SCHWABE, WILLIAMSON & WYATT®
ATTORNEYS AT LAW

Pacwest Center, 1211 SW 5th Ave., Suite 1900, Portland, OR 97204 | Phone 503.222.9981 | Fax 503.796.2900 | www.schwabe.com

Memorandum

To: John Rakowitz
AGC Oregon

From: Leora Coleman-Fire

Date: September 30, 2015

Subject: Oregon Sick Leave Administrative Rules Input from Associated General Contractors

Please accept this letter as a formal response to your request for comments on the Oregon sick leave (SB 454) administrative rules. These comments represent the primary interests of the members of the Associated General Contractors ("AGC") members.

1. AGC members will be impacted by the Oregon sick leave law and rules

Since 1922, AGC has served as the voice of the commercial construction industry. With over 800 member companies, AGC is the only trade association representing the full range of commercial construction from industrial to building, from heavy highway to multi-family residential. AGC members and their employees are working all over the State of Oregon. As a whole, AGC members are extremely concerned about how to administer the Oregon sick leave law, given the existence of previously formed and mandatory paid leave benefit programs already provided to workers through the prevailing wage fringe benefit system or existing collective bargaining agreements ("CBAs"). The below describes in further detail AGC's concerns and suggestions.

2. The legislature did not intend to burden employers already providing at least 40 hours of paid leave benefits to their employees

Representative Jessica Vega Pederson, chief sponsor of Senate Bill 454, stated, "Too many Oregon workers have to face that decision of staying home themselves with a sick child or losing a day of pay." THE OREGONIAN, Paid Sick Leave Bill Wins Final Approval from Oregon Legislature (June 12, 2015).

- Not true for workers who receive paid leave benefits that can be used for these reasons through the prevailing wage fringe benefit system.

- Not true for workers who receive paid leave benefits through their collectively bargained agreement.

Senator Elizabeth Steiner Hayward, sponsor of Senate Bill 454, told the House Interim Committee on Business and Labor, "Nobody should have to choose between their job and their health, or the health of family members." *Id.* "There's nothing that annoys me more than people coming to work with a hacking cough and fever. They're not really doing any work, they're just getting everyone else sick." THE OREGONIAN, Oregon lawmakers propose requirement that all businesses offer maximum of 7 days paid sick time (December 8, 2014).

- Again, not true for workers who receive paid leave benefits through the prevailing wage fringe benefit system or their collectively bargained agreement.

The legislature expressly recognized that there were employers who were currently doing the right thing by offering their workers paid leave so that they did not have to show up to work sick and do nothing, or choose between taking care of a sick child or losing a day of pay. For those employers, the legislature included Section 4(1) to Senate Bill 454 to ensure that those employers were not burdened or punished for already treating their employees well. Section 4(1) states provides the following:

> An employer with a sick leave policy, paid vacation policy, paid personal time off policy or other paid time off program that is *substantially equivalent to or more generous to the employee* than the minimum requirements of sections 2 to 16 of this 2015 Act shall be deemed to be in compliance with the requirements of section 2 to 16 of this 2015 Act.

(Emphasis supplied.) On January, 27, 2015, Senator Steiner Hayward, Senator Michael Dembrow and Representative Vega Pederson, the three chief sponsors of Senate Bill 454, met with the Oregon Business Association. In that meeting, Senator Vega Pederson stated, and both Senator Dembrow and Representative Hayward agreed, that "the PTO section" (i.e. what has now been finalized as Section 4(1)) would ensure that employers providing employees with 40 or more hours of paid leave to use for the reasons outlined in the law or any other reason would not need to do anything in response to this new law.

3. <u>The draft administrative rule that defines "substantially equivalent" conflicts with the legislature's intent</u>

The draft administrative rule on how to interpret "substantially equivalent" requires that even employers who are providing workers with paid leave that is greater than 40 hours per year will need to make costly adjustments to meet the requirements of the Oregon sick leave law. The draft rule regarding "substantial equivalency" states that a policy is "substantially equivalent,"

> when such a policy provides for the same amount of sick time hours an employee would earn under Chapter 653, Oregon Laws, 2015 and complies with all other minimum requirements, including provisions related to the *rate of accrual; the regular rate of pay;* qualifying absences; *conditions of notice and documentation*; and employment protections.

(Emphasis supplied.) Clearly the draft administrative rule, which necessitates a detailed review and almost inevitable revision of any sick leave policy, runs afoul of the legislature's intent.

4. The current definition of "substantially equivalent" will cause significant and costly consequences for AGC members already providing the substantially equivalent benefit to their workers

For employers who are already providing employees with the benefit of paid sick leave, those employers should not be tasked with hiring lawyers, re-drafting policies, re-training managers, accountants, and human resources, setting up additional notice and recordkeeping procedures, and so on in order to comply with a law intended to provide their employees with an already-provided-for benefit. This burden is particularly harsh on AGC members who are already bound by CBAs or the prevailing wage laws to provide these benefits and now will have to duplicate this cost and effort. These two scenarios are described in greater detail below.

