



April 6, 2016

VIA E-MAIL

The Honorable Thomas E. Perez
Secretary, Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Dr. David Weil
Administrator, Wage and Hour Division
Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Establishing Paid Sick Leave for Federal Contractors; Proposed Rule

Dear Secretary Perez and Administrator Weil:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration respectfully submits this comment letter to the Department of Labor (DOL) for the proposed rule, *Establishing Paid Sick Leave for Federal Contractors*.¹

Advocacy is concerned that DOL's Initial Regulatory Flexibility Analysis (IRFA) underestimates the numbers of small businesses affected by this regulation. DOL does not account for or estimate the cost of this rule for small businesses such as restaurants, retail and outdoor recreation companies operating on federal lands, federal buildings and military bases. Participants at an Advocacy roundtable expressed concern that the proposed rule's requirements for tracking paid sick leave are complicated, and that small businesses will spend more time and money to understand, implement and pay for this accrued sick leave than DOL estimates. Advocacy recommends that DOL consider any small business alternatives submitted in the comment period that may minimize the economic impact of this rulemaking on small entities.

¹ DOL, *Establishing Paid Sick Leave for Federal Contractors*, 81 Fed. Reg. 9592 (Feb. 25, 2016).



The Office of Advocacy

Congress established Advocacy under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), gives small entities a voice in the Federal rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, Federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy. The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Background

Executive Order 13706, signed by President Barack Obama on September 7, 2015, requires that certain parties who contract with the federal government provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care.² The Executive Order directs the Secretary of Labor (Secretary) to issue regulations by September 30, 2016; DOL released this proposed rule on February 25, 2016.

The proposed rule applies to any new contract with the federal government, provided that it is a procurement contract for construction covered by the Davis-Bacon Act (DBA); a contract for services covered by the Service Contract Act (SCA); a contract for concessions; and a contract in connection with federal property and lands and related to offering services for federal employees, their dependents or the general public.³ The proposed rule requires that any contractor and subcontractor incorporate a clause into any contracts with lower-tier subcontractors specifying, as a condition of payment, that all employees shall earn not less than one hour of paid sick leave for every 30 hours worked. This paid sick leave carries over from one year to the next and will be reinstated for employees rehired by a covered contractor within 12 months.

On March 1, 2016, Advocacy submitted a comment letter requesting an extension of the comment period for this rule to provide extra time for small businesses to provide meaningful comments.⁴ DOL extended the comment period by 15 days.⁵ On March 14, 2016, Advocacy held a roundtable attended by DOL staff, small businesses, and small business representatives.

² Executive Order 13706, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697 (Sept. 7, 2015).

³ 81 Fed. Reg. at 9601.

⁴ Comment letter from the Office of Advocacy to the U.S. Department of Labor (March 1, 2016), available at: <https://www.sba.gov/advocacy/establishing-paid-sick-leave-federal-contractors-proposed-rule>.

⁵ DOL, *Establishing Paid Sick Leave for Federal Contractors; Extension of Comment Period* (March 14, 2016).

Small Business Concerns

1) DOL's IRFA Does Not Adequately Estimate the Numbers of Small Businesses Affected By the Rule

The RFA requires that an IRFA contain “a description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.”⁶ Advocacy is concerned that DOL's IRFA underestimates the number of small businesses affected by this rule. DOL estimates that this proposed rule affects an estimated 422,400 small federal contractors and subcontractors, utilizing the General Services Administration's (GSA) System for Award Management (SAM). In this IRFA, DOL acknowledges that this database may not include small businesses that are affected or the cost of this rule to these entities in the following categories: (i) concessions contracts and (ii) contracts entered into the federal government in connection with federal property or lands and related to offering services for federal employees, their dependents, or the general public.⁷

Advocacy believes that there may be hundreds or thousands of small businesses such as restaurants, retail, and outdoor recreation companies operating on federal lands, in federal buildings and on military bases that DOL has not adequately counted in determining the numbers of small businesses affected or in estimating the costs of this rule. According to National Park Service (NPS) officials, in FY 2013, the agency issued approximately 500 concessions contracts, over 6,000 commercial use authorizations, and over 33,000 special use permits. In FY 2015, the U.S. Forest Service issued approximately 7,804 permits, including 404 for lodging, 474 for concessions services, and 6,926 for outfitting and guiding operations.⁸ In FY 2015, U.S. Bureau for Land Management issued 4,552 special recreation permits.⁹ While these agencies do not have the breakdown of how many of these entities are small businesses, DOL could make assumptions on the numbers of small businesses affected based on their industry categories or NAICS codes.

