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

April 12, 2016

Robert Waterman,
Compliance Specialist
Wage and Hour Division,
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 (I thank you for the opportunity to submit comments on the U.S. Department of Labor Wage and Hour Division ( ) notice of proposed rulemaking (or) implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (the).

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, 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.
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 nd -Bacon Act commonly referred to as construction craft workers presents significm[10440059004C0056}-mrI07.3 RS ENTITs9mrI07.3 RS Eies, dasiSO0F3 12 Tf1 0 0

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***

Work in the commercial construction industry is typically project-based, transitory, and seasonal. Most craft workers move fromBT1 34u8 stnd fromempl(o)y(tole)5mpooy, ok withti

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

2.

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.-

projects wind down and -
offs.

Increased absenteeism is partic

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:

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
As DOL notes in the

vernment 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

provides the worker with employee-type benefits, such as iactors to provid 0 1 64.8 28807>1160484sC>30052051

Hence,
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 *Field Opeations Handbook* r
the DBA 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
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

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,

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

is 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 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 numbeTm(uiuni)-TJ 0 1 4(

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> 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 ddition 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.

. In turn, it appears that a new task order issued on or after January 1, 2017, pursuant to a pre-existing IDIQ

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 - 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

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

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

contract retroactive to commencement of performance under the contract through the exercise of

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-

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

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 o
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

-tier subcontractors, with whom they have no contractual relationship.

liability. AGC respectfully disagrees. Under the DBA, prime and upper-tier contractors have access to much information via certified payroll reports

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
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.

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