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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.



April 12, 2016

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U.S. Department of Labor, Room S-3510
200 Constitution Avenue NW.
Washington, DC 20210
Submitted electronically at <http://www.regulations.gov>

RE: Notice of Proposed Rulemaking, Establishing Paid Sick Leave for Federal Contractors, RIN 1235-AA13

Dear Mr. Waterman:

On behalf of The Associated General Contractors of America (“AGC”), I thank you for the opportunity to submit comments on the U.S. Department of Labor Wage and Hour Division’s (“DOL”) notice of proposed rulemaking (“NPRM” or “proposed rule”) implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (the “Executive Order”).

AGC is the leading association in the construction industry, proudly representing both union and non-union prime and specialty construction companies. AGC represents more than 26,000 firms, including over 6,500 of America’s general contractors, over 9,000 specialty contractors, and over 10,500 service providers and suppliers to the construction industry, in a nationwide network of 92 chapters. AGC contractors are engaged in the construction of the nation’s commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more. Many of these firms regularly perform construction services for the federal government. Most are small and closely held businesses.

AGC offers the following comments and recommendations on the NPRM.

I. THE SCOPE OF WORKERS ENTITLED TO PAID LEAVE UNDER THE RULE SHOULD BE CHANGED

A. The Rule Should Not Apply to “Laborers and Mechanics” Under the Davis-Bacon Act

Requiring federal contractors to provide paid leave to employees who are considered “laborers and mechanics” under the Davis-Bacon Act (“DBA”) – commonly referred to as construction craft workers – presents significant practical, economic, and legal problems for both contractors and the

government. For the reasons discussed below, AGC recommends that DOL exclude from the final rule the obligation of contractors to provide paid leave to such workers.

1. *The Unique Nature of Construction Work Renders Application of the Rule to “Laborers and Mechanics” Impractical*

Work in the commercial construction industry is typically project-based, transitory, and seasonal. Most craft workers move from project to project and from employer to employer, often within short periods of time. They may earn fluctuating rates of pay due to changes in project type and location, or changes in assigned tasks, that call for different rates of pay under applicable wage determinations or because no wage determination applies (when moving to work not covered by the DBA). They may have days with no work to do, when their skills are not needed on a job at that time or when the daily weather prevents work. Likewise, they may experience longer periods of layoff due to seasonal weather or a downturn in the demand for construction. This is the unique, immutable nature of the work and is well-known to those employed in the industry.

Congress and federal regulators have recognized this and have established many special rules for the industry to accommodate that nature, such as special affirmative action rules under Executive Order 11246, special voter eligibility rules under the National Labor Relations Act, and special pension plan withdrawal liability rules under the Employee Retirement Income Security Act, to name a few. State and municipal lawmakers have also recognized it, most notably in their adoption of mandatory paid leave laws, many (if not most) of which expressly limit or exempt construction-industry coverage.

Special rules, exempting construction craft workers from coverage, are also needed here. The administrative difficulty for contractors employing transient, intermittently employed craft workers is just too heavy. As one typical contractor told us, “We have hundreds of employees per year who come and go and may work for us for varying short periods. Keeping track of sick pay eligibility and hours would be a nightmare.”

Given the nature of the work, craft workers traditionally have been paid only for time actually worked. Payment specifically for sick time is quite rare and likely only provided by those open-shop contractors employing less-transitory workforces. A recent AGC survey of commercial construction contractors indicates that only 32 percent of contractors operating on an open-shop basis outside any state or local mandate to provide paid sick leave actually provide such a benefit. In the union sector, the percentage is much lower. In fact, AGC is unaware of *any* collective bargaining agreement (“CBA”) in the commercial construction industry that specifically provides for paid sick leave. (Collectively bargained “vacation” plans are addressed below.) Management and organized labor have always negotiated compensation on the assumption that wages must be high to compensate for days when the employee is not needed or cannot come to work and will not be paid. These high wages have carried over into the open-shop sector as well, as market forces call for above-average pay to compensation workers for the inconvenience of irregular work and other challenging conditions.

For these reasons and others discussed below, particularly regarding the proposed rule’s reinstatement and vicarious liability provisions, the proposed coverage of construction craft workers is not workable. It threatens to turn practical, long-established compensation practices of the

industry upside-down and replace them with impractical, ill-fitting, and difficult-to-manage obligations.

2. Application of the Rule to “Laborers and Mechanics” is Inconsistent with the DBA

In enacting the DBA, Congress has spoken on how contractors shall pay “laborers and mechanics” on federal construction projects. Section 3142 of the statute states, in relevant part:

(b) Based on Prevailing Wage.- The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.

[...]

(d) Discharge of Obligation.- The obligation of a contractor or subcontractor to make payment in accordance with the prevailing wage determinations of the Secretary of Labor, under this subchapter and other laws incorporating this subchapter by reference, may be discharged by making payments in cash, by making contributions described in section 3141(2)(B)(i) of this title, by assuming an enforceable commitment to bear the costs of a plan or program referred to in section 3141(2)(B)(ii) of this title, or by any combination of payment, contribution, and assumption, where the aggregate of the payments, contributions, and costs is not less than the basic hourly rate of pay plus the amount referred to in section 3141(2)(B) of this title.

