed rule relies heavily on the language of the rule implementing the Executive Order increasing minimum wage for federal contractors, as if that regulation is a model of clarity and balance. Failure by the Department to properly address those issues in the context of this Executive Order and Proposed Rule would be an abdication of the Department's responsibilities given the likelihood that this Executive Order will impact far more employees than did the minimum wage Executive Order. Furthermore, implementing new paid sick leave benefits is far more burdensome and complicated than complying with a new minimum wage. It is incumbent upon the Department to provide clear guidance—through the regulation itself—on the critical issues.

A. Proposed Section 13.2—Definitions

Several of the definitions proposed by the Department are confusing. Others are the source of the significant expansion into areas previously untouched by federal contracting requirements. In this section, we address these definitions.

1. Subcontracts

a. Clear Definitions of subcontracts are needed.

The Department should precisely define "subcontract" in the regulatory text, not simply reference subcontracts in the preamble. Despite some explanation of the term in the preamble, as well as in the rulemaking related to the establishment of a minimum wage for federal contractors, the Department needs to provide significantly more guidance in the regulations to the regulated community regarding the definition of and/or scope of coverage for "subcontracts." The term "subcontract" should receive its own definition, with a detailed explanation of the factors the Department intends to consider in determining whether a particular subcontract will be subject to the minimum wage requirements of the Executive Order. This is particularly important with respect to the concession contracts and contracts in connection with Federal property and related to services. Given the absence of any small business threshold (unlike the Healthy Families Act that includes a 15 employee threshold) this could end up impacting a wide array of small businesses.

In addition, the Department should provide an explanation (including a financial analysis) in the final rule of how its definition of subcontract supports the stated goal of reducing inefficiency in government contracting—specifically, the Department should explain how requiring small business subcontractors to provide paid sick leave, as well as the administrative and legal costs expended by the contractor tasked with somehow monitoring the subcontractor's compliance, increases efficiency in government contracting.

b. The Department needs to explain any "joint employer" implications that may arise.

Providing adequate guidance on the issue of subcontracting (and the responsibilities that upper-tier contractors may have for compliance) takes on a heightened importance in the context of other Departmental activity. For example, the Department's focus on the issues of joint employment, through its recent Administrator's Interpretation and other emphases, is causing concern in the contracting community that taking the necessary steps to ensure subcontractor compliance may result in findings of joint employment under other statutory schemes. The Department should ensure that its definition and guidance on subcontracting includes coverage of whether and how a joint employment relationship could be found and what that would mean for contractors, and how such issues would be handled under the enforcement provisions envisioned in this proposal.

This can be accomplished by detailing the types of activities that upper-tier contractors would be expected to conduct in order to establish compliance by subcontractors. It is difficult to imagine that an upper-tier contractor would be able to fully police whether a second-level subcontractor is complying with paid sick leave obligations for an employee who spends between 15 and 25 percent of her time working "in connection with" a covered contract. Providing guidance on the reasonable measures that an upper-tier contractor can take to ensure their own compliance with the paid sick leave obligations is critical.[8]

In addition, the Department should provide guidance with respect to the obligations of entities that are deemed to be joint employers under the FLSA. For example, if an employee is jointly employed (under the Department's recently identified "horizontal" joint employment) on two separate contracts, do both employers need to count time worked on those contracts as hours worked/paid? Can the time accrued for one joint employer be used on the other joint employer's job? In the context of the Department's extra-regulatory definition of "vertical" joint employment, does an employee's paid sick leave accrual "transfer" if, for example, the employee stops working for the subcontractor and begins working for the prime contractor? If there is, for example, a six-month delay in doing so, would the reinstatement of leave provisions operate with respect to the prime contractor? These and many other questions must be addressed to ensure that the Department's regulatory framework under the Executive Order properly integrates with the many other initiatives being undertaken by the Department.

2. Covered Family Member and Related Definitions

The Proposed Rule defines covered family members to include 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). The latter term in the preceding list is broadly 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 notes 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.

The above list of covered family members and supportive definitions are far too extensive and unwieldy for employers to use. By comparison, most existing paid sick leave laws limit covered family members to some combination of child, parent, spouse, grandparent, grandchild, domestic partner, and sibling. The Connecticut law only allows eligible employees to use leave for

[8] The need for such guidance is further heightened when considering the very real probability that compliance with the paid sick leave Executive Order will almost certainly be added to the list of laws and other provisions, violations of which must be disclosed under Executive Order 13673, Fair Play and Safe Workplaces.

their child or spouse. The Massachusetts law is only slightly broader, limiting covered family members to an employee's child, parent, spouse, and parent-in-law. Even the more expansive provisions, such as San Francisco, Oakland, and Emeryville, CA, allow leave usage for non-family members—"designated persons"—but only if the employee does *not* have a spouse or domestic partner, and, even then, the employee can only designate *one person per year*.

From a practical sense, covered businesses have no means of determining whether an employee actually 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." Each layer of explanation offered by the Department introduces another undefined, expansive term or phrase that greatly restricts an employer's ability to manage and ensure proper use of paid sick leave by its employees. If the Department does not narrow the list of protected family members in its final rules, covered businesses will once again be faced with two equally inadequate options: (1) challenge employees' use of paid sick leave for outlier family members or supposed close friends because of suspected abuse and risk violating the anti-interference and anti-discrimination provisions; or (2) allow employees to use leave for virtually any individual's illness, injury or health condition (or other protected reasons), thereby leaving the employer with no viable means of preventing abuse and further challenging the notion of improving the economy and efficiency in federal contracting.

B. Proposed Section 13.3—Coverage

Initially, there is a significant compliance danger in the Department's coverage section in that it is fairly bare-bones, with virtually all of the important information regarding coverage found in the preamble. As the Department is well-aware, the preamble is not included when the regulations are published in the Code of Federal Regulations. Thus, many contractors (and non-contractors) considering their obligations under the Executive Order will be deprived of the Department's most important statements regarding perhaps the most important issues in the Proposed Rule. In developing the final rule, the Department should provide more meaningful, more robust descriptions of coverage in the regulatory text, instead of keeping them in the preamble.

1. <u>Coverage of Types of Contractual Arrangements</u>

The application of the Executive Order to concession contracts and contracts in connection with Federal property and related to services are perhaps the most damaging portions of the Executive Order and the Proposed Rule. As the Department will see in many of the comments submitted for the record, the application of the Executive Order paid sick leave requirements to these types of contracts is where the erroneous assumptions underlying the Department's analysis show themselves most clearly.

Underlying the Proposed Rule is a belief that contractors subject to the Executive Order's paid sick 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 sick leave requirements, and that the government itself ultimately will pay for the paid sick leave through increased prices paid to contractors on awarded contracts. Undoubtedly, this is why the Executive Order's obligations will apply only to "new" contracts. Nevertheless, whether that belief will ultimately play out in the context of "traditional" SCA and DBA contracts remains to be seen.

