



April 11, 2016

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

**Via Electronic Submission**

<http://www.regulations.gov>

**Re: Proposed Department of Labor (Wage and Hour Division) Rule on Establishing Paid Sick Leave for Federal Contractors** ([RIN 1235-AA13](#))

Dear Mr. Waterman,

The National Employment Lawyers Association (NELA) respectfully submits the following comments in support of the Proposed Department of Labor Rule on Establishing Paid Sick Leave for Federal Contractors (RIN 1235-AA13).

NELA is the largest professional membership organization in the country of lawyers who represent employees in labor, employment, wage and hour, and civil rights disputes. NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. Thus, NELA has an interest in the U.S. Department of Labor's (DOL's) proposed rule implementing Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors ("the EO" or "the Order").

The proposed rule will directly benefit an estimated 828,000 employees of federal contractors, including an estimated 437,000 employees who currently receive no paid sick leave. The proposed rule requires contractors to allow employees working on, or in connection with a covered contract, to accrue up to 56 hours of paid sick time annually to care for their own medical needs, a family member's medical needs, or for purposes related to domestic violence, sexual assault, or stalking. These employees will join the approximately 10 million or more workers across the country who have, or will soon have, access to paid sick leave as a result of

laws that have been enacted in five states, the District of Columbia, and more than 20 localities across the country.<sup>1</sup>

**I. The proposed rule will benefit workers, public health, and the economy, and aligns with existing state and local paid sick leave laws.**

The proposed rule prohibits a contractor's interference with an employee's accrual or use of paid sick time, as well as discrimination against an employee for using or attempting to use paid sick time, filing a complaint, cooperating in an investigation, or informing another of his or her rights. State and local paid sick leave laws have similar protections. Such protections are fundamental, because without them a worker's right to earn paid sick time would be illusory. In the United States, nearly half of private sector workers (49 percent) who have paid sick time say their employers have progressive disciplinary policies that punish workers for using paid sick time; more than one-third report that they fear retaliation or abuse for utilizing paid sick time.<sup>2</sup>

Provisions regarding notice, interference, discrimination, and enforcement are also included. NELA considers these provisions critically important. Pursuant to the proposed rule, contractors will be required to notify employees performing work on, or in connection with a covered contract, of the paid sick time requirements by posting a notice provided by DOL in a prominent and accessible location in the workplace. Contractors are familiar with posting requirements under federal employment laws and executive orders.<sup>3</sup> Additionally, the provisions require contractors to inform employees, in writing, of the amount of paid sick time the employee has accrued but not used. This will ensure that employees have the information they need to use their sick time appropriately.

The proposed rule also includes important enforcement provisions, allowing employees to file complaints with DOL's Wage and Hour Division, and provides remedies such as recovery of liquidated damages and the possibility of debarment for contractors who are found to have disregarded their obligations under the EO. While these enforcement provisions are essential to protecting workers' rights and discouraging contractors from violating the law, this comment letter proposes a change that would further strengthen the enforcement of the rule.

NELA strongly supports the inclusion of a wide array of circumstances under which sick leave can be taken. The proposed rule requires that workers be allowed to use paid sick time for absences from work due to the employee's or a family member's physical or mental illness, or to obtain medical care, or for purposes related to the employee or employee's family member dealing with domestic violence, sexual assault, or stalking. Defining these different

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<sup>1</sup> National Partnership for Women & Families. (2016, March). *Paid Sick Days – State Statutes and City and County Laws*. Retrieved 14 March 2016, from <http://www.nationalpartnership.org/research-library/work-family/psd/paid-sick-days-statutes.pdf>.

<sup>2</sup> Miller, K., Drago, R., & Williams, C. (2011, July). *Paid Sick Days and Employer Penalties for Absence*. Institute for Women's Policy Research Publication. Retrieved 14 March 2016, from <http://www.iwpr.org/publications/pubs/paid-sick-days-and-employer-penalties-for-absence>.

<sup>3</sup> See, e.g., U.S. Department of Labor. (n.d.). *Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers*. Retrieved 14 March 2016, from <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm#>; U.S. Office of Federal Contract Compliance Programs. (n.d.). *OFCCP Equal Employment Opportunity Posters*. Retrieved 14 March 2016, from <http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>.

circumstances as bases for the use of paid sick leave is consistent with similar laws across the country.