The Executive Order and proposed rule impose compensation mandates that not only exceed these statutory provisions but conflict with them. First, the statute provides that wages (defined in Section 3141(2)(B) as including the basic hourly rate of pay plus bona fide fringe benefits) shall be paid based on the prevailing rate in the geographic area for the type of project involved. The Executive Order and proposed rule require contractors to pay wages for sick leave that have absolutely no correlation to prevailing practices in the area, for the type of project involved, or, as discussed above, even in the industry overall. Second, the statute provides that contractors may meet their obligations by making contributions to bona fide fringe benefit trust funds, assuming a commitment to bear the costs of a bona fide fringe benefit plan or program, or doing either or both in combination with paying cash wages. The Executive Order and proposed rule apparently require contractors to pay wages for sick leave in the form of cash with no option for meeting their paid leave obligations through contributions to fringe benefit trust funds or commitments to bear the costs of a fringe benefit plan or program.

This exceeds the President’s and DOL’s authority. While the Secretary of Labor may have authority to issue regulations that implement the DBA, he may not issue regulations that contradict it. Nor may the President authorize the Secretary to do so via executive order. If changes to the compensation obligations of federal construction contractors are to be made in a manner inconsistent with the DBA, then it is Congress’s role to enact them through the legislative process.

3. Application of the Rule to “Laborers and Mechanics” Will Obstruct Economy and Efficiency in Federal Construction Procurement

Coverage of construction “laborers and mechanics” will also lead to serious consequences for federal construction costs and schedules. It will hinder economy and efficiency in federal procurement, rather than promote it as stated in the Executive Order and proposed rule.

Contractors that do not already provide paid leave benefits will incur substantial costs in compliance with the new mandate. First, they must pay the individual using paid leave for time not worked while, in many cases, also pay a substitute worker for time worked in place of the worker on leave. Those contractors already providing paid leave benefits would see their expenses rise under the rule as proposed as well, since they would no longer be permitted to take credit for the benefit toward meeting prevailing wage obligations and will have to make up that cost through payment in cash or other benefits. (See Section I.C below for further discussion of this matter.) All covered contractors – whether they currently offer paid leave benefits or not – will also incur substantial costs in preparing for and administering compliance with the new rule. Numerous AGC-member contractors subject to state and local paid leave mandates have told us of the considerable costs that they have incurred in complying with such mandates. These include costs related to:

- Staff time to create a paid leave policy or revise current policy;
- Hiring outside counsel or a consultant to develop, draft, and/or review a new paid leave policy;
- Training office, managerial, and/or supervisory staff on administering the new policy;
- Educating nonsupervisory employees about the new policy;
- Revising subcontract documents;
- Educating subcontractors about their new obligations;
- Purchase of new hours-tracking, payroll, accounting, and/or other software, or upgrading and implementing current software;
- Revising manual systems for tracking hours, computing payroll, and the like; and
- Ongoing tracking, recordkeeping, and reporting of leave accruals, carryover, and use.

Contractors that work in multiple jurisdictions have also decried the added complexities and costs associated with having to comply with different rules, with varying specifications, in different states and cities.

In addition to the direct costs of compliance with the rule, federal construction costs – and schedules – also will be harmed by the secondary effect of lost productivity. It seems self-evident, and research¹ supports the premise, that the availability of paid leave leads to increased absenteeism. Of course, absenteeism may be a good or a bad thing depending on the circumstances, but increased absenteeism surely encompasses increased abuses of the benefit as well as legitimate uses. In fact, AGC-member contractors working in Massachusetts, where a paid leave mandate took effect last July, report facing mass numbers of employees calling in sick the day before Labor Day weekend for the first time. They have also experienced a noticeable uptick in workers calling in sick as

¹See, e.g., Ahn, T. & Yelowitz, A. *Paid Sick Leave and Absenteeism: The First Evidence from the U.S.*, 2016. Retrieved April 11, 2016, from <http://ssrn.com/abstract=2740366>.

projects wind down and when the construction season wound down before winter's seasonal lay-offs.

Increased absenteeism is particularly problematic in the construction industry, where cost and schedule concerns are critical and highly dependent on labor productivity. As researcher Seungjun Ahn put it, "Even today, many tasks in construction have to be manually performed by construction workers on job sites, which is indicated by [sic] that labor costs typically range from 33% to 50% of the total construction cost (Hanna 2001). Therefore, workers' timely attendance and operation at the site is crucial to the success of a construction project."²

Ahn examined the implications of construction worker absenteeism on productivity and construction costs, reporting:

Researchers have attempted to estimate the cost impact of missed work in construction. Nicholson et al. (2006) have used economic models to estimate that when a carpenter in construction is absent, the cost of the absence is 50% greater than his/her daily wage, and when a laborer in construction is absent, the cost is 9% greater than his/her daily wage. Researchers have also investigated the impact of absenteeism on overall productivity in construction. Hanna et al. (2005) looked at electrical construction projects and revealed that productivity decreased by 24.4% when the absence rate on a job site was between 6% and 10%, whereas productivity increased by 3.8% when the absence rate was between 0% and 5%. They also reported that 9.13% of productivity loss on average was measured in electrical construction projects. These analyses imply that the costs of absenteeism increase nonlinearly in the level of absenteeism. For example, 10% absenteeism is not just a 10% decrease in productivity, and if absenteeism increases from 5% to 10%, the decrease in productivity caused by absenteeism might more than double. The decrease in productivity is one of the main causes of cost overruns in construction projects. Therefore, maintaining a low absence rate is critical to cost-effective construction.³

