



VIA ELECTRONIC SUBMISSION

April 12, 2016

Robert Waterman
Compliance Specialist
Wage and Hour Division
U.S. Department of Labor
Room S-3510
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: RIN 1235-AA13, Comments on WHD's Notice of Proposed Rulemaking on Establishing Paid Sick Leave for Federal Contractors

Dear Mr. Waterman:

Associated Builders and Contractors, Inc. (ABC) hereby submits the following comments to the U.S. Department of Labor's (the Department) Wage and Hour Division (WHD) in response to the above-referenced notice of proposed rulemaking (proposed rule or NPRM), published in the *Federal Register* on February 25, 2016, at 81 Fed. Reg., at 9592.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Many of ABC's members are government contractors, and as such they will be directly affected by the proposed rule. As you are aware, most government construction contracts are covered by the Davis-Bacon Act, 40 U.S.C. § 3142 (DBA). Therefore, many of ABC's members are required to comply with the DBA's minimum wage and benefits provisions when they perform government contracts. Other

contractor members of ABC perform work under government contracts that are covered by the minimum wage and benefits provisions of the Service Contract Act (SCA), 41 U.S.C. § 6702.

The Proposed Rule Exceeds the Executive Branch’s Constitutional and Statutory Authority.

Federal minimum benefits on government contracts in the construction industry have long been established by acts of Congress. The DBA, 40 U.S.C. § 3142 (b), states: “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.” The DBA further defines such minimum wages as including both the basic hourly rate of pay and pay for “medical or hospital care, compensation for injuries or illness resulting from occupational activity, or insurance, ... vacation and holiday pay, ... or for other bona fide fringe benefits, where ... not required by other federal, state or local law to provide any of those benefits.” Pursuant to the DBA, the Department has created an elaborate regulatory scheme for determining prevailing wages and benefits in the construction industry.¹ Congress also has established a regime for the calculation of minimum wages and benefits on non-construction service contracts covered by the SCA.²

By the plain language of these statutes, Congress has established as a matter of law the minimum wages and benefits that must be paid by federal contractors. The NPRM nevertheless asserts that the minimum wage and benefits requirements of the Executive Order are “that paid sick leave required by Executive Order 13706 and part 13 is in addition to a contractor’s obligations under the SCA and DBA, and a contractor may not receive credit toward its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of Executive Order 13706 and part 13.”³ This assertion confirms that the President and the Department are creating a new fringe benefit requirement in derogation of Congressional intent. As a result, in a significant number of instances under the DBA and SCA, wage rates and fringe benefits that the Department has previously found to be “prevailing” in local jurisdictions, according to the dictates of Congress, will under the proposed rule no longer be deemed to be the minimum fringe benefits that contractors can provide.

The sole authority for the Executive Order or the proposed rule cited by either the President or the NPRM is the Federal Property and Administrative Services Act of 1949 (FPASA, or the Procurement Act), 40 U.S.C. §§ 101, 121(a). The FPASA authorizes the President to “prescribe policies and directives” that [he] considers necessary to carry out the statutory purposes of ensuring “economical and efficient” government procurement and administration of government property. *In the 65-year*

¹ See U.S. Department of Labor Prevailing Wage Resource Book, available at www.dol.gov.

² See 41 U.S.C. § 6703.

³ 81 Fed. Reg., at 9619.

history of the FPASA, no President has ever before attempted to use this law as authority to establish a mandatory fringe benefit for government contractors' employees, and certainly no President has ever done so in direct violation of acts of Congress. In any event, the Procurement Act's authorization to achieve greater economy or efficiency cannot truthfully be said to authorize the President or the Department to increase the government's costs, as will be the most likely result of increasing the paid sick leave that government contractors will now have to pay their employees.

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

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

As a result, the *Reich* court found that the FPASA provided no authority for the President to dictate to government contractors as to matters on which Congress has already spoken.

In the present circumstance, as in *Reich*, Congress has already made the judgment that the government will achieve its greatest economy and efficiency by requiring government contractors to pay only the minimum wages and benefits specified by the DBA and SCA. Reasonable minds may differ as to whether Congress has set the prevailing wage and benefits at the most economical or efficient levels for government contractors, but once Congress has made the political judgment necessary to set the minimum wage and benefits and has acted upon it in the form of legislation, the President and the Department are required by the Constitution to faithfully execute the laws so enacted by Congress.⁴

⁴ Neither the President nor the Secretary can claim a right to "supplement" the Congressional prevailing benefit with their own independent scheme, as has been permitted for state governments under the DBA, SCA and FLSA. *See Frank Bros., Inc. v. Wisconsin Dept. of Transp.*, 409 F. 3d 880 (7th Cir. 2005) (holding that Davis-Bacon sets a "floor" that state governments are entitled to supplement because the state minimum wage acts are not preempted by the federal laws). Here, both Congress and the Executive Branch are part of the same (federal) "scheme," and it is Congress alone that is entitled to make the decision on behalf of the federal government as to the level of the minimum wages and benefits, once it has enacted legislation for this explicit purpose.

