May 17, 2022

Amy DeBisschop, Director
Division of Regulation, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Submitted through Federal e-Rulemaking Portal:
https://www.regulations.gov
Regulatory Information Number: RIN #1235-AA40

SUBJECT: ***Updating the Davis Bacon and Related Acts Regulations*, 87 Federal Register 15698 *et seq.*, March 18, 2022. RIN # 1235-AA40**

Dear Ms. DeBisschop and Department of Labor officials involved in the Davis Bacon rulemaking:

Please consider these comments submitted on behalf of the 2,600 specialty construction contracting employer members of the Mechanical Contractors Association of America (MCAA). A great many of MCAA member firms are classified as small businesses under the Small Business Administration's annual $ volume size standards for specialty construction firms (building equipment, hvac and plumbing contractors and specialty contractors – between $19.5 and $16.5 Million) – and are fully in support of the MCAA consensus position in favor of the proposed changes to the Davis Bacon regulations.

MCAA member firms compete vigorously for mechanical system, plumbing, fire sprinkler, hvac and refrigerant system installation new construction and existing facility maintenance and service contract awards in public and private sector markets across the country.

MCAA member firms deliver top-quality, high-tech services to their public and private sector clients in the industry through collective bargaining relationships maintained in multiemployer bargaining units across some 80 local affiliate MCAA chapters across the country, bargaining with local union affiliates of the national United Association of Plumbers and Pipefitters (UA) trade union.

In many areas, MCAA members also have multicraft bargaining relationships with other Building Trades unions to deliver top quality services in building, industrial and heavy industrial markets across the country for public and private sector clients.

MCAA member multiemployer bargaining unit (MEBU) collective bargaining agreements (CBAs) with UA local affiliates provide top-quality pay and benefits and training systems for some 350,000 highly skilled UA tradesmen and women in the US.

The MCAA and UA also jointly sponsor and administer the highly successful International Training Fund (ITF), a national educational training support fund that provides millions of dollars annually in grant funding to the over 200 local area jointly administered apprenticeship and journeymen training funds (JATCs). Those JATCs built, maintain, and continuously support that best trained pipe trades workforce in the industry.

The UA's apprenticeship standards were the first to be recognized by the Department of Labor under the Fitzgerald Act back in 1937. The ITF is a national cents per hour fund that bolsters the high-tech training and development systems that keep the UA workforce out in front of all the high-tech trends in the industry – from virtual design and construction means and methods and technologies, to prefabrication and modular construction, and building information and modeling technology, through state-of-the-art e-learning and distance training and virtual training systems and methods.

All of this description is by way of demonstrating that the MCAA and UA collective bargaining system is a custom fit for the workforce development and deployment demands of the construction industry with its unique market and jobsite performance and delivery systems and rapidly changing technology.

The balance and custom fit of the CBA systems and high workforce standards in the industry are the very aim and purpose of the Davis Bacon and DBRA policy – to respect the established workforce pay, benefits and workforce development system that built the essential high-skill base of the construction industry, and to ensure that the Federal government as market participant and as policy regulator does not diminish or otherwise impair established prevailing workforce standards. MCAA submits that this policy aim not only benefits covered workers, but also the industry's capacity to deliver top-quality services to its clients in the public (and private) sectors that also directly serves the best interest of taxpayers in many ways.

Put another way, the Federal prevailing wage policy – as restored to modern operation and efficacy by the instant regulatory proposal – is as sound today as ever since enactment in 1931. The aim is that the power of the Federal purse must remain a benign influence on established prevailing wage standards in the industry – whether the industry is in a cycle of hyper workforce

demand – as may well be the case now and in the immediate future – or in an economic downturn cycle – as when the policy was enacted.

The policy serves the interest of the construction workforce on covered projects receiving the prevailing wages and benefits (properly understood and defined as most common or prevalent – as the proposal establishes convincingly – not the "majority" rate) and established in the area of the projects as well as the proprietary interest of government agencies as market participants in receiving best value services in return for taxpayers' capital investments.

The taxpayers too benefit from high labor standards project performance, and best value returns to agency projects. Public and private sector construction purchasers have a proprietary interest in maintaining the construction industry's skill base to deliver projects successfully on an ongoing basis – as it's proven over the years in both public and private sector markets that low-road contracting practices lead inevitably to diminished workforce standards and consequent inferior project performance.

1. ***Overall MCAA conclusions of the proposed regulations*** – MCAA commends the Labor Department and the Wage and Hour Division for a meticulous, painstaking, and convincing analysis in its 107-page modernization of the very important national workforce policy underlying the Davis Bacon and Related Act statutory policy and regulatory procedures.

DoL hit the bullseye on modernization in its precise analytical reversal of the negative trend of accretion of regressive policy changes over the course of many years from the 1981-1982 rulemaking up until publication of this current modernization proposal.

2. ***MCAA regulatory review process*** – MCAA convened a Task Force of 7 member companies with substantial DB and DBRA experience, who reviewed the full 105-page proposal and met to discuss and review the matter on two separate occasions, and that group issued final review and comments on MCAA's overall response. In addition to that in-depth, real-world business perspective by specialty construction employers who operate in the Federal prevailing wage markets, as both prime contractors and subcontractors, on building, heavy industrial and covered residential projects, MCAA also conducted a nationwide Member survey on the issues.

That MCAA process yielded the comprehensive consensus views in support of the DoL modernization proposal, with some few qualifications and requests for refinement noted in the detailed specific item comments noted below. MCAA's consensus analysis also strongly supports DoL's regulatory economic impact analysis on the expected and predictable positive returns in competition for Federal projects and workforce performance on those projects directly applicable to this regulatory modernization.

MCAA contractors agree that these reforms will improve project performance and improve the quality of competition for covered projects.

Likewise, MCAA fully supports the bigger ticket regulatory changes: the return to the 3-part test for prevailing wage determinations (the 30% rule); the periodic updates of Blended Rate/Weighted Average wage determinations (with the ECI not CPI); the coverage of offsite fabrication (perhaps with some added qualification of "significant portion" of the work added); the crackdown on worker misclassification; the use of state and local wage determinations with statutory policy safeguards; and allowing blending of contiguous urban and rural market survey responses to reflect modern workforce mobility.

The MCAA survey also turned up a significant and related finding – that is, among those firms that said that they don't currently compete for prevailing wage work, low and out-of-date wage determinations were only a part of the problem, along with worker misclassification and other legal non-compliance problems. The survey revealed that there are several other procurement process problems keeping those respondents from entering the Federal market. Several of those nonparticipant firms cited lax prime contractor and subcontractor responsibility determination criteria and the lack of routine responsibility screening for major subcontractors, and other negative bidding practices (bid peddling and bid shopping among them), along with price-only selection methods that remain as serious impediments for them in deciding to compete for Federal projects.

The clear implication among those responses is that Davis Bacon modernization as proposed now is a big improvement in the Federal marketplace – but – more procurement reforms – some within the jurisdiction of the Labor Department directly – are needed to get that market up to leading-edge private sector market practices.

Following are MCAA Task Force and Member consensus comments on the significant elements of the proposed regulations by responsible and legally compliant union-signatory MCAA member firms from their experience as mechanical construction prime contracting or subcontracting firms on building, heavy industrial, and residential projects covered by the proposal.

3. ***Specific proposed measures to bring the wage determination process back around to support the original statutory intention and staunch the trend of regressive interpretations aimed at avoiding granting due weight to collective bargaining rates*** – MCAA's consensus view is in broad support of the restoration of the three-step wage determination process, the elimination of the ***Mistick Construction*** bar to due recognition of CBA rates, the elimination of the outdated urban/rural rate separation impediment to more market and workforce better reflect practices, and allowing (perhaps even routinely using) Federal project survey returns in building and residential project wage rate determinations.

MCAA fully supports the overall DoL analysis showing that all these impediments addressed in the proposed changes are based in one degree or another in a denial of the proper statutory policy of recognizing the most common or prevailing rate – not the artificially imposed "majority" rate (50%+) standard.

Moreover, the other aspects of these regressive impediments are based in one degree or another on a non-statutory aim, if not animus, of limiting the impact of CBA rates in the process – by giving frustrating effect to CBA variable pay elements, fearing "importation" of CBA rates in non-union areas, or fearing the compounding of the CBA rate influence and disallowing Federal projects in the building and residential survey process.

This intention to deny or limit the impact of CBA rates in the wage determination process in the ways outlined in this proposal is perforce a denial of the Davis Bacon policy altogether, and along with that too a denial of support for the National Labor Relations Act policy of encouraging collective bargaining.

Building Trades rates and high workforce standards are the bedrock of the skill base of the industry and are the long and hard work product of joint labor-management bargaining over high-standards pay and benefits compensation and workforce training. It cannot be acceptable Federal workforce policy under the Davis Bacon Act to avoid recognition of those high standards. DoL is to be commended for turning back the non-statutory and improper policy restrictions of previous Administrations in these respects.

Rates that are most common between 30 and 50 per cent of survey responses should be re-granted efficacy, and MCAA fully supports the return of the 30% rule.

Allowing blending of urban and rural contiguous county area survey returns is a due recognition of modern workforce conditions. Construction workers travel to perform their work, and union craft workers have the benefit of a nationwide referral system to fill market workforce demand on a national basis. The urban/rural market distinction is outdated now at best, if indeed it ever in fact had any merit. MCAA supports the proposal to allow blending of rates in contiguous labor market areas.

Likewise, allowing Federal project survey data in building and residential surveys is a due and full recognition of the statutory policy. At $217 Billion/per year, the Federal market is a very significant and prominent part of the overall market and the standards that it supports should be fully recognized – not just allowed weight in exceptional circumstances.

In addition to respecting the proper policy goals of the prevailing wage policy, allowing due weight to union or CBA rates also effectuates the DoL's stated economic rationale of the proposed changes. Allowing more projects to reflect higher wage scales may have a benign impact on

overall project costs, and the MCAA member survey reflects a consensus view that more and higher-performing firms will compete for those projects and that more highly compensated workers are more productive.

4. Allowing the administrative option for DoL to use state and local wage determinations – MCAA's consensus view is that the proposal to allow DoL the option to adopt state and local wage determinations where Federal policy standards are protected is a sound good-government policy. To the extent DoL can conserve its resources by relying on state and local wage determinations that are adopted with appropriate safeguards, then the better to effectuate the overall Davis Bacon policy more effectively elsewhere. MCAA supports the proposed change for those reasons and trusts that administrative discretion safeguards would prevent this process from lowering established rates.

5. Addressing trends toward offsite fabrication – MCAA's consensus view among our task force and the membership survey is that the proposal to require prevailing wage coverage for significant portions of the project fabricated at secondary site locations is a positive proposal to fully effectuate the goals of the statute and to protect established labor standards at the site of the work. Over the course of years, the statute has been granted flexibility in the courts to accommodate remote work at dedicated and adjacent facilities. This proposal is an application of those recognized principles to meet the statutory aim with respect to new technology and project performance practices. MCAA members have commented that the proposal maintains the proper standards at fabrication shops in the area of the project that use either field construction installation rates for the fab shop, or even slightly lower fab shop rates applicable in the area. In either case, the allowance of unregulated fabrication at non-prevailing rates for installation of entire project specific components of the project would undermine the workforce standards the prevailing wage policy is designed to protect.

(We are obliged to note a minor dissenting view that the off-site fabrication for signatory firms that import fabricated components of the project from remote low fab-shop-rate areas could conceivably be detrimental to the competitiveness for covered projects . In the main however, MCAA's consensus view recognizes that the proposal is aimed at maintaining area standards and competitive balance in the market. MCAA members also recognize that this is a difficult and complex proposed change that is necessary to keep the national prevailing wage policy in sync with developing field construction practices and means and methods and competitive practices in the industry.)

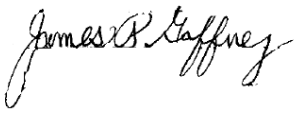
In addition, note that MCAA is fully in accord with the comments submitted by the United Association of Plumbers and Pipefitters on the issue of off-site prefabrication.

6. Emphasis that workers on the project – independent contractors or otherwise- are covered by the prevailing wage protections – It is indicative of the pervasiveness of the worker

misclassification cheating problem, that this proposed regulatory crackdown on worker misclassification abuses was the most highly rated of all the proposed changes in the MCAA member survey of the changes. Unfair competition by unscrupulous contractors, and worker misclassification in all its manifestations – Davis Bacon, wage-and-hour, labor, tax and benefits law, is the scourge of the industry for high-road legally compliant firms – in both public and private sector markets. MCAA supports this proposed change without reservation.

