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Submitted Electronically

Robert Waterman
Compliance Specialist
Wage and Hour Division, U.S. Department of Labor
Room S-3510
200 Constitution Avenue NW.
Washington, DC 20210

Re: **Establishing Paid Sick Leave for Federal Contractors (RIN 1235-AA13)**

Dear Mr. Waterman,

The Small Business Legislative Council (SBLC) appreciates this opportunity to comment on the above-referenced proposed rule published by the U.S. Department of Labor ("DOL" or the "Department") on February 25, 2016, and the impact that these proposed rules might have on America's small businesses.

The SBLC is an independent, permanent coalition of national trade and professional associations whose goal is to maximize the advocacy and presence of small business on Federal legislative and regulatory policy issues, and to disseminate information on the impact of public policy on small businesses.

Requiring government contractors to provide employees with paid sick leave will have a particularly significant impact on small businesses, which are less able to absorb additional costs and administrative burdens while maintaining competitiveness and profitability than their larger counterparts. The SBLC recognizes that many of the key provisions related to the establishment of paid sick leave for government contractors were set forth in Executive Order 13706 (the "Executive Order") and are not subject to repeal or modification by the DOL rules. That said, as set forth below, there are a number of ways that the proposed rules could be modified to ease the burden on small business while still maintaining the underlying objective of the Executive Order and the related rules.

Covered Employees Should Only Accrue Paid Leave on Hours That They Actually Work

The Executive Order sets forth the requirement that covered employees earn at least "1 hour of paid sick leave for every 30 hours worked." The Proposed Rules expands on this to provide 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."

Requiring that employees earn paid leave for time spent out on paid leave would mean that, for every 30 hours worked, employees would really be earning 1.03 hours, rather than 1 hour, of paid leave, based on the fact that employees will accrue leave on their leave. This is illogical and inconsistent with the terms of the Executive Order.

More importantly, if maintained in the Final Rule, this requirement will discourage employers from offering a more generous leave policy than the minimum required by the Executive Order. Specifically, the Executive Order provides that employers can cap the amount of leave that an employee earns in a year at no less than 56 hours. Employers may, however, set a cap higher than 56 hours or opt not to cap the amount of leave that employees can accrue at all. Employers that take this approach generally view paid leave as part the compensation for the hours employees work and do not want to limit how much leave their most hardworking employees can earn. These kinds of generous policies are clearly highly beneficial for employees who are able to earn, and use, more leave in a year. **Requiring that employees earn leave for hours they are out on leave will significantly increase the potential cost to an employer of offering a higher, or no, accrual threshold.**

For example, under the accrual rate set by the Executive Order, if a covered employee works 40 hours per week, the employee will accrue 56 hours (or 7 days) of paid leave after 42 weeks of work (with approximately 10 weeks remaining in the year). If the employer has a 56 hour accrual cap, the employee will not be able to accrue any more leave in that year. If the employer has no accrual cap, the employee will be able to accrue another 13.3 hours (or approximately 1.5 days) of paid leave that year. Under the proposed rule, this would be true regardless of whether the employee works the remaining 10 weeks or whether the employee uses all 56 hours of her paid leave starting in week 43 of work. In other words, by not capping the employee's accrual, under the proposed rules, the employer would be committing to provide the employee with another day and a half of paid leave that year whether the employee works 10 weeks or 8.5 weeks (using leave for the rest of the time). On the other hand, if the employee only accrues leave on hours actually worked, then, by not capping accrual, the employer would only be committing to provide the additional 13.3 hours of paid leave if the employee works the full 10 weeks. If the employee instead used all of her accrued leave starting in week 43 (and therefore only worked 8.5 more weeks) the employee would only be entitled to an additional 11.5 hours of leave (approximately 2 hours of leave less than she would have gotten had she accrued leave on her leave).

Considering the above example over multiple employees, it could cost contractors thousands of dollars more to offer unlimited accrual (or a higher accrual threshold) if the rules require employees earn leave on leave, than if the employees only earn leave on time actually worked. Particularly, for small businesses, who operate on very small margins this cost difference would be enough for them to decide not to begin, or continue, to offer unlimited accrual. Disincentivizing unlimited or higher accrual policies will likely hurt more employees than a rule allowing accrual of leave on leave would help.