In the context of concession contracts and contracts in connection with Federal property and related to services, however, there exists another dynamic -- external competition -- that the Department simply has not adequately considered. When several guard services contractors are "competing" for a guard services contract, they at least will all be on the same playing field with respect to paid sick leave. Once awarded the contract, the winning contractor need not consider whether the guard services company at the private office building down the street is charging lower rates. On the other hand, contractors with concession contracts and contracts in connection with Federal property often are in direct competition with other businesses who are unencumbered by these obligations. A quick service restaurant on a military base, a day care center in a Federal building, a "casual dining restaurant that rents space in a Federal building and serves food to the general public" -- all of these entities are competing directly against quick service restaurants off base, day care centers down the street from the Federal building, the dozens of other restaurants within walking distance.

Due to the application of the Executive Order's paid sick leave requirements, however, the playing field has been tilted <u>against</u> those contractors doing business with the Federal government. There is no question that providing paid sick leave will increase costs of doing business. Unlike state and local paid sick leave obligations, however, the Executive Order's requirements apply <u>only</u> to those doing business with the Federal government. A franchisee in a Federal building must provide the paid sick leave (with the concomitant costs of doing so); another franchisee just a couple of blocks away need not provide paid sick leave. Obviously, this puts the business in the Federal building at a significant competitive disadvantage. It does not get paid by the Federal government -- it pays the Federal government -- and cannot simply request that the government pay for the increased costs. This leaves the Federal building contractor with few options: it can increase its prices (if permitted by its contract with the government, which often is not the case) and hope that the price increase does not drive customers away; it can decrease staffing levels and hope that the reduced hours and/or lower quality of service do not result in lower profits; or it can decide to no longer operate in a Federal building (or on a military base).

The application of the Executive Order's paid sick leave requirements to concession contracts and contracts in connection with Federal property and related to services belies the presumption in the Executive Order that providing paid sick leave to workers on these contracts will promote the Federal government's procurement interests in economy and efficiency. Jobs will be lost, service quality will suffer, and the payments received by the Federal government by these contractors will dwindle. Concession contracts and contracts in connection with Federal property and related to services do not operate in a vacuum. They are subject to very real competitive

pressures. The Proposed Rule fails to consider any of those pressures in its application of the Executive Order to these businesses and its discussion of coverage of these contracts.

2. SCA Coverage of Contracts

The Proposed Rule specifically seeks comment on whether the Department should include within the scope of the paid sick leave requirement those contracts (other than concession contracts) that are excluded or exempted from coverage under the SCA. *See* 81 Fed. Reg. at 9603-04. As was the case with the minimum wage Executive Order, these contracts should be excluded or exempted from the paid sick leave Executive Order. Particularly in the context of those contracts excluded from SCA coverage because they are performed almost exclusively by FLSA-exempt employees, applying the paid sick leave obligations would require employers to develop and implement tracking systems in an effort to ensure compliance with the paid sick leave obligations. Coupled with the Department's decision to limit accrual to time spent on the contract, but including all paid time off in the determination of that accrual, application of the paid sick leave requirements to these exempted or excluded contracts will create significant logistical issues.

Contractors who previously had no obligation to track hours under—or in connection with—these contracts will now be obligated to do so. When "back of the house" employees who perform no work directly on an exempt contract are considered, bringing these contracts under the scope of the Executive Order will result in onerous recordkeeping obligations. Accordingly, consistent with the Department's position regarding the SCA-exempted contracts under the minimum wage Executive Order, the contracts excluded or exempted from the SCA wage requirements likewise should be excluded from the paid sick leave Executive Order.

C. Proposed Section 13.4—Exclusions

As is the case with the Minimum Wage Executive Order Final Rule, the Proposed Rule contains a narrow exemption for employees who perform work duties necessary to 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 sick leave if fewer than 20 percent of their hours worked in a particular workweek is spent working in connection with covered contracts. *See* Proposed 29 CFR 13.4(e).

The Proposed Rule lacks clear guidance on 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 understanding of the phrase "in connection with" employers cannot accurately assess whether the "20 percent" exception applies to

any of their employees. In addition, how is this requirement to be understood in the context of an employer deemed to be a contractor by virtue of merely leasing space from the federal government? Moreover, employers will struggle to maintain accurate records of when employees are working on a covered federal government contract versus an uncovered private contract.

D. Proposed Section 13.5—Paid Sick Leave for Federal Contractors and Subcontractors.

1. Accruing Paid Sick Leave for Paid Time Off

The Proposed Rule states 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. Contrary to the Department's claim, however, the decision to extend "hours worked" to situations when an employee is "in paid time off status" does not properly account for the practical consequences of subjecting employers to this standard.

First, allowing employees to accrue paid sick leave when they are not working is a departure from state and municipal paid sick leave laws. No existing state or local paid sick leave law imposes this burden. Instead, employers track an employee's actual hours worked and use that information to determine the employee's entitlement to paid sick leave. Adding another element that covered employers must track and account for when calculating paid sick leave accrual makes managing accrual more complex.[9] In addition, employers in the 30 or so jurisdictions that require some form of paid sick 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 will 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 sick leave accrual. As discussed in greater detail elsewhere in this comment, the Proposed Rule does not provide sufficient clarity for covered employers in determining when work is being performed "in connection with" covered contracts and how to track and differentiate between employees' work on covered versus non-covered contracts. As noted elsewhere, these issues will come into stark relief for employers with employees who spend time in a given workweek working on or in connection with both covered and non-covered contracts.

[9] The Department's likely "solution" of "following the more generous standard" is simply not a solution when considering the increased costs associated with the obligations and the need for employers to remain competitive not only with respect to employees, but in the marketplace.

Because covered employers will not want to risk violating the paid sick leave requirements, many will be compelled to err on the side of caution and assume that employees in paid time off status who sometimes perform work in connection with covered contracts are entitled to accrue paid sick leave for that time off, even if the employee would not have actually worked on or in connection with a covered contract had he or she gone to work (assuming, of course, that it is even possible for that information to be tracked in a meaningful way).

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

2. Employee Notification of Leave Balance

Under the Proposed Rule, a covered contractor must notify employees, in writing, of their available paid sick 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 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). The Department states -- without evidentiary support -- that it "does not believe these notification requirements will create a significant burden for contractors." *See* 81 Fed. Reg. 9611. Notification requirements under other paid sick leave laws, however, have created significant administrative challenges for employers.

