April 12, 2016

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

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking: Implementing Executive Order 13706 -- Establishing Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 9592, February 25, 2016 (RIN 1235-AA13)

Dear Dr. Weil:

The Society for Human Resource Management and the College and University Professional Association for Human Resources submit the following comment in response to the Department of Labor's Wage and Hour Division's (DOL or Department) Notice of Proposed Rule Making ("NPRM") on Proposed Regulations (RIN 1235-AA13) requiring federal contractors to provide paid leave.[1] The document (hereinafter referred to as "the NPRM"), was published on February 25, 2016 to implement Executive Order 13706, titled "Establishing Paid Sick Leave for Federal Contractors," (hereinafter referred to as "the EO").

BACKGROUND ON SHRM and CUPA-HR

Founded in 1948, the Society for Human Resource Management ("SHRM") is the world's largest human resources ("HR") membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, SHRM is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

[1] "Establishing Paid Sick Leave for Federal Contractors," 81 Fed. Reg. 9592 *et seq.* (proposed February 25, 2016).

College and University Professional Association for Human Resources ("CUPA-HR") serves as the voice of human resources in higher education, representing more than 20,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions, and 600 community colleges and specialized institutions. Higher education employs over 3.7 million workers nationwide, with colleges and universities in all 50 states.

SHRM and CUPA-HR have many HR professionals working for small and large government contractors and subcontractors among our members. These contractors and subcontractors represent a wide range of industries, cutting edge research, defense, energy, environmental, higher education, health, construction and many others. It is in the mutual interest of federal contractors and the federal government to ensure that any paid sick leave requirements imposed by the government are properly promulgated with sufficient stakeholder input and are unambiguous, efficient, and sufficiently flexible to accommodate the needs of both employers and employees.

SHRM and CUPA-HR members are the people who make employment policies work. Our members will be most directly responsible for implementing the final regulations. SHRM and CUPA-HR members have a heightened interest in crafting and administering employment policies that are practical and that can be adjusted to meet the variety of different workplaces and the exigencies that arise within them.

SHRM, CUPA-HR, and Paid Leave

SHRM and CUPA-HR support opportunities to create workplaces that meet the needs presented by work and life challenges. At the core of this position is the principle of flexibility, of granting both employers and employees the opportunity to design leave programs that maximize the benefits for all parties concerned. No government leave policy can or should attempt to anticipate and meet all the various desires of employees or individual workplaces. Therefore, regulatory schemes should avoid being unnecessarily prescriptive. Rather, within the context of the existing federal requirements, employers and employees should have the freedom to design leave programs that are responsive to their own identified needs.

With this in mind, we have several concerns about the paid leave proposal. The first is that the administration drafted the Executive Order (EO) behind closed doors without any opportunity for public input by HR professionals or employers. That problem has been compounded by the limited opportunity for notice and comment on the current proposal resulting from both the DOL's truncated comment period and an overly prescriptive EO.

As a result of this failure in process, the administration created an EO and the Department a proposed rule that are out of sync with progressive leave policies and realities of the modern workplace. If the government wants to increase the availability of leave for the employees of federal contractors without imposing undue and costly burdens on contractors, it should withdraw the EO and begin the process anew by meeting with stakeholders to discuss a path forward. That path forward should focus on options other than mandated leave through an EO for

several reasons, including the fact that by issuing the EO the President exceeded his Constitutional and statutory authority.

Second, to the extent the administration continues to impose the EO on contractors, SHRM and CUPA-HR urge that the final rule clarify that existing Paid Time Off ("PTO") programs will not be needlessly burdened with limitations and record-keeping obligations that can quickly turn this benefit into a liability. Third, we recommend that any final rule implementing the EO adhere to the familiar FMLA criteria to the extent possible and avoid creating new and overly burdensome requirements. Finally, the Wage and Hour Division of the Department of Labor ("DOL" or "the Department") does not consider graduate research assistants "employees." We ask that the Wage and Hour characterization be adopted in the final rule and that these individuals be excluded from coverage.

I. The EO Should be Withdrawn

As mentioned above, we believe that best way for the government to increase the availability of leave for the employees of federal contractors without imposing undue and costly burdens on contractors is to withdraw the EO and begin the process anew by meeting with stakeholders to discuss a path forward. That path forward should focus on options other than mandated leave through an EO for two key reasons. First, imposing a one-size-fits-all mandate does not allow employers to tailor their compensation packages to the needs and desires of their workforce. Second, the President lacks the authority to issue an EO requiring that contractors provide paid leave.