7. Other aspects of the proposal that MCAA addresses and supports – The proposed change to pay apprentices rates and ratios and practices established for registered program at the location of the project is a constructive change in the evaluation of the MCAA consensus. (The question of where the apprentice must actually be registered should be clarified in the final regulations.) MCAA also supports the explicit expansion of construction work definition to include wind turbines, solar panels, and EV charging stations – as provided in the infrastructure law. Similarly, MCAA's consensus position supports the full range of up-front and back-end enforcement improvements – expanded recordkeeping, flow-down notice requirements, updated WDs on new contract actions and extensions (with a specific right to a change order or equitable adjustment specified in the final regulations), expanded recordkeeping and whistleblower protections, and clarified debarment penalties. Again, these sets of proposal enforcement proposals were among the most approved of in the MCAA member survey, as the view in the consensus is that enhanced oversight, enforcement, and vulnerability to penalties may well drive some of the unfair competitors out of the market, allowing a more level playing field in competition for covered projects for high-road contractors.

Respectfully submitted,



Jim Gaffney, Chairman, MCAA Davis Bacon Review Task Force, MCAA Board Member, Chairman of the MCAA Government Affairs Committee, and CEO of Goshen Mechanical Contractors, Inc., West Chester, PA

Tim Brink, CEO, MCAA

Respondent Statement to DOL Notice of Proposed Rulemaking on Updating Davis-Bacon and Related Acts Regulations (RIN 1235-AA40) [1]

Michael Kelsay[2]

Gabriel Pleites[3]

Summary

On page 15776 of RIN 1235-AA40 Updating Davis-Bacon and Related Acts Regulations, the U.S. Department of Labor (DOL) stated that it "welcomes comments and data on the benefits of this proposed rulemaking". To this purpose, the present document examines ample scientific evidence related to the effects of Davis-Bacon and Related Acts Regulations (DBRA) on several labor market outcomes for the construction industry as a whole, its agents, and the U.S. taxpayers. The evidence shows that DBRA (or prevailing wage laws [PWLs]) benefit covered workers with higher wages, benefits, and improved social outcomes. Contractors also gain from the protection of PWLs through increased worker productivity, reduced workplace injuries and disabilities, and lower worker absenteeism. Furthermore, as a result of PWLs, the industry benefits from increased and more efficient apprenticeship training without higher average construction costs. Thus, the DOL claims on the benefits of adopting the proposal (available on page 15776), specifically those related to improved wages, increased productivity, and reduced absenteeism, are sustained by scientific evidence.

[1] This study was conducted with support from the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), the Signatory Wall and Ceiling Contractors Alliance (SWACCA), and The Association of Union Constructors (TAUC) through the Institute for Construction Economic Research, an independent, non-profit network of academic scholars. The study that follows is the independent work of the authors.

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Introduction

The Wage and Hour Division of the U.S. Department of Labor (DOL) has asked for public comment on various proposals to update and strengthen the regulations that implement the Davis-Bacon and related Acts (DBA).

The DBA establishes a wage floor (known as a "prevailing wage") that prevents contractors on federal and federally-assisted projects from driving down local area labor standards. Without the wage floor, cutthroat bidding practices result in a race to the bottom in wages and benefits for construction workers in an industry where wage theft is rampant. Previous administrations have chipped away at the regulatory system that is responsible for administrating the DBA which has resulted in lower wages for construction workers and unpoliced wage theft.

DOL's proposed rule will restore the DBA's promise to protect the hard-earned wages of construction workers and ensure that contractors compete for government contracts based on merit, rather than on who can exploit the cheapest labor. It will also restore the law to its intended purpose of ensuring prevailing wages reflect those wages actually paid to workers in the community and will protect construction workers from exploitation. In 1982, DOL changed the original regulatory definition of "prevailing wage" that had been in place almost 50 years. The result has been that some DBA rates are now based upon artificial weighted averages that do not resemble any actual wages paid to workers. Average rates paid to no one are not "prevailing" and watered-down wages not only hurt workers but make it difficult for high-road contractors to compete for government services.

DOL's proposal will restore the original method of determining prevailing wages (known as the "three-step process"), and ensure that DBA rates reflect the ***actual wages*** that most frequently appear in a county, rather than an arbitrary mathematically-contrived average.

Under the three-step process, the DOL calculates the prevailing wage for each job classification in a county, as follows:

1. The prevailing wage is the same wage paid to a majority of workers in a job classification.
2. If no single wage is paid to a majority of workers, then the wage rate becomes that which is paid to the greatest number of workers, provided it was paid to at least 30 percent of workers
3. If, however, no single wage is paid to at least 30% of workers, then the weighted average of all wages paid is deemed to be the prevailing wage.

The first two steps of the three-step process increase the likelihood that the prevailing wage will reflect the actual wages paid to workers in a county. This removes the need to calculate an artificial weighted average that does not reflect any specific wage that is paid to workers. The 1982 ruling distorted the definition of prevailing wage by eliminating the second step of the three-step process which resulted in the utilization of weighted averages that effectively reduced the prevailing wage rates.

The legislative history of the DBA and subsequent amendments show that Congress delegated to the Secretary of Labor the broadest definition imaginable to determine which rates prevail.[4] In fact, during a House floor debate, Rep. William Kopp (R-IA) emphasized that although "the term 'prevailing rate' has a vague and indefinite meaning…the power will be given…to the Secretary of Labor to determine what the prevailing rates are."[5]

In eliminating the three-step process in 1982, the DOL improperly relied on factors that Congress did not intend for it to consider: the maximization of resources at the expense of blue-collar workers in the construction industry. Legislative history shows that the Act's sole focus is on protecting construction workers from substandard wages.[6] In fact, during the 74th Congressional Hearing in 1931, Congressman Mead stated "[I]t is our chief concern to maintain the wages of our workers and to increase them wherever possible. . . for to fail in this regard would be…permitting a gross injustice to be perpetrated upon our citizens."[7]. Moreover, the preponderance of peer-reviewed studies conclude that prevailing wage laws have no significant effect on overall construction costs.

[4] Building Trades v. Donovan, 712 F.2d 611 D.C. Cir (1983).
[5] 74 Cong. H6516 (Feb. 28, 1931).
[6] See U.S. v. Binghamton Constr. Co., Inc., 347 U.S. 171 (1954).
[7] 71 Cong. Third Session. (Feb. 28, 1931).

In 2006, the definition of "prevailing wage" was further diminished when DOL's Administrative Review Board forced the agency to abandon its long-standing policy of treating variable rates paid to union-represented workers in the same classification as a single rate for purposes of calculating the prevailing wage[8]. This change has generated even more prevailing wage rates based on artificial weighted averages.

If adopted, DOL's proposal will rectify this problem by restoring its pre-2006 practice of treating negotiated wage differentials that form part of a worker's total compensation package as one single rate. In the construction industry, such privately-negotiated differentials include shift premiums for work performed during late or undesirable hours, hazard pay for workers exposed to extraordinary hazards on the job, call-back work, and zone pay for work in certain geographic locations. DOL's pre-2006 policy is consistent with the DBA's legislative history and DOL's longstanding preference for prevailing wages that reflect *actual* wages paid to workers instead of artificial averages. Moreover, the current policy has created a chilling effect with respect to negotiated wage differentials, resulting in artificially depressed wages. Contractors are reluctant to agree to such premiums out of concern that such differentials will produce Davis-Bacon rates based on artificial averages, making it difficult for them to compete for DBA projects. By restoring the pre-2006 policy, DOL will restore the economic freedom of workers and contractors to negotiate over wage differentials.

We support DOL's proposal to establish a process for regularly updating wage rates using DOL's Bureau of Labor Statistics' Employment Cost Index data. Although it is preferable for Davis-Bacon rates to reflect ***actual*** wages paid to workers in their communities, where a weighted average prevails it is critical that DOL does not allow those rates to become stagnant. Outdated wages not only undermine the purpose of the DBA to protect local area wages, but also discourage workers from entering the construction workforce. The ability to attract and recruit new entrants into the construction industry is especially important today given the unprecedented amount of infrastructure work that the Bipartisan Infrastructure Law will generate.[9] The construction industry will need to attract

[8] See Mistick Construction, ARB Case No. 04-051 (Mar. 31, 2006).
[9] Littlehale, Scott, "Rebuilding California: The Golden State's Housing Workforce Reckoning". SmartCitiesPrevail.org (2019). Available at: https://www.smartcitiesprevail.org/wp-content/uploads/2019/01/SCP_HousingReport.0118_2.pdf

thousands of workers to meet the demand for labor, but it will not be able to do so by offering artificially low wages. In a 2020 survey of construction firms across the country, over 70% of respondents reported that they anticipate a labor shortage to be the biggest hurdle in coming years[10]. It is therefore critical that DOL update its current policy for determining wage rates to ensure that such rates keep up with the times.

DOL's proposal to strengthen enforcement on Davis-Bacon projects is long overdue. The construction industry is a sector in which wage and hour requirements are too often ignored. According to DOL data, the construction industry consistently ranks among the top three industries for noncompliance.[11] Because construction bids are typically awarded to the lowest bidder, cutthroat competition in the sector leads to razor thin profit margins and a race to the bottom in labor practices. Many contractors have responded to such competitive pressures by minimizing costs using illegal means. As a result, the construction industry is awash with illegal labor practices, including wage theft, the exploitation of undocumented workers, cash-only payments, employee misclassification, tax fraud and unsafe job sites. Studies show that by ignoring federal and state labor laws, low-road employers are able to reduce costs (although the effects of this on productivity are not considered).[12] As a result, the modus operandi in the construction sector has become one of brazen lawbreaking. Indeed, some observers suggest that certain sectors of the construction industry are akin to the "Wild West" in terms of lawbreaking.[13]

Enforcement efforts in the construction industry are further complicated by the fact that many aggrieved workers are undocumented immigrants. Undocumented workers are easy prey for low-road contractors because of their reluctance to report illegal activity to government officials for fear of deportation. While some may turn to local unions and other workers' rights organizations, many labor violations simply go unreported.

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[10] Associated General Contractors of America, 2020 Construction Outlook Survey. https://www.agc.org/sites/default/files/Files/Communications/2020_Outlook_Survey_National.pdf

[11] U.S. DOL Website, WHD by the Numbers 2021, https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

[12] National Employment Law Project, *Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries* (July 22, 2015); Russell Ormiston, Dale Belman, Julie Brockman, & Matt Hinkel, Rebuilding Residential Construction, in Creating Good Jobs: An Industry-Based Strategy 75, 81 & 84 (Paul Osterman ed., MIT Press 2020).

[13]Tom Juravich, Essie Ablavsky, & Jake Williams, *The Epidemic of Wage Theft in Residential Construction in Massachusetts*, UMass-Amherst Labor Center Working Paper Series, (May 2015), https://www.umass.edu/lrrc/research/working-papers-series/wage-theft (last visited Apr. 15, 2022).

It is critically important that DOL implement front-end measures to help mitigate the risk of noncompliance and strengthen back-end enforcement. We fully support front-end enforcement measures, including DOL's proposal requiring that covered contracts include a provision expressly stating that independent contractors are also entitled to the prevailing wage, strengthened record-keeping requirements, and clarification that Davis-Bacon requirements apply by operation of law and are binding on contractors regardless of whether contracting agencies erroneously omit such contractual requirements.

DOL's back-end enforcement proposals are especially important, given that a number of courts have suggested that workers on Davis-Bacon jobs are not entitled to take their wage theft claims straight to court and that their only recourse is DOL's administrative complaint process. We therefore support DOL's proposal to protect workers from retaliation, strengthen procedures for cross-withholding to ensure recovery of back wages, and to adopt a strong and uniform standard for contractor debarment.

Wages

Prevailing wage laws (PWLs) help maintain living standards of blue-collar workers, ensuring that their hard, hazardous labor is rewarded with pay that keeps them in the middle-class. Enforcing the "three-step rule" will lead to sustained higher wage rates for construction workers. All of the evidence to date shows that wages in construction increase after enacting state PWLs, decrease following repeals, and these effects continue over time. Thus, it follows that an enforced DBRA such as the one proposed by the DOL will lead to higher wages.

Philips et al (1995) found that repeals in nine states in the 1970s and 1980s were associated annually with a lowering of construction wages.[14] Kessler and Katz (2001) compared relative wages for blue-collar construction and non-construction workers on repeal and non-repeal states using data from the Current Population Survey (CPS; for years 1977 to 1993) and the Decennial Census (for years 1970, 1980, and 1990). They found that repeals decrease the wages of construction workers by 2% to 4%, relative to non-construction workers. Furthermore, repeals hurt union workers by reducing their wage

[14] Philips, Mangum, Waitzman, and Yeagle, "Losing Ground: Lessons from the Repeal of Nine 'Little Davis-Bacon' Acts" (The University of Utah, Salt Lake City, February 1995).

premium over non-union workers by 5.9%, but this grows to a 9.8% after three years of the repeal and 11.2% following five or more years after repeal.[15] This is important since it is well-known within the industry that union workers are better trained, and higher union wages provides an incentive for a new generation of workers to begin a career in construction.