Indeed, the proposed notification requirements, which entitle employees (thousands of them in some cases) to request this information -- in writing -- on a weekly basis**,** will impose a significant burden on employers. The requirement is also significantly different from existing obligations. Although a few of the state and local paid sick leave laws require some form of employee notification, they require it at predictable, regular intervals – not whenever an employee asks for notification or upon some other unpredictable occurrence. To provide for regular, periodic notification, an employer's system first must be modified to set up the capability and process for tracking paid sick leave and accounting for carryover to the extent required; and, second, must be configured and programmed to enable periodic notification.

With sufficient lead time, a system may be programmed to provide periodic notifications on a regular basis, such as quarterly. However, programming a system to provide notifications when the events triggering the need for notification – such as an oral request for paid sick leave or a weekly inquiry – is not recorded or accounted for in the system is not doable. This requirement is far broader than what is necessary or reasonable to keep employees informed about their available paid sick leave.

Satisfying the Department's concern that "employees be able to determine whether absences will be paid," does not require notice to be provided at such a large expense and burden. The

Department can and should reduce the load on employers by limiting the number of situations when an employer must provide employees with paid sick leave balance information.

3. Frontloading

The Proposed Rule claims 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) (2016). Inexplicably, however, the Proposed Rule expressly states that frontloading employees with an annual lump grant of at least 56 hours will *not* excuse the employer's year-end carryover obligations. *Id.* In other words, 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. Somehow, the Department "believes [this provision]… will be beneficial to contractors that find the tracking of hours worked and/or calculations of paid sick leave accrual to be burdensome, and [that] it provides employees with the full amount of paid sick leave contemplated by the Executive Order at the beginning of each accrual year." *See* 81 Fed. Reg. 9611-12.

Many existing state and local paid sick 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 sick leave over time, based on hours worked throughout the year. The benefit for employees is substantial: They do not have to work to "earn" the paid sick leave. They have it to use immediately -- even if they have worked for the company for one day, or it is 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 sick 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 national employers for their employees working on federal contracts.

The Department's position on the issue of frontloading seems to miss the point. 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 leave hours. When an employer frontloads employees a lump grant of leave at the start of each year, the need for carryover is no longer present. The Department should remove employers' accrual tracking and year-end carryover obligations where employers frontload their employees a lump grant of 56 leave hours each year.

Absent that removal, the Proposed Rule technically allows employers to frontload paid sick 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 sick 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 sick leave. By contrast, employers who frontload

must provide an additional 56 hours on January 1, potentially resulting in the employee having 112 hours (14 days) of paid sick leave that they may use at any time. This result is unnecessary and excessive, harmful to employers, and inconsistent with the apparent purpose of the Executive Order.

4. Annual Usage Cap

The Proposed Rule forbids an annual paid sick leave usage cap. *See* Proposed 29 CFR 13.5(c)(4) (2016). 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 will prevent 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 sick leave each year. Not surprisingly, the Department's position is inconsistent with all but two of the more than 30 existing state and local paid sick leave laws.

The Proposed Rule thus wreaks havoc on the paid sick leave plans of those contractors subject not only to the Executive Order's requirements, but also to a state or local paid sick 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 coerced 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 is a recipe for disaster.

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

5. Reinstatement of Leave after Termination and Cash-Out

Perhaps the most inexplicable provision in the Proposed Rule relates to the "reinstatement upon rehire" provision. Although this provision is common under most existing state and local laws, 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 sick 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 cashing out a terminated employee is somehow inconsistent with the Executive Order, employees should not receive the windfall

anticipated by the Department. There are plenty of reasons why an employer would not want to carry a balance of unused sick leave on its books when an employee has been terminated. Carrying such leave operates as an added liability on an employer's books, which can reduce the employers line of credit and will reduce the contractor's bonding capacity.

The Department's position on cashing out sick leave also is fundamentally inconsistent with its statements that employers can satisfy the paid sick leave requirements through a PTO policy. In states, such as California, Illinois, Massachusetts, and Nebraska, 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 be able to have his paid sick leave reinstated. This, of course, means that the employer would need to have tracked paid sick leave usage versus other leave usage, which, in turn, defeats the purpose of having a PTO policy. Given the application of this provision to SCA-covered contracts, the Department's statements regarding the ability of contractors to use PTO policies is disingenuous, at best.[10]

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

E. 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. This involves thousands of pages of records that should be permitted to be sent electronically, without generating unnecessary paperwork.

The Department exclaims that these requirements are necessary and 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. The Department, however, fails to

[10] The PTO issue also arises for SCA-covered employees on an annual basis. Under the SCA, an employee must have vacation cashed out on an annual basis. Under the Executive Order, the employee must carry over paid sick leave on an annual basis. Thus, any "PTO" policy would need to separately account for vacation and paid sick leave, thus rendering the policy a "PTO" policy in name only.

recognize the administrative hardship, especially for employers with hundreds, or possibly thousands, of eligible employees, created by maintaining these records for each employee for at least three years. 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.

Finally, employers are supposed to designate leave in their records as "paid sick leave pursuant to Executive Order 13706." Paid sick leave, however, might satisfy the requirements of more than one legal mandate – such as a state or local paid sick time law along with the Executive Order, or even the Family Medical Leave Act, and the designation suggests that the leave would not satisfy other legal requirements. Additionally, some employers will undoubtedly provide paid sick leave to all employees, even those who do not work on federal contracts, for ease of administration and consistency.[11] The same time recording and tracking systems may be used for all employees. Requiring leave to be labelled as "paid sick leave pursuant to Executive Order 13706" creates exposure for those employers providing paid sick leave to employees who are not covered by the Executive Order and not subject to the same requirements.

IV. The Department's Economic Impact and Initial Regulatory Flexibility Analyses are Deeply Flawed.

In its haste to comply with every detail of Executive Order 13706, the Department has failed to comply with the equally compelling requirements of Executive Order 12866 to demonstrate that the proposed rule addresses a genuine market failure, that prescriptive regulation is a superior approach to less intrusive informational/behavioral approaches, and that the proposed approach is less costly than alternatives that yield similar benefit. *See* E.O. 12866, sec. 1. This criticism of the Department's inadequate analysis of the proposed rule's costs and benefits is not intended to reflect opposition to the principle of paid sick leave: Rather, the concern is that the overly prescriptive and detailed mandates of the proposed rule will impose unnecessary and counter-productive costs on employers who already offer generous paid sick leave and personal time off benefits to modify adequate and effective existing policies to conform with the Department's arbitrary list of more than 15 detailed requirements.

Even the Department of Labor acknowledges that most employers covered by this Executive Order offer such leave, often more generous allotments of annual days of paid leave than the seven days required by the proposed rule. *See* 81 Fed. Reg. 9643. The issue is the impact of the myriad arbitrary requirements subsidiary to the general mandate to offer up to seven days per year of paid leave.

[11] Given the President's repeated assertions of being willing to go around Congress when it would not act, the Executive Order can easily be seen as trying to impose the Healthy Families Act on employers with the expectation that they will apply it universally throughout their workforce thereby providing these benefits to a much wider swath of employees than just those attached to federal contracts.