The Business Roundtable reported similar findings when it studied the most quantifiable direct effects of absenteeism in construction, namely: time spent by crew members waiting for replacements; time spent moving replacements to and from other work locations; and lost time by supervisory personnel in reassignment of work activities and locating replacements. The study team concluded that "each 1% increase in daily absenteeism produces a 1½% increase in labor costs...or a 15% increase in direct labor cost for 10% absenteeism."⁴

Jobsite employee absenteeism not only affects productivity, schedules, and costs of the project on which the absences take place, it can quickly affect other projects currently in progress or in the pipeline. The scheduling of projects and the allocation of employees among projects by are very complex and challenging endeavors for a construction contractor. A delay on one project can cause serious problems in planning the staffing of other projects, causing potential delays on those projects as well. Considering how many different contractors and subcontractors work on each

² Ahn, Seguin. "Construction Workers' Absence Behavior Under Social Influence." Ph.D diss., University of Michigan, 2014. Retrieved April 11, 2016, from <http://ssrn.com/abstract=2740366>.

³ *Id.*

⁴ "Absenteeism and Turnover," *Construction Industry Cost Effectiveness Project (Report C-6)*, Business Roundtable, 1982 (reprinted 1993).

federal construction project, the impact of increased absenteeism on the expense and timelines of federal construction multiplies exponentially.

In sum, requiring contractors to provide paid leave to construction craft workers will cause federal construction projects to be delayed and to cost more. Assuming that the costs will be recoverable as overhead under the contract, then the costs will be passed onto the government. These added costs, especially when incurred along with the added costs of the plethora of other new mandates for federal contractors, will cause federal contracting agencies' construction costs to mount and budgets to burst. This contradicts the justification for the mandate expressed in the Executive Order and in the proposed rule that "providing access to paid sick leave on Federal contracts will increase efficiency and cost savings for the Federal Government." Hence, the President is acting in contravention with the legal authority cited for the Executive Order in the NPRM and granted by the Federal Property and Administrative Services Act to "prescribe policies and directives that [the President] considers necessary to carry out' the statutory purposes of ensuring 'economical and efficient' government procurement and administration of government property."

B. If the Rule Does Apply to "Laborers and Mechanics" Under the DBA, then the Rule Should Permit Contractors to Comply by Paying into a Trust Fund on Behalf of Such Workers

If DOL rejects our recommendation to exclude coverage of "laborers and mechanics," then AGC recommends allowing construction contractors an option of meeting their obligations to such employees by contributing to a multiemployer or other benefit trust fund.

As noted above, construction contractors have provided craft workers with higher wages instead of paid sick leave. Over the years, many bargaining parties in the industry have agreed to go one step further to accommodate workers needs by including in CBAs a negotiated dollars-per-work-hour contribution into a multiemployer "vacation fund." These vacation funds are typically jointly administered Taft-Hartley funds that may be used not only for vacations but for sick and personal days too, much like modern-day "personal time off" ("PTO") policies. For example, a recent CBA covering carpenters in San Diego requires each signatory employer to pay each journeyworker carpenter working on a commercial building project \$34.30 per hour in the paycheck and to make a contribution of \$3.30 per hour to the Southwest Carpenters Vacation Trust on the employee's behalf (in addition to contributions into pension, health-and-welfare, and apprenticeship funds). Such plans allow the contractor to meet its contractual obligations simply by keeping proper records of each employee's hours worked and remitting to the fund the records along with the required contributions; the fund administrator does most of the rest of the work. Moreover, such plans allow workers to take accrued benefits with them to any employment and any employer covered by the CBA. When employees wish to take time off for vacation or sickness, they may draw from their accounts in the fund to offset the unpaid, unworked time. Unused benefits are paid out at appropriate thresholds of accrual without any carry-over from year to year as required by law.

Although these plans effectively provide a paid sick leave benefit much like a PTO policy, they do not meet all of the criteria set forth in proposed Section 13.5(f)(5) of the proposed rule. Plans could be altered to meet some of those criteria, but other criteria do not fit well for such a program. AGC recommends that DOL revise the rule to render contractor contributions into such a Taft-Hartley "vacation fund" sufficient for compliance, provided that the plan and/or CBA: guarantees that workers will accrue not less than one hour of paid sick leave for every 30 hours of work on or in

connection with a covered contract; allows workers to receive pay for time off for at least all of the same purposes set forth in proposed Section 13.5(c)(1); and prohibits employers from engaging in interference, discrimination, and waiver inducement described in proposed Sections 13.6 and 13.7.

AGC further recommends that DOL revise the rule to allow open-shop construction contractors the option of meeting their obligations to craft workers by contributing to a benefit trust fund established outside of collective bargaining. AGC is aware of at least one jurisdiction – the State of California – that has authorized this as an option for compliance with its mandatory paid leave law. Further, many third-party administrators already offer vacation fund services to open-shop contractors seeking to offer paid leave to DBA-covered workers as a bona fide fringe benefit toward meeting prevailing wage obligations. Therefore, AGC believes it would be relatively easy to establish and use such an option.

C. If the Rule Does Apply to “Laborers and Mechanics” Under the DBA, then the Payments for the Benefit Should Count Toward Meeting Prevailing Wage Obligations

If DOL rejects our recommendation to exclude coverage of “laborers and mechanics,” then AGC urges the Department to allow contractors to receive credit for the paid leave benefit provided to such workers toward meeting its prevailing wage obligations.