Employees Should Only Accrue Paid Sick Leave for Work Directly Called for by a Covered Contract

The Executive Order requires that covered employees earn paid sick leave for hours spent "in the performance of a contract or subcontract." However, the proposed rules would expand upon the provisions of the Executive Order to require that employees accrue paid leave not just for work on a covered contract but also for work "in connection with a covered contract." Elsewhere in the proposed rules, the DOL describes employees who perform work "in connection with a covered contract" as "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 in the contract." However, the proposed rules do not discuss what duties might be considered "necessary to the performance of the contract."

Read broadly, any general administrative functions performed by employees of a covered contractor that keeps the contractor's overall business functions running, from accounting to human resources, could be considered necessary to allow the contractor to perform on a specific covered contract. Surely by referring to work in the "performance of a contract" the Executive Order did not intend to require that, for example, a human resources employee accrue paid sick leave on the hours he spends recruiting employees who will work on a covered contract but who performs no actual work on the contract himself.

What it means for work to be "in connection with a covered contract" will inevitably be fact specific to each individual contract, such that it would be seemingly impossible to craft a definition of this term that would provide any meaningful guidance or assistance to contractors. To require contractors to constantly have to be making employee and contract specific determinations of what work is being performed in connection with a covered contract, and then tracking those hours, would create a huge and costly burden for contractors.

On the other hand, there is no question, or challenge, for contractors in identifying and tracking which employees are directly engaged in performing work on a contract and how many hours an employee has spent working on such contract.

In order to both conform to the terms of the Executive Order and create a rule that contractors can, in good faith, comply with without incurring extraordinary costs, the final rule should limit the accrual of paid sick leave to hours worked on a covered contract, not also hours "in connection with" such a contract. Otherwise, the rules will be turning what should be an objective standard into a subjective one and small businesses will be put at risk during an audit which is not only costly and burdensome but unfair to small businesses.

The Exception for Employees Performing Limited Work with Respect to Covered Contracts Should be Expanded and Extended

As set forth above, it is the SBLC's position that the final rules should not require contractors to have employees accrue paid leave for hours worked "in connection with" a covered contract (rather than directly on a covered contract). However, if this is to be the rule, the exception for such employees should be expanded from that currently set forth in the proposed rules.

Specifically, the proposed rules provide that employees who perform work *in connection with* a covered contract (and not directly on a covered contract) for less than 20% of their total hours in a given workweek will not be required to accrue paid leave on those hours. This is an important exception that will help alleviate some, but certainly not most, of the burden on contractors of providing leave based on work performed *in connection with* covered contracts. However, the 20% threshold appears to be arbitrary and will be one that will be difficult for contractors to discern. As discussed above, it will be very challenging for contractors to identify, and track, work performed *in connection with* a covered contract, not least because certain tasks performed by employees may have mixed purposes. We submit that it will be nearly impossible for a contractor to make a judgment each week as to whether 19% or 20% of an employee's work was *in connection with* a covered contract.

In order for the exception to be meaningful, it must also be one that contractors can actually utilize. While it will still require contractors to make a difficult determination of what work is performed in connection with a covered contract, a 50% or majority threshold would be a much easier, and more useful, exception for contractors. In other words, the contractor would only need to determine whether a majority of an employee's work is *in connection with* a covered contract, in which case the employee would accrue paid sick leave.

In short, the SBLC urges that, if the DOL does retain the rule providing for paid leave accrual on work in *connection with* a covered contract, the threshold for this exception be increased from 20% to 50%.

If Employers Elect to Provide the Maximum Amount of Leave Up-Front At the Beginning of the Year the Rollover Requirement Should Not Apply

The proposed rules give employers the option to simply provide employees, who would otherwise accrue paid sick leave under the terms of the Executive Order, with 56 hours of paid leave at the beginning of the year, rather than tracking hours and calculating accrual.

While exercising this option will certainly be administratively easier for contractors, contractors will risk incurring extra costs if they exercise this option. Specifically, the contractor will be providing the employee with the maximum amount of leave that they might be entitled to under the Executive Order regardless of the fact that the employee might not actually work enough hours on covered contracts to earn that amount of leave under the accrual schedule or the employee might use all his or her leave in the beginning of the year, before he or she would have otherwise accrued it, and then separate from the employer.