The Executive Order specifically instructs the Department to issue regulations implementing the order only “to the extent permitted by law and consistent with the requirements of the Federal Property and Administrative Services Act” ... “including providing exclusions from the requirements set forth in this order where appropriate.” The order further instructs the Department to “incorporate existing definitions, procedures, remedies, and enforcement processes” under the SCA and DBA. These instructions confer upon the Department all the discretion necessary to decline to enforce the Executive Order in a manner that is inconsistent with Congressional authority (i.e., by declining to mandate a new fringe benefit for any employee covered by the DBA, or SCA that differs from the Congressionally mandated minimum wages and benefits under the foregoing statutes).

For each of these reasons, the NPRM should be withdrawn or substantially modified to avoid imposing any new benefit that is different from the minimum wages and benefits dictated by Congress.

At a Minimum, the Department Should Conform the Proposed New Paid Sick Leave Benefits to the Existing Requirements of the DBA and SCA in Order to Avoid Confusion and Unnecessary Burdens on Government Contractors.

Aside from the questions surrounding the Department’s legal authority to implement the proposed rule, it would be administratively prudent for the Department, and entirely consistent with the Executive Order, to modify the proposal to achieve greater conformity with the DBA and SCA. As written, the Department’s proposed new paid sick leave benefit overlaps with, but differs significantly from, the extensive regulations implementing the DBA and SCA in ways that will cause considerable confusion among government contractors. Issues likely to cause particular confusion to contractors are highlighted below:

- First, construction contractors that have spent decades complying with the Department’s regulations implementing the DBA have long become accustomed to looking at the Department’s published wage determinations to determine what their laborers and mechanics will be paid at the site of the work. The Department’s own regulations make clear that prevailing wages must only be paid for such laborers and mechanics and only for those who perform at the site of the construction work. By failing to give credit to those contractors who already provide paid sick leave benefits on DBA projects as part of their fringe benefit package, the NPRM is in effect imposing a double payment penalty on such contractors.
- The NPRM creates unnecessary confusion and imposes administrative burdens on contractors by declaring for the first time that they must provide paid sick leave to laborers and mechanics on DBA-covered jobsites at rates that exceed the benefits listed in the published wage determinations. At the same time, the NPRM changes the long established DBA-mandated “site of the work” rule for purposes of the new paid sick leave requirement and expands the covered types of workers beyond the categories of laborers and mechanics.

- Further, the NPRM discusses the lack of agency authority to require federal contractors to allow employees to use sick leave earned on federal work on *private* projects.⁵ There is no indication in the proposed rule as to whether the contractor could be penalized for allowing an employee to use sick leave earned on a federal project on private work. Clarification of this point is hereby requested.
- Clarification is also requested as to whether contractors will be required to maintain usage limited to just the ‘federal jobs,’ which would be extremely burdensome. By way of example, it is unclear how contractors who do ‘federal’ work and ‘non-federal’ work are supposed to track that work in addition to the work they are performing in multiple states.
- The NPRM appears to carve out paid time off (PTO) that is equivalent to paid sick leave, without sufficiently explaining what this means.⁶ Do contractors need to have sick leave and vacation leave separated from each other in order to benefit from this carve out? If it can be combined, is there a minimum number of hours the Department would require in order to say it protects the benefits described in the NPRM?
- It is also unclear how general contractors are expected to monitor and be responsible for violations of this new paid sick leave requirement by their subcontractors. Many subcontractors work on multiple federal contracts for different contractors, and their employees’ paid sick leave may accumulate at different rates depending on the frequency of their work on other projects for other contractors.
- The proposed rule does not appear to address the problem posed by exempt employees whose hours are not normally tracked by contractors.⁷ It appears from the NPRM that such tracking will now be required, thereby defeating the purpose of exempt status. The problem will be exacerbated when exempt employees are performing work on public and private projects during the same workweek(s).
- Contractors are also uncertain whether they are required to pay employees for accrued, unused paid sick leave when an employee’s job ends or at the end of the contract. Though the department’s website says the NPRM does not require a contractor to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment, we note that the proposal provides that a contractor cannot avoid the requirement to reinstate paid sick leave when it rehires an employee by cashing out the leave at the time of the original separation from employment. Similarly, contractors need clearer guidance as to

⁵ 81 Fed. Reg., at 9614.

⁶ 81 Fed. Reg., at 9620.

⁷ 81 Fed. Reg., at 9611.

what happens to the paid sick leave accrual if an employee's employment terminates, but the employee is later rehired? These requirements will be burdensome and confusing to administer in practice in the construction industry.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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

Ben Brubeck
Vice President of Regulatory, Labor and State Affairs

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