In the preamble to the proposed rule, DOL properly notes that “the SCA and DBA both provide that fringe benefits furnished to employees in compliance with their requirements do not include any benefits ‘required by Federal, State, or local law.’” However, DOL improperly concludes that “because paid sick leave provided in accordance with the Executive Order and part 13 is required by law, such paid sick leave cannot count toward the fulfillment of SCA or DBA obligations.” The Executive Order does not require, as a matter of law, that any employers provide the paid leave benefits. Rather, the Executive Order requires federal agencies to impose on their contractors, as a condition of doing business with the federal government, a *contractual* obligation to provide the benefits. Contractors that violate that contractual obligation may be liable for breach of contract but not for violating any law. Accordingly, the DBA does not preclude DOL from issuing regulations that allow contractors to get credit for the paid leave as a bona fide fringe benefit for DBA-covered workers.

Nor does the Executive Order preclude DOL from doing so. While Section 2(f) of the Executive Order provides that “contractors may not receive credit toward their prevailing wage or fringe benefit obligations under [the DBA or SCA] for any paid sick leave provided in satisfaction of the requirements of this order,” Section 3 of the order gives the Secretary of Labor broad authority to make exclusions from the requirements of the order where appropriate.

An exclusion is appropriate here. Currently, construction contractors that voluntarily provide sick pay – whether via specifically-designated sick leave plans or via PTO and PTO-like “vacation” plans discussed above – may take DBA credit for the pay as a bona fide fringe benefit if certain conditions are met. Prohibiting such credit will require such contractors to make significant changes in compensation and administration. In addition to continuing to cover sick pay, they will now need to make up the amount previously spent on sick pay in other fringe benefits or in wages. These added costs will make such employers – who have been acting with the best intentions of providing good benefits – less competitive.

This was not the intention of Congress when it amended the DBA in 1964 to include language allowing contractors to count fringe benefit payments, outside of those required by another law, toward meeting prevailing wage obligations. A report of the House of Representatives subcommittee that voted to add the restriction concerning otherwise-required benefits to the legislation states:

Two other changes in the language of H.R. 404 should be pointed out. First, a provision was added which in effect would exclude those fringe benefits from the bill which a contractor or subcontractor is already under an obligation by other Federal, State, or local law to provide. In these cases the committee believed that there was no need to include such fringe benefits mandatory under other (than Davis-Bacon) laws since all contractors and subcontractors would be subject to the same requirements relating to these fringes.⁵

Since all contractors and subcontractors will not be equally affected if paid leave benefits are excluded from wages that count toward meeting DBA prevailing wage obligations, the proposed rule is inconsistent with the intended purpose of this statutory provision.

Furthermore, this restriction has long been understood to address payments made to the government or a third party on behalf of employees rather than payments made directly to employees as here. This is illustrated in both the DBA's implementing regulations and in DOL's *Prevailing Wage Resource Book*, both of which list, as examples of legally required benefits for which contractors may not take credit, only the former type of benefits: workers compensation, unemployment compensation, and Social Security contributions. The restriction should not be extended to payments for sick leave paid directly to employees.

D. The Rule Should not Apply to Independent Contractors

The Executive Order does not require coverage of independent contractors, and DOL should not extend coverage to independent contractors as it does in the proposed rule.

AGC supports the federal government's efforts to "weed out" bad-actor employers that intentionally misclassify employees as independent contractors. Such employers not only deprive true employees of certain benefits to which they are entitled and deprive the government of significant tax revenue, they also gain an unfair competitive advantage against law-abiding employers. However, the government goes too far when its efforts actually *harm* such law-abiding employers and intrude into legitimate independent contractor relationships. That is what the proposed rule does by treating independent contractors the same as employees entitled to paid leave benefits.

Bona fide independent contractor relationships do exist. In construction – where certain skills are needed only for limited periods of time on a project, where craft workers and specialized professionals often work for multiple construction companies within a short timeframe, and where many businesses are too small to keep specialized workers fully occupied at all times – a legitimate need to engage outside help on a project-by-project basis may arise. Such workers not only understand this, but many prefer to work as independent contractors. The arrangement allows them greater work-life flexibility, a chance to "be your own boss," the ability to deduct legitimate

⁵ *Legislative History of the Act Amending the Wage Section of the Davis-Bacon Act As Amended*, Public 88-349, 88th Congress (1964).

business expenses for tax purposes, other entrepreneurial opportunities, and, typically, greater take-home pay.

For example, trucks and truck drivers may be necessary only for the first portion of a construction project in order to carry dirt, large materials, and other objects to and around a construction jobsite. Once the basic structure has been erected, the use of trucks and truck drivers will likely decrease and eventually be eliminated altogether as more cosmetic work begins. Rather than enduring the long-term expenses associated with employing truck drivers (as employees) that they cannot keep regularly employed, in addition to the expenses of owning and maintaining several trucks, a construction company may find it more sensible to work with independent contractors who provide truck driving services and use their own trucks for just the periods of time needed.

Another example is building information modeling (“BIM”) specialists. BIM is a relatively new technical service ideally provided to commercial construction companies by independent contractors. BIM services require the use of special software programs and expertise, which can be costly. These services are not required after the start of actual construction work. It is not uncommon for this type of virtual construction to be completed by one individual or a small team of individuals who will then move on to another project, possibly for another construction firm, to provide their services. Without independent contractors in these roles, employee-workers and expensive software and/or equipment will be sitting idle or in lay-off status until the start of the next project. For many construction firms, this could be weeks or months down the road.