A. The EO Should be Withdrawn Because it was Created with Insufficient Stakeholder Input & the Current Rulemaking Fails to Provide Adequate Opportunity Notice and Comment

The EO was created without any opportunity for public input by HR professionals or employers. This failed process led to an over prescriptive EO that is inconsistent with progressive leave policies and the realities of a modern workplace. DOL compounded this problem by offering a truncated comment period and requested comments on a narrow set of issues.

Under the Administrative Procedures Act ("APA"), agencies propounding certain regulations are required to provide public notice and an opportunity for comment on any proposed rule. [2] The entire Notice and Comment undertaking is designed to "afford[] interested persons a reasonable and meaningful opportunity to participate in the rulemaking process."[3]

It is our belief that the NPRM cannot meet the standards of the APA. We recognize that as an Executive agency, the DOL must strictly adhere to the positions articulated in the EO.

[2] 5 U.S.C. §553

[3] *See, e.g., Forester v. Consumer Product Safety Commission,* 559 F.2d 774, 787 (D.C. Cir. 1977).

However, by doing so, DOL has effectively excluded the public, in general, and the regulated community, in particular, from having "a reasonable and meaningful opportunity to participate in the rulemaking process." At every turn, the NPRM refers to and relies on the EO as the sole rationale for its proposed regulations, whether it is coverage or use of leave. There is no reference to a record or to an articulated need, simply a citation to a section of the EO. All that is left for the public is to state its disagreement.

Further, the DOL's disinterest in substantive public input is reflected in the few occasions when public comment is invited. In a handful of instances, the NPRM seeks comments only on ancillary issues: the definition of "non-nuclear family" (81 Fed. Reg. 9599); the inclusion of certain non-SCA-covered employees (81 Fed. Reg. 9604); re-instatement (81 Fed. Reg. 9613); "cash out" (81 Fed. Reg. 81 Fed. Reg. 9613); cost accounting (81 Fed. Reg. 9613); familiarization costs (81 Fed. Reg. 9642). Nowhere is the public invited to comment on core issues: the need for paid leave, the cost of paid leave, the proper amount of leave, accrual issues, the expansion of covered individuals, or the expansion of covered events. DOL makes the point that no further discussion is required because those aspects of the NPRM have been decided – by the Executive Order.

The APA contemplates a different protocol. Courts do not permit limitations to notice and comment procedures that do not sufficiently provide interested parties with an opportunity to participate in and influence agency decision-making. The NPRM and the EO upon which it is based did not ensure sufficient opportunity for interested parties to provide input on a rule for which they would ultimately be responsible. The NPRM and the EO should, therefore, be withdrawn and reconsidered.

B. President Exceeded His Authority by Issuing the EO

The President exceeded his Constitutional and statutory authority in issuing the EO. Congress established minimum wages and benefits that government contractors must pay through statutes such as the Service Contract Act (SCA) and the Davis-Bacon Act (DBA). Those statutes do not authorize the Executive Branch to create a different scheme for minimum compensation for federal contractors. Moreover, over the years, Members of Congress have introduced various proposals requiring that employers provide paid leave, including proposals nearly identical to the EO. Congress chose not to act on any these proposals, providing clear evidence that it did not wish to impose any requirements on government contractors in addition to those specified in the SCA and DBA. There are a host of court decisions finding that neither the President nor the Department have the authority to override Congress by EO or rules that are inconsistent with statutes that already govern a matter. *See Youngstown Sheet & Tube Co. v Sawyer,* 343 US 579, 638 (1952) (Jackson concurring) and *Chamber of Commerce v. Reich,* 74 F. 3d 1322 (D.C. Cir 1996).

II. Existing PTO Programs Need Clear Guidance

Paid Time Off ("PTO") plans, in which employees are offered a pool of paid leave to use for any purpose, are becoming more widespread. According to SHRM's 2015 Employee

Benefits survey, 53 percent of employers offer paid time off, making it more popular than plans that distinguish between vacation, sick, family, personal days, or other types of leave. Both employers and employees value these plans because they allow for flexibility and diversity of reasons for leave, privacy about what those reasons are, and equity among groups of employees, for example, employees with caregiving responsibilities and those without. In addition, they are easier to administer, freeing employers from tallying leave taken from different categories.

For these reasons, we are pleased that proposed rule section 13.5(f) (5) recognizes the importance of establishing the circumstances under which an existing PTO plan will comply with the new regulation. Unfortunately, the answer remains ambiguous, which disserves contractors. The many examples in the NPRM (81 FR at 9620-21) do not resolve a key issue: if a PTO plan provides the required leave under the required conditions and imposes no limits on the use of the leave (other than those permitted in the rule), has it complied? For example, if an employee *chooses* to exhaust her accrued leave on vacation days (which are in excess of 56 hours), is the employer required to provide *additional* leave days to be taken for the health-related purposes specified in the NPRM?

We believe that an employer should not be required to provide additional leave if the employee *chooses* to use all accrued leave for purposes other than those specified by the Department of Labor. In the final rule, the Department should make clear that all that is required of a compliant PTO plan is that it (i) provide the required number of paid leave hours, (ii) make the leave *available* for the circumstances specified in the NPRM, and (iii) impose no unauthorized limitations or impediments on the use of the leave, regardless of how the employee chooses to use the leave. If those conditions are fulfilled, then the final rule should clearly and unambiguously state that such a PTO plan complies with the NPRM.

Similarly, although the NPRM proposes a complicated scheme for "carrying-over" unused paid leave hours (Sec. 13.5(a)(3); 81 Fed. Reg. 9611), the final rule should be clear that if an employee exhausts all available leave, *even if* fewer than 56 hours were used for paid sick leave, no hours of leave would be available to be carried over.

Any other option will reduce employee flexibility in the use of leave and will cause thousands of employers to unwind their PTO programs and reinstate the discarded practice of denoting specific leave days for specific purposes. This would be a step backwards for employees and employers alike. If 56 hours must be reserved for the uses specified in the NPRM, then those are 56 hours the employee cannot freely use for purposes of his own choice, effectively reducing his PTO. What is more, simply by delineating 56 hours as the appropriate measure of paid leave, the DOL is inadvertently validating efforts to *reduce* existing leave programs to the new federal standard, thus, further limiting employee choice.

III. Concerns with Proposed Regulatory Requirements

A. Definition of Covered Family Members

Throughout the NPRM, the FMLA is repeatedly cited as the source for most of the definitions and many of the functional elements of the paid leave program. SHRM and CUPA-HR applaud this attempt to model a new proposal on a familiar program, especially because HR professionals have had over twenty years' experience working with the FMLA. The NPRM, however, renders much of this familiarity moot by adding a number of new definitions, new covered persons, and new covered conditions.

Proposed § 13.5(c)(1)(i) and (ii) state that paid leave may be used by covered employees to provide care for a "child, parent, spouse, domestic partner, and *individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.*" (emphasis added). [4] The last of these terms is not included in the FMLA. There is nothing in any record describing how many additional covered individuals the new class would include or at what cost. Thus, there is no way to assess the obvious burdens it creates against its unknown benefits.

The fact that the new included class is *derived* from an OPM *discussion*[5] is of little assistance to employers who are covered by the NPRM. The NPRM's examples of covered relationships such as "an elderly neighbor with whom the employee has regularly shared meals and to whom the employee has provided unpaid caregiving assistance for the past 5 years" or "a friend of the family in whose home the employee lived while she was in high school and whom the employee therefore considers to be like a mother or aunt to her…" [6] do nothing to clarify the scope of individuals that might fall into this category.

The plain fact is that HR professionals will have to make critical coverage decisions with respect to classes of people about which they have no experience or understanding. What appears to be a simple expansion of the FMLA's coverage provisions is, in fact, a burdensome requirement that employers and their HR professionals engage in a probing inquiry into personal private relationships.

B. Employee Notification of Leave Balance

The NPRM requires that employers provide employees with written notifications of accrued sick leave in the following circumstances:

- No less than monthly;
- At any time when the employee makes a request to use paid sick leave;
- Upon the employee's request for such information, but no more often than once a week;
- Upon separation from employment; and
- Upon reinstatement of paid sick leave in the event of rehire.

[4] 81 Fed. Reg. 9613
[5] 81 Fed. Reg. 9599
[6] 81 Fed. Reg. 9600

Despite the proposed rule's statement to the contrary, these frequent, and on-demand notification requirements will result in burdens on employers, especially those with hundreds or thousands of employees and nation-wide employers who must comply with varying notification requirements in different jurisdictions. Although some state and local paid sick leave laws require employee notification, they require it at predictable, regular intervals – not whenever an employee asks for notification or upon some other unpredictable occurrence. We urge the Department to identify a limited number of predictable situations when an employer must provide employees with paid sick leave balance information.

C. Providing Frontloaded Leave

The Proposed Rule allow employers to provide paid sick leave upon hire, or at the beginning of each calendar year rather than requiring employees to accrue the paid sick leave over time, based on hours worked throughout the year, also known as "frontloading." Employees benefit from frontloading because they do not have to work to accrue the paid sick leave. Instead, an employee is able to use sick leave immediately -- even if they have worked for the company for one day, or it is the second day of the year. Employers benefit from not having to track leave accrual.

While the Proposed Rule recognizes that employers can avoid the accrual rate requirement if they provide an employee with at least 56 hours of paid sick leave at the beginning of each accrual year, it explicitly does not excuse the employer's year-end carryover obligations. In other words, employers must allow employees to carryover up to 56 hours of unused leave from one year to the next, even if the employer provides employees with 56 leave hours at the start of each year. The Department states that this provision "will be beneficial to contractors that find the tracking of hours worked and/or calculations of paid sick leave accrual to be burdensome, and [that] it provides employees with the full amount of paid sick leave contemplated by the Executive Order at the beginning of each accrual year."[7]

This assurance, however, ignores the key benefit of providing a lump sum of leave at the start of the year. When employees accrue leave over time, requiring employers to carryover unused leave from year to year ensures that employees have some leave available in case they need it for a covered absence at the start of the year before they have worked to earn additional leave hours. When an employer frontloads employees a lump grant of leave at the start of each year, the need for carryover is no longer present. The Department should remove employers' accrual tracking and year-end carryover obligations where employers frontload their employees a lump grant of 56 leave hours each year.

D. Cashing Out Unused Paid Leave

Proposed Section 13.5(b) (5) indicates that unused paid leave need not be cashed-out at the end of a covered employee's service with a covered employer.[8] This may cause considerable difficulty for employers in states which regard earned vacation as a form of deferred

[7] 81 Fed. Reg. 9611-12.
[8] 81 Fed. Reg. 9613.

compensation and require that unused vacation pay be "cashed-out." An unintended consequence of this provision is that it induces employers to scrap their undifferentiated PTO programs, reduce employee flexibility, and reduce the number of hours that can be cashed out. The final rule should make it clear that nothing in the rule can be construed to conflict with state or local law or to compel a reduction in benefits to a covered employee.

In light of the challenges these provisions create, the Department should consider altering its requirement that any paid time off policy must be compliant with every aspect to the Proposed Rule. Eliminating compliance with items such as the unlimited usage cap or the carryover provisions for a PTO policy that is otherwise compliant with the Proposed Rule would go a long way to minimizing the disruptive impact of the Executive Order. Compliance with the strict terms of the Proposed Rule will be extremely challenging for employers in practice and the leave provisions of the Executive Order will likely become a ceiling rather than a floor. We request that the Department review which of the Proposed Rule's substantive provisions it deems most significant and only require that employers' existing paid time off policies satisfy those provisions.

IV. Graduate Research Assistants Should Be Excluded

At Section 13.3, the NPRM states that even "employees who qualify for any exemption from the minimum wage and overtime provisions" of the Fair Labor Standards Act are covered for purposes of receiving paid leave.[9] An ambiguity remains, however, for certain categories of individuals who are not even considered employees under applicable DOL standards. One such category includes Graduate Research Assistants.

The Department of Labor's *Field Operations Handbook*, at Chapter 10 (entitled FLSA COVERAGE — Employment Relationship, Statutory Exclusions, Geographical Limits), the DOL states:

> In some cases graduate students in colleges and universities are engaged in research in the course of obtaining advanced degrees and the research is performed under the supervision of a member of the faculty in a research environment provided by the institution under a grant or contract. Normally, the graduate students involved in these programs are simultaneously performing research under the grants or contracts and fulfilling the requirements of an advanced degree. Under such circumstances, WH will not assert an employee-employer relationship between the students and the school, or between the student and the grantor or contracting agency, even though the student receives a stipend for their services under the grant or contract. (Field Operations Handbook at 10b18).

We believe that the Wage and Hour Division's rationale for excluding graduate research assistants from the realm of "employees" applies with even greater force here. For these

[9] 81 Fed. Reg. 9601

individuals, there is no discernible way to segregate either the nature of the work or the hours worked on a grant or contract from the effort or hours devoted to "fulfilling the requirements of an advanced degree." It is also the case that there is no relationship between their work or their hours and the fixed stipend the research assistants receive. Thus, the simplest computation necessary for accruing paid leave would be impossible.

We urge that the final rule make clear that graduate research assistants who qualify for the exclusion in the Field Operations Handbook, who are not deemed "employees" under the criteria therein would also be excluded from the coverage provisions of the Paid Leave regulations.

SHRM and CUPA-HR appreciate the opportunity to submit this Comment and would be pleased to provide the Department of Labor with any additional information or clarification it may require or request.

Respectfully submitted,

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