A policy providing maximum leave up-front to employees, favors employees because they will generally have more leave to use at any given time during the year. As such, the final rules should attempt to encourage contractors to take this approach despite the potential additional costs to the contractor. The most logical way to balance out the potential additional costs of an

up-front policy would be to except contractors who adopt such a policy from the requirement that employees be permitted to rollover any unused leave from on year to the next.[1]

The two biggest reasons behind allowing employees to rollover unused leave from one year to the next are to give employee a fair amount of time to use leave after they accrue it and to allow employees who know that they may need leave early in the year before they have accrued much leave to plan ahead by saving leave in the prior year. Providing employees with leave up-front addresses both of these issues. Thus, establishing an exception to the rollover requirements for contractors who provide the leave up-front will not undermine any policy objectives and will encourage contractors to adopt such a policy.

Given that providing maximum leave up-front favors employees, the final rules should attempt to encourage contractors to take this approach despite the potential additional costs. The easiest way to do this would be to eliminate the rollover requirement.

The Option to Provide the Maximum Amount of Leave Up-Front Rather Should be Expanded to Address Part-Time Employees

As noted above, providing maximum leave up-front favors employees. However, as the proposed rules are currently drafted, the up-front option would only work for employers with exclusively full-time workforces or who are still willing to calculate accruals for part-time employees. Given that avoiding the need to calculate accruals is a primary reason that a contractor would establish an up-front policy, despite the potential for extra costs, it is unlikely that a contractor would adopt an up-front policy if it can only apply to some, but not all, of its employees.

In order to address this in a manner consistent with the existing framework of the proposed rules, the final rule should be structured to permit contractors that adopt a policy of providing leave up-front to pro-rate the 56 hours of leave for part-time exempt employees or for exempt employees who split their time between covered contracts and other work based on the typical number of hours worked on covered contracts. This approach would be entirely consistent with, and mirror, the provisions of the proposed rules regarding how contractors would calculate accrual of leave for exempt employees who are part-time or who do not spend all their time working on covered contracts.

The Final Rules Should Also Give Contractor's the Option of Providing Leave Up-Front on a Quarterly, Rather than Annual, Basis

As noted above, the option of providing leave up-front, and thereby eliminating the need to perform accrual calculations, will significantly reduce the administrative burden that the Executive Order will impose on contractors. However, for small businesses operating on narrow margins, it will be difficult for them to decide whether avoiding the administrative burden outweighs the risk of having an employee use all of his or her leave early in the year (and paying

[1] This approach has already been taken in certain localities that have adopted paid leave laws, including New York City, NY and Montgomery County, MD.

the employee for that leave) only to have the employees separate from the company shortly thereafter. While employers can certainly hope that their employees will behave morally and not abuse leave policies, experience has often taught them otherwise.

In order to allow contractors the benefit of providing leave up-front and avoiding accrual calculations while also mitigating the risk of having an employee use up all his or her leave up front and resigning, the final rules should provide contractors with a second option of providing paid leave up-front on a quarterly basis. In other words, instead of providing 56 hours of leave at the beginning of the year (which would remain an option), contractors could instead opt to provide employees with 14 hours of leave (or a pro-rated amount for certain exempt employees as described above) at the beginning of each quarter.

Allowing contractors to provide leave up-front on a quarterly basis would not, in any way, undermine the employees' right to the amount of leave that they would be entitled to under the Executive Order at the time they would have been entitled to it under the accrual method. Under a system of allocating leave on a quarterly basis, employees would get the maximum amount of leave to which they would be entitled to by October 1 or, in other words, with just over 13 weeks remaining in the year. Under the Executive Order's 1 hour for every 30 hour accrual method, even if an employee worked 40 hours per week on a covered contract, the employee would not accrue his or her maximum required amount of leave until 42 weeks into the year or, in other words, with around 10 weeks remaining in the year. Thus, the under the quarterly allocation method, the employees would actually get their maximum amount of leave earlier in the year.

In order to continue to ensure employees have sufficient time to use leave after they accrue and the opportunity to plan ahead for future years, contractors providing leave up-front on a quarterly basis would still be subject to the rollover rule. In other words, if the DOL adds this option, the SBLC is not advocating for it to include the same rollover exemption as the SBLC has advocated with respect to the up-front at the beginning of the year option.