The Department has not examined the distinct costs and benefits of these 15 or more subsidiary requirements, nor has it compared the costs and benefits of these detailed prescriptions with the variety of alternatives present in currently offered paid sick leave policies that employers will be required to alter to comply with the proposed regulation. These are comparisons that the Department is required to present by Executive Order 12866 and it has not done so. *See* E.O. 12866, sec. 1(b). It is further required that the estimates of the costs and benefits of the proposed approach be calculated fully and accurately, which, also, the Department has failed to do. The Department's calculations rely on unsubstantiated assumptions and incomplete data that in every instance has the effect of minimizing the apparent compliance burden of the proposed rule.

Even if one accepts the Department's contention that it is bound to propose the details specified in Executive Order 13706, it is a well-established principle of regulatory impact analysis under Executive Order 12866 to present comparative costs and benefits for various alternatives, including those the underlying law or Executive Order may seem to exclude. A thorough and accurate analysis of alternatives is essential to provide Congress, the President and the public with meaningful data to inform future decisions.

A. Examples of Specific Errors and Omissions in the Regulatory Impact Analysis.

The Department's regulatory impact analysis suffers from other major errors and omissions, including inadequate analysis of small business impacts required by the Regulatory Flexibility Act, the Unfunded Mandates Act, and the Paperwork Reduction Act. The following are examples of some of the more egregious errors and omissions in the Department's analysis:

1. <u>The Department has not presented a credible estimate of the number of employees and employers who will be affected.</u>

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 could have been avoided by the simple expedient of conducting a baseline survey of a random sample[12] of government contracts or

[12] 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

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. Indeed, since the Department of Labor drafted the Executive Order, such basic research should have been conducted to lay the groundwork for the Executive Order.

2. The Department's analysis is internally inconsistent.

Table 2 (81 Fed. Reg. 9637) identifies 1.2 million potentially affected employees of Federal contractors,[13] 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.[14] The inconsistency between these numbers suggests the erroneousness of the Department's assumption embedded in Table 2 (81 Fed. Reg. 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

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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.

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

[14] It is notable that data posted by the Small Business Administration Office of Advocacy 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.

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. Going forward, there remains an opportunity to approach the issue correctly and conduct the baseline survey needed to inform a credible analysis of regulatory need and impact. Even if the proposed regulation is finalized, there will still remain the need under Executive Order 13563 (*See* E.O. 13563, sec. 6.) to conduct an evaluation of its implementation, and a baseline survey of contractors, as well as follow-on surveys to track implementation, will be essential for such an *ex-post* evaluation.

3. The Department has significantly underestimated the familiarization cost of the proposed rule by applying an arbitrary and unsubstantiated value of one hour of familiarization time per affected contractor and by omitting significant numbers of persons who will experience familiarization costs.

Experience based on other recent regulations that necessitate Federal contractors to review and assess whether current policies and procedures are consistent with new rules (e.g., the Department's Office of Federal Contract Compliance Programs' recent regulations regarding veterans and persons with disabilities) shows that the initial familiarization process entails many hours of involvement by a variety of company executives, attorneys and consultants.

The Department also seriously underestimated the aggregate familiarization cost by multiplying the time per familiarization review by a total number reflecting only awarded contracts. In reality every potential bidder on any Federal contract[15] will need to spend time to determine whether the contract under bid consideration is covered by the paid sick leave rule, to review the detailed requirements (which the Department admits are not revealed fully by the proposed contract clause[16]), to spend time to review its own existing leave policies in light of the rule, and to assess the cost and other impacts of making changes to its existing policies to conform with the new rules. An important part of this review will be consideration of the effort, time and expense that would be required to design and implement any new information collection systems to track employee hours

[15] The familiarization step will be necessary at least the first time after promulgation of the rule that a potential contractor considers entering a bid. There may be circumstances under which a familiarization effort may require repetition. For example, a large firm with decentralized contract teams, may find that multiple familiarization activities occur as different teams within the company make independent bid decisions on different contract opportunities.

[16] NPRM, p. 9641, "The Department understands that the proposed rule imposes requirements beyond the fundamental obligations described above [i.e, in the contract clause] and that contractors should seek to familiarize themselves with these requirements." The Department suggests (p. 9642) that additional familiarization cost will be mitigated by yet-to-be-produced compliance assistance materials that it will post on-line. It is not possible to comment meaningfully on this assertion by the Department without the benefit of seeing the putative assistance materials. In fairness to the commenting public, the Department should suspend the proposed rule and extend the comment period until such critical materials are made available for public review.

on covered contracts that would be necessary for compliance with the rule.[17] These costs may critically impact the firm's decision to bid or not to bid on a particular contract.

Some potential bidders may decide not to bid on a new government contract because of the results of their review, but they will nevertheless have been burdened with familiarization costs because of the rule. Some potential bidders may choose to proceed with changes to their policies and information systems and to submit a bid, but will not be selected as a successful bidder for various reasons, including the possibility that their bid is made too high by inclusion of amounts to reflect the costs of making needed leave policy modifications.[18] Even potential bidders who find that their existing policies already conform in all particulars to the proposed rule will have incurred familiarization costs to make that determination.

The Department's assessment that such a determination, carrying with it enormous potential financial and legal liabilities for the company, including debarment from Federal contracting, could be made in one hour by a single human resource manager acting alone is simply not credible. The process of familiarization with the rule and assessment of its potential impact on the company's existing policies and operations will necessarily involve collaboration of a team of managers, executives, attorneys and others.

The Department argues that some of the 564,400 contract recipients it identified from the SAM database may not incur familiarization costs because they are contractors "that strictly provide materials and supplies to the government (and other firms with no Federal contracts covered by the Executive Order)."[19] The Department is incorrect in this assertion. Even contractors exempt from the proposed rule for some reason will, first, have to review the regulation and their own book of contracts (and prospective bids) to make such a determination. For some this familiarization review may be relatively brief, but for others it may be very detailed. There is no process by which a regulator's conclusion that a particular group may be exempt is transmitted to the subject parties without the subject incurring a regulatory familiarization burden, i.e., without the need to read and understand the regulation (at least to the relevant determining part) and to assess its meaning and possible exemptions in relation to their own circumstances. This process requires application of

[17] Note that reference here is only to the time and expense to assess the need and potential cost of modifications or new systems that would be needed, and this does not include the subsequent cost of actually implementing changes if a decision to bid on a contract is made.

[18] The proposed rule may raise costs for contractors who need to create new or modify existing paid sick leave programs and put them at a contract bidding disadvantage compared to firms that already have such plans in place. The proposed rule may also raise barriers to entry of new firms to the government contracts market. The Department should particularly consider the impact of the proposed rule on minority owned, women owned and veteran owned contactor firms in addition to its consideration of general small business impacts.