Clark (2005) surveyed primary contractors on 345 public construction projects in Kentucky that had activity in either 1999 or 2000 and obtained wages for the same individual workers under prevailing wage projects as well as under non-prevailing wage projects, finding that work covered by the legislation received an additional average remuneration of $3.68 or more per hour.[16] The greatest strength of Clark's piece is that he was able to control for differences in the skill levels of workers. However, as Duncan and Ormiston (2018) argue, Clark is unable to account for differences in intensity and productivity that may arise under the two different labor conditions.[17]

Using CPS data from 1979 to 2002, Harris, Mukhopadhyay, and Wiseman (2017) estimated a fixed-effects model for the mountain states in the US discovering that, on average, repeals of prevailing wage laws decreased wages by 4.4% in a state 10 years after the repeal.[18]

Benefits

The effect of prevailing wage laws on the living standards of construction workers is also channeled through legally required and non-legally required benefits. The "three-step" process will also lead to higher benefits for construction workers, and the literature supports the DOL's claim on page 15705 that "Overall under the estimate, the percentage of fringe benefit rates based on collective bargaining agreements would increase from 25

[15] Daniel P. Kessler and Lawrence F. Katz, "Prevailing Wage Laws and Construction Labor Markets," ILR Review 54, no. 2 (January 2001): 259–74, https://doi.org/10.1177/001979390105400204.
[16] Mike Clark, "The Effects of Prevailing Wage Laws: A Comparison of Individual Workers' Wages Earned on and off Prevailing Wage Construction Projects," Journal of Labor Research 26, no. 4 (2005): 725–37.
[17] Kevin Duncan and Russell Ormiston, "What Does the Research Tell Us about Prevailing Wage Laws?", Labor Studies Journal, April 6, 2018, 0160449X18766398, https://doi.org/10.1177/0160449X18766398.
[18] Thomas Russell Harris, Sankar Mukhopadhyay, and Nathan Wiseman, "An Application of Difference-in-Difference-Difference Model: Effects of Prevailing Wage Legislation in Mountain States of the United States," Public Works Management & Policy 22, no. 2 (April 1, 2017): 165–78, https://doi.org/10.1177/1087724X16665369.

percent to 34 percent. The percentage of fringe benefit rates not based on collective bargaining rates would increase from 3 percent to 7 percent"

Petersen (2000) used the Form 5500 Series, the Census of Construction Industries (CCI), the Current Employment (CES) Statistics, and the CPS, to estimate a fixed-effects model, finding that states with prevailing wage legislation had higher total compensation (12%), wages (11%), benefits (61%), and pension benefits (105%) when compared to states which repealed[19]. Price (2005) used CPS data from 1977 to 2002 and found that state prevailing wage laws repeals decreased the average hourly wages of construction workers as well as pension and health insurance provided by the employer.[20] Finally, Fenn et al (2018) used quinquennial data from the Economic Census of Construction from 1972 to 2012 to show that repeals led to a decrease in construction blue-collar income of 1.9% to 4.2%. They also found that repeals were associated with a decrease in average legally-required benefits of 3.8% to 10.1% for blue and white-collar workers, as well as a decrease in average voluntary benefits (including apprenticeship training) by 11.2% to 16.0%.[21]

Poverty reduction and other social outcomes.

Construction work requires enduring hazardous working conditions, exposure to chemicals, and working outside. According to the Occupational Safety & Health Administration, about 20% of worker fatalities in the private industry came from construction in 2019.[22] Unfortunately, being a hard-worker in a risky industry does not warrant that the worker's family will remain above poverty. Because of this, it is important to consider what the evidence shows could be the consequence of the increased wages and benefits for construction workers following the adoption of the DOL's proposal. The literature on this is quite clear: Higher construction wages and benefits translate to a

[19] Jeffrey S. Petersen, "Health Care and Pension Benefits for Construction Workers: The Role of Prevailing Wage Laws Health Care and Pension Benefits for Construction Workers," Industrial Relations: A Journal of Economy and Society 39, no. 2 (2000): 246–64, https://doi.org/10.1111/0019-8676.00165.
[20] Mark Price, "State Prevailing Wage Laws and Construction Labor Markets" (Doctoral dissertation, Salt Lake City, The University of Utah, 2005).
[21] Ari Fenn, Zhi Li, Gabriel Pleites, Chimedlkham Zorigtbaatar, and Peter Philips. "The Effect of Prevailing Wage Repeals on Construction Income and Benefits," Public Works Management & Policy 23, no. 4 (October 1, 2018): 346–64, https://doi.org/10.1177/1087724X18758340.
[22] See Occupational Safety & Health Administration (2022) Available at: https://www.osha.gov/data/commonstats

reduction in poverty, less dependence in public assistance, increased access to health insurance, greater chance of home ownership, and increased tax contributions.

Manzo, Lantsburg, and Duncan (2016) showed that the absence of prevailing wage statutes increases the probability that construction workers will earn incomes below the poverty level, will become more dependent on public assistance programs, and will not have health and insurance benefits.[23] In addition, prevailing wage statutes prevent leakages of construction funds, jobs, income, and spending in the local economy since it is known within the industry that projects covered by PWLs are more likely to be completed by local contractors and local workers.

Weakening or repealing prevailing wages does not reduce construction costs but increases poverty and decreases economic activity. The results of their study showed that, because of higher incomes, blue-collar workers in the 25 states with average or strong prevailing wage statues contribute $3,289 per year in federal income taxes; in those states with weak or no prevailing wage statute, they only contribute $1,964 in federal taxes. The authors also found that only 9.4% of construction workers in states with average/strong prevailing wage statutes earn incomes below the poverty level while 15.2% of these same workers in states with weak or no prevailing wage laws earn below poverty-level incomes. Manzo, Lantsburg and Duncan also found that only 5.1% of blue-collar construction workers receive aid from the Supplemental Nutrition Assistance Program (SNAP) in states with average/strong prevailing wage laws while 9.2% of construction workers in states with weak or no wage policies receive SNAP. Additionally, they found 12.2% of construction workers in states with at least average laws receive Earned Income Tax Credits (EITC) while 15.3% of counterparts in states with less than average prevailing wage laws qualify for these credits.

Opponents of prevailing wage laws believe that the policy leads to racial discrimination in the construction industry. However, this claim is unfounded. Belman (2005) using BLS data shows that presence of PWLs is not associated with the racial composition of workers in construction once racial composition of labor supply in

[23] Manzo, Landsberg, and Duncan. The Economic, Fiscal, and Social Impacts of State Prevailing Laws: Choosing the High Road and the Low Road in the Construction Industry. (2016)

construction are taken into account.[24] Using Census data, Azari-Rad and Philips (2003) have similar results, and affirm that the proportion of African Americans in construction across states is not driven on whether the state is covered by prevailing wage laws, but on racial differences across states. [25]

Prevailing wage statutes establish a wage floor for skilled construction labor on public construction projects. Prevailing wage statutes are linked to higher incomes and provide a ladder to the middle class. Manzo, Gigstad, and Bruno (2020) examined the link between prevailing wage statutes, housing wealth, and property tax revenues for these blue-collar construction workers and the communities they live in and to which they contribute.[26] Among their most important findings were (1) the average home value for construction workers in states with prevailing wage laws was $235,515 compared to only $166,200 in states without prevailing wage laws, (2) prevailing wage laws significantly impacts African-American construction workers by increasing their homeownership rate by 7.52 percent and increasing their housing wealth by 18.26 percent. Although the authors did not find a statistically significant on the probability that Latino construction workers own homes, the study found that prevailing wage laws are associated with an 18.8 percent increase in housing wealth for people of color.

Apprenticeship training

Construction, and particularly skilled trade workers who complete apprenticeship training programs, has historically offered a pathway into the middle class. Reed, et al. (2012) found that workers in a registered apprenticeship program earn, on average, $123,906 more in compensation over their career than nonparticipants. As construction

[24] Dale Belman, "Prevailing Wage Laws, Unions and Minority Employment in Construction.," in Azari-Rad, P. Philips and M. Prus, "The Economics of Prevailing Wage Laws" (Hampshire, England: Ashgate, 2005), 101–22.
[25] Hamid Azari-Rad and Peter Philips, "Race and Prevailing Wage Laws in the Construction Industry: Comment on Thieblot," Journal of Labor Research 24, no. 1 (Winter 2003): 161–168.
[26] Manzo IV, Gigstad, Jill and Robert Bruno. Prevailing Wages and the American Dream. Impacts on Homeownership, Housing Wealth, and Property Tax Revenues. Illinois Economic Policy Institute. https://faircontracting.org/wp-content/uploads/2020/02/ilepi-pmcr-prevailing-wage-the-american-dream-final-1.pdf

workers earn more income and are able to have home ownership, they contribute more in taxes that strengthen communities.[27]

As a result, the literature suggests that the DOL's proposal of only considering lower wage rates for apprentices if they are part of a "program registered by a recognized [State Apprenticeship Agency (SAA)]"[28] or else "be paid the full prevailing wage"[29], along with other proposed improvements, are likely to improve the enrolment of apprentices in construction and increase the efficiency of the training programs.

This is because the evidence shows that PWLs (and their considerations regarding apprentices) lead to these outcomes. Bilginsoy (2005) examined data from the Apprenticeship Information Management Systems (AIMS) that tracks apprentices since they begin training until they complete or cancel their apprenticeship. Comparing states with and without PWLs, Bilginsoy found that states with PWLs have more apprentices, even after considering size differences between states. Furthermore, apprenticeship enrolment increases even more in states with "stronger" PWLs. Bilginsoy also discovered that apprentices graduate more slowly in states without PWLs, suggesting that states with PWLs are more efficient at training workers, although it is unclear if this is because of the policy, or because there is an association between having PWLs and union density, and it is unions who are more efficient at training workers.[30]

Workplace injuries

With increased training, PWLs also reduce injury and disability rates in the construction industry of the states covered by the policy. In fostering the enrollment of workers in apprenticeship programs, the DOL's proposal will lead to reduced workplace injuries, disabilities and fatalities. The evidence shows that states covered by PWLs have lower injury and disability rates. Using state-level data from the 1976-99 Survey of Occupational Injuries and Illnesses from the BLS, and controlling for unemployment and

[27] Reed, Debbie, Albert Yung-Hsu Liu, Rebecca Kleinman, Annalisa Mastri, Davin Reed, Samina Sattar, and Jessica Ziegler. An effectiveness assessment and cost-benefit analysis of registered apprenticeship in 10 states. Mathematica Policy Research, 2012.
[28] Page 15737, brackets are ours.
[29] Page 15737.
[30] Cihan Bilginsoy, "Wage Regulation and Training: The Impact of State Prevailing Wage Laws on Apprenticeship," in Azari-Rad, P. Philips and M. Prus, "The Economics of Prevailing Wage Laws" (Hampshire, England: Ashgate, 2005), 149–68.

fixed state differences, Azari-Rad (2005) found that states with prevailing wage laws had lower injury rates for different severity measurements not encompassing fatalities[31]. Philips (2014) noted that construction workers in state without PWLs report 12% more disabilities than workers in states covered by PWLs.[32] Using state-level data from the BLS on injury rates of seven construction subindustries from 1976 to 2016, Li et al (2019) demonstrate that repealing state PWLs increase injury rates from 11.6% to 13.1% as the seriousness of the injury increases (measured by the injury rate), with disabilities increasing by up to 8.2%[33].

Worker Productivity

Higher income and benefits are linked with higher productivity and better paid workers do not necessarily mean more costly workers. Labor productivity is a critical component to the long run economic health of the United States. Given the size of the construction industry in the United States, productivity changes within the construction sector have large direct impacts on the national productivity and economic well-being of the United States. In December 2021, total construction spending accounted for 8.5% of the Real Gross Domestic Product in the United States.[34,35]

Critics offer a number of arguments against prevailing wage regulations. A crucial assumption of the critics of prevailing wage regulations is that prevailing wage laws increase the costs of public construction due the impact of higher wage rates on total construction costs. Implicit in that assumption is that productivity remains constant with lower wage payments to construction workers and coworkers with less safety training. Yet, the empirical evidence clearly suggests otherwise. Close examination of the wage component in overall costs of construction has shown that wages have had a decreasing

[31] Hamid Azari-Rad, "Prevailing Wage Laws and Injury Rates in Construction," in Azari-Rad, P. Philips and M. Prus, "The Economics of Prevailing Wage Laws" (Hampshire, England: Ashgate, 2005), 169–87.
[32] Peter Philips, "Kentucky's Prevailing Wage Law: An Economic Impact Analysis," January 2014, 57.
[33] Zhi Li, Gabriel Pleites, Chimedlkham Zorigtbaatar, Ari Fenn, and Peter Philips. "The Effect of Prevailing Wage Law Repeals and Enactments on Injuries and Disabilities in the Construction Industry," Public Works Management & Policy, January 13, 2019, 1087724X18822600, https://doi.org/10.1177/1087724X18822600.
[34]U.S. Census Bureau. Annual Rate for Total Construction, December 2021. Series Report – 202205011514. http://fred.stlouisfed.org/series/GDP1.
[35] St. Louis Federal Reserve Bank. http://fredhelp.stlouisfed.org. Real Gross Domestic Product – December, 3032. Chained 2012 Dollars.

impact on the total costs of construction. Labor costs account for far less than a third of total construction costs and that percent has been decreasing over time. According to the Census of Construction, labor costs including voluntary benefits and required fringe benefits paid to all employees in the construction sector were 26.2% of total costs in 1987, 25.5% in 2002, 24.6% in 2007, and 22.8% in 2012.