For the hiring company, the practicality of using bona fide independent contractors includes, of course, the opportunity to allay administrative, economic, and legal burdens. This normally includes avoidance of the administering and paying for fringe benefits like paid leave. Moreover, if the independent contractor is working for different hiring firms throughout the day or the week, how would the parties determine whether a particular hiring firm is obligated to give the worker paid leave at the time that he or she requests it? Providing independent contractors with paid leave presents practical challenges and burdens that negate an important role of the independent contractor arrangement.

In addition, requiring federal contractors to provide paid leave benefits to independent contractors may actually effect a change in the independent contractors’ legal status. As DOL notes in the preamble to the proposed rule, “even workers who are independent contractors are covered by the SCA and DBA.” However, it is one thing for the government to require its contractors to pay their independent contractors above a designated floor, and it is a whole other thing to require them to provide them with specific benefits like paid sick leave. Providing such benefits could actually make a legitimate independent contractor look more like a misclassified employee in the eyes of some regulatory agencies. For example, among the factors that the Internal Revenue Service considers in determining whether a worker is properly classified as an independent contractor under the Internal Revenue Code is the “relationship of the parties.” This includes “whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.”⁶ Accordingly, the proposed rule’s treatment of independent contractors like employees could have far-reaching ramifications. Not only is this intrusion into contractors’ legitimate business relationships unfair and overly obtrusive, it is likely an unlawful interference.

⁶ IRS, *Topic 762 - Independent Contractor vs. Employee*. Retrieved April 8, 2016, from <https://www.irs.gov/taxtopics/tc762.html>. (Emphasis added.)

Hence, AGC urges DOL to revise the definition of “employee” in the final rule to expressly exclude independent contractors.

E. If the Rule Does Apply to Independent Contractors, then Coverage of Owner-Operator Truck Drivers Should be Clarified

If DOL rejects our urging to exclude all independent contractors from the definition of covered employees, then we ask DOL to exclude owner-operator truck drivers at the very least.

DOL Wage and Hour Division’s *Field Operations Handbook* explains contractors’ obligations under the DBA and Contract Work Hours and Safety Standards Act (“CWHSSA”) when using the services of a truck driver who owns and operates his or her own truck as follows:

As a matter of administrative policy, the provisions of DBRA/CWHSSA are not applied to bona fide owner-operators of trucks who are independent contractors. For purposes of these acts, the certified payrolls including the names of such owner-operators need not show hours worked nor rates paid, but only the notation owner-operator. This position does not pertain to owner-operators of other equipment such as bulldozers, scrapers, backhoes, cranes, drilling rigs, welding machines, and the like. Moreover, employees hired by owner-operators are subject to DBRA in the usual manner.⁷

The preamble to the proposed rule indicates that independent contractors in general are treated the same as employees who work on or in connection with the covered contract, but it does not specifically address independent contractors who are owner-operator truck drivers. AGC requests that DOL expressly adopt in the final rule the above policy limiting contractors’ obligations under DBA and CWHSSA with regard to such owner-operators.

II. THE SCOPE AND LANGUAGE OF THE RULE’S PROVISIONS REGARDING MAXIMUM ACCRUAL, CARRYOVER, REINSTATEMENT, AND CERTIFICATION SHOULD BE CHANGED

A. The Rule Should be Revised to Clarify Whether an Employer May Limit the Amount of Paid Leave an Employee May Accrue Overall and the Amount of Accrued Paid Leave an Employee May Use at Once

The provisions in proposed Section 15.5(b) concerning maximum accrual and carryover are quite confusing. Individuals reading the proposed rule have reported varying interpretations of these provisions, leading AGC to urge DOL to carefully review the language of those provisions and revise them for clarity in the text of the final rule (not just in the preamble). Substantive changes may also be called for, as discussed below.

⁷ U.S. Department of Labor, *Field Operations Handbook*, Revision 684, Section 15e17. See also, U.S. Department of Labor, *Prevailing Wage Resource Book*, Ch. 9, “DBA/DBRA Compliance Principles,” p. 7.

Proposed Section 13.5(b)(2) states that paid leave “shall carry over from one accrual year to the next” and that carried-over leave “shall not count toward any limit the contractor sets on annual accrual.” Does this mean only that leave accrued during one year may be carried over only into the immediately following year, or that it goes into a leave bank that continues to accumulate from year to year as long as the employee does not have a 12-month break in employment? Given the prohibition in proposed Section 13.5(c)(4) on contractors setting any limit “on the amount of paid leave an employee may use per year or at once,” the unlimited potential for accruals in the latter scenario could lead to substantial staffing problems and costs for contractors, especially those that are small businesses. If this is what DOL is proposing, then AGC recommends revising the rule to clearly allow contractors to set a reasonable cap on accrued leave accumulated over multiple years.

Proposed Section 13.5(b)(3) may help mitigate the risk, but it does so in a very confusing and challenging manner. The subsection allows a contractor to “limit the amount of paid leave an employee is permitted to have available for use at any point to not less than 56 hours.” First, the language should be revised for clarity because the term “available for use at any point” could be interpreted to allow an employer to limit the amount of paid leave that an employee may take at any given time – i.e., consecutive hours used in one leave incidence – to 56 hours. This reading, however, is inconsistent with the language in proposed Section 15.5 (c)(4). Given the second sentence in proposed Section 13.5(b)(3), it appears that the provision relates to accrual, rather than use, of leave. The second sentence provides that an “employee need only be permitted to accrue additional paid sick leave if the employee has fewer than 56 hours available for use.” Doesn’t this mean that an employer may suspend an employee’s accrual once the employee has reached 56 hours? And, if so, isn’t that, in effect, setting a limit on the amount of paid leave an employee may use per year or at once in violation of proposed Section 13.5(c)(4)? Further, while AGC appreciates the latitude granted to employers in proposed Subsection 13.5(b)(3), we question the feasibility of keeping track of carried-over, newly accrued, and used leave as contemplated in this provision such that a contractor would be able to utilize it.

