



Mr. Howard Shelanski, Administrator  
Office of Information and Regulatory Affairs (OIRA)  
The Office of Management and Budget  
725 17<sup>th</sup> Street, NW  
Washington, DC 20503

December 23, 2015

**SUBJECT: Comments to OIRA on Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors (80 FR 54697; RIN:1235-AA13); Request for a meeting with OIRA to provide more detailed information underlying the comments below. Submitted by email to: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov) and [Mabel E. Echols@omb.eop.gov](mailto:Mabel.E.Echols@omb.eop.gov)**

Dear Mr. Shelanski: Please accept these comments on EO13706 and give due consideration to our request for a meeting with OIRA representatives to provide more detailed back up information underlying our position.

These comments are submitted on behalf of the 2,700 mechanical contractors members of the Mechanical Contractors Association of America (MCAA), allied in some 82 local affiliate multiemployer collective bargaining units across the country that bargain construction labor agreements with local union affiliates of the United Association of Plumbers and Pipefitters and other crafts. MCAA also is allied with other construction industry employer groups that sign labor agreements in the specialty construction sector of the construction industry, primarily the National Electrical Contractors Association (NECA) and other union-signatory employer groups allied in the Construction Employers of America (CEA), which operates in the specialty construction sector of the industry, which according to Bureau of Labor Statistics data comprises over 60% of industry employment.

MCAA, NECA, and the other CEA groups all bargain labor pacts (CBAs) with a wide variety on Building Trades unions. Those CBA's set the highest workforce standards in the industry overall. The CBA pay and benefits are second to none in the construction industry. Our jointly administered apprenticeship and training programs, health and welfare funds, and multiemployer pension plans lead the American production workforce and economy in setting middle class pay and benefits for our highly skilled workers and their families. Our workers benefit from independent local union fair representation in bargaining labor pacts that maintain high workforce standards and provide employers and construction industry users with the highest workforce quality performance. Demonstrably, MCAA, NECA and the other CEA groups don't skimp on pay and benefits. So please understand, our comments and position on EO13706 are not in opposition to good pay and benefits.

Rather, the position is based on the unique workforce deployment patterns demanded by construction project logistics and project performance requirements, as well as respect for the independent bargaining process that adapts industry workforce standards to meet those specific conditions. Our position on EO13706 does not necessarily imply opposition to paid sick leave in other employment contexts on other Federal production and service contracts. Still, we are confident that the procurement rationale for exempting application of EO13706 for construction industry employers with independent workforce collective bargaining representation is fully warranted by the longstanding patterns and practices in construction industry collective bargaining and workforce deployment requirements.

We respectfully submit the analysis below to constructively substantiate our request for an exemption and our request for a meeting with OIRA to provide further documentation and substantiation of our position.

1. **The EO13706 procurement rationale fully warrants a construction CBA exemption.** The EO does not promote economy and efficiency in performance of Federal construction contracts and projects. In fact the EO could diminish competition for Federal projects and may well be expected to impair, not improve, successful project performance.
2. **Lack of evidence that paid sick leave will improve Federal construction project economy and efficiency; data supports the contrary conclusion** -- Construction project employment patterns are performe very different from fixed-place, indefinite term employment in other production, service, or consulting type contracts with the Federal government. Construction project craft employment is very project specific, for a definite term (until project completion), and is logistically very complex. Construction employers that operate with CBA's requisition project specific workers from hiring halls, or in some cases with open solicitation of bargaining unit workers, under performance requirements requiring tight scheduling and sequencing of work among a variety of different prime contractors and subcontractors, closely coordinating and sequencing separate elements of the overall project -- mechanical, plumbing, electrical, sheet metal and the rest of the project -- under tight critical path scheduling requirements. Any disruption in staffing a particular part of the CPM (Critical Path Method) schedule so that follow on crafts can't perform their sequence of the work on time causes disruptions, such as diminished productivity because of stacking of trades (unproductively crowding the project workspaces), delays of follow on craft performance, and consequent overall project delays, and contract claims, disputes, and cost overruns. The number of academic and consultant studies documenting the diminished construction project performance caused by the "missing man" effect is voluminous. We will provide citations in our requested follow-on meeting with OIRA.
3. **Ad hoc work-arounds for absences are common, and more constructive than mandated, banked benefits with ambiguous entitlement conditions** -- Adding paid sick leave as an incentive to take unplanned absences can only decrease, not increase, the conditions for successful construction project performance. For sure, there are unplanned absences now under current Federal construction project performance rules and regulations, and key personnel absences (key workers, crew leaders, foremen, lead production workers, even some helpers and apprentices on balanced crew mixes), who have to take unplanned absences because of illness not doubt occur and present work-around challenges for project supervision. Accommodations are made for key personnel, and company practices in this respect have developed in close concert with the unique attendance, and schedule conformance requirements of logistically complex construction projects. But, adding a financial incentive for unplanned absences, and raising a bar to discipline for unexcused/unplanned absences jeopardizing CPM scheduling performance, will be most deleterious for Federal construction projects. There is no objective evidence to the contrary, and instead much objective analysis showing the deleterious effect of construction crew unplanned absences.
4. **CBAs don't contain paid sick leave because of industry performance requirements** -- The above assertions also are confirmed by longstanding employment patterns and practices in the construction industry. A comprehensive review of construction collective bargaining agreements in the database of the Construction Labor Research Council (sponsored in part by the CEA Coalition groups) shows that paid sick leave in construction collective bargaining agreements is virtually non-existent. There's a reason for that -- the bargaining parties realize that project specific employment, and critical path schedule conformance are the very essence and key performance requirements on logistically complex, site-specific, definite-term employment and work performance on construction projects. It is essentially the opposite of employment administration practices in other very different types of employment

administration on Federal goods and service contracts, with fixed-place, indefinite term employment administration making unplanned absence work-arounds much more practicable.