The Final Rules Should Include an Impossibility Exception to the One Hour Increment Rule

The proposed rules provide that employees cannot be required to use paid sick leave at increments greater than one hour (referred to herein as the "one hour increment rule"). The DOL specifically requested comments on whether the final rules should include a physical impossibility exception to the one hour increment rule, much like that which exists under the Family and Medical Leave Act regulations.

The SBLC urges the DOL to adopt an impossibility exception in the final rule. To not have an impossibility exception would, in practice, mean that an employee who works on a job site that cannot be physically accessed after the start of the shift, or exited before the end of the shift, would be able to get an entire day off work by simply using one hour of paid leave. In other words, even if the employer did not choose provide any options for unpaid leave, such an employee would be able to take up to 56 days off per year by simply using 1 hour of paid leave per day, which, by virtue of the inaccessibility of their work environment, would give them the

remainder of the day off. In light of the one hour increment rule and the rule against interfering with employees' use of leave, there would be nothing that an employer could do about this.

The lack of an impossibility exception would be particularly concerning if the employee in question was an exempt employee under the Fair Labor Standards Act (FLSA). The FLSA permits employers to deduct from an exempt employee's salary only under very limited circumstances. One exception where deductions are permitted is "for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability."[2] Absent further clarification in the proposed rule, we believe it is unclear whether an employer would be permitted under the FLSA to deduct from an exempt employee's salary to account for days in which the employee used one or more hours of paid leave but then was unable to access their worksite for the remainder of the workday but during which period the employer could require the employee to use paid leave.

The Final Rules Should Also Include an Exception to the One Hour Increment Rule Where the Employee Has Requested to Use Leave for Most of the Workday

The logic behind the one hour increment rule is perfectly understandable. The DOL reasonably wants to prevent employees from being forced to use 7 or 8 hours of paid leave to take an entire day off work, when all they really need is an hour or two to attend an appointment or address some other covered situation. However, when an employee is out for a substantial part of the day, rather than just an hour or two, the employer will frequently have to find (and pay) another employee to cover the shift. Even if another employee has not been brought in to cover for the employee using leave, an employee cannot reasonably be expected to complete beneficial work for an employer if they only work one or two hours in a given day. For example, as set forth in the proposed rules, the one hour increment rule would mean that, if an employee normally works from 10am to 6pm, the employee would be able to take seven hours of paid leave and then come in to work from 5-6pm (and be paid for that hour) even if the work requires set up or breakdown, or has other factors that would result in the employer getting no actual benefit from that hour of paid working time.

In order to avoid a situation such as that outlined above, the SBLC recommends that the final rule include an exception to the one hour increment rule that would allow employers to require employees to use a full day's worth of leave in any case in which the employee has requested to use leave for 75% or more of employee's normally schedule work hours in a given day. This would still prevent an employer from requiring an employee to take a full day of leave simply to attend an appointment, while protecting employers from having to pay for unproductive worktime caused by an employee only coming in for a small fraction of the workday.

[2] 29 CFR 541.602

Absent a Specific Request to Use Leave, Employers Should Be Permitted to Calculate Employee Leave Balances In Accordance with the Employers Normal Payroll Schedule, and no Less than Twice Per Month

The proposed rules would require contractors to calculate every covered employees' leave accrual at the end of each work week. Requiring weekly calculations will create a new and significant administrative burden for these contractors. The vast majority of employers, including government contractors, pay employees either every two weeks or twice a month. The common practice for employers is to calculate leave accrual and use and other benefits each time an employee is paid. Requiring weekly calculations of paid leave accrual will not only require employers to make leave calculations at a time that, absent the rule, they would not otherwise do so, it will also require employers to change their procedures for collecting time records for employees. For example, under the rule as proposed, an employer who currently pays employees on the first and fifteenth of each month and collects time sheets one week in advance of each payday, would be required, not only to collect time sheets one week before each payday as necessary to calculate employee pay and other benefits, but also to collect time sheets at the end of each week simply for the purposes of calculating paid leave accrual. If the dates one week in advance of a pay day did not happen to fall on a Friday in a given month, this would mean that the employer would need to collect four more time sheets from employees than they otherwise would.