B. The Rule’s Reinstatement Provision Should be Revised to Fit in the Construction Industry

Proposed Section 13.5(b)(4) states that paid leave “shall be reinstated for employees rehired by the same contractor or a successor contractor within 12 months after a job separation.” This provision is well-drafted for application in most employment situations, where employees work on regular, permanent basis for a single employer. It is not, however, well-drafted for application in the construction industry, where, as discussed above, workers typically work for different employers for short periods of time over the course of the year. This is particularly the case in the union sector of the industry, where contractors obtain workers from hiring halls on an “as-needed” basis only for the portion of a project that requires the skills of the workers’ particular trade. Consider the following hypothetical example: a local hiring hall of the Operative Plasterers and Cement Masons union refers Terry Williams to work for Acme Construction Company to perform cement masonry on a federal courthouse project; Williams works on Acme’s cement mason crew at the courthouse for two weeks, after which the cement masonry work is complete; Williams goes back to the hiring hall for referral to other union contractors working on other projects in the area; 11 months later, Williams is again referred to Acme, now to work on a Marine barracks project; Williams works at the barracks for two days until the cement masonry is complete; Williams goes back to the hiring hall for referral to other contractors; 10 months later, Williams is referred to Acme again, to work on a VA hospital project; Williams works at the hospital for five days until the cement masonry

work is complete; Williams goes back to the hiring hall for referral to other contractors... This can go on for years. In such a situation, what constitutes a “job separation,” and what constitutes “reinstatement?”

AGC recommends that DOL revise Section 13.5(b)(4) to accommodate the irregular and transitory nature of construction employment. This might include defining the terms “job separation” and “reinstatement” in a manner that contemplates this unique nature. It might also include allowing contractors to set a reasonable, minimum number of days of continuous employment before an employee is eligible to accrue paid sick leave or eligible for reinstatement of accrued paid leave after a break in work.

C. The Rule Should Empower Contractors to Stop Employee Abuses of Paid Leave Without Running Afoul of Certification and Discrimination Restrictions

Proposed Section 13.5(e)(1) allows a contractor to require documentation verifying that an employee’s request for paid sick leave is for one of the purposes set forth in the proposed rule only if the employee is absent for three or more consecutive, full work days. AGC understands that employees may need to take a few days off from time to time for legitimate purposes that do not lend themselves to documentation, such as when suffering from a common cold or a migraine headache. It is conceivable, though, that some employees will abuse the opportunity to take undocumented paid leaves of less than three days for illegitimate purposes. Such employees might take a day off here and two days off there, again and again over time, each time claiming the leave is for a permitted purpose when it is not. AGC can also foresee the possibility of large numbers of construction workers all calling in “sick” the day before or after a holiday. (As noted above, we have already received reports this occurring under one state paid leave law). These abuses can cause significant productivity and economic consequences for the contractor and, in turn, negatively impact the progress and budgets of federal construction. Yet, the proposed rule offers the contractor little recourse to stop such abuses. Not only is the contractor prohibited from requiring documentation by Section 13.5(3)(1), but it cannot take any adverse action against the employee without running the risk of being deemed in violation of proposed Section 13.6(b)(1)’s prohibition on discrimination against an employee for “using, or attempting to use, paid leave.”

AGC recommends that DOL revise the rule to expressly allow contractors with evidence of employee abuse of paid leave appropriate opportunities for recourse without running afoul of the rule’s documentation restrictions or anti-discrimination provisions.

III. THE SCOPE OF CONTRACTS COVERED BY THE RULE SHOULD BE CHANGED

A. The Definition of “New Contracts” Should be Revised to Provide More Time to Adjust Bids and Implement Mandates

The proposed rule applies to “new contracts,” a term defined in Section 13.2 as contracts resulting from solicitations issued on or after January 1, 2017, or awarded outside the solicitation process on or after January 1, 2017, whether completely new or simply replacements for expiring contracts. The preamble states, “By applying only to ‘new contracts,’ the Executive Order ensures that contracting agencies and contractors will have sufficient notice of any obligations under Executive Order 13706 and can take into account any potential impact of the Order prior to entering into ‘new contracts’ on or after January 1, 2017.” AGC respectfully disagrees and believes that more time is

needed. In particular, AGC is concerned that contracting agencies for contract competitions that begin in 2016 and extend into 2017 will either forget to amend the applicable request for proposal (“RFP”) to meet this new mandate or will provide insufficient communication and time for bidding contractors to properly estimate the cost of the change for bidding purposes and to implement the requisite changes in their business operations.

