U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

AUG 24 2018

Claiborne S. Guy
Director, Employment Policy & Practices
Associated General Contractors of America
2300 Wilson Boulevard, Suite 300
Arlington, VA 22201-3308

Re: Paid Sick Leave and CBA Question

Dear Mr. Guy:

This letter is in response to your December 19, 2017 email requesting guidance regarding the application of Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors ("EO") and the Department of Labor's Final Rule implementing the EO at 29 CFR Part 13. You note in your email that the regulation at 29 CFR 13.4(f) provides for a temporary exclusion from the requirements of the EO and Part 13 for certain collective bargaining agreements ("CBAs"). You ask whether that temporary exclusion applies to CBAs that do not provide for paid sick leave, but require employer contributions to vacation plans or health and welfare plans.

The temporary exclusion set out at section 13.4(f) provides that the EO and Part 13 do not apply to CBAs ratified before September 30, 2016 that apply to an employee's work performed on or in connection with a covered contract and that provide employees with at least 56 hours (or seven days, if the CBA refers to days rather than hours) each year of paid sick leave or paid time off that may be used for reasons related to sickness or health care until the earlier of the date the CBA terminates or January 1, 2020. *See* 29 CFR 13.4(f). Section 13.4(f) further provides that if CBAs ratified before September 30, 2016 provide paid sick leave or paid time off but the amount provided each year is less than 56 hours (or seven days), the EO and Part 13 do not apply until the earlier of the date the CBA terminates or January 1, 2020, provided that the contractor provides covered employees with the difference between 56 hours (or seven days) and the amount provided in the CBA in a manner consistent with either the EO and Part 13 or the terms and conditions of the CBA. *See id.*

You state in your email that few, if any, construction-industry CBAs directly grant employees paid sick leave, but many require employers to provide monetary contributions to vacation plans, and that employees may take time off for sickness or health care and the vacation plans reimburse the employees at the end of the year for the pay lost during the leave. You assert that these CBAs and corresponding plans effectively compensate CBA-covered employees for time that they may be off work due to sickness or health care. While you acknowledge that a CBA requiring contributions to a vacation plan does not satisfy the language in section 13.4(f), you nonetheless argue that such CBAs "seem[] to be within the spirit of section 13.4(f) sufficient to allow the contractors to benefit from the temporary exclusion while they work their way through renegotiation of the CBAs and transition into full compliance with the rule by 2020." In response to our request, you provided us, on February 12 and May 30, 2018, with portions of CBAs

addressing vacation funds (redacted of identifying information), links to some publicly available complete CBAs, and six vacation and holiday plan trust fund agreements as representative samples.

As you acknowledge, an employer's contributions, pursuant to a CBA, to a vacation or health and welfare plan do not satisfy the literal language in section 13.4(f) excluding certain CBAs from the requirements of the EO and Part 13. Based on the information you provided to us, we conclude that the information and documents you have provided present no factual basis to treat an employer's contributions to a vacation or health and welfare plan as equivalent to paid sick leave and therefore we decline to extend the temporary exclusion in section 13.4(f) to a CBA requiring contributions to a vacation or health and welfare plan. As outlined below, our conclusion is based on several aspects of the vacation plans and CBA provisions you sent us.

The timing of the disbursements to employees under some of the plans render them fundamentally different than paid sick leave. For instance, two of the fund agreements you sent us provide for disbursement of contributions to employees annually or quarterly. Under the Construction Teamsters Trust Funds for Southern California, the most frequent distribution to employees is annually, and those annual distributions are of amounts contributed the year prior (e.g., contributions for work performed from September 1 to August 31 are distributed in December). *See* Art. VII, Sec. 8 Benefit Disbursal Schedule. Under the Oregon-Washington Carpenters-Employers Vacation Savings Trust Fund, the most frequent distribution to employees is quarterly, and those quarterly distributions are of amounts contributed many months prior (e.g., contributions made in September, October, and November are distributed the following April). *See* Art. VII, 7.2 Distributions. Under these agreements, if any employee is absent from work due to sickness or health care, the employee is not able to receive any payments for such missed work until many months after the absence. This is not consistent with a basic premise of paid sick leave, which is that an employee receives pay for the period of absence due to sickness either during the same pay period as the absence or soon thereafter. *Cf.* 29 CFR 13.27 (requiring contractor to compensate employee for paid sick leave taken "no later than one pay period following the end of the regular pay period in which the paid sick leave was used"). Because of the lengthy delay between an employee's absence due to sickness and the disbursal of money that corresponds to the absence under these two agreements, the disbursal cannot be viewed as payments for absences due to sickness.

Even for those fund agreements that appear to permit more frequent distribution of contributions to employees, the plans do not appear to operate in a manner similar to a paid sick leave benefit. *See* Operating Engineers Vacation-Holiday Savings Trust (California), Amendment No. 17 to Art. VII, Sec. 1(g) (permitting employees to withdraw on a monthly basis contributions made the prior month); Operating Engineers Local Union No. 3 Vacation, Holiday, and Sick Pay Trust Fund Agreement (Hawaii), Appendix 1, Secs. 4, 9 (same). Under these plans (as well as the other plans you submitted to us), employees can withdraw funds for any reason, regardless of whether an employee has taken leave due to sickness or health care, and in fact regardless of whether an employee has been absent from work. Furthermore, there is no indication in the materials you sent us that the CBAs permit employees to be absent due to sickness or health care. Thus, there does not appear to be a nexus between the withdrawal of funds and taking of leave due to

sickness or health care. It does not appear that such plans are regarded and used as a paid sick leave benefit.

Additionally, we note that the purpose of the temporary exclusion in section 13.4(f) was to "balance[] the importance of ensuring that the Executive Order applies to all employees entitled to its benefits promptly against the complications that could arise where an existing CBA provides for paid sick time in a manner that is similar to, but not sufficient to meet the requirements of, the paid sick leave provisions of part 13." 81 Fed. Reg. 67598, 67623 (Sept. 30, 2016). We concluded in the Final Rule that the temporary exclusion was warranted in light of the fact that "[t]hese complications are significant in circumstances involving CBAs because the agreement will limit a contractor's ability to unilaterally change the terms of the leave it requires to be provided." *Id.* By contrast, in the scenarios presented in the CBAs and plan agreements you sent us, these same interests are not at issue because there is no evidence that the CBAs or the plan agreements actually provide paid sick leave in a manner similar to the provisions of Part 13. Therefore, there is no indication that applying the EO and Part 13 would disrupt genuinely negotiated provisions in such CBAs.

For the reasons outlined above, we conclude that CBAs that require employer contributions to vacation or health and welfare plans but that do not provide for any paid sick leave or paid time off do not qualify for section 13.4(f)'s temporary exclusion from the requirements of the EO and Part 13.

Any interested party wishing further consideration of this matter should submit their request for reconsideration, with supporting documentation, to Bryan Jarrett, Acting Administrator, Wage and Hour Division, Room S-3502, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, D.C. 20210, within thirty (30) days of the date of this letter.

Sincerely,

Michele R. King

Michele R. King, Acting Chief
Branch of Government Contracts Enforcement
Office of Government Contracts