In a study of the productivity of unionized workers, Allen (1984) showed that unionized labor productivity is 17%-52% higher than non-union labor.[36] In addition, the higher wage rates that prevail may induce contractors to substitute capital and other inputs for labor; this would further mitigate the effect of higher labor costs on total construction costs. In a study of unionization and productivity in office buildings and school construction, Allen (1986) found that union productivity in office building projects was at least 30% higher than non-union productivity and from 0%-20% in school projects.[37] In a study by Belman (1992), the union productivity effect was between 17%-38%. In a report by Phillips (2015), he showed that states that have a prevailing wage law have 13%-15% higher value added per worker.

Analyzing of the North Central States region, Kelsay (2016) found that the eight states that have a prevailing wage law have 16.2% higher value added per worker than do the four non-prevailing wage states.[38] Phillips (2016) examined the productivity effect of better wages and benefits that are associated with common construction wage laws in Indiana by an examination of the difference in value added per worker compared to states without prevailing wage laws. The value added per worker is 14% higher than in states without a prevailing wage law. For public work projects, the value added per worker is 21% higher than in non-prevailing wage states.[39]

The Construction Labor Research Council has conducted two major studies on wages, productivity, and highway construction costs in the fifty states. The first study was an analysis of highway construction costs for the period 1980-1993 for all fifty states. The

[36] Allen, Steven G. "Unionized Construction Workers are More Productive." Quarterly Journal of Economics, Vol. 99, No. 2 (May, 19843) https://econpapers.repec.org/article/oupqjecon/v_3a99_3ay_3a1984_3ai_3a2_3ap_3a251-274.htm.
[37] Allen, Steven G. "Unionization and Productivity in Office Buildings and School Construction. Sage Journals. https://doi.org/10.1177/001979398603900202. 1986
[38] Kelsay, Michael. *The Adverse Impact of Real of Prevailing Wage in Missouri.* 2016.
[39] Philips, Peter. *Indiana's Common Construction Wage Law.* January 2015.

updated analysis was conducted for the period 1994-2002.[40] Critics of prevailing wage legislation assume that a reduction in wages in the construction sector has no impact on the number of hours of labor to be employed and that the productivity of labor is constant. However, empirical evidence clearly indicate that the payment of higher wages attracts a more highly skilled labor force that is more productive. The increase in productivity may more than offset the higher wage rates paid. Their report showed that higher wage rates resulted in lower highway costs per mile. For example, between 1980 and 1993, the study showed that the total cost per mile in high-wage-states was 11% lower than the per mile cost in low-wage states even though the wage rate in high-wage states was more than double the wage rate in the lower wage states ($18.39 versus $8.16). The study further showed that labor-hours per mile were 42% less in high-wage states, implying high-wage workers were more productive.[41]

All of this evidence points to the fact that the DOL's claim on page 15776 that "higher wages could lead to benefits such as … increased productivity" are true. All of the evidence above shows that in the construction industry, higher wages are associated with more productive workers.

Bid competition

One may make the argument that PWLs could affect construction costs if the advent of the legislation led to a decrease in the number of bidders or increased the project bids. However, this is not the case.

In an examination of 497 bids on highway construction projects in Colorado, Duncan (2015) found that the level of bid competition did not differ between federally funded projects and state-funded projects.[42] Onsarigo, Duncan, and Atalah (2020) examined the impact of federal prevailing wage laws on construction costs and bid

[40] Construction Labor Research Council. The Impact of Wages on Highway Construction Costs. 2004. http://niabuild.org/WageStudybooklet.pdf

[41] The low wage rate states were Alabama, Florida, Georgia, Texas, and Virginia. The high wage rate states were California, Illinois, Missouri, New York, Ohio, and Pennsylvania. All the low wage states, except Texas, never had a prevailing wage statute or repealed the statute prior to the data collection period from 1980 to 1993. All the high-wage-states have a prevailing wage statute.

[42] Kevin Duncan, "The Effect of Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations on Highway Maintenance Costs," ILR Review 68, no. 1 (January 2015): 212–37, https://doi.org/10.1177/0019793914546304.

competition in Ohio finding that prevailing wage laws do not have a statistically significant impact on building costs or bid competition.[43] In another study, Kuo-Liang, Philips, and Kim (2012) found no evidence that prevailing wage policies impacted the number of bidders.[44]

Atalah (2013) examined whether there was a union vs. non-union difference, in Ohio.[45] The author examined 8,093 bids received from the years 2000-2007 for school construction, finding that the average bid per square feet for the non-union contractors ($20.49/SF) was greater than the bids for union contractors ($19.22/SF), concluding that there was no statistical difference between union and non-union bids after accounting for sample size.

In a study examining the impact of prevailing wage laws and bid competition, the authors found that prevailing wage laws have no statistically significant impact on bid competition (Onsarigo, Duncan and Atalah, 2020).[46] Manzo, et al. (2020) found that repeal of the prevailing wage law in Wisconsin did not increase competition on highway projects.[47] Prior to repeal, the authors found that the average number of bids per project was 3.48, with a decrease post-repeal to 2.92. Empirical evidence from Manzo and Kelsay (2019) examining construction costs in West Virginia suggests that repeal has led to more out-of-state securing work paid for by West Virginia taxpayers.[48] In the same study, the authors found that, after repeal of the state's prevailing wage law, seven of 22 school construction projects using state funding were awarded to union contractors and 15 were awarded to nonunion contractors. Of the known subcontractors on each of these projects,

[43] Lamackc Onsarigo, Kevin Duncan, and Alan Atalah. "The Effect if Prevailing Wage on Building Costs, Bid Competition, and Bidder Behavior: Evidence from Ohio School Construction". Construction Management and Economics, 2020, Vol 38, Issue 10: 917-933.
[44] Kim, Jae-Whan, Kuo-Liang, Change, and Peter Philips. The Effect of Prevailing Wage Regulations on Contractor Bid Participation and Behavior: A comparison of Palo Alto, California with Four Nearby Prevailing Wage Municipalities. Industrial Relations: A Journal of Economics and Society, Vol. 51, Issue 4, pp.87f4-891, 2012. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2148260
[45] Atalah, Alan. Impact of Prevailing Wages on the Costs of Various Construction Trades. Journal of Civil Engineering and Architecture. ISSN 1934-7349, USA, June 2013, Volume 7, No. 6 (Serial No. 671), pp. 670-676.
[46] Onsarigo, Lameck, Kevin Duncan, and Alan Atalah. The Effect of Prevailing Wages on Building Costs, Bid Competition, and Bidder Behavior: Evidence from Ohio School Construction. 2020.
[47] Manzo IV, Frank, Kevin Duncan, Jill Gigstad, and Nathaniel Goodell. The Effects of Repealing Prevailing Wage in Wisconsin. Impacts on Ten Construction Market. 2020.
[48] Kelsay, Michael P. and Frank Manzo IV. The Impact of Repealing West Virginia's Prevailing Law: Economic Effects on the Construction Industry and Fiscal Effects on School Construction Costs. (2019) https://faircontracting.org/wp-content/uploads/2019/05/THE-IMPACT-OF.pdf

only one out of 12 subcontractors on the union projects were from another state (8.3 percent). In comparison, seven of the 38 subcontractors on nonunion projects were from out of state (18.4 percent). If repeal of prevailing wage law increased nonunion contractors' market share, a consequence is that a larger share of out-of-state firms came to West Virginia, performing work on taxpayer-funded school projects, and taking their earnings back with them to their home states upon project completion. These findings are supported in a recent study by (Manzo & Duncan, 2018b) in Minnesota, where the authors found that local contractors accounted for a 10 percent higher market share when prevailing wages were included on public school construction projects[49].

Worker absenteeism

Higher wages are linked with lower absenteeism. The evidence is clear about the fact that as PWLs increase construction wages, these in turn lead to increases in productivity and also, reduced worker absenteeism and turnover, often resulting in lower construction costs. Thus, the DOL's claim on page 15776 that "increased productivity could occur through numerous channels, such as employee morale, level of effort, and reduced absenteeism" rings with the scientific findings.

Examining absenteeism in the Canadian industrial construction sector, Sichani, Lee and Fayek (2011) analyzed the adverse impact of absenteeism in the industrial construction sector.[50] They found that the adverse impacts of absenteeism include, but are not limited to, (1) an increase in manpower to meet the needs of the project, (2) the loss of revenue in not meeting construction project schedules, (3) inefficient use of capital investments. (4) interruption of workflow, and (5) increased overtime. There have been a number of empirical studies that have shown there is a negative impact on productivity as absenteeism increases. Studying wages and absences using the Quality of Employment Survey and the Current Population Survey, Allen (1984) found that a 10-percentage point increase in the absence rate was associated with a 2.1 percent decrease in the wage rate. In the production

[49] Frank Manzo and Kevin Duncan. An Examination of Minnesota's Prevailing Wage Law. Effects on Costs, Training, and Economic Development. July, 2018.

[50] Sichani, Mahdi Sichani, Lee, SangHyun, and Amish Robinson Fayek. Understanding Construction workforce absenteeism in Industrial Construction. Canadian Journal of Civil Engineering. 8 August 2011. https://doi.org/10.1139/l11-052

function used by Allen in his analysis, he found that the elasticity of the absence rate was -0.015. This implies that an increase in the absent rate from 10% to 20% decreased the output per hour by one percent.[51]

Construction costs[52]

Increased safety in the workplace, higher productivity, unchanged bid competition, and lower absenteeism, could justify higher wages and benefits. The evidence for the U.S. construction industry shows that the level of productivity augment following increases in the wages and benefits received by workers, and other effects from PWLs such as reduced injury rates and more efficient apprenticeship training could also lead to productivity improvements. Because of this, reducing the analysis of construction costs to a simple "wage before" vs. "wage now" differential is a critical flaw.

Thus, although the DOL proposal will likely increase wages and benefits for construction workers, they will not necessarily lead to higher construction costs after considering productivity increases. As mentioned by the literature on page 15777 of the proposal, and other empirical evidence, PWLs have no impact on total construction costs (Duncan & Ormiston, 2017; Mahalia, 2008, and Kelsay and Manzo, 2019).[53,54,55]

Kelsay and Manzo (2019) reviewed 28 research papers that analyzed the impact of prevailing wage laws on school construction; Of the 20 studies reviewed that utilized regression analysis or other advanced econometric techniques, 19 found no statistical impact of prevailing wage standards on school construction costs.[56] After an examination of peer-reviewed research, Kelsay and Manzo found that when wages in construction

[51] Allen, Steven G. How Much Does Absenteeism Cost? The Journal of Human Resources. Summer, 1983, Vol 18, No. 3 (Summer, 1983), pp. 379-393.
[52] Although we will only include the school construction sector in this section, throughout this document we have pointed out to other cost studies that are not about school construction.
[53] Duncan, Kevin and Russell Ormiston. Prevailing Wage Law: What Do We Know. Institute for Construction Economic Research. http://iceres.org/wp-content/uploads/2014/10/prevailing-wage-review-duncan-ormiston.pdf
[54] Mahalia, Nooshin. Prevailing Wages and Government Contracting Costs. Economic Policy Institute. Briefing Paper No. 215. July 2008. https://www.epi.org/publication/bp215/
[55] Kelsay, Michael P. and Frank Manzo IV. The Impact of Repealing West Virginia's Prevailing Law: Economic Effects on the Construction Industry and Fiscal Effects on School Construction Costs. https://faircontracting.org/wp-content/uploads/2019/05/THE-IMPACT-OF.pdf
[56] Studies that rely on the "wage differential" method—simply comparing prevailing wage rates to some arbitrary lower wage as a means of estimating the cost effects of the law--are not considered viable contributions to the literature given the flaws in the approach as identified by Duncan and Ormiston (2018).

increase, contractors respond by using more capital equipment and by hiring skilled workers in place of their less productive counterparts (Balistreri, et al, 2003; Blankenan & Cross, 2011).[57]

As examples of studies on school construction costs, Azari-Rad, Philips, and Prus (2002) used data from F.W. Dodge on accepted bid prices for new schools built in the US from 1991 to 1999 but did not find statistically significant cost effects.[58] In a follow up study in 2003, these authors find that differences in the strength of PWLs regulations across states are virtually insignificant on school construction costs. With the same database, but covering the years from 1993 to 2002, Kaboub and Kelsay (2014) compared mean square foot costs across different types of construction in states with and without PWLs, finding that there was no statistically significant difference in the mean square foot costs of construction.[59]

Using bid data in 14 Northern Indiana counties, Manzo and Duncan (2018a) found that repealing Indiana's prevailing wage law had no statistical impact on the average cost of public-school projects in Northern Indiana.[60] Duncan and Waddoups (2020) discovered that reducing Nevada's prevailing wage rates on education-related construction in 2015 to 90% of the applicable rate for other state-funded construction had no statistically significant effect on school construction costs. In fact, reduced bidding and contractor shifts to other projects led to a 20% increase of bid costs.[61]

Duncan (2018) examined side-by-side bids for school construction costs in Maryland, where contractors were asked to submit two bids for the same project: one with prevailing wage rates and one without prevailing wage rates. Utilizing fixed effects

[57] Balisteri, Edward J., McDaniel, Christine A, and Vivian Wong. An Estimation of US Industru-Level Capital-Labor Elasticities: Support for Cobb-Douglas. North American Journal of Economics and Finance. Volume 14, Issue 3, December 2003, pages 343-356. https://www.sciencedirect.com/science/article/abs/pii/S106294080300024X

[58] Hamid Azari-Rad, Peter Philips, and Mark Prus, "Making Hay When It Rains: The Effect Prevailing Wage Regulations, Scale Economies, Seasonal, Cyclical And Local Business Patterns Have On School Construction Costs," Journal of Education Finance 27, no. 4 (2002): 997–1012.