Providing workers time off to attend to their own and their family members' health care needs will ensure a healthier and more productive federal contracting workforce. Paid sick time reduces recovery time, promotes the use of regular medical providers rather than hospital emergency departments, and reduces the likelihood of workers spreading illness.<sup>4</sup> Access to paid sick time helps decrease the likelihood that a worker will put off needed care, and can increase the use of preventive care among workers and their children.<sup>5</sup> Allowing workers time off to care for their children helps ensure that recovery is faster and is a factor in preventing future health problems.<sup>6</sup>

The inclusion of coverage for time off related to domestic violence, sexual assault, or stalking, is essential for the safety and economic security of workers. Survivors of domestic and sexual violence are often forced to lose days of paid employment because of the violence they face. According to surveys from the Bureau of Justice Statistics, 36 percent of rape and sexual assault victims lost more than ten days of work following victimization, and more than half of stalking victims lost five or more days of work.<sup>7</sup> Each year, victims of domestic violence are forced to

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<sup>4</sup> Human Impact Partners. (2009, September 3). *A Health Impact Assessment of the Healthy Families Act of 2009*. Retrieved 17 March 2016, from <http://www.humanimpact.org/downloads/national-paid-sick-days-hia-report/>; Miller, K., Williams, C., & Yi, Y. (2011, November). *Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits*. Institute for Women's Policy Research Publication. Retrieved 17 March 2016, from <http://www.iwpr.org/publications/pubs/paid-sick-days-and-health-cost-savings-from-reduced-emergency-department-visits>; Smith, T. W., & Kim, J. (2010, June). *Paid Sick Days: Attitudes and Experiences*. National Opinion Research Center at the University of Chicago Publication. Retrieved 15 March 2016, from [http://news.uchicago.edu/static/newsengine/pdf/100621\\_paid\\_sick\\_leave.pdf](http://news.uchicago.edu/static/newsengine/pdf/100621_paid_sick_leave.pdf); Drago, R., & Miller, K. (2010, February). *Sick at Work: Infected Employees in the Workplace During the H1N1 Pandemic*. Institute for Women's Policy Research Publication. Retrieved 17 March 2016, from <http://www.iwpr.org/publications/pubs/sick-at-work-infected-employees-in-the-workplace-during-the-h1n1-pandemic>; Kumar, S., Quinn, S. C., Kim, K. H., Daniel, L. H., & Freimuth, V. S. (2011, November 17). *The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness Incidence During the 2009 H1N1 Pandemic*. *American Journal of Public Health*, 102(1), 134-140. Retrieved 17 March 2016, from [http://www.cdc.gov/phpr/documents/science/AJPH\\_2011\\_300307v1.pdf](http://www.cdc.gov/phpr/documents/science/AJPH_2011_300307v1.pdf); Pichler, S., & Ziebarth, N. R. (2015). *The Pros and Cons of Sick Pay Schemes: Testing for Contagious Presenteeism and Shirking Behavior*. Deutsches Institut für Wirtschaftsforschung Publication. Retrieved 14 March 2016, from [http://www.diw.de/documents/publikationen/73/diw\\_01.c.514633.de/dp1509.pdf](http://www.diw.de/documents/publikationen/73/diw_01.c.514633.de/dp1509.pdf).

<sup>5</sup> Miller, K., Williams, C., & Yi, Y. (2011, November). *Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits, 14-15 (Tables 5, 6)*. Institute for Women's Policy Research Publication. Retrieved 15 March 2016, from <http://www.iwpr.org/publications/pubs/paid-sick-days-and-health-cost-savings-from-reduced-emergency-department-visits>; Peipins, L., Soman, A., Berkowitz, Z., & White, M. C. (2012, July 12). The lack of paid sick leave as a barrier to cancer screening and medical care-seeking: results from the National Health Interview Survey. *BMC Public Health*, (12)520. Retrieved 17 March 2016, from <http://www.biomedcentral.com/content/pdf/1471-2458-12-520.pdf>; DeRigne, L., Stoddard-Dare, P., & Quinn, L. (2016, March). Workers Without Paid Sick Leave Less Likely To Take Time Off For Illness Or Injury Compared To Those With Paid Sick Leave. *Health Affairs* 35(3), 520-527. Retrieved 17 March 2016, from <http://content.healthaffairs.org/content/35/3/520.abstract>.

<sup>6</sup> Heymann, J. (2001). *The Widening Gap: Why America's Working Families Are in Jeopardy—and What Can Be Done About It*. New York, NY: Basic Books; see also National Partnership for Women & Families. (2015, August). *Healthy Kids, Healthy Schools: The Case for a National Paid Sick Days Standard*. Retrieved 17 March 2016, from <http://www.nationalpartnership.org/research-library/work-family/psd/healthy-kids-healthy-schools-the-case-for-paid-sick-days.pdf>.