[19] NPRM, P. 9641.

some time to the familiarization process even by employers who discover in the end that they are exempt.

The Department has estimated aggregate regulatory familiarization costs for the proposed rule as $45.1 million based on its unsubstantiated claim of one hour per contractor for familiarization time and its unrealistic estimate that only successful contract bidders will incur familiarization cost. Consideration of more realistic familiarization time parameters and of the potential numbers of affected (including possibly exempt) firms who may incur some familiarization cost, the actual familiarization cost of the proposed rule will likely be hundreds of millions of dollars greater than the Department imagines.

4. The Department has significantly underestimated implementation costs.

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. 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 are fundamentally flawed by the assumption that 81 percent of contractors will have minimal implementation burden because, according to the survey cited by the department, 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 to comply with the proposed rule. The Department has provided no 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 requirements 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 entirely arbitrary.

Similarly, the Department's assertion that the 19 per cent of companies that would presumably need to create completely 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 come from the imagination of someone with no actual experience in the subject.

The recurring 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 to 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 inconceivable 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 will be an important part of implementation costs for the proposed regulation, especially 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 spent 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 "on 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.

5. The Department has significantly underestimated annual (recurring) administrative costs.

Annual administrative costs are the recurring costs of operating a paid sick leave program once it has been designed and implemented. The Department's estimates of annual recurring administrative costs suffer from flaws similar to those described for 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 under estimate 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. 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.

6. 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 Bureau of Labor Statistics Occupational Employment Statistics 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.[20] 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

[20] 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.

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 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 factor would increase the 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 (81 Fed. Reg. 9643) would increase from $92.1 million to $204.5 million.

7. <u>The Department has not provided an accurate and complete analysis of the burden of the proposed rule as required under the Regulatory Flexibility Act.</u>

The Small Business Administration's Office of Advocacy has submitted a letter to the comment docket for the proposed rule that confirms the concerns that are raised here regarding the underestimation of affected employees and businesses.[21] We fully endorse Advocacy's comments and encourage the Department to give them close consideration.

SBA Advocacy points out that many of the lessees and concessionaires that the Department omitted from its counts of affected businesses and whose employees were omitted from the Department's estimates of affected workers, are small businesses.[22] These omissions render the

[21] See comments from SBA Advocacy, attached as Appendix A.

[22] As noted elsewhere in these comments, the Executive Order adopts much of the text of the Health Families Act. However the Executive Order does not adopt the 15 employee threshold in the Healthy Families Act which means that even self-employed federal contractors could be subject to the complex, confusing, and burdensome requirements of the E.O.

Department's Initial Regulatory Flexibility Analysis wholly inadequate. SBA Advocacy also confirms the conclusion that the Department's assertions of one hour for program modification and ten hours for creation of an entire new paid sick leave program are unreasonable and lead to gross under estimation of compliance costs, especially for small businesses.

In addition to the objections raised by the Office of Advocacy, the proposed rule will reduce competition in the marketplace for Federal contracts. Adverse effects on competition are considered part of the definition of the definition of a "significant regulatory action" under E.O. 12866 (See, E.O. 12866, sec. 3(f)(1).) In particular, it erects economic barriers to entry into the Federal contract marketplace. Since new entrants into the market as either prime or subcontractors are most often smaller size businesses, the adverse impact will be particularly great on the small business sector.

8. The Department has not conducted an accurate and complete analysis of the burden that the proposed rule will impose on States, local government, and Tribes as required by the Unfunded Mandates Reform Act.

The Department claims that adverse impacts on State, local and Tribal governments will be mitigated because any additional costs that they incur may be incorporated into contract costs and passed on to the Federal government. (See, 81 Fed. Reg. 9657.) It is not clear that all such costs will be passed to the government. All covered contracts are not cost reimbursement contracts, some are fixed price contracts for which passing on increased costs or uncertain costs (such as paid sick leave) may be constrained by budget and competitive pressures, and the fact that these entities do not have the ability to increase revenues. Even for cost reimbursement contracts, the overhead rates allowed are often constrained and may not fully reflect all overhead cost elements, of which paid sick leave benefits are a part. The mitigation of unfunded mandate costs imposed on State, local or Tribal governments or institutions (such as schools and hospitals) that lease space or act as concessionaires on Federal property is even more problematic. As with other required analyses, the Department neglected to identify the various parties or types of contracts that would be implicated. The Department has therefore not addressed these important issues in its Unfunded Mandates Reform Act analysis.

9. The Department has not prepared an accurate and complete assessment of the burdens of the information collection requirements of the proposed rule as required by the Paperwork Reduction Act.

These errors and omissions in the Department's analysis will be addressed in separate comments directed to the Information Collection Request clearance process.

B. The Department's Estimate of the Number of Affected Employees and Employers Lacks Credibility

The number of affected employees (those who receive new or expanded paid sick leave benefits) under the proposed rule is a key parameter of the Department's analysis of economic costs because the Department calculates significant components of employer cost burden based on the number of affected employees of each contractor. The value of transfers is also calculated based on affected employees.

The proposed regulation imposes very exacting requirements for offering paid sick leave benefits:[23]

1. A compliant benefit plan must cover all employees who directly work any hours on a covered Federal contract, including part-time and full-time employees, temporary workers[24] and independent contractors;

2. A compliant benefit plan must cover all employees "who perform work duties necessary to the performance of the contract but who are not directly engaged in performing the specific work called for by the contract," during any week in which such employee spends 20 percent or more of their work time providing such necessary duties. (e.g., management, payroll, accounting, information technology, facilities maintenance, etc. services);

3. A compliant benefit plan must provide accrual of leave entitlement at the rate of one hour of leave per 30 hours worked;

4. In the event that a compliant benefit plan does not allow an employee "to accrue paid sick leave in increments less than one hour for completion of any fraction of 30 hours worked," it must provide for carry-over of hours worked in any week that are less than a 30 hours to future weeks of work to be added together with future hours for the calculation accrued of leave entitlement;

5. A compliant benefit plan must allow accrual of a cumulative annual amount of at least 56 hours (seven days) of leave entitlement during a plan year;

6. A compliant benefit plan must allow an employee to carry over from one benefit year to the next at least 56 hours of previously accrued paid leave benefit entitlements;

[23] The following list of requirements is illustrative but not exhaustive.

[24] In the event that a contractor obtains services from a temporary labor supply company for a worker to replace a worker who is absent on paid sick leave, the contractor will be responsible to ensure that either the temporary services company provides a fully compliant paid sick leave benefit plan or directly provide the required paid leave benefit to the temporary worker.