DOL's IRFA also does not analyze the number of small businesses that lease space in federal buildings, such as restaurants and gift shops. According to the GSA, as of FY 2015, there are 732 retail leases on public buildings and hundreds of other businesses that have concessions contracts. There also may be other agencies that lease space, like the U.S. Department of Agriculture and the U.S. Department of Education. Advocacy spoke to the Randolph-Sheppard Vendors Association of America, who reported that there are over 2,100 small businesses with visually-impaired owners who have leases in federal buildings. There may also be hundreds of small businesses that operate on military bases. For example, the Army and Air Force Exchange

⁶ 5 U.S.C. Sec. 603(b)(3) .

⁷ 81 Fed. Reg. at 9601, see Footnote 72.

⁸ Phone call with U.S. Forest Service, Feb. 1, 2016

⁹ Phone call with U.S. Bureau of Land Management, Feb. 1, 2016.

Service (AAFES) reported that there were 1,200 direct operations and 462 concessions operating on its federal bases, including restaurants, theaters and other operations.¹⁰

2) DOL Should Clarify Types of Small Businesses and Workers Covered Under The Rule

At Advocacy's roundtable, small businesses asked for clarification on what types of contracts and workers were covered under this rule. A representative from the American Outdoors Association (AOA) cited concern that its members in the recreation industry did not know if the type of contract or permit issued to them by agencies such as the NPS was covered by this rule; its members have a wide range of federal interactions, from retail stores and lodging, to short and long term recreational trips or events on or through federal lands. Advocacy also heard from the National Ski Areas Association, which sought clarification on whether workers who were part-time, seasonal, immigration visa holders, or students are covered by this regulation. For example, a small ski resort may hire and have to keep track of the paid sick leave of hundreds of part-time workers for a winter ski season.

3) DOL's IRFA Underestimates Small Business Compliance Costs

Small businesses at Advocacy's roundtable were very concerned that DOL has underestimated the costs of this rule for small businesses. DOL estimates that on average, an affected small firm is expected to incur \$150 to \$650 in year one direct employer costs, which includes one hour of regulatory familiarization (to read and understand the rule), one to ten hours of implementing costs, and payroll costs for employees taking the paid sick leave.¹¹ However, small businesses at Advocacy's roundtable reported they will spend thousands of dollars to comply with this rule, and are seeking clarification on how DOL has arrived at these low estimates.

Payroll Costs

Small businesses have told Advocacy that the bulk of the compliance costs will come from employers paying employees for utilizing up to seven days of sick leave; the number of employees at their firm affects their total compliance costs for this rule. In DOL's IRFA, the payroll costs associated with this rule only range from \$1.79 to \$472 per small business; this seems to reflect the cost of providing only one employee with up to seven days of paid sick leave.¹² DOL should be more transparent on how it arrived at this lower estimate. For example, a small recreation company with 20 full-time staff and 220 seasonal workers estimated costs of \$25,000 to comply with this regulation. Multiple small restaurant franchisees located in military bases reported costs from \$5,000 to \$35,000. A manufacturing representative stated that one of its members with 67 workers was going to incur \$70,000 in compliance costs.

¹⁰ Phone call with Army and Air Force Exchange Service, Feb. 1, 2016.

¹¹ 81 Fed. Reg. at 9666; *see* Table 20- Average Costs and Transfers Per Small Firm with Affected Employees.

¹² *Id.*

At Advocacy's roundtable, small concessionaires and franchisees on federal land and in federal buildings expressed concern that they will incur higher costs than traditional federal contractors subject to this rule because they cannot pass the costs on to the federal government or to their customers, and this creates a significant barrier to small businesses pursuing these contracts. Small recreation companies have stated that they will be reluctant to sign a new contract to provide services such as food or equipment rentals on federal lands, as they may not be able to increase the price of their products to offset these costs.