<sup>7</sup> Bureau of Justice Statistics, U.S. Department of Justice. (2013, December). *Stalking*. Retrieved 15 March 2016, from <http://www.bjs.gov/index.cfm?ty=tp&tid=973>; Bureau of Justice Statistics, U.S. Department of Justice. (2002, August). *National Crime Victimization Survey: Personal and Property Crimes, 2000*.

miss nearly eight million days of paid work, costing more than \$700 million annually due to lost productivity.<sup>8</sup>

Another strength of the proposed rule is the flexibility embodied in the definition of what constitutes a family relationship. Inclusions that an “[i]ndividual related by blood or affinity whose close association with the employee is the equivalent of a family relationship,” and that “any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship” sets an appropriate standard to establish a familial relationship. In response to DOL’s request for input, NELA does not believe specific limitations are necessary. In fact, any attempt to enumerate and limit the types of relationships covered by the “blood or affinity” standard could undermine its purpose and exclude important family relationships. DOL’s emphasis on a significant personal bond, regardless of a biological or legal relationship, captures the essence of this standard and reflects the reality of today’s families. The example of a worker who has provided, for five years, unpaid care to an elderly neighbor illustrates the breadth of the kinds of significant relationships covered by a flexible definition.

The accrual rate and maximum accrual amount set out in the proposed rule will enable workers and contractors to realize the benefits of paid sick leave, and are aligned with state and local laws. Contractors must allow workers to accrue one hour of paid sick time for every 30 hours worked on or in connection with a covered contract, though the contractor may limit an employee’s accrual to 56 hours (the equivalent of seven days for a full-time worker) annually. Enabling workers to accrue an adequate amount of paid sick leave is essential to realizing the intended benefits of this proposed rule. An uncomplicated case of influenza can take between three and seven days to resolve, and most healthy adults may be contagious for five to seven days after becoming sick.<sup>9</sup> In addition, allowing accrual up to 56 hours is in line with typical private sector employers’ practices.<sup>10</sup> Offering comparable benefits will help federal contractors compete with the private sector for talented employees.

NELA strongly supports reinstatement of accrued, unused, paid sick time for employees rehired by the same contractor or a successor contractor within 12 months after a job separation. Reinstatement of paid sick time means that an employee will not lose her accrued time if she leaves and returns to the same job on one contract, or while she remains employed by an employer in between work on covered contracts. Additionally, NELA supports DOL’s interpretation of the EO to mean that an employee does not forfeit accrued paid sick time when she takes a job working on a successor contract. Reinstating unused, paid sick time may encourage employees to continue working for the same contractor on new contracts and on

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<sup>8</sup> Centers for Disease Control and Prevention. (2013, December 24). *Intimate Partner Violence: Consequences*. Retrieved 15 March 2016, from <http://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html>; Hanson, R. F., Sawyer, G. K., Begle, A. M., Hubel, G. S. (2010, April). The Impact of Crime Victimization on Quality of Life. *Journal of Traumatic Stress, 23*(2), 189–197. Retrieved 17 March 2016, from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2910433/>.

<sup>9</sup> Centers for Disease Control and Prevention. (2015, January 26). *Clinical Signs and Symptoms of Influenza*. Retrieved 14 March 2016, from <http://www.cdc.gov/flu/professionals/acip/clinical.htm>.

<sup>10</sup> U.S. Bureau of Labor Statistics. (2015, September). *National Compensation Survey: Employee Benefits in the United States, March 2015* (Table 35). Retrieved 14 March 2016, from <http://www.bls.gov/ncs/ebs/benefits/2015/ebb10057.pdf>.

successor contracts, which will further improve efficiency for the contractor and for the government.

**II. To effectuate its purpose, the proposed rule should establish attorneys' fees and cost-shifting provisions that inure to the benefit of a prevailing employee who is represented by private counsel in an administrative proceeding for enforcement of this rule.**

Although the EO does not provide employees with a private right of action allowing them to file an action in federal court to seek a remedy for a violation, the proposed rule is enforceable through an administrative process. The rule would be strengthened by the addition of language to allow prevailing employees represented by private counsel to recover attorneys' fees and costs. Employees may seek legal advice to help them understand and vindicate their rights through the DOL remedial process. As with many statutes enforced through the Agency process, employees can benefit from the assistance of private counsel in preparing a complaint or petition for review. Without the ability for prevailing employees to recover attorneys' fees, enforcement of the proposed rule will be weakened.