[59] Fadhel Kaboub and Michael Kelsay, "Do Prevailing Wage Laws Increase Total Construction Costs?," Review of Keynesian Economics 2, no. 2 (April 2014): 189–206, https://doi.org/10.4337/roke.2014.02.04.

[60] Frank Manzo and Kevin Duncan, "The Effects of Repealing Common Construction Wage in Indiana: Impacts on Ten Construction Market Outcomes," January 2018, http://www.faircontracting.org/wp-content/uploads/2018/03/mepi-csu-effects-of-repealing-common-construction-wage-in-indiana-final-1.pdf.

[61] Kevin Duncan and Jeffrey Waddoups, "Unintended Consequences of Nevada's Ninety-Percent Prevailing Wage Rule," Labor Studies Journal 45, no. 2 (2020): 166–85.

regression of an unbalanced panel of nonunion roofing contractors, Duncan found that the gap between the two bids decreased as the level of bid competition and accumulated contractor experience increased. Duncan also found that the apparent 10 percent cost inflation associated with prevailing wage rates disappeared entirely when bid behaviors and factors were accounted for.

Conclusion

We support the Proposed Rulemaking on Updating Davis-Bacon and Related Acts Regulations (RIN 1235-AA40) on the grounds that regulations such as the one proposed show positive effects for workers, improving their living conditions, increasing their access to fringe benefits, reducing their risk for injuries and disabilities in the workplace, and augmenting their productivity. We also support the proposed rulemaking based on the fact that prevailing wage policies motivate current construction workers to continue in the industry, and prospective construction workers are incentivized to enter the industry and access more efficient training without higher construction costs for the taxpayers through higher worker productivity, less cutthroat competition and detrimental competitive practices, as well as reduced absenteeism and employee turnover.

May 17, 2022

VIA ELECTRONIC SUBMISSION

Jessica Looman
Acting Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

RE: Public Comments on RIN 1235-AA40 – Updating the Davis-Bacon and Related Acts Regulations Notice of Proposed Rulemaking

Dear Ms. Looman:

The Construction Employers of America (CEA) is a nationwide coalition of seven union construction employer associations: The International Council of Employers of Bricklayers and Allied Craftworkers (ICE-BAC); FCA International (FCA); The Mechanical Contractors Association of America (MCAA); The National Electrical Contractors Association (NECA); The Sheet Metal & Air Conditioning Contractors' National Association (SMACNA); The Signatory Wall and Ceiling Contractors Alliance (SWACCA); and The Association of Union Constructors (TAUC). Collectively, CEA member associations represent more than 15,000 contractors who in turn employ more than 1.4 million workers.

CEA employers and their partners in the union building trades recognize that their success is highly dependent upon one another: the trades acknowledge the competitive nature of the construction marketplace while employers value their highly skilled union workforce. The CEA has long advocated for many of the proposed regulatory reforms endorsed in our comments and for a stronger Davis-Bacon Act, as well as for widespread prevailing wage laws across the nation. We have also advocated in our comments and in Congress for sufficient budgetary support for the Department of Labor's survey, wage calculation, and enforcement role in meeting the statutory promise of the Davis-Bacon Act.

CEA provides these comments in support of the DOL's Notice of Proposed Rulemaking, Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15698 (March 18, 2022)

(hereafter "Proposed DBA Rule"). As outlined in detail below, CEA enthusiastically supports many of the revisions included in the Proposed DBA Rule.

1. DEFINITION OF "PREVAILING WAGE" – RETURNING TO THE 30-PERCENT RULE IS CONSISTENT WITH THE LEGISLATIVE TEXT AND THE DOL'S LONGSTANDING INTERPRETATION OF "PREVAILING WAGE."

CEA fully supports the Proposed DBA Rule's return to the original definition of "prevailing wage" – including the 30 percent rule – that was in effect from 1935 to 1982. CEA believes that the original definition is in accordance with the plain meaning of the legislative text and better effectuates the purpose of the Davis-Bacon Act.

Originally enacted in 1931, the Davis-Bacon Act is "a minimum wage law designed for the benefit of construction workers." United States v. Binghamton Constr. Co., 347 U.S. 171, 178 (1954). Its purpose was "to give local labor and the local contractor a fair opportunity to participate in [ ] building program[s]." Univs. Res. Ass'n v. Coutu, 450 U.S. 754, 773–74 (1981) (quotation omitted); see also S.R. Rep. No. 88-963 (1964) (noting that the Davis-Bacon Act was designed to protect local contractors who were losing bids on federal projects to "outside contractors . . . who recruited labor from distant cheap labor areas.").

To that end, the Davis-Bacon Act requires contractors on most federally funded infrastructure projects to pay employees, at a minimum, "**the wages the Secretary of Labor determines to be *prevailing* for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed . . . .**" 40 U.S.C. § 3142(b) (emphasis added). The Davis-Bacon Act does not define the term "***prevailing***" or "***prevailing wage***," but instead delegates this task to Secretary of Labor. Id. The legislative history of the DBA and subsequent amendments show that Congress delegated to the Secretary of Labor the broadest authority imaginable to determine which rates prevail. See Building Trades v. Donovan, 712 F.2d 611,616 (D.C. Cir. 1983); 74 Cong. H6516 (daily ed. Feb. 28, 1931) (during the House floor debate, Rep. William Kopp (R-IA) emphasized that although "the term 'prevailing rate' has a vague and indefinite meaning . . . the power will be given . . . to the Secretary of Labor to determine what the prevailing rates are.")

For nearly 50 years, "***prevailing wage***" was defined by the Department of Labor to mean "the wage (hourly rate of pay and fringe benefits) paid to the greatest number of laborers or mechanics in the classification on similar projects in the area during the period in question, *provided* that the wage is paid to ***at least 30% of those employed in the classification***." 29 C.F.R. § 1.2(a) (1935). As the DOL notes, determining the prevailing wage required a three-step process: (1) Any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then (3) the weighted average rate. The second step is referred to as the "30-percent rule."

Then, in 1982, the DOL abruptly removed the second step in the three-step process—the 30-percent rule. See 47 Fed. Reg. 23644, 23645 (May 28, 1982). The new process required only

two steps: (1) identifying if there was a single wage rate paid to more than 50 percent of workers, and then (2) if no wage rate is greater than 50 percent of workers, relying on a weighted average of all the wage rates paid. Id. at 23645; see also 29 C.F.R. § 1.2(a)(1) (1982) ("The 'prevailing wage' shall be the wage paid to the majority (more than 50 percent) of the laborers or mechanics in the classification on similar projects in the area during the period in question. If the same wage is not paid to a majority of those employed in the classification, the 'prevailing wage' shall be the average of the wages paid, weighted by the total employed in the classification.").

The DOL's elimination of the long-standing 30-percent rule was first and foremost inconsistent with the text and purpose of the Davis-Bacon Act. "***Prevailing***" means "[t]o be ***commonly accepted or predominant***." Prevail, Black's Law Dictionary (11th ed. 2019); see also Webster's New Collegiate Dictionary (defining "prevailing" to mean "having superior force in influence; most frequent."); Webster's Third New International Dictionary (1976) (defining the term "prevailing" as "most frequent" or "generally current," descriptive of "what is in general or wide circulation or use . . . ."). For a wage to be "***commonly accepted***" or "***predominant***," there is no requirement that the rate be received by a "majority" (i.e., more than 50 percent) of workers. Indeed, if Congress had intended the DOL to determine the "majority" wage, then it could have easily crafted the statutory text to so reflect.

Returning to the DOL's original three-step model is more consistent with the plain meaning of the term "prevailing." That is, the DOL first looks to the majority (i.e., 50 percent) of the workers in the appropriate classification. Obviously, if a wage rate is paid to a majority of workers, it is "commonly accepted" or "predominant." Failing to find a majority wage, the rate paid to the greatest number becomes the standard, which is the next logical step in the search for the "commonly accepted" or "predominant" wage. If this greater number does not represent a substantial portion of the wage pattern of the community – and 30% has been selected as a reasonable measure of substantiality – the DOL then averages all of the wage rates paid in the area.

The DOL's current two-step analysis – which uses an averaging method in all cases where a single wage is not paid to a majority (i.e., more than 50 percent) of workers – does not result in a wage that is "commonly accepted" or "predominant." Indeed, the average rate is an artificial rate that likely is not, in fact, paid to any workers in the locality. What is more, the difference in meaning between "average" and "prevailing" is clear and application of the latter method where one wage is frequently paid would be inconsistent with the statutory language of the Davis-Bacon Act.

The Davis-Bacon Act was designed to protect local wage standards – even if they were enjoyed by a minority (i.e., less than 50 percent) of workers. The designers of the Davis-Bacon Act obviously recognized the futility of a statute that would protect a rate only if it was being received by a majority of workers or that was the product of an "averaging" process.

In 1982, the Office of Legal Counsel (OLC) at the Department of Justice analyzed whether the DOL could utilize an "average rate" in calculating the "prevailing wage." The OLC concluded that "prevailing wage" means the current and predominant actual rate paid, and an average rate

should only be used as a last resort. See 5 Op. O.L.C. at 176–77.[1] Specifically, the OLC concluded: "we believe that it is proper under both Acts to define the prevailing wage rate in terms of the lowest rate only where the lowest rate is also that which occurs with ***greatest frequency***. Use of an average is permissible in situations in which no single rate can fairly be said to be 'generally current.'" Id. at 177 (emphasis added).

From 1935 to 1982, the DOL consistently applied the three-step process – including the 30 percent rule – for calculating the "prevailing wage." During this time, Congress made several amendments to the Davis-Bacon Act and Congress made no attempt to nullify the DOL rule or clarify its intent. This should be regarded as Congress' acquiescence in this interpretation as "presumptive evidence of its correctness." 2A Sands, Sutherland Statutory Construction § 49.10 (4th ed. 1973). Indeed, according to the Supreme Court, "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" CFTC v. Schor, 478 U.S. 833, 846 (1986) (quoting NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974) (footnotes omitted)).

For example, in 1964, Congress amended the Davis-Bacon Act to define "prevailing wages" to include fringe benefit payments. Pub. L. 88-349 (July 2, 1964). At the time, Congress made no attempt to negate the DOL's contraction or clarify the legislative intent. To the contrary, prior to passage of the 1964 amendments, the DOL's use of the 30 percent rule was reviewed in depth by the House Special Subcommittee on Labor in oversight hearings. In its 1963 report, the House Subcommittee supported use of the 30 percent rule:

> The subcommittee believes that the Department of Labor exercised its best judgment in attempting to define prevailing wages. It must be remembered that no legislative guideposts were given in the Davis-Bacon Act or the legislative history which would assist the Department. ***It was learned that the so-called 30 percent rule goes back some 25 years, and the Department has followed this rule consistently***.
>
> ***It should be kept in mind that "prevailing" means only a greater number. It need not be a majority***. Therefore, the subcommittee believes that the 30 percent rule should be established legislatively.
>
> ***The subcommittee strongly opposes using an average unless at least 30 percent of those employed in a given classification do not receive the same rate***. As was indicated previously an average rate is per se going to be an artificial rate in that it will not mirror any of the actual wages paid in a community. To that extent it would disrupt such local wages.

Staff of the H. Subcomm. on Lab., 88th Cong., Administration of the Davis-Bacon Act, Rep. of the Subcomm. on Lab. of the Comm. on Educ. and Lab. (Comm. Print 1963) (emphasis added).

[1] Available at: https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf.

In summary, CEA believes that returning to the three-step process for determining the prevailing wage – including the 30 percent rule – is necessary to effectuate the text and purpose of the Davis-Bacon Act. Thus, the definition of "prevailing wage" in Section 1.2(a) of the Proposed DBA Rule should be adopted without amendment. It is only by returning to the DOL's long-standing construction of "prevailing wage" that Congress' intent will be effectuated.

2. DEFINITION AND SCOPE OF PROJECT REFORMS – MODERNIZED DEFINITIONS WILL CLARIFY APPLICABILITY OF THE DAVIS-BACON ACT.

CEA supports the Proposed DBA Rule's amendments to Section 5.2, which seeks to modernize the definition of "building or work" (as used to delineate contracts for covered construction activities) by adding language to the definitions of "building or work" and "public building or public work" to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement.

The CEA also endorses the DOL proposal to modernize the definition of "building or work" (as used to delineate contracts for covered construction activities) by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of covered activities. Including these lower wage and unorganized work specializations into the "building work" definition with Davis-Bacon coverage will help contractors and workers alike receive better, prevailing wages. It is also appropriate that this definitional revision occurs at the same time the Federal government has committed to an historic infrastructure investment benefitting these exact activities following clear prevailing wage guidance from both the Congress and Executive branch. While these building work activity categories have suffered skilled labor shortages, contractors would benefit from a growing labor force if Davis-Bacon Act coverage boosts registered apprenticeship, career opportunities, and quality wages.

The DOL also proposes to add language to the definitions of "building or work" and "public building or public work" to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Specifically, the Proposed DBA Rule provides that the term "building or work" includes a portion of a building or work, or the installation of equipment or components into a building or work. The proposal includes additional language in the definition of "public building or public work" to clarify that a "public building" or "public work" includes the construction, prosecution, completion, or repair of a portion of a building or work that is carried on directly by authority of or with funds of a federal agency to serve the interest of the general public, even where construction of the entire building or work does not fit within this definition.

Separately, the DOL proposes to add a new sub-definition to the term "construction, prosecution, completion, or repair" to clarify when demolition and similar activities are covered by the Davis-Bacon labor standards. Historically, the DOL has understood the standards to cover demolition and removal under certain circumstances. First, demolition and removal activities are covered by Davis-Bacon labor standards when such activities themselves constitute construction, alteration, or repair of a public building or work. Second, the DOL maintains that if future construction that will be subject to the Davis-Bacon labor standards is contemplated on a demolition site (either because the demolition is part of a contract for such construction or because

such construction is contemplated as part of a future contract), then the demolition of the previously-existing structure is considered part of the construction of the subsequent building or work and therefore within the scope of the Davis-Bacon labor standards. Accordingly, the DOL proposes to clarify in its regulations that demolition work is covered under any of three circumstances: (1) where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing public building or work; (2) where subsequent construction covered in whole or in part by the Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or (3) where otherwise required by statute.

Of special importance to contractors represented by the national associations in the CEA is a definitional revision to the Act's use of the term "journeyman", which has been long ago replaced within the industry CBAs with the term "journey person". This important definitional updating of an outdated and objectionable term is just one example of the countless changes for a more inclusive and diverse skilled workforce from apprenticeship to journeyperson level. Further, CEA objects to any suggestion that use of the term "working supervisor" is interchangeable with the skill attainment or definitional responsibilities of "journey person" or that it is appropriate or acceptable for the DBA to confuse the two terms in any way.

CEA supports the Proposed DBA Rule's clarification amendments to Section 5.2 because they further the remedial purpose of the Davis-Bacon Act by ensuring that the Act's protections apply to contracts for construction activity for which the government is responsible.

3. <u>FEDERAL PROJECT DATA</u> – USING FEDERAL PROJECT DATA WILL BE HELPFUL IN CALCULATING "PREVAILING WAGE"

CEA supports the Proposed DBA Rule's amendments to Section 1.3(d) regarding when survey data from federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements may be used in determining prevailing wages for **building and residential** construction wages.

Under current regulations, data from federal or federally assisted projects is used in compiling wage rate data for heavy and highway wage determinations but may not be used for determining wage rates for building and residential construction projects. In the Proposed DBA Rule, the DOL notes the challenges it has faced in achieving high levels of participation in residential wage surveys and cites these challenges as a justification for why it may be appropriate to expand the amount of federal project data that is available to use in setting prevailing wage rates for residential construction to include survey data from federal or federally assisted projects. CEA urges **both** building and residential federal wage data be included, not just residential project data.

4. <u>USE AND EFFECTIVENESS OF WAGE DETERMINATIONS</u> – INCORPORATING MOST-RECENT WAGE DETERMINATIONS INTO ANY CONTRACT ENSURES THAT THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT IS EFFECTUATED.

CEA supports the Proposed DBA Rule's amendments to Section 1.6, which requires the most-recent version of any applicable wage determination must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work

not within the scope of work of the original contract or order. Specifically, the Proposed DBA Rule amends Section 1.6 to clarify that "archived" wage determinations that are no longer current may only be used when the contracting agency initially failed to incorporate the correct wage determination into the contract and subsequently must incorporate the correct wage determination after contract award or the start of construction. In that circumstance, even if the wage determination that should have been incorporated at the time of the contract award has since become inactive, it is still the correct wage determination to incorporate into the contract. The DOL proposes to rename "archived" wage determinations to be "inactive" wage determinations.

The DOL is also proposing to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The Proposed DBA Rule states that when a construction contract includes work in more than one area and no multi-county project wage determination has been obtained, the applicable wage determination for each area must be incorporated into the contract so that all workers on the project are paid the wages that prevail in their respective areas, consistent with Davis-Bacon. The DOL is further proposing that when a construction contract includes work in more than one type of construction, the contracting agency must incorporate the applicable wage determination for each type of construction where the total work in that category of construction is "substantial." The DOL intends to continue interpreting the meaning of "substantial" through sub-regulatory guidance, which will allow it greater flexibility than fixing this term in a notice and comment rulemaking.

In addition, the DOL notes that its "longstanding position" has been to require that contracts and bid solicitations contain the most recently issued revision to a wage determination to be applied to construction work to the extent that such a requirement does not cause undue disruption to the contracting process. The DOL is proposing to include language at Section 1.6 to reflect this principle. First, DOL proposes to explain that the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order, or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract. Under these circumstances, the most recent version of any wage determination(s) must be incorporated as of the date of the change or, where applicable, the date the agency exercises its option to extend the contract's term. This does not extend to situations where a contractor is simply given additional time to complete its original commitment or where the additional construction, alteration, and/or repair work in the modification is merely incidental.

In the Proposed DBA Rule, the DOL also observes that modern contracting methods frequently involve a contractor agreeing to perform construction as the need arises over an extended period, with the quantity and timing of the construction not known when the contract is awarded—often referred to as Indefinite Delivery Indefinite Quantity (IDIQ) contracting. For these types of contracts, the DOL proposes to require that contracting agencies incorporate the most up-to-date applicable wage determination(s) annually on each anniversary date of a contract award or, where there is no contract, on each anniversary date of the start of construction, or another similar anniversary date where the agency has sought and received prior approval from the DOL for the alternative date.

5. <u>PERIODIC ADJUSTMENTS TO NON-COLLECTIVELY BARGAINED PREVAILING WAGE RATES</u> – PROPOSED RULE WOULD ENSURE THAT NON-COLLECTIVELY BARGAINED RATES ARE REGULARLY UPDATED.

CEA supports the Proposed DBA Rule's amendments to Section 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates. The proposed rule expands the DOL's practice of updating prevailing rates between surveys to include updating non-collectively bargained rates.

The DOL generally publishes two types of prevailing wage rates on the Davis-Bacon wage determinations that it issues: (1) modal rates (under the current rule, wage rates that are paid to a majority of workers in a particular classification); and (2) weighted average rates, which are published whenever the wage data received by the DOL reflects that no single wage rate was paid to a majority of workers in the classification.

Under the current regulations, when a CBA rate prevails on a general wage determination, the DOL updates that prevailing wage rate based on periodic wage and fringe benefit increases in the CBA. However, when the prevailing wage is set through the weighted average method based on non-collectively bargained rates or a mix of collectively bargained rates and non-collectively bargained rates, or when a non-collectively bargained rate prevails, such wage rates on general wage determinations are not updated between surveys, and therefore can become out-of-date.

The Proposed DBA Rule expands the DOL's practice of updating prevailing rates between surveys to include updating non-collectively bargained rates. The CEA endorses the DOL proposal to permit adjustments to non-collectively bargained rates on general wage determinations based on Bureau of Labor Statistics **Employment Cost Index (ECI) data** or its successor data. Under the Proposed DBA Rule, non-collectively bargained rates may be adjusted **based on ECI data** no more frequently than once every three years, and no sooner than three years after the date of the rate's publication, continuing until the next survey results in a new general wage determination. Non-collectively bargained rates (wages and fringe benefits) would be adjusted from the date the rate was originally published and brought up to their present value. Going forward under the proposed 30 percent rule, any non-collectively bargained prevailing or weighted average rates published after this rule becomes effective would be updated if they were not re-surveyed within three years after publication

CEA agrees that Section 1.6(c)(1) is necessary to "keep [non-collectively bargained] rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area." 87 Fed. Reg. at 15764.

6. <u>"FLOW-DOWN" REQUIREMENTS AND RESPONSIBILITY FOR COMPLIANCE</u> – THE MANDATORY "FLOW-DOWN" REQUIREMENT EFFECTUATES THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT.

CEA supports the Proposed DBA Rule's amendments to Sections (a)(6) and (b)(4), which provide that prime contractors are responsible for the compliance by **<u>any subcontractor or lower tier subcontractor</u>** adding new language underscoring that being "responsible for compliance"

means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of contracts. Further, CEA asks that the proposal specifically include compliance language, including timetables, directing the prime contractor to expedite any new wage changes and contract modifications so they quickly and appropriately reach the lower tier subcontractors and their workforce entitled to the DBA revisions.

The DOL's current regulations contain explicit contractual requirements for prime contractors and upper-tier subcontractors to "flow-down" the required contract clauses into their contracts with lower-tier subcontractors. The provisions also state that prime contractors are responsible for the compliance by any subcontractor or lower tier subcontractor.

The Proposed DBA Rule includes new language underscoring that being "responsible for compliance" means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. See § 5.5(a)(6) (stating that the prime contractor "or subcontractor" must insert the required clauses in "any subcontracts"). The Proposed DBA Rule also clarifies that underpayments of a subcontractor's workers may in certain circumstances subject the prime contractor itself to debarment for violating the responsibility for compliance provision. See § 5.5(b)(4) (stating that the flow-down clause must "requir[e] the subcontractors to include these clauses in any lower tier subcontracts").

The DOL made clear that "the Department does not intend to place the same strict liability responsibility on all upper-tier subcontractors." 87 Fed. Reg. at 15740. Instead, the DOL made clear that its proposal "is intended to clarify that, in appropriate circumstances, . . . upper-tier subcontractors may be held responsible—both subjecting them to possible debarment and requiring them to pay back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages." Id.

CEA supports the changes to §§ 5.5(a)(6) and (b)(4) because the changes are simply a clarification and because the amendments are designed to ensure that contractors cannot practically shirk their responsibilities through subcontracting arrangements.

7. DEBARMENT – THE PROPOSED DBA RULE CLARIFIES THE DEBARMENT STANDARDS AND PROCEDURES.

CEA supports the Proposed DBA Rule's clarifications to the DOL's debarment regulations because they promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify debarment standards and procedures.

The Proposed DBA Rule features a series of revisions to the DOL's debarment regulations intended both to promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify debarment standards and procedures. The DOL is proposing to adopt the Davis-Bacon statutory debarment standard for all debarment cases and to eliminate the Related Acts' regulatory "aggravated or willful" debarment standard. The Proposed DBA Rule would also: (1) adopt Davis-Bacon's mandatory three-year debarment period for Related Act cases and eliminate the process under the Related Acts regulations for early removal from the "debarment list"; (2) expressly permit debarment of responsible officers under the Related Acts; (3) clarify that under the Related Acts (as under Davis-Bacon), entities in which debarred entities or individuals have

an interest (as opposed to a "substantial" interest) may be debarred; and (4) make the scope of debarment under the Related Acts consistent with the scope of debarment under Davis-Bacon.

8. <u>MISCLASSIFYING CONSTRUCTION WORKERS AS INDEPENDENT CONTRACTORS</u> – THE PROPOSED DBA RULE MAKES CLEAR THAT AN EMPLOYMENT RELATIONSHIP IS NOT REQUIRED.

CEA supports the Proposed DBA Rule's amendments to reinforce the "well established" principle that Davis-Bacon labor standards apply even when there is no employment relationship between a contractor and worker. To this end, to the extent that the words "employee," "employed," or "employment" are used in the regulations, the DOL is revising them to be interpreted expansively to not limit coverage to workers in an employment relationship.

Employee misclassification is a pervasive and growing problem in the construction industry. Unscrupulous contractors regularly use these arrangements to avoid and evade their legal obligations in the areas of payroll taxes, insurance premiums, overtime, and other legal obligations. The following recent examples – a select few among many - make clear the significance of this issue in the industry:

- In 2021, a North Carolina cabinet remodeling contractor was ordered to pay $100,504 in back wages for eight employees who had been misclassified as independent contractors and were denied overtime pay.2 The Department of Labor stated, "Misclassifying employees as independent contractors is a serious and costly problem. This practice denies workers the wages – including proper overtime compensation – that they rightfully earned under the law."3

- In 2021, a New Hampshire carpentry contractor was ordered to pay $53,839 in back wages and $53,839 in liquidated damages after misclassifying 52 employees as independent contractors and failing to pay them overtime.4

- In 2021, a Massachusetts construction contractor was ordered to pay $438,000 in back wages to 250 employees for violation of the FLSA. The Department of Labor found that, between August 2017 and November 2020, the employees were misclassified as independent contractors and were not paid overtime. The contractor was also ordered to pay civil penalties in the amount of $64,750 for willful violations of the FLSA.5

The proposed amendment confirms and makes clear that contractors cannot use employee misclassification schemes to avoid their obligations under the Davis-Bacon Act and will aid enforcement efforts on this critical issue in the industry.

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[2] U.S. Department of Labor News Release dated Sept. 21, 2021, available at https://www.dol.gov/newsroom/releases/whd/whd20210921.

[3] *Id.*

[4] U.S. Department of Labor News Release dated Dec. 2, 2021, available at https://www.dol.gov/newsroom/releases/whd/whd20211202.

[5] U.S. Department of Labor News Release dated Dec. 20, 2021, available at https://www.dol.gov/newsroom/releases/whd/whd20211220.

9. ENHANCED RECORDKEEPING REQUIREMENTS – RECORDKEEPING AMENDMENTS REINFORCE THE DAVIS-BACON ACT'S REQUIREMENTS.

CEA supports the Proposed DBA Rule's amendments to reinforce Davis-Bacon recordkeeping requirements. The DOL believes that these requirements will facilitate prevailing wage enforcement.

Specifically, the Proposed DBA Rule clarifies the DOL's "longstanding" approach to require contractors to maintain and preserve basic records and information, as well as certified payrolls. The required basic records include (but are not limited to) regular payroll and additional records relating to fringe benefits and apprenticeship and training. The Proposed DBA Rule would require all contractors, subcontractors, and recipients of federal assistance to maintain and preserve Davis-Bacon and Davis-Bacon Related Acts (collectively, the DBRA) contracts, subcontracts, and related documents for three years after all the work on the prime contract is completed. These related documents include, without limitation, contractors' and subcontractors' bids and proposals, as well as amendments, modifications, and extensions to contracts, subcontracts, or agreements. Moreover, contractors and subcontractors must maintain records of each worker's correct classification or classifications of work actually performed and the hours worked in each classification.

10. ANTI-RETALIATION – ANTI-RETALIATION.

CEA supports the Proposed DBA Rule's anti-retaliation amendments in Sections 5.5(a)(11), 5.5(b)(5), and 5.18. The amendments are designed to discourage contractors, responsible officers, and any other persons from engaging in "unscrupulous" business practices that may chill worker participation in federal prevailing wage investigations or other compliance actions.

Currently, debarment is the primary mechanism under the prevailing wage civil enforcement scheme for remedying retribution against workers who assert their right to prevailing wages. Debarment is also the main tool for addressing "less tangible" discrimination, such as interfering with investigations by intimidating or threatening workers. There are also criminal sanctions for certain coercive conduct by federal contractors. Despite these protections against retaliatory conduct, workers who have been discriminated against for speaking up, or for having been perceived as speaking up, currently have no redress under the DOL's regulations and DBRA to the extent that back wages do not make them whole.

As a result, the DOL is proposing to add new anti-retaliation protections in its regulations that would be in all contracts subject to Davis-Bacon or DBRA. These new provisions would state that it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or to cause any person to do the same, against any worker for engaging in a number of "protected activities," including: (1) notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of Davis-Bacon prevailing wage statutes or regulations; (2) filing any complaints, initiating or causing to be initiated any proceeding, or otherwise asserting any right or protection under prevailing wage

statutes and regulations; (3) cooperating in an investigation or other compliance action, or testifying in any proceeding related to prevailing violations; or (4) informing any other person about their rights under Davis-Bacon, the Related Acts, or related the DOL regulations.

The Proposed DBA Rule also proposes remedies to assist in enforcement of these anti-retaliation provisions. These include "make-whole" relief and remedial actions to restore workers subjected to a violation to the position—both economically and in terms of work or employment status (e.g., seniority, leave balances, health insurance coverage, 401(k) contributions, etc.)—that the worker would have occupied had the violation never taken place. Other remedies include, but are not limited to: (1) any back pay and benefits denied or lost by reason of the violation; (2) other actual monetary losses sustained as a direct result of the violation; (3) interest on back pay or other monetary relief from the date of the loss; (4) appropriate equitable or other relief, such as reinstatement or promotion; (5) expungement of warnings, reprimands, or derogatory references; (6) provision of a neutral employment reference; and (7) posting of notices that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements.

11. <u>REQUIRING FEDERAL AGENCIES TO REPORT PLANNED CONSTRUCTION</u> – REQUIRING FEDERAL AGENCIES TO REPORT PLANNED CONSTRUCTION ALLOWS THE DOL TO PLAN FOR APPROPRIATE WAGE DETERMINATIONS.

CEA supports the Proposed DBA Rule's amendments to Section 1.4 requiring federal agencies to include in their reports proposed construction programs for an additional two fiscal years beyond the upcoming year, including notification of any options to extend the terms of current construction contracts or any significant changes to previously reported construction programs.

Currently, Section 1.4 provides that, "to the extent practicable," agencies that use wage determinations must submit an annual report to the DOL outlining proposed types and locations of construction for the coming year. The DOL has found that these reports are an effective way for the agency to know where federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use. Unfortunately, contracting agencies have not regularly provided these reports to the DOL.

To ensure these reports are submitted, the Proposed DBA Rule removes the "to the extent practicable" language in the regulation that makes the reports discretionary instead of mandatory and expressly requires federal agencies to submit the construction reports. The proposed rule would also: (1) require agencies to include in their reports proposed construction programs for an additional two fiscal years beyond the upcoming year; (2) include new language requiring federal agencies to include notification of any expected options to extend the terms of current construction contracts; (3) require that federal agencies include in the annual report a notification of any significant changes to previously reported construction programs; and (4) eliminate the current directive that agencies provide notice mid-year of any significant changes in their proposed construction programs.

CEA believes the proposed changes to Section 1.4 are necessary to ensure that the DOL is informed of "where Federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use." 87 Fed. Reg. at 15712.

12. POST-AWARD DETERMINATIONS – IT IS APPROPRIATE TO ADOPT THE CORRECT OR OMITTED WAGE DETERMINATIONS VIA SUPPLEMENTAL AGREEMENT OR CHANGE ORDER.

The Proposed DBA Rule includes updates regarding the administrative procedure for enforcing Davis-Bacon requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract. The Proposed DBA Rule includes language in Section 5.5(e) providing that labor standards contract clauses and appropriate wage determinations are effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract.

The "by operation of law" provision would operate in tandem with the requirement that contracting agencies must insert the contract clause in full into any new contracts and into existing contracts by modification where the clause had been wrongly omitted. While agencies must retroactively incorporate the required clauses upon the request from the DOL, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made.

The Proposed DBA Rule amends Section 1.6(f)(1) to provide that if a contract subject to the labor standards provisions of the Davis-Bacon Act is entered into without the correct wage determination(s), the relevant agency must incorporate the correct wage determination into the contract or require its incorporation. The DOL proposes to add language to Section 1.6(f)(1) expressly providing for an agency to incorporate the correct wage determination post-award "upon its own initiative" as well as upon the request of the Administrator.

The proposed revision to Section 1.6(f) also provides that the agency must either: (a) terminate and resolicit the contract with the correct wage determination or (b) "incorporate the correct wage determination into the contract (or ensure it is so incorporated) through supplemental agreement, change order, or any other authority that may be needed." The proposed regulation also specifies that "[t]he method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law."

CEA believes that the revisions to Section 1.6(f) in the Proposed DBA Rule are appropriate and necessary to ensure that employees receive the correct prevailing wages and contractors are fully compensated for the government's failure to include the correct wage determination or omission of a wage determination.

13. DEFINITION OF "AREA" FOR PROJECTS SPANNING MULTIPLE COUNTIES –

The DOL is proposing to revise the definition of "area" in Section 1.2 to address projects that span multiple counties. Under the existing methodology, if a project spans more than one county, a contracting officer is instructed to attach wage determinations for each county to the project and contractors may be required to pay differing wage rates to the same employees when their work crosses county lines. While requiring different prevailing wage rates for work by the same worker on the same project may be consistent with the current regulations, the DOL points out that the Davis-Bacon and Related Acts statutes themselves do not address multi-jurisdictional

projects. Issuing and applying a single project wage determination for such projects is not inconsistent with the text of the law. Accordingly, the CEA supports the DOL proposal to add language in the definition of "area" to expressly authorize the agency to issue project wage determinations with a single rate for each classification, using data from all the relevant counties in which a project will occur.

The Proposed DBA Rule also revises the definition of "area" to allow the use of state highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects, specifically. The DOL asserts that using state highway districts as a geographic unit for wage determinations would be consistent with the statutory specification that wage determinations should be tied to a "civil subdivision of a state." Moreover, as state highway or transportation districts often plan, develop, and oversee federally financed highway projects, the agency asserts that the provision of a single wage determination for each district would simplify the procedure for incorporating federal financing into these projects.

14. ADOPTION OF STATE/LOCAL PREVAILING WAGE DETERMINATIONS FOR FEDERAL PREVAILING WAGE

The Proposed DBA Rule would expressly permit, under specified circumstances, the determination of Davis-Bacon wage rates by adopting prevailing wage rates set by state and local governments for all types of construction even where the state or locality's definition of prevailing wage differs from the DOL's. Although the existing regulations permit the DOL to "consider" state and local wage determinations and to give "due regard" to state rates for highway construction, the regulations do not specifically address whether the agency may adopt state or local rates derived using methods and requirements that differ from those used by the DOL. To fill this gap, the proposal would permit the adoption of such wage rates following a determination that they meet specified criteria.

These criteria are that: (1) the state or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties; (2) the state or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, each of which can be calculated separately; (3) the state or local government must classify laborers and mechanics in a manner that is recognized within the field of construction; and (4) the state or local government's criteria for setting prevailing wage rates must be "substantially similar" to those that the DOL uses in making wage determinations (based on such factors as the state or local government's definition of prevailing wage, the types of fringe benefits it accepts, its classification of construction projects, etc.) These criteria are intended to facilitate the adoption of state and local prevailing wage rates while ensuring adoption of such rates is consistent with the statutory requirements of Davis-Bacon and does not create arbitrary distinctions between jurisdictions where the DOL makes wage determinations by using its own surveys and jurisdictions where the DOL makes wage determinations by adopting state or local rates.

15. "CONTRACT," "CONTRACTOR," "PRIME CONTRACTOR," "SUBCONTRACTOR," AND "TRAINEE" DEFINITIONS

The DOL's current regulations define the term "contract" as including any prime contract and any subcontract of any tier thereunder. The DOL is requesting comment on whether a more detailed definition of the term "contract" is warranted, noting that it may not be necessary to include in the regulatory text a detailed recitation of types of agreements that may be considered contracts because such a list necessarily follows from the use of the term "contract" in the statute.

In addition to the term "contract," the DOL's existing regulations use the terms "contractor," "subcontractor," and "prime contractor," but do not currently define these three terms. The proposed rule includes a definition of the term "contractor" to clarify that it applies to both prime contractors and subcontractors. In addition, the definition would clarify that sureties may also be considered "contractors" under the regulations.

The Proposed DBA Rule also includes a broad definition for the term "prime contractor, clarifying that the label an entity gives itself is not controlling, and an entity may be considered a "prime contractor" based on its contractual relationship with the government, its control over the entity holding the prime contract, or the duties it has been delegated. The proposed definition also includes as a "prime contractor" the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (e.g., a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing and/or performing the construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. Under this definition, more than one entity on a contract (for example, both the owner/developer and the general contractor) may both be considered "prime contractors" on the same contract.

The Proposed DBA Rule defines a "subcontractor" as any contractor that agrees to perform or be responsible for the performance of any part of a contract (at any tier) that is subject wholly or in part to the Davis-Bacon labor standards. Importantly, this proposed definition clarifies that "subcontractors" do not include laborers or mechanics for whom a prevailing wage must be paid, given that the requirement to pay a prevailing wage to ordinary laborers and mechanics cannot be evaded by characterizing such workers as "owner operators" or "subcontractors."

The DOL also proposes to amend the current regulatory definition in Section 5.2(n) of "apprentice, trainee, and helper" to remove references to trainees. A trainee is currently defined as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by the Employment and Training Administration (ETA) as meeting its standards for on-the-job training programs. The ETA no longer reviews or approves on-the-job training programs, however, so this definition is no longer necessary.

16. APPRENTICES

To harmonize the Davis-Bacon regulations and the Employment and Training Administration's (ETA) apprenticeship regulations, CEA supports the Proposed DBA Rule proposes to revise these regulations to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which an apprenticeship program was originally registered **must adhere to the apprentice wage rate and ratio standards of the locality in which the project is situated.** The general requirement is that contractors may pay less than the

prevailing wage rate for the work performed by an apprentice employed pursuant to and individually registered in a bona fide apprenticeship program registered with the ETA or a recognized state apprenticeship agency (SAA). Under the ETA's regulations, if a contractor has an apprenticeship program registered for one state but wishes to employ apprentices to work on a project in a different state with an SAA, the contractor must seek and obtain reciprocal approval from the project state SAA and adhere to the wage rate and ratio standards approved by the project state SAA. Accordingly, upon receiving reciprocal approval, the apprentices in such a scenario would be considered employed pursuant to and individually registered in the program in the project state, and the Proposed DBA Rule would ensure that the terms of that reciprocal approval would apply for purposes of the DBRA. The CEA supports the DOL reasons that requiring contractors to apply the ratio and wage rate requirements from the relevant apprenticeship program for the locality where the laborers and mechanics are actually working **better aligns with the ETA's regulations on recognition of SAAs** and is meant to eliminate potential confusion.

17. PUBLICATION OF GENERAL WAGE DETERMINATIONS AND PROCEDURE FOR REQUESTING PROJECT WAGE DETERMINATIONS –

The Proposed DBA Rule includes several revisions to Section 1.5 intended to clarify the applicability of general wage determinations and project wage determinations. In addition to retitling Section 1.5 as "Publication of general wage determinations and procedure for requesting project wage determinations," the Proposed DBA Rule adds language explaining that a general wage determination contains, among other information, a list of wage rates determined to be prevailing for various classifications of laborers and mechanics for specified type(s) of construction in a given area.

The Proposed DBA Rule also adds language explaining circumstances under which an agency may request a project wage determination. These circumstances exist when: (1) the project involves work in more than one county and will employ workers who may work in more than one county; (2) there is no general wage determination in effect for the relevant area and type of construction for an upcoming project; or (3) all or virtually all of the work on a contract will be performed by one or more classifications that are not listed in the general wage determination that would otherwise apply, and contract award or bid opening has not yet taken place. In addition, when requesting a project wage determination for a project that involves multiple types of construction, the requesting agency would be required to attach information indicating the expected cost breakdown by type of construction.

18. SCOPE OF GEOGRAPHIC CONSIDERATION IN MAKING WAGE DETERMINATIONS – ELIMINATING THE ANTIQUATED DISTINCTIONS ARE NECESSARY TO ENSURE THAT THE TEXT AND PURPOSE OF THE DAVIS-BACON ACT ARE EFFECTUATED.

CEA supports the Proposed DBA Rule's amendments to Section 1.7, which would eliminate the binary "rural" and "metropolitan" designations. CEA agrees that the change is appropriate because it is consistent with the DOL's historical practice and better effectuates the text and purpose of the Davis-Bacon Act.

Under the current regulations, Section 1.7 addresses two related concepts. The first is the level of geographic aggregation of wage data that should be the default for making a wage

determination. The second is how DOL should expand that level of geographic aggregation when it does not have sufficient wage survey data to make a wage determination at the default level.

With respect to the first concept, Davis-Bacon specifies that the relevant geographic area for determining the prevailing wage is the "civil subdivision of the state" where the contract is performed. 29 U.S.C. § 3142(b). The DOL has historically used the county as the default civil subdivision for making a wage determination. Under the second concept, if there is insufficient data to determine a prevailing wage rate for a classification of workers in a given county, the DOL will determine that county's wage-rate for that classification by progressively expanding the geographic scope of data (still for the same classification of workers) that it uses to make the determination. The DOL initially expands to include a group of surrounding counties at a "group" level. If there is still not sufficient data at the group level, the DOL considers a larger grouping of counties in the state called a "supergroup," and thereafter uses data at a statewide level. Although the current regulations do not define the term "surrounding counties" that delineates the initial county grouping level, the provision that describes "surrounding counties" limits the counties that may be used in this grouping by excluding the use of any data from a "metropolitan" county in any wage determination for a "rural" county, and vice versa. The DOL's current procedures do not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

The regulatory language barring the cross-consideration of metropolitan and rural wage data was added in the 1981-1982 Rulemaking. The DOL now believes that this blanket decision did not adequately consider the heterogeneity of commuting patterns and local labor markets between and among counties that may be designated overall as "rural" or "metropolitan." Moreover, the DOL feels that limitations based on binary rural and metropolitan designations at the county level can result in geographic groupings that at times do not fully account for the realities of relevant construction labor markets.

Beyond the elimination of the metropolitan-rural proviso, the Proposed DBA Rule also seeks comment on other potential changes to the methods for describing the county groupings procedure. The Proposed DBA Rule provides three alternatives:

- **The first option** is to more precisely define "surrounding counties" to include counties in a group as long as they are all a part of the same contiguous area of either metropolitan or rural counties, even though each county included may not be directly adjacent to every other county in the group.

- **The second option** on which DOL requests comment would be to limit surrounding counties to solely those counties that share a border with the county for which additional wage data is sought.

- **The third option** would be to include language defining the "surrounding counties" grouping as a grouping of counties that are all a part of the same "contiguous local construction labor market" or some comparable definition.

CEA believes that Option 1 is the most appropriate for county grouping but finds merit in Option 3. These are the most appropriate options because they best reflect common construction market realities and are contiguous areas for contractors and workforce involvement in recent years for building and related project bidding and completion.

19. FREQUENTLY CONFORMED RATES

The DOL is proposing revisions to its regulations at Sections 1.3 and 5.5 aimed at reducing the need for "conformances" where the agency has received insufficient data to publish a prevailing wage for a classification of worker. Conformance is the expedited process by which a classification and wage and fringe benefit rate are added to an existing wage determination applicable to a specific DBRA-covered contract.

Specifically, the Proposed DBA Rule provides that, where the DOL has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, it may nonetheless list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that certain basic criteria for conformance of a classification and wage and fringe benefit rate have been satisfied. These criteria include: (1) the work performed by the classification is not performed by a classification in the wage determination; (2) the classification is used in the area by the construction industry; and (3) the wage rate for the classification bears a reasonable relationship to the wage rates contained in the wage determination. In other words, for a classification for which conformance requests are regularly submitted, and for which the DOL received insufficient data through its wage survey process, it is permissible to essentially "pre-approve" certain conformed classifications and wage rates, thereby providing contracting agencies, contractors, and workers with advance notice of the minimum wage and fringe benefits required to be paid for work within those classifications.

20. PAYMENT OF BACK WAGES

The proposed rule includes several provisions regarding enforcement of Davis-Bacon requirements. Existing Davis-Bacon regulations and contract clauses do not specifically provide for the payment of interest on back wages. The Administrative Review Board and DOL's administrative law judges, however, have held that interest calculated to the date of the underpayment or loss is generally appropriate where back wages are due under other similar remedial employee protection statutes. As a result, the Proposed DBA Rule makes clear that interest will be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 ("Determination of rate of interest") and will be compounded daily.

21. ANNUALIZED FRINGE BENEFITS

The Proposed DBA Rule includes a new provision codifying the principle of annualization used to calculate the amount of Davis-Bacon credit that a contractor may receive for contributions to a fringe benefit plan when the contractor's workers also work on private projects. Annualization generally compels a contractor performing work on a Davis-Bacon covered project to divide its contributions to a fringe benefit plan for a worker by that worker's total hours of work on both

Davis-Bacon and private projects for the employer in that year, rather than attribute those contributions solely to the worker's work on Davis-Bacon covered projects.

While existing guidance generally requires the use of annualization to compute the hourly equivalent of fringe benefits, annualization is not currently addressed in DOL's regulations. The proposed rule would require annualization of fringe benefits unless a contractor is approved for an exception and provides guidance on how to properly annualize fringe benefits. In explaining when an exception to the general annualization principle may be appropriate, the Proposed DBA Rule includes language stating that a fringe benefit plan may only qualify for such an exception when three criteria are satisfied: (1) the benefit provided is not continuous in nature; (2) the benefit does not provide compensation for both public and private work; and (3) the plan provides for immediate participation and essentially immediate vesting. A plan would generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours. In addition, to avoid any disruption to the provision of worker benefits, DOL proposes that any plan that does not require annualization under the agency's existing guidance may continue to use such an exception until the plan has either requested and received a review of its exception status, or until 18 months have passed from the effective date of this rule, whichever comes first.

Moreover, while DOL's current regulations provide that fringe benefits may be used for the defrayment of the costs of apprenticeship programs, the existing rules do not address how to properly credit such contributions against a contractor's fringe benefit obligations. The CEA, an advocate of registered apprenticeship programs, supports the proposed DBA Rule's attempt to clarify when a contractor may take credit for contributions made to an apprenticeship program and how to calculate the credit a contractor may take against its fringe benefit obligation. Under the proposal a contractor or subcontractor may take credit for the costs of an apprenticeship program only if the program, in addition to meeting all other requirements, is registered with the ETA Office of Apprenticeship, or with a recognized State Apprenticeship Agency. If these conditions are satisfied, under the Proposed DBA Rule contractors may take credit for the actual costs of the apprenticeship program, such as tuition, books, and materials, but may not take credit for additional contributions that are beyond the costs actually incurred for the apprenticeship program. The DOL also emphasizes that the contractor may only claim credit towards its prevailing wage obligations for the classification of laborer or mechanic that is the subject of the apprenticeship program.

22. "OPERATION OF LAW" PROVISION

The CEA also appreciates the Proposed DBA Rule including updates regarding the administrative procedure for enforcing Davis-Bacon requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract. The Proposed DBA Rule includes language providing that labor standards contract clauses and appropriate wage determinations are effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract. This provision would operate in tandem with the requirement that contracting agencies must insert the contract clause in full into any new contracts and into existing contracts by modification where the clause had been wrongly omitted. While agencies must retroactively incorporate the required clauses upon the request from DOL, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made.

The DOL intends the proposed "operation of law" language will ensure that, in all cases, a mechanism exists to enforce Congress's mandate that workers on covered contracts receive prevailing wages, notwithstanding any mistake by an executive branch official in an initial coverage decision or in an accidental omission of the labor standards contract clauses. Under the proposal, when the contract clause or wage determination is incorporated into the prime contract by operation of law, prime contractors would be responsible for the payment of applicable prevailing wages to all workers under the contract (including the workers of their subcontractors) retroactive to the contract award or beginning of construction, whichever occurs first. DOL adds, however, that this responsibility would be offset by a new compensation provision that would require that the prime contractor be compensated for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law. Accordingly, this proposed procedure will not undermine contractors' reliance on an initial determination by the contracting agency that the DBRA did not apply or that a wage determination with lower rates applied.

23. WITHHOLDING AND CROSS-WITHHOLDING

The DOL's current regulations authorize withholding from the contractor accrued payments or advances on the federal contract equal to the amount of unpaid wages due laborers and mechanics for prevailing wages. The proposed rule seeks to clarify and update the DOL's "cross-withholding" procedure for recovering back wages if sufficient funds are no longer available on the contract under which the violations took place. Under the Proposed DBA Rule, cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. Furthermore, the proposed rule includes a mechanism through which contractors would be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in certain circumstances (e.g., if those entities are controlled by the same controlling shareholder or are joint venturers or partners on a federal contract).

The DOL is also proposing language confirming that, consistent with the Davis-Bacon's remedial purpose to ensure that prevailing wages are fully paid to covered workers, DOL has priority to funds withheld (including funds that have been cross-withheld) for violations of Davis-Bacon prevailing wage requirements. The proposed rule expressly states that DOL has priority to funds withheld for wage underpayments over competing claims to such withheld funds by: (1) a contractor's sureties; (2) a contracting agency for its re-procurement costs; (3) trustees (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate; (4) a contractor's assignees; (5) a contractor's successors; or (6) a claim asserted under the Prompt Payment Act.

24. CONCLUSION

CEA enthusiastically supports the DOL's effort to include many long overdue but extremely important program simplification enhancements to reflect technological changes in work processes in the nine decades since the DBA was enacted. These would greatly improve the overall efficiency of the Act, its enforcement, and ensure that project wage rates do not become

"stale" or unfairly outdated. These valued changes advance the goal of the Act, which was initially enacted to prevent contractors and the federal government from undermining local labor standards. Submitting bid packages on federal construction with substandard wages only drives down the quality of bidding firms often unable to perform on complex, high-value federal projects and service work.

In conclusion, CEA encourages the DOL to quickly implement the changes to the Davis-Bacon Act outlined above before the large infrastructure projects are largely released. The positive impact of the proposed rule changes on CEA, its members, Davis-Bacon Act supporters, and union workforces across the complex and quality driven public construction industry would be substantial. These very important regulatory changes are long overdue and would represent significant progress toward achieving the Administration's goal of fulfilling the statutory intent of the Davis-Bacon Act while working to expand the registered apprentice program to grow the nation's skilled workforce. Finally, vigorously enforced and supported prevailing wage standards would benefit the federal government as well as play a central role in expanding a well-trained, highly skilled, and productive construction workforce **needed now more than ever** during a time of widespread skilled labor shortages.

Sincerely,

The Construction Employers of America
www.constructionemployersofamerica.com

International Council of Employers of Bricklayers and Allied Craftworkers
FCA International
Mechanical Contractors Association of America
National Electrical Contractors Association
Sheet Metal & Air Conditioning Contractors' National Association
Signatory Wall and Ceiling Contractors Alliance
The Association of Union Constructors

cc: Martin J. Walsh, Secretary
U.S. Department of Labor