Generally speaking, contract award signifies issuance of a new contract between contractor and federal government. However, before contract award, an often long solicitation and bidding process occurs on an RFP. A prime contractor bids work based on the requirements of the RFP. The contractor must evaluate and ensure that its existing internal processes meet such requirements or can be modified to do so. This requires the contractor to rely on the accuracy and completeness of the RFP. During the RFP process, the contracting agency may issue amendments to the RFP and will provide additional time for bidding contractors to address those changes. Such amendments typically concern a change in scope that can be priced within a matter of days or a week. Construction contractors can and do price changes in *project scope* in the general course of the construction bidding business. They are not, however, accustomed to quickly pricing changes to their human resources practices and processes as will be required under the present rule. If an agency amends an RFP to accommodate the new paid leave requirements and provides only the typical few days or one week extension of the competition, many contractors, especially small business contractors, will be unable to estimate the resulting cost change and submit a timely new bid, let alone implement the new requirements in time for contract award.

Therefore, AGC strongly recommends that the final rule apply only to “new contracts” resulting from solicitations issued no sooner than one year from the date of the rule’s publication in the Federal Register or those awarded outside the solicitation process no sooner than one year from such publication date. This will allow contractors sufficient time to evaluate the compliance options available to them and to make the necessary internal changes. The extremely abbreviated period of time allowed to adjust to RFP amendments during the solicitation process would put many contractors (again, especially small businesses) at a distinct disadvantage in the competition and put a winning contractor in jeopardy of hastily implementing this mandate to its detriment later.

B. Coverage of Indefinite-Delivery, Indefinite-Quantity Contracts and Related Task Orders Should be Clarified

When the final rule goes into effect, many indefinite-delivery, indefinite-quantity (“IDIQ”) contracts will be in progress. IDIQ contracts can last many years. This type of contracting vehicle allows agencies to issue to a limited pool of contractors a number of smaller contracts – in the form of task orders – under the umbrella of a global contract – i.e., the original IDIQ contract. The original IDIQ contract acts as a “master contract” that delineates the scope of a project and the responsibilities of the parties to the contract. Application of the proposed rule to task orders issued under such IDIQ contracts existing when the rule takes effect is unclear and should be clarified.

As discussed above, the proposed rule applies to “new contracts,” which is defined in Section 13.2 as “contracts” resulting from solicitations, or awards issued outside the solicitation process, on or after January 1, 2017. No specific reference is made to task orders. However, in defining the term “contracts,” the proposed rule states:

The term contract shall be interpreted broadly to include, but not be limited to, any contract that may be consistent with the definition provided in the Federal Acquisition Regulation (FAR) or applicable Federal statutes...In addition to bilateral instruments, contracts include, but are not limited to, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

Accordingly, it appears that a task order issued under an IDIQ contract is a “contract.” In turn, it appears that a new task order issued on or after January 1, 2017, pursuant to a pre-existing IDIQ contract is a “contract that results from a solicitation issued on or after January 1, 2017, or a contract that is awarded outside the solicitation process on or after January 1, 2017.” However, language in the preamble to the proposed rule – the only place where IDIQ contracts are explicitly referenced in the NPRM – indicates otherwise. In the preamble at 81 Fed. Reg. 9602, DOL discusses “in-scope modifications” that do not create “new contracts” and encourages agencies to bilaterally negotiate application of the paid leave requirements as part of such modifications. DOL cites IDIQ contracts, stating:

For example, the FARC should encourage, if not require, contracting officers to modify existing indefinite-delivery, indefinite-quantity contracts in accordance with FAR section 1.108(d)(3) to include the paid sick leave requirements of Executive Order 13706 and part 13, particularly if the remaining ordering period extends at least 6 months and the amount of remaining work or number of orders expected is substantial.

While this language expressly addresses treatment of the existing IDIQ contract itself, the implication is that a new task order under an existing IDIQ contract would not itself be a “new contract.” If it were, then there would be no need to modify the IDIQ contract.

AGC urges DOL to clear up the confusion and expressly address in the final rule whether new task orders under existing IDIQ contracts are “new contracts.” AGC also recommends that DOL work with the Federal Acquisition Regulation Council to ensure that contracting personnel are adequately informed about how IDIQ and task orders are treated under the rule, through notice, trainings, and other communications. Such communications will help avert any potential failure to include the clause where required. In addition, AGC recommends that DOL require contracting agencies to provide special notice to contractors with IDIQ contracts about such treatment to help ensure full awareness and compliance.

IV. THE SCOPE OF AUTHORITY GRANTED TO A CONTRACTING AGENCY THAT FAILS TO INCLUDE THE APPLICABLE CONTRACT CLAUSE SHOULD BE CHANGED

Section 13.11(b) of the proposed rule provides that, if a contracting agency fails to include the applicable contract clause, then the contracting agency must “incorporate the contract clause in the contract retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed.” Such authority includes the authority to negotiate or amend, to pay any necessary additional costs, and to change, cancel, or terminate contracts. AGC believes that, under such circumstances, the contracting agency should be required to utilize the adjustments/change-order process to govern any cost increases related to this federal action.

Otherwise, confusion will arise not only for contractors but also for contracting agencies, which could lead to litigation and project delays. Canceling or terminating contracts, especially construction contracts, which tend to be multi-year contracts, could be extremely detrimental to contractors that must plan their business operations around such contracts.

As such, AGC strongly recommends that DOL not allow contracting agencies to cancel or terminate a contract that fails to include the clause. Instead, DOL should require the contracting agency to: (1) negotiate with the contractor under any existing adjustments/change order clause included in the contract; and (2) pay the contractor for the costs of meeting the new requirements.