7. A compliant benefit plan must allow the accrual of additional paid sick leave entitlement hours during hours of absence from work for which the employee receives paid sick leave or other paid time off benefits;

8. A compliant benefit plan must provide to each covered employee a written accounting of the amount of sick leave that is available to the employee at least monthly, whenever a request to use leave is made and at other specified times;

9. A compliant benefit plan must provide for reinstatement of unused paid leave in the event that an employee separates and is rehired within 12 months;

10. A compliant benefit plan must provide for excused absence and the use of paid leave for any of four specified categories of use, including the (a) employee's own physical or mental illness, injury, or medical condition, (b) diagnosis, care or preventive care, (c) caring for or providing diagnosis or preventive care for a family member, and (d) absence associated with domestic violence, sexual assault, stalking, etc.;

11. A compliant benefit plan must not limit for the use of paid leave benefits to increments of greater than one hour;

12. A compliant benefit plan must not limit the amount of leave used per year or per incident;

13. A compliant benefit plan must not require the employee requesting leave to provide explanations or documentation of need beyond specific items denoted in the regulation;

14. A compliant benefit plan may not require foreseeable need uses to be scheduled more than seven days in advance and must permit taking of unscheduled leave without prior notice under at least specified circumstances;

15. A compliant benefit plan must provide an employee with a written explanation in the event of a denial of leave request and must provide the employee with the opportunity to cure defects in an application for leave;

16. A compliant benefit plan may not require medical necessity documentation for sick leave taken for less than three consecutive days and may not otherwise require documentation beyond certain specified items of documentation;

17. The proposed rule includes at least ten additional specific requirements that a compliant benefit plan must meet.

If any one of these or other of the myriad specifications for a compliant paid sick leave benefit plan is not satisfied, a contractor covered by the proposed rule will incur costs to establish a compliant plan. For a contractor with no paid sick leave benefit plan in place for any employees, the employer will be required to undertake the full burden of creating a compliant benefit plan. For contractors who already provide some paid sick leave benefit plan, the extent of the cost burden to become compliant with the proposed regulation will vary in relation to the number and content of the items in non-conformity. In most cases for a contractor with some sort of paid sick leave plan but not one fully compliant in every respect, the cost of becoming compliant will be comprised of both an initial cost to identify and revise the existing plan to correct the deficiency in terms of its policies and an ongoing administrative cost and transfer burden associated with the operational changes required (e.g., increasing cumulative accrual limit, raising the number of days of consecutive leave triggering need documentation, or expanding the types of qualifying need).

The Department's regulatory impact analysis identified (Table 2, 81 Fed. Reg. 9637) 1.2 million potentially affected employees of Federal contractors, of whom it estimated that 231,000 might be eligible for new or expanded paid sick leave benefits in the first year of implementation of the proposed rule, based on the assumption that only 20 percent of covered contracts would be covered in the first year because of the coverage limitation to new or modified contracts. The Department then reduced its estimate of actually affected employees to 153,100, a 34 percent reduction, for implementation year one based on an analysis of the number of days of paid sick leave available to employees (by industry) from data extracted from available Bureau of Labor Statistics surveys. The Department eliminated 77,900 employees from their calculations because their data analysis suggested that these might already be getting 7 days or more of paid sick leave per year, but that criterion (requirement number 5 in the list above) is not the only reason that could make an existing paid sick leave benefit program fail the Department's regulation test and require costly modifications to become compliant.

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

The Department has not conducted the necessary inventory and assessment of the numbers of Federal contracts and concessions that would be covered by the proposed regulations. This is the essential first step toward determining the cost of implementation of the paid sick leave requirement. The mistake that the Department made was attempting to rely on a convoluted analysis of 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 conducted 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.

Even if the Department's claim that it has no discretion to deviate from the highly prescriptive terms of Executive Order 13706 were valid, the analysis that could have been conducted if the Department had taken the time and effort to conduct a baseline pre-rule compliance survey would have provided valuable feedback to the President, who might, then, be able to reconsider the wisdom some of the proposed specifications. Indeed, given that the Department wrote the actual Executive Order, this research should have been done prior to developing the E.O. Perhaps if that had happened, the E.O. could have been better tailored and less burdensome. By failing to do the baseline survey work needed for a thorough analysis of regulatory impact, the Department has poorly served both the President and employers.

A second major flaw in the Department's analysis is the assumption indicated by footnote d of Table 2 on page 9637 of the NPRM: For total contract employees, 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." Thus, the Department has explicitly made an assumption that minimizes any estimate of compliance cost, and the Department admits that it knows that this is an unrealistic assumption. Any observer of Federal contract operations would note 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 regulatory impact 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 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 Occupational Employment Statistics data on which the Department based its estimates of affected workers.

The fifth major flaw in the Department's estimation of affected employees involves the coverage of subcontract workers. 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 the 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, the prime will have 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.

The five flaws described above render the foundation of the Department's regulatory impact analysis – the estimated number of affected employees – meaningless and useless. Because the Department's analysis omits potentially significant numbers of affected workers and their employers, the Department's analysis grossly under estimates the compliance cost and transfer amounts derived from the employment base. The only way for the Department to correct this wrong-headed analysis is to start over and to conduct a baseline survey of Federal contractors, concessionaires, and lessors to determine the key parameters regarding compliance with each of the

specific requirements of the proposed rule. This detailed information is feasible to obtain and essential for a thorough and credible regulatory impact analysis.

This objection is not presented with the intention to delay or derail the regulatory process by proposing something impossible or infeasible. The Department could easily, speedily and at reasonable cost have undertaken to do the regulatory impact analysis task correctly. Department of Labor agencies, including OSHA and MSHA, have applicable experience and available support contract procurement vehicles on which the Wage and Hour Division could have relied. If the Department had undertaken to conduct the appropriate baseline survey of Federal contractors at the outset, following the issuance of Executive Order 13706 in September 2015, it could have already deployed such a survey to the field for data collection and still be on schedule to complete the contemplated rulemaking by September 30, 2016, Furthermore, the experience of OSHA and MSHA conducting similar baseline pre-rulemaking surveys suggests that the cost would have been less than one million dollars – an insignificant amount in the overall context of the Department of Labor budget. The Department's choice to approach its regulatory impact analysis duties with so little appreciation for generating a credible estimate, when it was within its power to have done it rightly, is inexplicable.

V. Implementation

Because of the extremely tight timeline set forth in the Executive Order for implementation, the regulated community has had little-to-no time to carefully consider the impact of the rule. These comments are not nearly as robust as they would have been had the regulated community had had some opportunity to develop its own record.

Based on the anticipated timeline, the regulated community will apparently be expected to understand as-of-yet unidentified regulations in order to properly compete on contracts that will be bid in just over four months. Moreover, as explained above, the carryover and notification requirements make compliance incredibly 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 systems to enable compliance with the extensive tracking and notification requirements currently proposed.