Regulatory Familiarization and Implementation

Advocacy believes that DOL has underestimated the time it will take for small businesses to read, understand and implement this rule for their companies; DOL sets the burden at one hour for regulatory familiarization and one to ten hours to implement this rule in their payroll system. Roundtable participants have told Advocacy that compliance with this rule will be more expensive for small contractors and concessionaires because they will have to hire outside professionals since they have limited or no human resources personnel or legal counsel on staff. For example, Advocacy spoke to one small restaurant franchisee on a military base with 15 employees who outsources their payroll through a national payroll company and received a quotation of \$500 per year to update his human resources system, and \$1000 in additional time for management to report the leave taken each pay period. A concessionaire at Advocacy's roundtable hired a human resources consultant at \$60,000 a year to comply with recent requirements and a labor attorney at \$400 per hour.

Small businesses at the roundtable discussed the complexities of tracking the accrual of sick leave, which may necessitate hiring outside payroll companies and legal professionals to comply with this rule. For example, construction industry representatives commented that their members will find it difficult and expensive to segregate covered federal work with non-federal work for the accrual of paid sick leave, as their employees often work at multiple locations for multiple clients. Seasonal recreation businesses like outfitters were concerned that these tracking requirements are not practical, as these businesses often have large numbers of part time workers and operate in remote locations, shifting from covered and non-covered work for multiple days. These employers will have to track their employees' paid sick leave for all of their work, unless they can segregate or track the work completed by this worker in both of these categories.

Roundtable participants stated that it may be difficult to track which employees accrue paid sick leave, as this rule applies to workers performing work directly "on" a contract, and other workers that are working "in connection with a contract."¹³ Small businesses commented that they currently do not track the hours of other employees not working directly under a covered contract, such as accounting, delivery and management staff; and therefore this provision would

¹³ Fed. Reg. at 9606, differentiating a worker who is performing "on" a covered contract or "directly performing the specific services under a contract," from one who is performing work "in connection with" a covered contract or the performing work activities that are "necessary to the performance of a covered contract but who is not directly engaged in performing services called for in the contract itself." Under this rule, the accrual requirements do not apply to these workers performing work "in connection" with the contract if they spend less than 20 percent of their hours worked in connection with such contracts.

be burdensome. A representative from the Associated General Contractors was concerned with another provision that requires prime contractors and upper-tier contractors to be responsible for the compliance by any subcontractor or lower-tier subcontractor in the tracking of the accrual leave of its workers.¹⁴

Under this proposed rule, an employee's paid sick leave carries over from one year to the next and is reinstated for employees rehired by a covered contractor within 12 months after a job separation.¹⁵ Participants at Advocacy's roundtable stated that there are conflicting federal and state regulations that govern the accrual and payment of sick leave, and small businesses have to reconcile this rule with current requirements under the law. Small businesses believe that there can be additional costs from this accrual provision for employers. A representative from the Professional Services Council did not support a provision of the rule that would require that the winner of a new federal contract (successor contractor) must inherit the accrued paid sick leave of the employees of the prior contractor (or predecessor contractor). According to this representative, a successor contractor would not know the dollar amounts of this carryover so that it can be built into the contract price.

4) DOL Must Consider Significant Regulatory Alternatives

Under the RFA, the IRFA must contain a description of any significant regulatory alternatives to the proposed rule that accomplish the stated objectives of the applicable statutes and that minimize any significant economic impact of the proposed rule on small entities. DOL has not provided any regulatory alternatives in this rulemaking. DOL should consider any alternatives provided during the comment period that minimize the impact of the rule on small business while accomplishing the objectives of the rule, such as exemptions for certain part-time and seasonal work.

Conclusion

Based on small business feedback, Advocacy believes that DOL's IRFA does not properly inform the public about the impact of this rule on small entities. DOL has not adequately estimated the small businesses affected by this regulation, particularly restaurants, retail and outdoor recreation companies operating on federal lands, buildings and military bases. DOL's IRFA is not transparent regarding how it arrived at its cost estimates, and Advocacy believes that these costs will be much higher than anticipated by DOL. Advocacy strongly recommends that DOL revisit its IRFA to update their estimates of the numbers of small businesses impacted and the costs of this rule. Advocacy also recommends that DOL consider any small business alternatives submitted during the comment period that may minimize the economic impact of his

¹⁴ 81 Fed. Reg. at 9624, Proposed § 13.21(b).

¹⁵ 81 Fed. Reg. at 9593.

rulemaking on small entities. For additional information or assistance please contact me or Janis Reyes at (202) 619-0312.

Sincerely,



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Copy to: The Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget