



## Outline of Oral Presentation

### MCAA Representatives at Office of Information and Regulatory Analysis

Thursday, February 11, 2016

### Comments on Regulatory Implementation of Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors

Mechanical Contractors Association of America (MCAA) Participants:

Chip Mitchell, General Counsel, The Kirlin Group, Rockville, Maryland

Adam Snavelly, President and CEO, The Poole & Kent Corp., Baltimore, MD

Stephen Weissenberger, Executive Vice President, MCA-Maryland

Bob Battista, Labor Counsel, MCA-MD and MCA Detroit

John McNerney, General Counsel, MCAA, Rockville, Maryland

1. ***Introduction***- MCAA's position, backed by other union-signatory employer groups in the Construction Employers of America (CEA), including the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), The Association of Union Constructors (TAUC), FCAInternational, Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), and the International Council of Employers of Bricklayers and Allied Craftworkers is as follows:

***Position: The regulations implementing EO13706, to be fully consistent with Federal procurement policy, national labor policy, and regulatory policy under EOs 12866 and 13563 (Improving Regulation and Regulatory Review) must contain an exemption from sick leave accrual for direct Federal construction prime contractors and subcontractors and Federal facility hvac/mechanical service contract project personnel covered by a collective bargaining agreement (CBA exemption).***

Section 1(b) EO13563 (1/18/2011): ". . . As stated in that Executive Order [12866] and to the extent permitted by law, each agency must among other things: (1) propose or adopt a



regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); . . . “

There is no record of an objective analysis or basis for EO13706’s assertion that the accrual of paid sick leave on direct Federal construction projects or Federal facility hvac /mechanical service contracts will improve the economy and efficiency of firms performing those new construction and Federal facility hvac service projects or provide better project outcomes for public agencies.

In fact, the academic literature is replete with studies establishing the contrary conclusion – the problem of absenteeism (the “missing man” effect) on construction projects is among the leading causes of contractor caused claims and disputes. (“... the most common cause of claims on construction project . . . for contractors [listed second after poor estimating] – Resource shortages and inexperienced or unqualified project team – Lack of available craft or staff labor, inexperienced field supervisory personnel, and/or lack of qualified and experienced project management team members.” *The Changing Landscape of Government Contract Claims, A Research Perspective* Issued by the Navigant Construction Forum, Navigant Consulting, December 2015, page 6.)

All contractor experience counsels that allowing accrued paid sick leave on direct Federal projects, with regulatory mandated entitlement, no strong requirement of advance notice of absences in the EO, and insulation from discipline for abuse written into the EO, will lead to greater crew/staffing unpredictability, not less.

Project close-out will be plagued by unforeseen absences as workers press to take advantage of their entitlement to paid time off before the project closes out.

EO13706 also preempts national labor policy for workers covered by construction collective bargaining agreements, whose bargaining agents can and do bargain higher wages to make accommodations for the industry specific conditions requiring strict adherence to critical path scheduling and project sequencing requirements on Federal construction projects.

With no objective basis for the procurement rationale on direct Federal construction and Federal facility hvac/mechanical service projects under EO 13706, this patent conflict with national labor policy ceding decisions on mandatory terms and conditions of employment to the free interchange of collective bargaining must be avoided altogether with a construction industry CBA exemption.



Construction collective bargaining agreements typically do not include paid sick leave.

For this reason, collectively bargained wage rates, which are typically higher than those for open shop contractors, account for the necessary sick hours a union member might expect to need during the course of a year.

Construction labor and management realize that their performance model depends on the reliable deployment and dispatch of competent crews to meet the project schedule and work sequences and is a cardinal condition of construction contract performance. For this reason, collectively bargained wage rates, which are typically higher than those for open shop contractors, account for the necessary sick hours a union member might expect to need during the course of a year.

Incentives for unplanned time off do not fit that model. And, the relative higher premium pay rates in construction CBAs make unpaid sick leave for unavoidable absences affordable for construction craft personnel covered by CBAs.

Very many of the growing number of state laws and local ordinances requiring paid sick leave have included an exemption from eligibility for construction workers covered by collective bargaining agreements.

Implementation of EO13706 should follow that same example to avoid preemption issues of the type recognized by the US Court of Appeals for the DC Circuit in *US Chamber v. Reich*, 74 F3d 1322, 1996, striking down President Clinton's EO 12954, which had sought to make employers that use striker replacement workers ineligible for Federal contract awards.

Following are a number of other issues we have identified that are all meant to underscore the need for a construction collective bargaining exemption in the EO13706 regulations for direct Federal construction and Federal facility hvac/mechanical service contracts.

2. ***The EO 13706 will increase project costs and diminish competition for Federal projects*** -- While the EO fairly clearly states that entitlement to paid sick leave will accrue only on covered Federal contracts, there are a number of problems and ambiguities that will increase project costs and diminish competition for Federal projects. For example, the EO does not clearly exclude use of accrued leave on private projects. If that is intentional, and the regulations were to follow the implementation example set under EO11246 and extend the entitlement to use leave accrued on Federal projects to private projects as well, then the cost and competitive effects will be detrimental and drive companies that can afford to work elsewhere to do so.



Moreover, while the EO seems to envision incorporating Davis Bacon Act regulatory principles, it does not clearly say that the entitlement to leave accrual will only apply to workers assigned to Federal projects under the Davis Bacon Act site of work rules. That is, leave will accrue only to workers who are working on projects dedicated solely to Federal contracts. So, home office fabrication shop personnel, home office administrative workers, and hvac technicians who work on a variety on public and private projects over the course of a work period should not be entitled to accrue leave if they are not dedicated solely or nearly so to a covered Federal contract. If that site of work principle is not applied, then the paperwork and administrative burden of parsing out what amount of a work day time is entitled to accrued leave will be extremely difficult (if not impossible), it will increase the performance costs of Federal contracts, and it will drive firms out of the market for direct Federal construction projects. Reducing the level of competition for Federal contracts, ultimately, will further drive up the costs to both the Government and the taxpayers.

There is precedent for the construction industry CBA exemption/carve-out in state law examples as well. Connecticut, for example, exempts industrial enterprises in North American Industrial Classification Codes 31, 32, 33 from its paid sick leave law. Also, state statutes and many local ordinances have CBA exemptions and/or construction CBA exemptions – for example, see Oregon Revised Statutes Sections 653 and following; ordinance in Philadelphia and Pittsburgh PA too for example; many of the local township ordinances in New Jersey too. Some state and local ordinances apply only to service and hospitality industry employees, for example. So, following those models the construction industry CBA exemption should apply to NAICS Codes 236, 237, 238, and hvac/mechanical service contracts NAICS Code 238220.

The benefits of paid sick leave are not the same for all industries. Fixed-place, indefinite term professional, service, and manufacturing contract performance characteristics and criteria are entirely different from definite-term construction hvac service projects.

Construction projects very often have a great many discrete subcontracts, requiring close coordination with tight project schedules and work sequencing mandated often by unique project site logistical issues, weather, unforeseen site conditions, and other variables that don't exist with the same prominence or in the same degree in other types of indefinite term, fixed-place employment/contract performance.

The reliable deployment of intact work crews and project supervision to get the work done on time in proper sequence is essential for successful project completions. Introducing incentives for unanticipated paid time off, without fear of discipline for abuse, demonstrably does not promote economic or efficient construction project performance.

We are aware of no objective evidence to the contrary.

3. **Payment scheme enforcement also contravenes established procurement policy** – The 1987 Federal Prompt Payment Act governing payment of direct Federal construction prime contractors and subcontractors was the result of careful consideration of Federal procurement policy and the project benefits of improving performance by expediting payments and removing the detrimental impacts of withheld payments at any contract tier. The Federal Acquisition Regulation payment clause (48 CFR Part 52.232-5) reflects that policy, and with the exception of Davis Bacon non-compliance withholding, there are few exceptions to the policy promoting timely payment processing. EO13706 says the accrual of paid sick leave shall be enforced by making compliance a condition of payment, including that condition of payment as a flow-down clause in covered project subcontracts at lower tiers. This implies that EO13706 will make an incursion into the payment process between primes and subs, and then lower-tier subcontractors and suppliers (perhaps, if the Davis Bacon site of work rules aren't applied). That is a recipe for claims and disputes – project disruptions, directly cutting against the 1987 Prompt Payment Act policy. Also, the costs of that lower-tier compliance oversight will increase project costs, and may well drive competitors who can't price that risk out of the market.

Furthermore, this new oversight obligation on primes and subs for lower-tier sick leave accrual compliance comes on the heels of other new Federal contract administrative rules under EO13673, where there may be a requirement that prime contractors and lower-tier subs inquire into and evaluate and remediate lower-tier parties' legal compliance certifications/records. Taken as a whole, the entire scheme of privity of government agency and prime contractor contract performance and oversight, and prime contractor and subcontractor independent legal compliance is being put at risk. The number of prime contractor and subcontractor firms that are willing to undertake and price the costs of this increasing involvement in lower-tier compliance oversight into their bids/proposals may certainly be expected to diminish as the administrative burdens and inconvenience of direct Federal contract performance escalates steadily. OIRA should consider alternative enforcement mechanisms rather than putting a strain on the essential cash flow on projects.

4. **Pay out of accrued sick leave on separation from employment will be increased under the operation of EO13706 -**

The EO says it does not require the pay out of accrued sick leave when workers separate from employment when they have accumulated paid sick leave (Section 2(j)). However, the EO also says it does not supersede Federal and state wage-and-hour laws (Section 2(l) – a good number of which do require pay out of accrued vacation, personal time off, and sick leave in many instances. It may be that as many as 13 or more states, based on a summary of state wage-and-hour laws, may require pay of accrued sick leave on separation of employment. In some cases the statute is unclear as to whether it includes accrued sick leave in the definition of paid time off – personal time (PTO) or accrued vacation leave; in other cases the statute clearly list



accrued sick leave. In some cases, the District of Columbia, for example, the mandate is in the form of a court decision – **National Rifle Association v. Ailes**, 428 A2d 816 (1981), DC Court of Appeals, 3/5/1981. So, in that number of places, EO13706 will have mandated increased costs for direct Federal construction/hvac/mechanical service contractors and subcontractors who employ workers who have accrued paid sick leave on direct Federal contracts in that state or even in other locations, as long as the employment relation is governed by that state law at the relevant time.

So, for example, consider the example of a traveling construction craft worker and/or whole crew employed by a Maryland-based construction prime or subcontractor performing a long-duration Federal project in West Virginia, DC or Virginia, and has accrued 56 or more hours at pipefitter local rates of \$35 or more per hour (without benefits – under Davis Bacon application, would the fringe benefits also be payable as the prevailing rate under the prevailing wage determination?), and then after that project is completed (assuming he/she doesn't use the accumulated sick leave as the project winds down), the individual or entire crew is referred out of the hiring hall back to his home local in Baltimore on a private project, for the same employer that performed the Federal job in the out-of-state location. If the worker/crew completes the private job within the one-year period of reinstatement eligibility allowed in EO13706 and is laid off from the current employer, or takes a hiring hall referral to another contractor in Maryland or elsewhere, then that employee/crew would under the plain terms of the EO be entitled to payment of accrued sick leave under Maryland law from the Federal contractor on the out-of-state job.

That employer will have to price that cost exposure into its bids/proposals on Federal projects, or choose to avoid the substantial financial risk for the entire workforce fitting that pattern by exiting the market. In any event, neither economy nor efficiency of Federal construction projects is improved in that circumstance.

***Conclusion: On behalf of union-signatory construction and hvac service prime contractors and subcontractors competing vigorously for Federal contract project awards, we respectfully request that OIRA adopt a construction industry collective bargaining agreement exemption into the regulations implementing EO 13706 to better reflect and reconcile sound Federal procurement, labor and regulatory policy.***

Respectfully submitted February 11, 2016.

#####