VI. Conclusion

As described above, the Proposed Rule ignores Congressional mandates in fringe benefits rates for federal service and construction contracts and exceeds any accepted understanding of

authority under the Procurement Act and therefore is *ultra vires*. It is based on a flawed economic analysis, and it fails to in any way consider how this complex proposal would strongly discourage many of our members from continuing to provide services to military service members, federal employees and other customers at federal locations. In addition, the Proposed Rule's complicated contractual definitions and unprecedented expansion of covered workers would introduce significant compliance uncertainty—and costs—into the federal contracting process and would reward unscrupulous contractors at the expense of diligent contractors. Thus, the Proposed Rule and the Executive Order should be withdrawn or substantially modified.

Sincerely,

Executive Director of Labor Law Policy
U.S. Chamber of Commerce

Vice President, Regulatory Affairs
International Franchise Association

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Appendix A: Comments submitted by Small Business Administration Office of Advocacy

U.S. SMALL BUSINESS ADMINISTRATION
OFFICE OF ADVOCACY
REGULATION • RESEARCH • OUTREACH

April 6, 2016

VIA E-MAIL

The Honorable Thomas E. Perez
Secretary, Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Establishing Paid Sick Leave for Federal Contractors; Proposed Rule

Dear Secretary Perez and Administrator Weil:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration respectfully submits this comment letter to the Department of Labor (DOL) for the proposed rule, *Establishing Paid Sick Leave for Federal Contractors*.[1]

Advocacy is concerned that DOL's Initial Regulatory Flexibility Analysis (IRFA) underestimates the numbers of small businesses affected by this regulation. DOL does not account for or estimate the cost of this rule for small businesses such as restaurants, retail and outdoor recreation companies operating on federal lands, federal buildings and military bases. Participants at an Advocacy roundtable expressed concern that the proposed rule's requirements for tracking paid sick leave are complicated, and that small businesses will spend more time and money to understand, implement and pay for this accrued sick leave than DOL estimates. Advocacy recommends that DOL consider any small business alternatives submitted in the comment period that may minimize the economic impact of this rulemaking on small entities.

[1] DOL, *Establishing Paid Sick Leave for Federal Contractors*, 81 Fed. Reg. 9592 (Feb. 25, 2016).

The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

Executive Order 13706, signed by President Barack Obama on September 7, 2015, requires that certain parties who contract with the federal government provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care.[2] The Executive Order directs the Secretary of Labor (Secretary) to issue regulations by September 30, 2016; DOL released this proposed rule on February 25, 2016.

The proposed rule applies to any new contract with the federal government, provided that it is a procurement contract for construction covered by the Davis-Bacon Act (DBA); a contract for services covered by the Service Contract Act (SCA); a contract for concessions; and a contract in connection with federal property and lands and related to offering services for federal employees, their dependents or the general public.[3] The proposed rule requires that any contractor and subcontractor incorporate a clause into any contracts with lower-tier subcontractors specifying, as a condition of payment, that all employees shall earn not less than one hour of paid sick leave for every 30 hours worked. This paid sick leave carries over from one year to the next and will be reinstated for employees rehired by a covered contractor within 12 months.

On March 1, 2016, Advocacy submitted a comment letter requesting an extension of the comment period for this rule to provide extra time for small businesses to provide meaningful comments.[4] DOL extended the comment period by 15 days.[5] On March 14, 2016, Advocacy held a roundtable attended by DOL staff, small businesses, and small business representatives.

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[2] Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697 (Sept. 7, 2015).
[3] 81 Fed. Reg. at 9601.
[4] Comment letter from the Office of Advocacy to the U.S. Department of Labor (March 1, 2016), *available at*: https://www.sba.gov/advocacy/establishing-paid-sick-leave-federal-contractors-proposed-rule.
[5] DOL, *Establishing Paid Sick Leave for Federal Contractors; Extension of Comment Period* (March 14, 2016).

Small Business Concerns

1) DOL's IRFA Does Not Adequately Estimate the Numbers of Small Businesses Affected By the Rule

The RFA requires that an IRFA contain "a description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply."[6] Advocacy is concerned that DOL's IRFA underestimates the number of small businesses affected by this rule. DOL estimates that this proposed rule affects an estimated 422,400 small federal contractors and subcontractors, utilizing the General Services Administration's (GSA) System for Award Management (SAM). In this IRFA, DOL acknowledges that this database may not include small businesses that are affected or the cost of this rule to these entities in the following categories: (i) concessions contracts and (ii) contracts entered into the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.[7]

Advocacy believes that there may be hundreds or thousands of small businesses such as restaurants, retail, and outdoor recreation companies operating on federal lands, in federal buildings and on military bases that DOL has not adequately counted in determining the numbers of small businesses affected or in estimating the costs of this rule. According to National Park Service (NPS) officials, in FY 2013, the agency issued approximately 500 concessions contracts, over 6,000 commercial use authorizations, and over 33,000 special use permits. In FY 2015, the U.S. Forest Service issued approximately 7,804 permits, including 404 for lodging, 474 for concessions services, and 6,926 for outfitting and guiding operations.[8] In FY 2015, U.S. Bureau for Land Management issued 4,552 special recreation permits.[9] While these agencies do not have the breakdown of how many of these entities are small businesses, DOL could make assumptions on the numbers of small businesses affected based on their industry categories or NAICS codes.

DOL's IRFA also does not analyze the number of small businesses that lease space in federal buildings, such as restaurants and gift shops. According to the GSA, as of FY 2015, there are 732 retail leases on public buildings and hundreds of other businesses that have concessions contracts. There also may be other agencies that lease space, like the U.S. Department of Agriculture and the U.S. Department of Education. Advocacy spoke to the Randolph-Sheppard Vendors Association of America, who reported that there are over 2,100 small businesses with visually-impaired owners who have leases in federal buildings. There may also be hundreds of small businesses that operate on military bases. For example, the Army and Air Force Exchange

Service (AAFES) reported that there were 1,200 direct operations and 462 concessions operating on its federal bases, including restaurants, theaters and other operations.[10]

[6] 5 U.S.C. Sec. 603(b)(3) .
[7] 81 Fed. Reg. at 9601, see Footnote 72.
[8] Phone call with U.S. Forest Service, Feb. 1, 2016
[9] Phone call with U.S. Bureau of Land Management, Feb. 1, 2016.
[10] Phone call with Army and Air Force Exchange Service, Feb. 1, 2016.