5. **Labor and employment policy can't trump procurement rational for the EO and a consequent exemption for Federal construction employers with CBA representation** -- If the underlying premise of EO13706, improved economy and efficiency of construction project performance, were to be so apparent as the EO presumes, without any objective analysis or verification, then it begs the question as to why labor and management collective bargaining parties have for so long and so comprehensively been unaware of this opportunity for improvement. Of course, the answer is readily apparent and objectively verified by analysis and longstanding bargaining patterns and practices in the construction industry: the independent bargaining agent for the employees, in the case of the CEA coalition union specialty/construction building trades, have consistently recognized that deployment of the workforce to the project reliably and predictably to meet the schedule is one of the hallmarks of bargaining unit/hiring hall administration. Of course, it is essential too for the employers to meet stringent contract performance and schedule requirements to avoid project defaults, claims, disputes and damages. Time and proper sequencing of work are of the essence in construction project performance, where the sequencing the work of many independent employers/subcontractors is key to keeping the project on schedule and budget. In fact, in response to the Working Families labor and employment policy initiatives, an increasing number of states and localities are considering paid sick leave policies for their contracts and for broader employer mandates. Frequently, the lawmaking authority has recognized the unique nature of construction project employment and performance requirements, and has exempted construction employers whose workforce is represented in a collective bargaining relationship from the paid sick leave mandates. Rightly, these prevalent exemptions defer to the bargaining parties to determine what aspects of employment administration suits the performance demand of their industry. To preempt the bargaining parties with broad-form mandates, more appropriate for other work and industries, and overriding the fiduciary and fair representation standards on the employees' bargaining agent, is to undermine performance requirements and the virtual foundation and utility of the bargaining relationship itself. In some cases, in some state and local initiatives, some building trades have in fact supported an exemption because of the pattern and practice of bargaining in the industry. A list of those areas and types of exemptions will be provided in the follow-on meeting with OIRA.
6. **Clarification: Can banked hours accrued on covered Federal projects be used with the same employer on private projects?** -- In addition to this very broad and objective challenge to the overarching rationale of the EO under Federal procurement policy, the CEA has several technical questions with respect to the application of the EO in the un hoped-for event that we were to have to implement it against the objective analysis offered above. The first is that the EO does not clearly say that the accrued leave – which accrues only for hours worked on covered Federal projects, is limited in eligibility to work only on covered Federal projects. That is, if a construction craft worker were to accrue paid sick leave eligibility on covered Federal projects, and then was assigned within the one-year accrual/retention period to the same employer on a non-covered private project – would that employee be entitled to assert eligibility for paid leave on that subsequent private project? The EO seems to expressly provide that eligibility accrues only on covered Federal projects, the entitlement to using the sick leave on only Federal projects is less clear.
7. **Clarification: Would state wage-and hour laws that require pay out of banked leave on separation of employment amount to a mandated payment under the EO?** -- The EO says that it doesn't preempt state and local laws and does not require pay out of accrued sick leave on termination of employment. But, if state and local wage-and-hour laws require employers to pay out all benefits that are accrued on a per hour basis and provided on a banked eligibility basis to be paid over on termination of employment, the

EO will have mandated a paid benefit in those places – a result that is outside the scope of the Federal procurement policy rationale for the EO.

8. **Clarification: Whose payments are withheld by whom on questions of EO13706 compliance; how is that held payment secured and contested?** The EO has only a general indication that its mandate will be enforced in the project payment process. Again, the generality of this part of the EO is just the beginning of a very problematic proposal. The direct Federal construction project payment scheme enacted in the 1987 Federal Prompt Payment Act is a very carefully crafted, positive solution to a problem that had long plagued direct Federal construction projects – the very deleterious project performance problems stemming from agency and prime contractor payment delays. Again, as we hope to gain a CBA exemption from EO13706 for direct Federal construction project, we will not have to address the ways EO13706 would interfere with the finely detailed FAR payment procedures for construction prime contracts and subcontracts; if not, a much more careful description and analysis is required than is currently contained in the EO pertaining to payment administration enforcement.

In summary, the CEA position is that the EO13706 Paid Sick Leave requirements are demonstrably a Working Families type of labor and employment law policy initiative operating impermissibly under the pretext of a Federal Property and Administrative Services Act procurement rationale. The EO requirements are entirely and objectively counterproductive for economy and efficiency of direct Federal construction projects – and that is born out both by comprehensive industry analysis, and longstanding patterns and practices of established collective bargaining relationships for construction project CBA/hiring hall referral practices. The Labor Department, OMB and OIRA, and the FAR Council should therefore exempt construction employers on direct Federal Construction projects from EO 13706 mandates, either prime contractors or subcontractors, whose workers are covered by a collective bargaining agreement.

The Construction Employers of America coalition also respectfully requests an in-person meeting with OIRA officials to discuss this analysis and request.

Respectfully submitted and requested,



John McNerney  
MCAA General Counsel