Availability of attorneys' fees is especially important because in many of these matters the dollar amount of the economic loss to the employee may not seem significant, but for some workers a denial of paid sick leave will create great hardship, such as inability to make a rent or a car payment. Given that the proposed rule permits employers to limit paid sick time to 56 hours per year, as stated above, the actual economic damages in such cases will often be minimal. The financial loss to a full-time employee who earns \$50,000 annually, but who has not been permitted to accrue or use any paid sick time, totals less than \$1,400 per year. Without the ability to recover reasonable attorneys' fees and costs, it would not be financially feasible for an employee to retain private counsel, nor would it be economically viable for an attorney in private practice to represent employees with this type of complaint. In view of this, we offer proposed language set out below, which, if added to the rule, would further the goal of compliance with, and enforcement of, the proposed rule.

*If an employer has been found to have violated this Executive Order, even in good faith, the employee shall receive, in addition to any other relief and irrespective of the amount in controversy, an award of reasonable attorney's fees and costs.*

**III. Paid sick leave will improve the efficiency of federal contracting.**

Evidence from the private sector, as well as from states and cities with paid sick leave laws, demonstrates that paid sick leave improves employee retention, reduces workplace contagion and injury, and increases productivity. The cost savings likely to result from paid sick leave will further economy and efficiency in federal contracting.

Research shows that paid sick leave helps reduce the high costs of employee turnover. The literature demonstrates that an employee is at least 25 percent less likely to voluntarily leave a job when the employee has access to paid sick leave.<sup>11</sup> Across all occupations, median turnover

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<sup>11</sup> Hill, H. D. (2013). Paid Sick Leave and Job Stability. *Work and Occupations*, 40(2), 143-173.

costs are estimated to be 21 percent of workers' annual wages. For workers in high-wage jobs and senior or executive positions, turnover costs can amount to 213 percent of workers' salaries,<sup>12</sup> and even in middle- and lower-wage jobs, turnover costs are estimated to be 16 to 20 percent of workers' annual wages.<sup>13</sup>

Paid sick leave also helps reduce the risks of workplace contagion and injury. Many workers without paid sick leave report to work sick rather than sacrificing critical income, resulting in co-workers' and customers' exposure to contagious infections. In a national survey, 87 percent of employers reported that employees had come to work with short-term, easily spread illnesses such as a cold or the flu.<sup>14</sup> Paid sick leave reduces the risk that employees will spread illness at work. Overall, people without paid sick leave are 1.5 times more likely than people with paid sick leave, to go to work with a contagious illness like the flu.<sup>15</sup>

Finally, paid sick leave may reduce the risk of workplace injuries. A study by researchers from the National Institute for Occupational Safety and Health at the Centers for Disease Control and Prevention found that workers with access to paid sick leave were 28 percent less likely than workers without access to paid sick leave to be injured on the job.<sup>16</sup> Paid sick leave will therefore improve the economy and efficiency of federal contracting by decreasing the amount of worker time lost to contagious illness and workplace injuries.

#### IV. Conclusion

NELA strongly supports the proposed rule, which will guarantee a greater number of workers the increased economic security that paid sick leave provides, reduce workplace contagion, increase productivity and retention, and lead to greater efficiency in federal contracting. NELA commends the Administration for leading the way on this important issue for America's workers and their families, and urges swift implementation of a final rule with the addition of attorneys' fees and cost-shifting provisions, as set out in Section II.

Respectfully submitted,



Terisa E. Chaw  
Executive Director

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<sup>12</sup> Boushey, H., & Glynn, S. J. (2012, November 16). *There Are Significant Business Costs to Replacing Employees*. Center for American Progress Publication. Retrieved 15 March 2016, from <http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>.

<sup>13</sup> Ibid.

<sup>14</sup> Wolters Kluwer Law & Business. (2008, January 10). *On the Job, But Out of It? CCH Survey Looks At Ill Effects of Sick Employees At Work*. Retrieved 14 March 2016, from <http://www.cch.com/press/news/2008/20080110h.asp>.

<sup>15</sup> Smith, T. W., & Kim, J. (2010, June). *Paid Sick Days: Attitudes and Experiences*. National Opinion Research Center at the University of Chicago Publication. Retrieved 15 March 2016, from <http://news.uchicago.edu/static/newsengine/pdf/100621.paid.sick.leave.pdf>.

<sup>16</sup> Asfaw, A., Pana-Cryan, R., & Rosa, R. (2012, September). Paid Sick Leave and Nonfatal Occupational Injuries. *American Journal of Public Health, 102*(9), e59-e64. Retrieved 15 March 2016, from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3482022/>.