A. Employers with CBAs that are not exempt under the law may still be substantially equivalent to the law based on providing at least 40 hours of paid leave to their employees

In the construction industry, work is often completed by utilizing the tools of collective bargaining agreements and project bids. Collective bargaining agreements are enforceable agreements between employers and employees that bind the parties to various agreed upon and negotiated working conditions. Likewise, the construction industry most often relies upon a system of collecting bids for construction projects, which are then evaluated, and any accepted bid becomes an enforceable and binding agreement to complete the particular project within the proposed constraints. Both collective bargaining agreements related to construction labor unions and accepted bids for work are binding on the parties and cannot be altered. In addition, both provide for work that can easily extend through January 1, 2016, when this law will take effect.

Nearly all (if not all) CBAs covering workers in this industry provide those workers with well over 40 hours of paid leave that can be used for any reason, including the reasons described in Senate Bill 454. However, almost none of these CBAs will be in compliance with the new law based on the proposed definition of "substantially equivalent." This is because most of these policies provide for accrual rates that are based on seniority, not on every 30 or 40 hours worked. These rates will have to be changed. In addition, each policy handles the incremental amount of leave that can be taken in different ways—some provide for as little as 30 minutes, while others require 4 hours or a full day. These are only a couple of the examples of specific nuanced

reasons why these policies will not be "substantially equivalent" to the law according to the proposed draft rules.

On the other hand, nearly all of these CBAs provide a greater benefit to their employees than the law will require. For example, most employees receive far more than 40 hours of paid time off. In addition, many of these agreements allow employees to be paid out at the end of the year for accrued, but unused leave. The law requires no credit for these types of additional benefits to employees (and these employers are not asking for one), but the legislature clearly intended for these greater benefits to meet the requirements of the law and not further burden employers with anything more.

Instead, employers are faced with a binding agreement to provide a benefit greater than this law will require *and* the necessity of providing a new, duplicative benefit at least while the CBA continues to be binding. The following example illustrates the point:

An employer offers employees under their CBA 100 hours of paid leave that can be used for any reason, including the specific qualifying reasons under the new law. However, the policy also provides that employees must take their first 4 hours of leave as unpaid and then anytime thereafter, up to 100 hours, the leave will be paid. Employees accrue leave at a rate of 8.33 hours at the end of each month, starting their first month of employment. They are eligible to use their accrued paid leave after they complete 120 calendar days of employment. Any unused paid leave can be paid out at the end of the year. The CBA is binding and will not be open for negotiations until August 1, 2017.

In this scenario, the employer will be forced to continue providing this significant and costly benefit to its employees *and* create a new policy that provides for 40 hours of paid leave that can be taken after 90 days of employment, in increments as small as 1 hour starting immediately, and accruing at a rate of 1 hour per 30 hours worked. While employees may initially be thrilled to now have a policy that provides them with 140 paid hours of leave (or 40% more paid time off), the employer must somehow absorb the cost with no opportunity to re-negotiate with the employees until August 1, 2016. With binding bids for work already accepted and work already underway, this leaves the employer with no wiggle room. Most importantly, this is not the position that the legislature intended to put employers in who were already doing the right thing. Instead, this employer provides a benefit that is "substantially equivalent" to the law and it should be permitted to continue to do so.

If employers are not permitted to provide this "substantially equivalent" benefit, then the law will be an illegal interference. The law requires already formed contracts to be materially altered, which is prohibited by the Constitution. The United States Constitution provides that "[n]o State shall […] pass any […] ex post facto law, or law impairing the obligation of contracts[.]" U.S. Const. Art. I, § 10. Article 1, § 21 of Oregon's Constitution contains a similar provision. Thus, attempts to dictate that previously formed and binding collective bargaining agreements and accepted bids be retroactively changed and impaired is prohibited.

These prohibitions on the impairment of contracts complement the underlying necessity in any construction bidding and collective bargaining context for both sides to be armed with the knowledge of what the financial factors are and for those factors to be fixed. It is financially impossible for businesses to properly compete with one another for construction jobs if laws, such as the Oregon sick leave law, can be enacted to retroactively change one of the financial factors taken into account in reaching a binding bid or collective bargaining agreement related to construction labor unions. Without certainty in knowing how much money a business will actually need to expend in order to complete a project, businesses in Oregon will suffer and look to other geographic areas to perform.

B. Employers who provide over 40 hours of paid leave through the prevailing wage fringe benefit system are providing paid leave that is substantially equivalent to the law

"Oregon's lawmakers designed prevailing wage rate laws ("PWR"), ORS 279C.800 *et seq*., to ensure that contractors compete on their ability to perform work competently and efficiently while maintaining community established compensation standards, to encourage the training and education of workers in industry skill standards and to encourage employers to use the funds required by the PWR law for fringe benefits for the actual purchase of such benefits." *See* BOLI's website, "Welcome to the Prevailing Wage Rate Unit," *available at* http: //www.oregon.gov/BOLIWHD/PWR/pages/index.aspx. ORS 279C.805.