Adding to the administrative burden for contractors, the proposed rules provide that paid leave does not need to be awarded in increments smaller than 1 hour but that if the employee has worked hours on a covered contract for which paid leave is not awarded in a given week, those hours will be added to the hours worked in the next week. Thus, employers will need to track how many hours will carryover from one week to the next.

In order to avoid creating a large and unnecessary burden on contractors, particularly small contractors, the final rules should permit employers to calculate leave in accordance with their normal payroll schedules, but no less than twice per month.

Allowing employers to calculate leave in accordance with their normal payroll schedule would not only permit employers to continue with what is normal practice for most employers, but also provide a longer period over which to calculate and award full days of leave. For example, if an employee is paid every two weeks and works 35 hours the first week and 25 the next week, instead of the employer having to keep track of the extra 5 hours worked in the first week and carry them over to the second, the employer would simply award 2 hours of paid leave based on the total number of hours worked over the two weeks. While employers will not be relieved of their obligation to track the carryover of extra hours from one pay period to the next, reducing the frequency at which this tracking must occur will lessen the burden it causes.

As Long as the Contractor Notifies Covered Employees of Their Leave Balances Each Time the Employees Are Paid the Employer Should Not be Subject to Weekly Leave Balance Requests

The proposed regulations require that employers provide written notice to the employees of how much paid sick leave they have available monthly or (i) when the employee requests the information; (ii) when the employee requests to use leave; or (iii) when the employee is separated from employment or reinstated. Under the proposed regulations, employees can request their leave balances no more than once per week.

Allowing employees to make weekly requests for their leave balances could create a real hardship, particularly for smaller businesses that may very well not have a designated human resources or accounting department to field these requests and make these calculations. Moreover, allowing for these requests does not serve to provide employees with information that would otherwise be unavailable to them. Employers are advised of the rate at which they accrue leave and will know how many hours they have worked in a pay period (either because they are required to maintain time record for payroll purposes or they are exempt and assumed to work 40 hours). Thus, so long as employees are regularly advised of their leave balances, they will be able to calculate their current leave accrual without having to request it from their employer.

As noted earlier in these comments, most employers calculate leave accrual, use and other benefits each time an employee is paid, which is generally every two weeks or twice a month. Most major payroll companies offer employers the option of printing employee leave balances on employee paychecks. **Therefore, in keeping with the interest of ensuring that employees know how much leave they have, while preventing a hardship for employers, instead of requiring monthly disclosures and allowing for weekly requests, the final rules should instead simply require that employees be informed of their leave balances each time they are paid, and no less than twice monthly.**

Employers Who Elect to Pay Employees Out For Unused Leave Upon Separation of Employment Should Not be Subject to the Leave Reinstatement Provisions

The Executive Order specifically states that employers are not required to pay employees for accrued unused leave at the time of their separation of employment and provides for the reinstatement of such unused leave for an employee who is rehired within 12 months. The proposed regulations build on this portion of the executive order to provide that, even if an employer chooses to be generous and pay an employee out for unused leave at the time of his or her separation, if the employee is rehired within 12 months, the employer will still be required to restore the unused leave to the rehired employee (even though it was paid out). The DOL has specifically requested comments on this element of the proposed rules.

The SBLC urges the DOL to include a provision in the final rule that would exempt employers who pay out leave at separation from being required to restore leave upon rehire.

Being paid out for unused leave upon separation provides a significant benefit for employees. Paying out leave already represents a cost for employers. Thus, employers should not be further discouraged from offering such this generous benefit to employees. Far more employees will separate from employment than will be rehired within 12 months of separation. Requiring reinstatement of leave regardless of any prior payout only helps those few employees who are rehired. On the other hand, by discouraging contractors from maintaining, or establishing, policies of paying out leave, a rule requiring reinstatement of leave regardless of prior payout will hurt a far wider swath of employees.

Allowing an exception to the reinstatement rule for employers who payout leave is an easy and obvious way to encourage, or at very least not discourage, employers from paying out leave.

On behalf of our members, we respectfully submit these comments and look forward to working with the Department to ensure that any final rules do not undermine the small business growth that is essential to the American economy.

Sincerely,

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SBLC recognized the assistance of Jessica Summers, Esq. in the preparation of these comments.