V. THE SCOPE OF CONTRACTING OFFICERS' AUTHORITY TO WITHHOLD PAYMENTS FROM CONTRACTORS WITH ALLEGED VIOLATIONS SHOULD BE CHANGED

Section 3.11(c) of the proposed rule provides that the contracting officer, "upon his or her own action or upon the written request of the Administrator," shall withhold payments to the prime contractor "as may be considered necessary to pay employees the full amount owed" for any violation of the Executive Order or rule. The contracting officer may withhold payments under the contract it is administering as well as under any and all other federal contracts under which the prime contractor is working.

Section 13.11(e) lists a number of forms of supporting evidence that a contracting officer may include in its report to DOL of contractor noncompliance. However, the proposed rule fails to provide the contracting officer with a standard upon which to determine that an alleged violation rises to the level of an actual or actionable violation. Consequently, the mere accusation of a violation from a disgruntled employee to the contracting officer could be sufficient justification for a contractor to withhold payment to a prime contractor. Such a situation is disconcerting for a host of reasons. First, allowing a contracting officer to subjectively and unilaterally decide that an allegation rises to a violation will lead to instances where innocent contractors are punished. Second, allegations and evidence of a violation may carry different weight with different contracting officers, leading to inconsistent and haphazard implementation and consequences. Third, withholding or suspending payment to a prime contractor places that prime contractor and potentially dozens of subcontractors at risk of contract default. An abrupt and unanticipated halt to cash flow could detrimentally impact the prime contractor's ability to pay innocent subcontractors, suppliers, and employees. Even in the case where a prime contractor has actually committed a violation and withholding occurs, it would be patently unfair for a compliant subcontractor to not be paid by the prime contractor for acceptable work it has completed.

Consequently, AGC urges DOL to eliminate from the final rule a contracting officer's subjective, unilateral authority to withhold payment for alleged violations. Instead, DOL should require contracting officers to forward all allegations and evidence indicating the possibility of contractor noncompliance to the DOL Wage and Hour Division for investigation. If, after conducting a thorough investigation, the Division finds sufficient evidence to proceed with an action against the contractor, then the contractor should have the opportunity to defend itself in a hearing. Only after a thorough investigation and hearing, leading to a determination that violation has occurred, should an appropriate penalty be levied on only the offending contractor.

VI. THE SCOPE OF PRIME AND UPPER-TIER CONTRACTOR RESPONSIBILITY FOR SUBCONTRACTOR COMPLIANCE SHOULD BE CHANGED

Section 13.21(b) of the proposed rule requires contractors to include the applicable contract clause concerning paid leave in all covered subcontracts and to require, as a condition of payment, that subcontractors include the clause in all lower-tier subcontracts. It further provides that the prime contractor and upper-tier contractor shall be responsible for compliance by subcontractors and lower-tier subcontractors. The provisions are patently unfair, creating grave risks of liability for misdeeds outside a contractor's control and will become a serious deterrent for many worthy contractors considering bidding on federal work.

In federal construction, a prime contractor could have dozens of subcontractors and several tiers of subcontracting. The amount of risk DOL is asking prime and upper-tier contractors to undertake is enormous. Contractors lack control over their subcontractors' compliance, nonetheless over compliance by their subcontractors' lower-tier subcontractors, with whom they have no contractual relationship.

DOL justifies imposing this vicarious liability on the fact that the DBA and SCA impose "parallel" liability. AGC respectfully disagrees. Under the DBA, prime and upper-tier contractors have access to much information – via certified payroll reports – that could show a subcontractor's noncompliance with prevailing wage obligations. In addition, a subcontractor's noncompliance with such DBA obligations can be readily pegged to a particular contract and project. Neither of these characteristics is true under the proposed rule. AGC points out that a construction subcontractor could be working for more than one prime or upper-tier contractor at the same time and will certainly be working for multiple contractors over time. If the subcontractor fails to comply with its obligations to an employee seeking to use paid leave, how will the government determine which prime or upper-tier contractor(s) will be held liable? Even *if* the prime (or upper-tier) contractor could know whether the subcontractor's employee accrued leave while working for it – which it may know only with regard to DBA-covered workers whose hours are reported on certified payroll reports – it could not possibly know whether the employee is entitled to paid leave when requested. A prime (or upper-tier) contractor has no available means to determine whether or not the subcontractor happens to be working for that prime at the time of the paid leave request. The facts that the prime contractor would not know include, for example: whether the employee accrued additional leave while working for the subcontractor on a project that this prime contractor was not involved; whether the employee already exhausted his or her accrued leave; and whether the employee left employment with the subcontractor for over a year. Note that, particularly given the carryover provisions of the proposed rule, subcontractor violations can occur *years* after the relationship between the subcontractor and any particular prime contractor has ended.

Given these complexities and the infeasibility of pegging a subcontractor violation to a particular contract with a particular prime or upper-tier contractor, it is not only unfair but arguably unlawful for the government to hold prime and upper-tier contractors liable for subcontractor noncompliance. AGC, therefore, urges DOL to delete the final sentence from Section 13.21(b) and limit contractors' flow-down responsibility to including the applicable contract clause in all covered subcontracts and to require, as a condition of payment, that subcontractors include it in lower-tier subcontracts.

VII. CONCLUSION

For all of the above reasons and in accordance with all of the above recommendations, AGC respectfully asks DOL to modify the rule establishing paid sick leave for federal contractors.

AGC appreciates the opportunity to engage in the rulemaking process and looks forward to working with DOL as it continues to develop regulations that impact construction employers. If we can offer assistance in any way, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Denise Gold". The signature is written in a cursive, flowing style.

Denise S. Gold
Associate General Counsel