Recognizing that employers who have created a fringe benefit plan to provide employees with paid leave certainly meets the legislature's intent to ensure at least 40 hours of paid leave to employees and the Oregon lawmakers' interest in creating a system where contractors compete on their ability to perform the work while encouraging employers to use funds required by the PWR law for fringe benefits for the actual purchase of such benefits.

C. The law upsets the competitive balance between union and non-union contractors

AGC members consist of substantial numbers of both union and non-union employers. Historically, the fringe benefit cash payment requirement was implemented to ensure that union contractors, who are subject to contractual obligations to contribute to retirement trust funds, paid time off trust funds, training trust funds, and the like, were not disadvantaged by the fact that open shop contractors do not have the obligation to make such contributions. Hence, a system was implemented whereby contractors on public works projects are required to pay their employees a cash-equivalent fringe benefit payment based on the individual worker's trade. However, where the employer elects to make payments into a "bona-fide" fringe benefit plan, the employer is entitled to take a credit against the mandatory cash fringe benefit payment to an individual employee. In other words, under prior law, a non-union employer with such "bona fide" fringe benefit programs was treated the same as a union contractor making contributions

into a union trust fund. The types of fringe benefit plans the legislature contemplated are enumerated at ORS 279C.800(1).

The mandatory sick leave law upsets this carefully crafted competitive balance between union and non-union contractors. Under the old system and employer could choose between a contribution to a "bona-fide" benefit plan or paying the fringe benefit amount calculated by BOLI as applicable to a given public improvement project. Now, because, as BOLI has interpreted it, the new law does not allow a credit against the cash fringe benefit payment for those contributions to a benefit plan that are "required by law," (ORS 279C.800(1)(b)) a contractor has to make that contribution *and* make the cash fringe benefit payment.[i] In other words, the legislation caused those responsible contractors who were already providing sick leave to their employees to essentially double the cost of that benefit because they no longer get the cash credit against the fringe payment.

To make matters worse, the law provides an exemption for employers, who are signatories to CBAs. Section 12(1)(a) of SB 454 specifically exempts the law from applicability to those employees "whose terms and conditions of employment are covered by a collective bargaining agreement." Thus, union employers are only subject to their existing obligations under a given CBA. If sick leave benefits are part of that CBA, the employer, because of this exemption from the "required by law" exception described above means those contractors do not have to make a cash fringe payment, as is the case with a non-union contractor. So, in essence, union contractors (notwithstanding the other significant impacts of the current proposed rules discussed elsewhere in this memorandum) have obtained a competitive advantage when bidding public improvement projects, because they do not have to pay twice, as is now the case for non-union contractors.

This is a very significant issue, because the essence of public contracting is that the public and the contracting community know and have faith that the system of awarding projects and paying monies from the public fisc is done in a fair manner that gives all contractors, whether union or non-union, a fundamentally equal opportunity to compete for work. The new law, if implemented as currently contemplated, will undermine that balance and consequently threatens to undermine public confidence in the system itself.

D. AGC members are asking for BOLI to interpret "substantially equivalent" in accordance with the legislature's intent

The current draft rules define "substantially equivalent" to mean, in essence, exactly the same in every possible way. This definition does not embrace the legislature's intent and does not fit the plain language definition of the terms "substantially equivalent."

As described above, the legislature intended that employers who were already providing employees with the ability to take paid leave so that they did not have to show up to work sick or could stay home to take care of a sick child or other qualifying reasons, met the intent of the law and would not be tasked with hiring a lawyer, revising their policies, creating an administrative

mechanism for recordkeeping and notice, etc. The legislature used the term "substantially equivalent" to address these employers.

The term "substantially equivalent" is borrowed from the agricultural industry. The term was first used in the early 1990s to deal with the desire to ensure that genetically modified foods needed to still be as safe as their traditional counterpart. *See* OECD, "Substantial Equivalent," available at https://stats.oecd.org/glossary/detail.asp?ID=2604. In that scenario, the genetically modified apple is obviously not identical to the non-genetically modified apple. However, both apples are safe for consumption, which is what really mattered in the early 1990s as this issue was arising. Here, the comparison is the same. The legislature intends for employers already providing 40 or more paid hours of leave to employees to not have to make additional changes. So long as that benefit is already being provided, the details of how the policy is made up is not what matters.

AGC members respectfully ask that BOLI issue a draft rule to define "substantially equivalent" that recognizes the legislature's intent. This definition should states that, "substantially equivalent" means that the policy provides employees with 40 or more hours of paid leave that can be used for any qualifying reason provided by law.

LFI:bn

---

[i] Note that the US Department of Labor specifically contemplates that a "bona-fide" fringe benefit plan that provides sick leave to an employee may be credited against fringe benefit payments. Moreover, the DOL contemplates that "Such payments required to fund Social Security, unemployment compensation and workers' compensation programs, as required by law, do not count as fringe benefits." USDOL Wage & Hour Division, "Davis Bacon and Related Acts Frequently Asked Questions, http://www.dol.gov/whd/programs/dbra/faqs/fringes.htm

In other words, tax and insurance programs paid into and administered by the government do not count as fringe benefits, but payments and plans administered privately do count. Except with respect to Oregon's new sick leave requirements.