2) DOL Should Clarify Types of Small Businesses and Workers Covered Under The Rule

At Advocacy's roundtable, small businesses asked for clarification on what types of contracts and workers were covered under this rule. A representative from the American Outdoors Association (AOA) cited concern that its members in the recreation industry did not know if the type of contract or permit issued to them by agencies such as the NPS was covered by this rule; its members have a wide range of federal interactions, from retail stores and lodging, to short and long term recreational trips or events on or through federal lands. Advocacy also heard from the National Ski Areas Association, which sought clarification on whether workers who were part-time, seasonal, immigration visa holders, or students are covered by this regulation. For example, a small ski resort may hire and have to keep track of the paid sick leave of hundreds of part-time workers for a winter ski season.

3) DOL's IRFA Underestimates Small Business Compliance Costs

Small businesses at Advocacy's roundtable were very concerned that DOL has underestimated the costs of this rule for small businesses. DOL estimates that on average, an affected small firm is expected to incur $150 to $650 in year one direct employer costs, which includes one hour of regulatory familiarization (to read and understand the rule), one to ten hours of implementing costs, and payroll costs for employees taking the paid sick leave. [11] However, small businesses at Advocacy's roundtable reported they will spend thousands of dollars to comply with this rule, and are seeking clarification on how DOL has arrived at these low estimates.

Payroll Costs

Small businesses have told Advocacy that the bulk of the compliance costs will come from employers paying employees for utilizing up to seven days of sick leave; the number of employees at their firm affects their total compliance costs for this rule. In DOL's IRFA, the payroll costs associated with this rule only range from $1.79 to $472 per small business; this seems to reflect the cost of providing only one employee with up to seven days of paid sick leave.[12] DOL should be more transparent on how it arrived at this lower estimate. For example, a small recreation company with 20 full-time staff and 220 seasonal workers estimated costs of $25,000 to comply with this regulation. Multiple small restaurant franchisees located in military bases reported costs from $5,000 to $35,000. A manufacturing representative stated that one of its members with 67 workers was going to incur $70,000 in compliance costs.

At Advocacy's roundtable, small concessionaires and franchisees on federal land and in federal buildings expressed concern that they will incur higher costs than traditional federal contractors subject to this rule because they cannot pass the costs on to the federal government or to their customers, and this creates a significant barrier to small businesses pursuing these contracts. Small recreation companies have stated that they will be reluctant to sign a new contract to provide services such as food or equipment rentals on federal lands, as they may not be able to increase the price of their products to offset these costs.

Regulatory Familiarization and Implementation

[11] 81 Fed. Reg. at 9666; *see* Table 20- Average Costs and Transfers Per Small Firm with Affected Employees.
[12] *Id.*

Advocacy believes that DOL has underestimated the time it will take for small businesses to read, understand and implement this rule for their companies; DOL sets the burden at one hour for regulatory familiarization and one to ten hours to implement this rule in their payroll system. Roundtable participants have told Advocacy that compliance with this rule will be more expensive for small contractors and concessionaires because they will have to hire outside professionals since they have limited or no human resources personnel or legal counsel on staff. For example, Advocacy spoke to one small restaurant franchisee on a military base with 15 employees who outsources their payroll through a national payroll company and received a quotation of $500 per year to update his human resources system, and $1000 in additional time for management to report the leave taken each pay period. A concessionaire at Advocacy's roundtable hired a human resources consultant at $60,000 a year to comply with recent requirements and a labor attorney at $400 per hour.

Small businesses at the roundtable discussed the complexities of tracking the accrual of sick leave, which may necessitate hiring outside payroll companies and legal professionals to comply with this rule. For example, construction industry representatives commented that their members will find it difficult and expensive to segregate covered federal work with non-federal work for the accrual of paid sick leave, as their employees often work at multiple locations for multiple clients. Seasonal recreation businesses like outfitters were concerned that these tracking requirements are not practical, as these businesses often have large numbers of part time workers and operate in remote locations, shifting from covered and non-covered work for multiple days. These employers will have to track their employees' paid sick leave for all of their work, unless they can segregate or track the work completed by this worker in both of these categories.

Roundtable participants stated that it may be difficult to track which employees accrue paid sick leave, as this rule applies to workers performing work directly "on" a contract, and other workers that are working "in connection with a contract."[13] Small businesses commented that they currently do not track the hours of other employees not working directly under a covered contract, such as accounting, delivery and management staff; and therefore this provision would be burdensome. A representative from the Associated General Contractors was concerned with another provision that requires prime contractors and upper-tier contractors to be responsible for the compliance by any subcontractor or lower-tier subcontractor in the tracking of the accrual leave of its workers.[14]

Under this proposed rule, an employee's paid sick leave carries over from one year to the next and is reinstated for employees rehired by a covered contractor within 12 months after a job separation.[15] Participants at Advocacy's roundtable stated that there are conflicting federal and state regulations that govern the accrual and payment of sick leave, and small businesses have to reconcile this rule with current requirements under the law. Small businesses believe that there can be additional costs from this accrual provision for employers. A representative from the Professional Services Council did not support a provision of the rule that would require that the winner of a new federal contract (successor contractor) must inherit the accrued paid sick leave

[13] Fed. Reg. at 9606, differentiating a worker who is performing "on" a covered contract or "directly performing the specific services under a contract," from one who is performing work "in connection with" a covered contract or the performing work activities that are "necessary to the performance of a covered contract but who is not directly engaged in performing services called for in the contract itself." Under this rule, the accrual requirements do not apply to these workers performing work "in connection" with the contract if they spend less than 20 percent of their hours worked in connection with such contracts.

[14] 81 Fed. Reg. at 9624, Proposed § 13.21(b).

[15] 81 Fed. Reg. at 9593.

of the employees of the prior contractor (or predecessor contractor). According to this representative, a successor contractor would not know the dollar amounts of this carryover so that it can be built into the contract price.

4) DOL Must Consider Significant Regulatory Alternatives

Under the RFA, the IRFA must contain a description of any significant regulatory alternatives to the proposed rule that accomplish the stated objectives of the applicable statutes and that minimize any significant economic impact of the proposed rule on small entities. DOL has not provided any regulatory alternatives in this rulemaking. DOL should consider any alternatives provided during the comment period that minimize the impact of the rule on small business while accomplishing the objectives of the rule, such as exemptions for certain part-time and seasonal work.

Conclusion

Based on small business feedback, Advocacy believes that DOL's IRFA does not properly inform the public about the impact of this rule on small entities. DOL has not adequately estimated the small businesses affected by this regulation, particularly restaurants, retail and outdoor recreation companies operating on federal lands, buildings and military bases. DOL's IRFA is not transparent regarding how it arrived at its cost estimates, and Advocacy believes that these costs will be much higher than anticipated by DOL. Advocacy strongly recommends that DOL revisit its IRFA to update their estimates of the numbers of small businesses impacted and the costs of this rule. Advocacy also recommends that DOL consider any small business alternatives submitted during the comment period that may minimize the economic impact of his rulemaking on small entities. For additional information or assistance please contact me or Janis Reyes at (202) 619-0312.

Sincerely,

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Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget