

## DEPARTMENT OF LABOR

### Office of the Secretary

#### 29 CFR Parts 1, 3, and 5

RIN 1235-AA40

#### Updating the Davis-Bacon and Related Acts Regulations

**AGENCY:** Wage and Hour Division, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** In this final rule, the Department of Labor (Department or DOL) updates regulations issued under the Davis-Bacon and Related Acts. As the first comprehensive regulatory review in nearly 40 years, revisions to these regulations will promote compliance, provide appropriate and updated guidance, and enhance their usefulness in the modern economy.

#### DATES:

*Effective date:* This final rule is effective on October 23, 2023.

*Applicability date:* The provisions of this final rule regarding wage determination methodology and related part 1 provisions prescribing the content of wage determinations may be applied only to wage determination revisions completed by the Department on or after October 23, 2023. Except with regard to § 1.6(c)(2)(iii), the provisions of this final rule are applicable only to contracts entered into after October 23, 2023. Contracting agencies must apply the terms of § 1.6(c)(2)(iii) to existing contracts of the types addressed in that regulatory provision, without regard to the date a contract was entered into, if practicable and consistent with applicable law. For additional information, see the discussion of Applicability Date in section III.C. below.

#### FOR FURTHER INFORMATION CONTACT:

Amy DeBisschop, Director, Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Alternative formats are available upon request by calling 1-866-487-9243. If you are deaf, hard of hearing, or have a speech disability, please dial 7-1-1 to access telecommunications relay services.

Questions of interpretation or enforcement of the agency's existing regulations may be directed to the nearest WHD district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US-WAGE ((866)

487-9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto WHD's website at <https://www.dol.gov/whd> offices for a nationwide listing of WHD district and area offices.

#### SUPPLEMENTARY INFORMATION:

##### I. Executive Summary

In order to provide greater clarity and enhance their usefulness in the modern economy, on March 18, 2022, the Department published a notice of proposed rulemaking (NPRM), 87 FR 15698, proposing to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the Davis-Bacon Act and the Davis-Bacon Related Acts (collectively, the DBRA). The Davis-Bacon Act (DBA or Act), enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. See 40 U.S.C. 3142. The DBA applies to workers on contracts entered into by Federal agencies and the District of Columbia that are in excess of \$2,000 and for the construction, alteration, or repair of public buildings or public works. Congress subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as "Related Acts") under which Federal agencies assist construction projects through grants, loans, loan guarantees, insurance, and other methods.

The Supreme Court has described the DBA as "a minimum wage law designed for the benefit of construction workers." *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 178 (1954). The Act's purpose is "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." *Univs. Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981) (quoting H. Comm. on Educ. & Lab., Legislative History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962)). By requiring the payment of minimum prevailing wages, Congress sought to "ensure that Government construction and federally assisted construction would not be conducted at the expense of depressing local wage standards." *Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts*, 5 Op. O.L.C. 174, 176 (1981) (citation and internal quotation marks omitted).<sup>1</sup>

Congress has delegated authority to the Department to issue prevailing wage determinations and prescribe rules and regulations for contractors and subcontractors on DBA-covered

construction projects.<sup>2</sup> See 40 U.S.C. secs. 3142, 3145. It has also directed the Department, through Reorganization Plan No. 14 of 1950, to "prescribe appropriate standards, regulations and procedures" to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 15 FR 3173, 3176 effective May 24, 1950, reprinted as amended in 5 U.S.C. app. 1 and in 64 Stat. 1267. These regulations, which have been updated and revised periodically over time, are primarily located in parts 1, 3, and 5 of title 29 of the Code of Federal Regulations.

The Department last engaged in a comprehensive revision of the regulations governing the DBA and the Related Acts in a 1981-1982 rulemaking.<sup>3</sup> Since that time, Congress has expanded the reach of the Davis-Bacon<sup>4</sup> labor standards<sup>5</sup> significantly, adding numerous Related Act statutes to which these regulations apply. The Davis-Bacon Act and now more than 70 active Related Acts<sup>6</sup> collectively apply to an estimated \$217 billion in Federal and federally assisted construction spending per year and provide minimum wage rates for an estimated 1.2 million U.S. construction workers.<sup>7</sup> The Department expects these numbers to continue to grow as Federal and State governments seek to address the significant infrastructure needs of the country, including, in particular, the energy and transportation infrastructure necessary to mitigate climate change.<sup>8</sup>

<sup>2</sup> The DBA and the Related Acts apply to both prime contracts and subcontracts of any tier thereunder. In this final rule, as in the regulations themselves, where the terms "contracts" or "contractors" are used, they are intended to include reference to subcontracts and subcontractors of any tier.

<sup>3</sup> See 46 FR 41444 (1981 NPRM); 47 FR 23644 (1982 final rule); 48 FR 19532 (1983 revised final rule).

<sup>4</sup> The term "Davis-Bacon" is used in this final rule as a shorthand reference for the Davis-Bacon and Related Acts.

<sup>5</sup> In this final rule, the term "Davis-Bacon labor standards" means, as defined in § 5.2 of the final rule, "the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes referenced in § 5.1, and the regulations in parts 1 and 3 of this subtitle and this part."

<sup>6</sup> The Department maintains a list of the Related Acts at <https://www.dol.gov/agencies/whd/government-contracts/>.

<sup>7</sup> These estimates are discussed below in section V (Executive Order 12866, Regulatory Planning and Review et al.).

<sup>8</sup> See Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," section 206 (Jan. 27, 2021), available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

<sup>1</sup> Available at: [https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf).

In addition to the expansion of the prevailing wage rate requirements of the DBA and the Related Acts, the Federal contracting system itself has undergone significant changes since the 1981–1982 rulemaking. Federal agencies have dramatically increased spending through interagency Federal schedules such as the Multiple Award Schedule (MAS). Contractors have increased their use of single-purpose entities, such as joint ventures and teaming agreements, in construction contracts with Federal, State and local governments. Federal procurement regulations have been overhauled and consolidated in the Federal Acquisition Regulation (FAR; 48 CFR chapter 1), which contains a subpart on the Davis-Bacon Act and related contract clauses. *See* 48 CFR 22.400 *et seq.* Court and agency administrative decisions have developed and clarified myriad aspects of the laws governing Federal procurement.

During the past 40 years, the Department's DBRA program also has continued to evolve. Where the program initially was focused on individual project-specific wage determinations, contracting agencies now incorporate the Department's general wage determinations for the construction type in the locality in which the construction project is to occur. The program also now uniformly uses wage surveys to develop general wage determinations, eliminating an earlier practice of developing wage determinations based solely on other evidence about the general level of unionization in the targeted area. In a 2006 decision, the Department's Administrative Review Board (ARB) identified several survey-related wage determination procedures as inconsistent with the 1982 final rule. *See Mistick Constr.*, ARB No. 04–051, 2006 WL 861357, at \*5–7 (Mar. 31, 2006).<sup>9</sup> As a consequence of these developments, the use of averages of wage rates from survey responses has increasingly become the methodology used to issue new wage determinations—notwithstanding the Department's long-held interpretation that the DBA allows the use of such averages only as a methodology of last resort.

The Department has also received significant feedback from stakeholders and others since the last comprehensive rulemaking. In a 2011 report, the Government Accountability Office (GAO) reviewed the Department's wage survey and wage determination process

and found that the Department was often behind schedule in completing wage surveys, leading to a backlog of wage determinations and the use of out-of-date wage determinations in some areas.<sup>10</sup> The report also identified dissatisfaction among regulated parties regarding the rigidity of the Department's county-based system for identifying prevailing rates,<sup>11</sup> and missing wage rates requiring an overuse of “conformances” for wage rates for specific job classifications.<sup>12</sup> A 2019 report from the Department's Office of the Inspector General (OIG) made similar findings regarding out-of-date wage determinations.<sup>13</sup>

Ensuring that construction workers are paid the wages required under the DBRA also requires effective enforcement in addition to an efficient wage determination process. In the last decade, enforcement efforts at the Department have resulted in the recovery of more than \$229 million in back wages for over 76,000 workers.<sup>14</sup> But the Department has also encountered significant enforcement challenges. Among the most critical of these is the omission of DBRA contract clauses from contracts that are clearly covered by the DBRA. In one recent case, a contracting agency agreed with the Department that a blanket purchase agreement (BPA) it had entered into with a contractor had mistakenly omitted the Davis-Bacon clauses and wage determination, but the omission still resulted in an 8-year delay before the workers were paid the wages they were owed.

Through this rulemaking, the Department seeks to address a number of these outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. In the NPRM, the Department proposed to update and

modernize the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. In some of these proposed revisions, the Department had determined that changes it made in the 1981–1982 rulemaking were mistaken or ultimately resulted in outcomes that are increasingly in tension with the DBA statute itself. In others, the Department sought to expand further on procedures that were introduced in that last major revision, or to propose new procedures that will increase efficiency of administration of the DBRA and enhance protections for covered construction workers. The Department invited comments on these proposed updates and received 40,938 timely comments after a 60-day comment period.

The comments were from a broad array of constituencies, including contractors, unions, employer and industry associations, worker advocacy groups, non-profit organizations, social scientists, law firms, think tanks, Members of Congress, a state attorney general, a state department of labor, and other interested members of the public. All timely received comments may be viewed on the *regulations.gov* website, docket ID WHD–2022–0001. Some of the comments the Department received were general statements of support or opposition, and the Department also received approximately 40,200 “campaign” comments sent in response to organized initiatives. Commenters expressed a wide variety of views on the merits of particular aspects of the Department's proposal; however, most commenters favored some, if not all, of the changes proposed in the NPRM. The Department has considered the timely submitted comments addressing the proposed changes.

The Department also received a number of comments that are beyond the scope of this rulemaking. These included requests that would require Congress to amend statutory language in the DBRA. For example, many commenters suggested a change to the \$2,000 threshold for DBA and certain Related Acts to apply. Others suggested eliminating or changing the weekly certified payroll requirement that is expressly required by 40 U.S.C. sec 3145.

Other comments beyond the scope of the rulemaking included those that suggested significant new regulatory provisions or changes that were not proposed in the NPRM. Among these, for example, the Iron Workers International Union suggested the codification of the requirement to thoroughly investigate “area practice” issues that arise during the wage survey

<sup>10</sup> *See* Gov't Accountability Office, GAO–11–152, “Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey” (2011) (2011 GAO Report), at 12–19, available at: <https://www.gao.gov/assets/gao-11-152.pdf>.

<sup>11</sup> *Id.* at 23–24.

<sup>12</sup> *Id.* at 32–33.

<sup>13</sup> *See* Department of Labor, Office of the Inspector General, “Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates” (2019) (2019 OIG Report), at 10, available at: <https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf>.

<sup>14</sup> The listed figures have been corrected from the NPRM. The updated figures reflect the sum of the annual enforcement statistics from 2010–2019 in Gov't Accountability Office, GAO–21–13, “Fair Labor Standards Act: Tracking Additional Complaint Data Could Improve DOL's Enforcement” (2020) (2020 GAO Report), at 39, available at: <https://www.gao.gov/assets/gao-21-13.pdf>.

<sup>9</sup> Decisions of the ARB from 1996 to the present are available on the Department's website at <https://www.dol.gov/agencies/arb/decisions>.

process. *See Fry Bros. Corp.*, WAB No. 76–06, 1977 WL 24823, at \*6 (June 14, 1977), *aff’d sub nom. Fry Bros. Corp. v. Dep’t of Hous. & Urb. Dev.*, 614 F.2d 732, 732–33 (10th Cir. 1980). The Iron Workers also suggested creation of a new administrative process for issuing “right to sue” notices to workers to pursue rights of action authorized by 40 U.S.C. sec 3144(a)(2). As noted in the comment, such an initiative would be better proposed in a separate and subsequent notice-and-comment rulemaking.

The Department reviewed the comments submitted in particular for assertions by interested parties of their reliance on the existing regulations in a way that would be adversely affected by the proposed rule. Although many comments stated that the current regulations had been in place for many years, few specified that parties had relied on the regulations so as to raise questions about the fairness or reasonableness of amending them in the current rulemaking. Nonetheless, the Department considered whether the rule as a whole, as well as its individual proposed provisions, could plausibly implicate significant and legitimate reliance interests, and the Department has concluded that the proposed amendments to the regulations do not raise reliance interests that would outweigh the agency objectives discussed throughout this preamble.

The Department did not identify significant reliance interests among contractors or others in the existing part 1 regulations. The part 1 regulations involve the Department’s methodology for determining the prevailing wage rates that are required on covered contracts. Some of the changes the Department proposed to this part may lead to higher required wage rates in places and lower wage rates in others, and the new periodic adjustments of certain non-collectively bargained wage rates will result in a smoother increase in such wage rates over time instead of longer periods of the same wage rates for an area followed by steeper increases after the publication of new survey rates. Similarly, the new language clarifying the procedure for incorporating prevailing wage rates into multiple award schedules and other similar contracts may result in more frequent updates to prevailing wage rates on such contracts when options are executed. These types of changes, however, should not be significantly different in their effect on contractors than the fluctuations in prevailing wage rates that already occur between wage surveys as a result of changes in local economies and shifts in regional labor

markets. Even if the part 1 changes were to have significant effects on prevailing wage rates in certain local areas, any reliance interests of local contractors, governmental agencies, or workers on prior prevailing wage rates would be limited, given that the changes to the wage determination processes generally will not affect current contracts—which will continue to be governed by the wage determinations incorporated at the time of their award, with limited exceptions. Most of the revisions to part 1 will only apply to wage surveys that are finalized after the rule becomes effective, and thus they will generally apply only to contracts awarded after such new wage determinations are issued.<sup>15</sup> Contractors will therefore be able to factor any new wage rates into their bids on future contracts.

Many of the amendments to part 5 of the regulations are regulatory changes that codify the Department’s current practices and interpretations of existing regulations. As a result, such changes do not, in practical terms, impose new obligations on contractors or contracting agencies. Other changes, such as the new anti-retaliation provision, provide new remedies to address conduct that already may subject contractors to potential debarment. Any reliance interest in the ability to carry out such conduct with lesser potential consequences is particularly weak. Regardless, these new amendments to part 5 will generally only apply to contracts that are awarded after the effective date of this final rule. Contractors entering into new contracts issued after the rule is published and becomes applicable will have notice of the regulatory changes and will be able to take the changes into consideration as they analyze internal controls and

<sup>15</sup> As explained in § 1.6(c), whenever a new wage determination is issued (either after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision as a general matter does not and will not apply to contracts which have already been awarded, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii), and they include where a contract or order is changed to include substantial covered work that was not within the original scope of work, where an option is exercised, and also certain ongoing contracts that are not for specific construction, for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. The final rule instructs contracting agencies to apply the terms of § 1.6(c)(2)(iii) to all existing contracts, without regard to the date of contract award, if practicable and consistent with applicable law. The Department does not anticipate that the application of the amended wage determination methodologies in these situations will result in unfair harm to reliance interests in a manner sufficient to outweigh the benefits of the final rule implementation as planned. *See also* section III.C. (“Applicability Date”) below.

develop their bids or negotiate contract pricing.

ABC argued that the Department’s denial of requests to extend the public comment period beyond the 60 days provided was arbitrary and capricious, and other commenters expressed disappointment that the comment period had not been extended. As explained in the Department’s public response to the extension requests in regulations.gov, the Department concluded that the 60-day period provided the public with a meaningful opportunity to comment on the proposed rule. The Davis-Bacon and Related Acts’ applicability is limited to Federal and federally assisted construction projects, and therefore applies to a defined group of stakeholders. Additionally, various elements of the proposed and final rules codify or clarify longstanding policies, practices, and interpretations. As a result, stakeholders were familiar with many of the issues addressed in the NPRM. The public had additional time to review the NPRM, which was available on the Department’s website on March 11, 2022, seven days in advance of its publication in the **Federal Register**. The comprehensive nature and substance of the comments received—both in favor of and opposing the proposed rule—support the Department’s view that the 60-day period was appropriate and sufficient. Finally, the Department and the Office of Management and Budget have participated in several meetings pursuant to E.O. 12866 at which stakeholders have had opportunities to elaborate on their public comments.

Finally, some commenters raised concerns about the administrative or paperwork burdens contractors might face while adjusting to, and under, the Department’s final rule. The Department considered such concerns in its economic analyses and concluded that the paperwork burdens associated with the rule are limited and are outweighed by the benefits of the regulation.

Having considered all of the comments, the Department has decided to adopt the NPRM’s proposed changes with some modifications. Significant issues raised in the comments are discussed in more detail below in section III (“Final Regulatory Revisions”), along with the Department’s responses to those comments.

This final rule includes several elements targeted at increasing the amount of information available for wage determinations and speeding up the determination process. In particular, the final rule amends § 1.3 of the

regulations by outlining a new methodology to expressly give the Wage and Hour Division (WHD) Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied. Such a change will help improve the currentness and accuracy of wage determinations, as many States and localities conduct surveys more frequently than the Department and have relationships with stakeholders that may facilitate the process and foster more widespread participation. This revision will also increase efficiency and reduce confusion for the regulated community where projects are covered by both DBRA and local or State prevailing wage laws and contractors are already familiar with complying with the local or State prevailing wage requirement.

The Department also amends the definition of “prevailing wage” in § 1.2, and in § 1.7, the scope of data considered to identify the prevailing wage in a given area. To address the overuse of weighted average rates, the Department returns to the definition of “prevailing wage” in § 1.2 that it used from 1935 to 1983.<sup>16</sup> Currently, a wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise, a weighted average is used. The Department returns instead to the “three-step” method that was in effect before 1983. Under that method (also known as the 30-percent rule), in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. The Department also returns to a prior policy on another change made during the 1981–1982 rulemaking related to the delineation of wage survey data submitted for “metropolitan” or “rural” counties in § 1.7(b). Through this change, the Department will more accurately reflect modern labor force realities, allow more wage rates to be determined at smaller levels of geographical aggregation, and will increase the sufficiency of data at the statewide level.

Revisions to §§ 1.3 and 5.5 are aimed at reducing the need for the use of “conformances” where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome on contracting agencies, contractors, and the Department. This

final rule codifies a new procedure through which the Department may identify (and list on the wage determination) wage and fringe benefit rates for certain classifications for which WHD received insufficient data through its wage survey program. The procedure will reduce the need for conformances of classifications for which conformances are now often required.

The Department also revises § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Employment Cost Index (ECI) published by the Bureau of Labor Statistics (BLS).<sup>17</sup> The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing rates in the area.

The Department also strengthens enforcement in several critical ways. The Department addresses the challenges caused by the omission of contract clauses. In a manner similar to its rule under Executive Order 11246 (Equal Employment Opportunity), the Department designates the DBRA contract clauses in § 5.5(a) and (b), and applicable wage determinations, as effective by “operation of law” notwithstanding their mistaken omission from a contract. This is an extension of the retroactive modification procedures that were put into effect in § 1.6 by the 1981–1982 rulemaking, and it will expedite enforcement efforts to ensure the timely payment of prevailing wages to all workers who are owed such wages under the relevant statutes.

In addition, the Department finalizes new anti-retaliation provisions in the Davis-Bacon contract clauses in new paragraphs at § 5.5(a)(11) (DBRA) and (b)(5) (Contract Work Hours and Safety Standards Act (CWHSSA)), and in a new section of part 5 at § 5.18. The language ensures that workers who raise concerns about payment practices or assist agencies or the Department in investigations are protected from termination or other adverse employment actions.

Finally, to reinforce the remedies available when violations are discovered, the Department clarifies and strengthens the cross-withholding procedure for recovering back wages by including new language in the withholding contract clauses at § 5.5(a)(2) (DBRA) and (b)(3) (CWHSSA) to clarify that cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. The Department

also creates a mechanism through which contractors will be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in appropriate circumstances—if, for example, those entities are controlled by the same controlling shareholder or are joint venturers or partners on a Federal contract. The revisions also include a harmonization of the DBA and Related Act debarment standards.

## II. Background

### A. Statutory and Regulatory History

The Davis-Bacon Act, as enacted in 1931 and subsequently amended, requires the payment of minimum prevailing wages determined by the Department to laborers and mechanics working on Federal contracts in excess of \$2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3141 *et seq.* Congress has also included the Davis-Bacon requirements in numerous other laws, known as the Davis-Bacon Related Acts (the Related Acts and, collectively with the Davis-Bacon Act, the DBRA), which provide Federal assistance for construction projects through grants, loans, loan guarantees, insurance, and other methods. Congress intended the Davis-Bacon Act to “protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” *Coutu*, 450 U.S. at 773 (quoting H. Comm. on Educ. and Lab., Legis. History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962)).

The Copeland Act, enacted in 1934, added the requirement that contractors working on Davis-Bacon projects must submit weekly certified payrolls for work performed on the contract. *See* 40 U.S.C. 3145. The Copeland Act also prohibits contractors from inducing any worker to give up any portion of the wages due to them on such projects. *See* 18 U.S.C. 874. In 1962, Congress passed CWHSSA, which, as amended, requires an overtime payment of additional half-time for hours worked over 40 in the workweek by laborers and mechanics, including watchpersons and guards, on Federal contracts or federally assisted contracts containing Federal prevailing wage standards. *See* 40 U.S.C. 3701 *et seq.*

As initially enacted, the DBA did not take into consideration the provision of fringe benefits to workers. In 1964, Congress expanded the Act to require the Department to include an analysis of fringe benefits as part of the wage determination process. The amendment

<sup>16</sup> The 1981–1982 rulemaking went into effect on Apr. 29, 1983. 48 FR 19532.

<sup>17</sup> Available at: <https://www.bls.gov/news.release/eci.toc.htm>.

requires contractors and subcontractors to provide fringe benefits (such as vacation pay, sick leave, health insurance, and retirement benefits), or the cash equivalent thereof, to their workers at the level prevailing for the labor classification on projects of a similar character in the locality. *See* Act of July 2, 1964, Public Law 88–349, 78 Stat. 238.

Congress has delegated broad rulemaking authority under the DBRA to the Department. The DBA, as amended, contemplates regulatory and administrative action by the Department to determine the prevailing wages that must be paid and to “prescribe reasonable regulations” for contractors and subcontractors. 40 U.S.C. 3142(b); 40 U.S.C. 3145. Congress also, through Reorganization Plan No. 14 of 1950, directed the Department to “prescribe appropriate standards, regulations and procedures” to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts. 15 FR 3176; 5 U.S.C. app. 1.

The Department promulgated its initial regulations implementing the Act in 1935 and has since periodically revised them. *See* U.S. Department of Labor, Regulations No. 503 (Sept. 30, 1935). In 1938, these initial regulations, which set forth the procedures for the Department to follow in determining prevailing wages, were included in part 1 of Title 29 of the new Code of Federal Regulations. *See* 29 CFR 1.1 *et seq.* (1938). The Department later added regulations to implement the payroll submission and anti-kickback provisions of the Copeland Act—first in part 2 and then relocated to part 3 of Title 29. *See* 6 FR 1210 (Mar. 1, 1941); 7 FR 687 (Feb. 4, 1942); 29 CFR part 2 (1942); 29 CFR part 3 (1943). After the Reorganization Plan No. 14 of 1950, the Department issued regulations setting forth procedures for the administration and enforcement of the Davis-Bacon and Related Acts in a new part 5. 16 FR 4430 (May 12, 1951); 29 CFR part 5. The Department made significant revisions to the regulations in 1964, and again in the 1981–1982 rulemaking.<sup>18</sup>

While the Department has made periodic revisions to the regulations in recent years, such as to better protect the personal privacy of workers, 73 FR 77511 (Dec. 19, 2008); to remove references to the “Employment Standards Administration,” 82 FR 2225 (Jan. 9, 2017); and to adjust Federal civil money penalties, 81 FR 43450 (July 1, 2016), 83 FR 12 (Jan. 2, 2018), 84 FR 218 (Jan. 23, 2019), 87 FR 2328 (Jan. 14, 2022), 88 FR 2210 (Jan. 13, 2023), the Department has not engaged in a comprehensive review and revision since the 1981–1982 rulemaking.

#### *B. Overview of the Davis-Bacon Program*

WHD, an agency within the U.S. Department of Labor, administers the Davis-Bacon program for the Department. WHD carries out its responsibilities in partnership with the Federal agencies that enter into direct DBA-covered contracts for construction and/or administer Federal assistance to State and local governments and other funding recipients that is covered by the Related Acts. The State and local governmental agencies and authorities that receive covered financial assistance also have important responsibilities in administering Related Act program rules, as they manage programs through which covered funding flows or the agencies themselves directly enter into covered contracts for construction.

The DBRA program includes three basic components in which these government entities have responsibilities: (1) wage surveys and wage determinations; (2) contract formation and administration; and (3) enforcement and remedies.

#### *1. Wage Surveys and Determinations*

The DBA delegates to the Secretary of Labor the responsibility to determine the wage rates that are “prevailing” for each classification of covered laborers and mechanics on similar projects “in the civil subdivision of the State in which the work is to be performed.” 40 U.S.C. 3142(b). WHD carries out this responsibility for the Department through its wage survey program and derives the prevailing wage rates from survey information that responding contractors and other interested parties voluntarily provide. The program is carried out in accordance with the program regulations in part 1 of Title 29 of the Code of Federal Regulations, *see* 29 CFR 1.1 through 1.7, and its procedures are described in guidance documents such as the “Davis-Bacon Construction Wage Determinations

(final rule parts 1 and 5); 50 FR 4506 (Jan. 31, 1985) (final rule §§ 1.3(d) and 1.7(b)).

Manual of Operations” (1986) (Manual of Operations) and “Prevailing Wage Resource Book” (2015) (PWRB).<sup>19</sup> Although part 1 of the regulations provides the authority for WHD to create project-specific wage determinations, such project wage determinations, once more common, now are rarely employed. Instead, nearly all wage determinations are general wage determinations issued for general types of construction (building, residential, highway, and heavy) and applicable to a specific geographic area. General wage determinations can be incorporated into the vast majority of contracts and create uniform application of the DBRA for that area.

#### *2. Contract Formation and Administration*

The Federal agencies that enter into DBA-covered contracts or administer Related Act programs have the initial responsibility to determine whether a contract is covered by the DBA or one of the Related Acts and identify the contract clauses and the applicable wage determinations that must be included in the contract. *See* 29 CFR 1.6(b). In addition to the Department’s regulations, this process is also guided by parallel regulations in part 22 of the FAR for those contracts that are subject to the FAR. *See* 48 CFR part 22. Federal agencies also maintain their own regulations and guidance governing agency-specific aspects of the process. *See, e.g.,* 48 CFR subpart 222.4 (Defense); 48 CFR subpart 622.4 (State); U.S. Department of Housing and Urban Development (HUD), HUD Handbook 1344.1, Federal Labor Standards Requirements in Housing and Urban Development Programs (2013).<sup>20</sup>

Where contracting agencies or interested parties have questions about such matters as coverage under the DBRA or the applicability of the appropriate wage determination to a specific contract, they are directed to submit those questions to the Administrator of WHD (the Administrator) for resolution. *See* 29 CFR 5.13. The Administrator responds to such questions and provides periodic guidance on other aspects of the DBRA program to contracting agencies and other interested parties, particularly through All Agency Memoranda

<sup>19</sup> The Manual of Operations is a 1986 guidance document that is still used internally for reference within WHD. The PWRB is a 2015 document that is intended to provide practical information to contracting agencies and other interested parties, and is available at <https://www.dol.gov/agencies/whd/government-contracts/prevailing-wage-resource-book>.

<sup>20</sup> Available at: <https://www.hud.gov/sites/dfiles/OCHCO/documents/Work-Schedule-Request.pdf>.

<sup>18</sup> *See* 29 FR 13462 (Sept. 30, 1964); 46 FR 41444–70 (NPRM parts 1 and 5) (Aug. 14, 1981); 47 FR 23644–79 (final rule parts 1, 3, and 5) (May 28, 1982). The Department also proposed a significant revision of parts 1 and 5 of the regulations in 1979 and issued a final rule in 1981. *See* 44 FR 77026 (Dec. 28, 1979) (NPRM Part 1); 44 FR 77080 (Dec. 28, 1979) (NPRM part 5); 46 FR 4306 (Jan. 16, 1981) (final rule part 1); 46 FR 4380 (Jan. 16, 1981) (final rule part 5). The 1981 final rules, however, were delayed and subsequently replaced by the 1981–1982 rulemaking. The 1982 final rule was delayed by litigation and re-published with amendments in 1983 and 1985. 48 FR 19532–53 (Apr. 29, 1983)



(AAMs) and ruling letters. In addition, the Department maintains a guidance document, the Field Operations Handbook (FOH), to provide guidance for the regulated community and for WHD investigators and staff on contract administration and enforcement policies.<sup>21</sup>

During the administration of a DBRA-covered contract, contractors and subcontractors are required to provide certified payrolls to the contracting agency to demonstrate their compliance with the incorporated wage determinations on a weekly basis. *See generally* 29 CFR part 3. Contracting agencies have the duty to ensure compliance by engaging in periodic audits or investigations of contracts, including examinations of payroll data and confidential interviews with workers. *See* 29 CFR 5.6. Prime contractors have the responsibility for the compliance of all the subcontractors on a covered prime contract. 29 CFR 5.5(a)(6). WHD conducts investigations of covered contracts, which include determining if the DBRA contract clauses or appropriate wage determinations were mistakenly omitted from the contract. *See* 29 CFR 1.6(f). If WHD determines that there was such an omission, it will request that the contracting agency either terminate and resolicit the contract or modify it to incorporate the required clauses or wage determinations retroactively. *Id.*

### 3. Enforcement and Remedies

In addition to WHD, contracting agencies have enforcement authority under the DBRA. When a contracting agency's investigation reveals underpayments of wages of the DBA or one of the Related Acts, the Federal agency generally is required to provide a report of its investigation to WHD, and to seek to recover the underpayments from the contractor responsible. *See* 29 CFR 5.6(a), 5.7. If violations identified by the contracting agency or by WHD through its own investigation are not promptly remedied, contracting agencies are required to suspend payment on the contract until sufficient funds are withheld to compensate the workers for the underpayments. 29 CFR 5.9. The DBRA contract clauses also provide for "cross-withholding" if sufficient funds are no longer available on the contract under which the

violations took place. Under this procedure, funds may be withheld from any other covered Federal contract or federally assisted contract held by the same prime contractor in order to remedy the underpayments on the contract at issue. *See* 29 CFR 5.5(a)(2), (b)(3). Contractors that violate the DBRA may also be subject to debarment from future Federal contracts and federally assisted contracts. *See* 29 CFR 5.12.

Where WHD conducts an investigation and finds that violations have occurred, it will notify the affected prime contractor(s) and subcontractor(s) of the findings of the investigation—including any determination that workers are owed back wages and whether there is reasonable cause to believe the contractor may be subject to debarment. *See* 29 CFR 5.11(b). Contractors can request a hearing regarding these findings through the Department's Office of Administrative Law Judges (OALJ) and may appeal any ruling by the OALJ to the Department's ARB. *Id.*; *see also* 29 CFR parts 6 and 7 (OALJ and ARB rules of practice for Davis-Bacon proceedings). Decisions of the ARB are final agency actions that may be reviewable under the Administrative Procedure Act (APA) in Federal district court. *See* 5 U.S.C. 702, 704.<sup>22</sup>

## III. Final Regulatory Revisions

### A. Legal Authority

The Davis-Bacon Act, as enacted in 1931 and subsequently amended, requires the payment of certain minimum "prevailing" wages determined by the Department to laborers and mechanics working on Federal contracts in excess of \$2,000 for the construction, alteration, or repair, including painting and decorating, of public buildings and public works. *See* 40 U.S.C. 3141 *et seq.* The DBA authorizes the Secretary of Labor to develop a definition for the term "prevailing" wage and a methodology for setting it based on wages paid on similar projects in the civil subdivision of the State in which a covered project will occur. *See* 40 U.S.C. 3142(b); *Bldg. & Constr. Trades' Dep't, AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983).

<sup>22</sup> In addition to reviewing liability determinations and debarment, the ARB, the Secretary (when exercising discretionary review), and the courts also have jurisdiction in certain circumstances to review general wage determinations. Judicial review, however, is strictly limited to any procedural irregularities, as there is no jurisdiction to review the substantive correctness of a wage determination under the DBA. *See Binghamton Constr. Co.*, 347 U.S. at 177.

The Secretary of Labor has the responsibility to "prescribe reasonable regulations" for contractors and subcontractors on covered projects. 40 U.S.C. 3145. The Secretary, through Reorganization Plan No. 14 of 1950, also has the responsibility to "prescribe appropriate standards, regulations and procedures" to be observed by Federal agencies responsible for the administration of the Davis-Bacon and Related Acts "[i]n order to assure coordination of administration and consistency of enforcement of the labor standards provisions" of the DBRA. 15 FR 3176; 5 U.S.C. app. 1.

The Secretary has delegated authority to promulgate these regulations to the Administrator and to the Deputy Administrator of the WHD if the Administrator position is vacant. *See* Secretary's Order No. 01–2014, 79 FR 77527 (Dec. 24, 2014); Secretary's Order No. 01–2017, 82 FR 6653 (Jan. 19, 2017).

### B. Overview of the Final Rule

The Department finalizes its proposals to update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the DBRA. The sections below address these regulatory revisions as adopted in the final rule.

#### 1. 29 CFR Part 1

The procedures for determining the prevailing wage rates and fringe benefits applicable to laborers and mechanics engaged in construction activity covered by the Davis-Bacon and Related Acts are set forth in 29 CFR part 1. The regulations in this part also set forth the procedures for the application of such prevailing wage determinations to covered construction projects.

##### i. Section 1.1 Purpose and Scope

The Department proposed technical revisions to § 1.1 to update the statutory reference to the Davis-Bacon Act, now recodified at 40 U.S.C. 3141 *et seq.* The Department also proposed to eliminate outdated references to the Deputy Under Secretary of Labor for Employment Standards at the Employment Standards Administration. The Employment Standards Administration was eliminated as part of an agency reorganization in 2009, and its authorities and responsibilities were devolved into its constituent components, including the WHD. *See* Secretary's Order No. 09–2009 (Nov. 6, 2009), 74 FR 58836 (Nov. 13, 2009), 82 FR 2221 (Jan. 9, 2017). The Department further proposed to revise § 1.1 to reflect the removal of Appendix A of part 1, as discussed below. The Department also proposed to add new paragraph (a)(1) to reference the WHD website ([https://](https://www.dhs.gov)

<sup>21</sup> The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator. It is not used as a device for establishing interpretive policy. Chapter 15 of the FOH covers the DBRA, including CWHSSA, and is available at <https://www.dol.gov/agencies/whd/field-operations-handbook/Chapter-15>.

[www.dol.gov/agencies/whd/government-contracts](http://www.dol.gov/agencies/whd/government-contracts), or its successor website) on which a listing of laws requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act is currently found.

The Department received one comment in favor of this proposal. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States & Canada (UA) commented in support of the proposal, noting that the current information was outdated. The final rule therefore adopts this change as proposed, with one technical edit to delete an unnecessary conjunction that is not intended to reflect a change in the substance of this section.

## ii. Section 1.2 Definitions

### (A) Prevailing Wage

Section 1.2 contains the definition of the term “prevailing wage.” The DBA and the Related Acts require laborers and mechanics on covered projects to be paid a prevailing wage as set by the Secretary of Labor, but the statutes do not define the term “prevailing.” The Department’s regulatory definition of the term “prevailing wage” in 29 CFR 1.2 specifies the basic methodology with which the Department determines whether a certain wage rate is prevailing in a given geographic area. The Department uses this methodology to prepare wage determinations that are incorporated into DBRA-covered contracts to set minimum wage rates for each classification of covered workers on a project.

In the NPRM, the Department proposed to redefine the term “prevailing wage” in § 1.2 to return to the original methodology for determining whether a wage rate is prevailing. This original methodology has been referred to as the “three-step process.”

Since 1935, the Secretary has interpreted the word “prevailing” in the Davis-Bacon Act to be consistent with the common understanding of the term as meaning “predominant” or “most frequent.” From 1935 until the 1981–1982 rulemaking, the Department employed a three-step process to identify the most frequently used wage rate for each classification of workers in a locality. *See* Regulation 503 section 2 (1935); 47 FR 23644.<sup>23</sup> This process identified as prevailing: (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 has been referred to as the “30-percent rule.”

The three-step process relegated the average rate to a final, fallback method of determining the prevailing wage. In 1962 congressional testimony, Solicitor of Labor Charles Donahue explained the reasoning for this sequence in the determination: An average rate “does not reflect a true rate which is actually being paid by any group of contractors in the community being surveyed.” Instead, “it represents an artificial rate which we create ourselves, and which does not reflect that which a predominant amount of workers are paid.”<sup>24</sup>

In 1982, the Department published a final rule that amended the definition of “prevailing wage” by eliminating the second step in the three-step process—the 30-percent threshold. *See* 47 FR 23644. The new process required only two steps: first identifying if there was a wage rate paid to more than 50 percent of workers, and then, if not, relying on a weighted average of all the wage rates paid. *Id.* at 23644–45.

In eliminating the 30-percent threshold, however, the Department did not change its underlying interpretation of the word “prevailing”—that it means “the most widely paid rate” must be the “definition of first choice” for the prevailing wage. 47 FR 23645. While the 1982 rule continued to allow the Department to use an average rate as a fallback, the Department rejected commenters’ suggestions that the weighted average could be used in all cases. *See* 47 FR 23644–45. As the Department explained, this was because the term “prevailing” contemplates that wage determinations mirror, to the extent possible, those rates “actually paid” to workers. 47 FR 23645.

This interpretation—that the definition of first choice for the term “prevailing wage” should be an actual wage rate that is most widely paid—has now been shared across administrations for over 85 years. In the intervening decades, Congress has amended and expanded the reach of the Act’s prevailing wage requirements dozens of times without altering the term “prevailing” or the grant of broad authority to the Secretary of Labor to define it.<sup>25</sup> In addition, the question was

also reviewed by the Office of Legal Counsel (OLC) at the Department of Justice, which independently reached the same conclusions: “prevailing wage” means the current and predominant actual rate paid, and an average rate should only be used as a last resort. *See* Determination of Wage Rates Under the Davis-Bacon & Serv. Cont. Acts, 5 Op. O.L.C. 174, 176–77 (1981).<sup>26</sup>

In the 1982 final rule, when the Department eliminated the 30-percent threshold, it anticipated that this change would increase the use of artificial average rates. 47 FR 23648–49. Nonetheless, the Department believed a change was preferable because the 30-percent threshold could in some cases not account for up to 70 percent of the remaining workers. *See* 46 FR 41444. The Department also stated that it agreed with the concerns expressed by certain commenters that establishing a prevailing wage rate based on 30-percent of survey wage rates was “inflationary” and gave “undue weight to collectively bargained rates.” 47 FR 23644–45.

After reviewing the development of the Davis-Bacon Act program since the 1981–1982 rulemaking, the Department has concluded that eliminating the 30-percent threshold has ultimately resulted in an overuse of average rates. On paper, the weighted average remains the fallback method to be used only when there is no majority rate. In practice, though, it has become a central mechanism to set the prevailing wage rates included in Davis-Bacon wage determinations and covered contracts.

Prior to the 1982 rule change, the use of averages to set a prevailing wage rate was relatively rare. In a Ford Administration study of Davis-Bacon Act prevailing wage rates in commercial-type construction in 19 cities, none of the rates were based on averages because all of the wage rates were “negotiated” rates, *i.e.*, based on collective bargaining agreements (CBAs) that represented a predominant wage rate in the locality.<sup>27</sup> The Department

types); CWHSSA of 1962, Public Law 87–581, 76 Stat. 357 (1962) (requiring payment of overtime on contracts covered by the Act); Act of July 2, 1964, Public Law 88–349, 78 Stat. 238 (1964) (extending the Act to cover fringe benefits); 29 CFR 5.1 (referencing 57 Related Acts into which Congress incorporated Davis-Bacon Act requirements between 1935 and 1978).

<sup>26</sup> Available at: [https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174\\_0.pdf](https://www.justice.gov/sites/default/files/olc/opinions/1981/06/31/op-olc-v005-p0174_0.pdf).

<sup>27</sup> *See* Robert S. Goldfarb & John F. Morrall, “An Analysis of Certain Aspects of the Administration of the Davis-Bacon Act,” Council on Wage and Price Stability (May 1976), reprinted in Bureau of Nat’l Affs., *Construction Labor Report*, No. 1079, D–1, D–2 (1976).

<sup>24</sup> *Administration of the Davis Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. & Lab.*, 87th Cong. 811–12 (1962) (testimony of Charles Donahue, Solicitor of Labor).

<sup>25</sup> *See, e.g.*, Act of Mar. 23, 1941, ch. 26, 55 Stat. 53 (1941) (applying the Act to alternative contract

<sup>23</sup> Implemented Apr. 29, 1983. *See* 48 FR 19532.

estimates that prior to the 1982 final rule, as low as 15 percent of classification rates across all wage determinations were based on averages. After the 1982 rule was implemented, the use of averages may have initially increased to approximately 26 percent of all wage determinations.<sup>28</sup>

The Department's current use of weighted averages is now significantly higher than this 26 percent figure. To analyze the current use of weighted averages and the potential impacts of this rulemaking, the Department compiled data for select classifications for 19 recent wage surveys—nearly all of the completed surveys that WHD began in 2015 or later. The data show that the Department's reliance on average rates has increased significantly, and now accounts for 63 percent of the observed classification determinations in this recent time period.<sup>29</sup>

Such an overuse of weighted averages is inconsistent with the Department's longstanding interpretation of Congress's use of the word "prevailing" in the text of the Act—including the Department's statements in the preamble to the 1982 rule itself that the definition of first choice for the "prevailing" wage should be the most widely paid rate that is actually paid to workers in the relevant locality. If nearly two-thirds of rates that are now being published based on recent surveys are based on a weighted average, it is no longer fair to say that it is a fallback method of determining the prevailing wage.

The use of averages as the dominant methodology for issuing wage determinations is also in tension with the recognized purpose of the Act "to

protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." *Coutu*, 450 U.S. at 773 (internal quotation marks and citation omitted). Using an average to determine the minimum wage rate on contracts allows a single low-wage contractor in the area to depress wage rates on Federal contracts below the higher rate that may be generally more prevalent in the community—by factoring into (and lowering) the calculation of the average that is used to set the minimum wage rates on local Federal contracts.<sup>30</sup>

To address the increasing tension between the current methodology and the purpose and definition of "prevailing," the Department proposed in the NPRM to return to the original three-step process. The Department expects that re-introducing the 30-percent threshold will reduce the use of average rates roughly by half—from 63 percent to 31 percent. The data from the regulatory impact analysis included in section V suggests that returning to the three-step process will continue to result in 37 percent of prevailing wage rates based on the majority rule, with the balance of 32 percent based on the 30-percent threshold, and 31 percent based on the weighted average.

As part of its review of the wage determination definition and methodology, the Department also considered, but decided against, proposing to use the median wage rate as the "prevailing" rate. The median, like the average (mean), is a number that can be unrelated to the wage rate paid with the greatest frequency to employees working in the locality. Using either the median or the average as the primary method of determining the prevailing rate is not consistent with the Department's long-held interpretation of the meaning of the term "prevailing" in the Davis-Bacon Act. See 47 FR 23645. The Department therefore proposed to return to the three-step process and the 30-percent threshold, and did not propose as alternatives the use of either the median or mean as the primary or sole methods for making wage determinations.

<sup>28</sup> See *Oversight Hearing on the Davis-Bacon Act, Before the Subcomm. on Lab. Standards of the H. Comm. on Educ. & Lab.*, 96th Cong. 58 (1979) (statement of Ray Marshall, Secretary of Labor) (discussing study of 1978 determinations showing only 24 percent of classification rates were based on the 30-percent rule); Jerome Staller, "Communications to the Editor," *Policy Analysis*, Vol. 5, No. 3 (Summer 1979), pp. 397–98 (noting that 60 percent of determinations in the internal Department 1976 and 1978 studies were based on the 30-percent rule or the average-rate rule). The authors of the Council on Wage and Price Stability study, however, pointed out that the Department's figures were for rates that had been based on survey data, while 57 percent of rates in the mid-1970's were based solely on CBAs without the use of surveys (a practice that the Department no longer uses to determine new rates). See Robert S. Goldfarb & John F. Morrill II., "The Davis-Bacon Act: An Appraisal of Recent Studies," 34 *Indus. & Lab. Rel. Rev.* 191, 199–200 & n.35 (1981). Thus, the actual percentage of annual classification determinations that were based on average rule before 1982 may have been as low as 15 percent, and the percent based on the average rule after 1982 would have been expected to be around 26 percent.

<sup>29</sup> See below section V (Executive Order 12866, Regulatory Planning and Review et al.).

<sup>30</sup> For example, the 2001 wage determination for electricians in Eddy County, New Mexico, was an average rate based on responses that included lower-paid workers that had been brought in from Texas by a Texas electrical contractor to work on a single job. As the ARB noted in reviewing a challenge to the wage determination, the result was that "contract labor from Texas, where wages reportedly are lower, effectively has determined the prevailing wage for electricians in this New Mexico county." *New Mexico Nat'l Elec. Contractors Ass'n*, ARB No. 03–020, 2004 WL 1261216, at \*8 (May 28, 2004).

(1) Comments on the Definition of "Prevailing Wage"

The Department received many comments regarding the definition of the term "prevailing wage" and the proposed return to the three-step process and the 30-percent threshold. These included comments in favor of the proposal, comments in favor of keeping the current definition, comments suggesting that the Department abandon the "modal" methodology entirely and use only an average, and comments suggesting the Department should use data from sources other than its wage surveys before applying any specific methodology. Having reviewed and considered all the comments, the Department has decided that the best course is to adopt the re-definition of "prevailing wage" as proposed and return to the three-step process that was in effect from 1935 to 1983.

The Department continues to believe, as it has consistently for over 85 years, that the best methodology for determining the "prevailing wage" under the Davis-Bacon Act is one that uses a mathematical mode to determine "the most widely paid rate" as the "definition of first choice." 47 FR 23645. The modal definition of prevailing as "the most widely paid rate" is the methodology that is most consistent with Congress's use of the word "prevailing" in the statutory text. Commenters in support of the Department's proposal cited to various dictionary definitions of the word "prevailing" that support this conclusion. The Construction Employers of America (CEA), for example, noted the definition of "prevailing" as "most frequent" or "generally current" and descriptive of "what is in general or wide circulation or use" from Webster's Third New International Dictionary (1976). *Accord* 5 Op. O.L.C. at 175. The Department agrees that this and other similar dictionary definitions support the use of a modal methodology as the method of first choice.

Although the legislative history of the Act does not suggest that Congress understood there to be only one possible way of determining the prevailing wage,<sup>31</sup> there is no question that a modal methodology was within the common and ordinary public meaning of the term "prevailing" at the time. One

<sup>31</sup> See, e.g., 74 Cong. Rec. H6516 (daily ed. Feb. 28, 1931) (statement of Rep. William Kopp) (noting that some might argue "the term 'prevailing rate' has a vague and indefinite meaning," but that this was not an obstacle because "the power will be given . . . to the Secretary of Labor to determine what the prevailing rates are").



contemporaneous exchange from 1932 is particularly instructive. During an early debate over potential amendments to the Act, the Associated General Contractors (AGC) explained that union representatives believed the prevailing rate should always be a collectively bargained union wage, while the contractors, many members of Congress, and Federal contracting agencies believed it should be “the rate paid to the largest number in a particular locality at a given time”—in other words, the modal rate.<sup>32</sup>

Several commenters on the Department’s current proposal also argued that a modal methodology is generally more consistent with the purpose of Davis-Bacon Act. These commenters, including the National Black Worker Center, the International Union of Bricklayers and Allied Craftworkers, and others, argued that the use of a modal methodology results in a prevailing wage rate that is “actually paid” to workers in the area. These commenters said that average rates are less preferable because they are “artificial” and may not mirror any of the actual wage rates paid in the community. North America’s Building Trade Union (NABTU), among others, asserted that “average rates paid to no one are not ‘prevailing[.]’” Many unions and contractor associations, including the Washington State Building and Construction Trades Council (WA BCTC) and NABTU, noted that the use of wage rates that are actually paid to workers in the community is more likely to protect local construction firms from being underbid by unscrupulous low-wage contractors, which is the purpose of the Act.<sup>33</sup> Accordingly, commenters in favor of the proposal said averages should only be used as a fallback method when there is no clear rate prevailing in a given area.

A wide range of commenters that supported the proposal agreed with the Department that the use of an average—rather than a “modal” number identifying the most prevalent wage rate—is less preferable because the use of an average allows outlier wage rates paid to very few workers to influence the prevailing wage. The Leadership Conference on Civil and Human Rights (LCCHR), the National Women’s Law Center, Oxfam America, and several other civil rights and worker advocacy organizations similarly commented that “reliance on weighted averages creates the potential for a single employer’s rates that are exceptionally high or exceptionally low having outsize influence in determining the prevailing wage.” Commenters noted that this feature of averages makes the overuse of averages less consistent with the Act’s purposes of limiting the depressive effect of low-wage contractors on the wage rates in the local community.

Commenters supportive of the Department’s proposal also argued that this characteristic of average rates is particularly problematic for maintaining prevailing local construction standards where the use of an average results in a prevailing wage rate that is lower than a modal rate. As a Professor of Economics at the University of Utah commented, “[b]ecause the mean is sensitive to a long tail of lower wages compared to the mode, the mode is less likely to undercut local labor standards, including fringe benefits which underpin training and apprenticeship programs.” Conversely, the commenter noted, “the modal wage will deter market failures associated with short-run bidding practices that incentivize bidders to jettison all but the most necessary short-run costs of specific projects.”

In addition to determining that a modal methodology continues to be preferable, the Department proposed to return to the lower 30-percent threshold for using the mode, before falling back to the use of an average rate. Several commenters, including think tanks such as Americans for Prosperity and Institute for the American Worker (AFP-I4AW) and Competitive Enterprise Institute (CEI), opposed this proposal because they asserted that only a wage rate paid to a “majority” of workers fits the term “prevailing.” The National Federation of Independent Business (NFIB) asserted that 30 percent did not fall within the meaning of “prevailing” when Congress enacted the DBA in 1931 and the Department’s initial regulation was “erroneous” at the time. CEI cited to a definition of “prevailing” as meaning “accepted,

used, or practiced by most people.”<sup>34</sup> CEI asserted that the term “most people” used in that context “can only mean ‘a majority’” and therefore that “30 percent is not ‘prevailing’ under any meaningful sense of the term.”

On the other hand, many commenters supported the Department’s proposal and criticized the 1982 rule for seeming to conflate the dictionary definitions of “prevailing” with a “majority.” These commenters, including Mechanical Contractors Association of America (MCAA), National Electrical Contractors Association (NECA), and the UA, argued that the term “prevailing” is properly understood and defined as the most common or prevalent—which may be, but is not necessarily, a “majority.” If Congress had intended for the Department to determine only a “majority” wage, they argue, Congress would have explicitly stated as much in the statutory text. NECA and CEA noted that the interpretation of “prevailing” as not necessarily a majority was supported by the 1963 report of the House Subcommittee that examined the 30-percent threshold in depth before the passage of the 1964 amendments to the Act.<sup>35</sup> A joint comment from the Pennsylvania Attorney General and the Pennsylvania State Department of Labor and Industry (PAAG and PADLI) supported the reversion to the original definition, noting that it “aligns with the underlying interpretation of the word ‘prevailing’ as the ‘most widely paid rate.’”

The Department agrees with these commenters that the 30-percent threshold is consistent with the meaning of the word “prevailing” because “prevailing” is not coextensive with “majority.” A statute is normally interpreted with reference to the ordinary public meaning of its terms “at the time of its enactment.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). Dictionaries from around the time of the 1935 amendments to the Act, when Congress revised the DBA to require the Secretary to predetermine prevailing wage rates, had definitions similar to the one cited in the 1981 OLC opinion. *See, e.g., Prevailing*, Merriam-Webster, Webster’s Collegiate Dictionary (5th ed. 1936) (“Very generally current; most frequent; predominant” with synonyms of common, widespread,

<sup>32</sup> See Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings before the Committee on Labor, House of Representatives, 72nd Cong., 1st Sess., on S. 3847 and H. R. 11865 (Apr. 28, 1932) at 34–35. The National Association of Manufacturers, similarly, argued that the prevailing wages should be “considered as that being paid to the largest number in the particular locality at a particular time.” *Id.* at 71–72. See also 5 Op. O.L.C. at 175–76 (noting that this testimony leading up to the 1935 amendments “indicates a common understanding by spokesmen for labor and management, as well as individual legislators, that the ‘prevailing’ wage was the wage paid to the largest number of workers in the relevant classification and locality”).

<sup>33</sup> See also 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. & Lab. (Comm. Print 1963) (1963 House Subcommittee Report), at 7–8; 5 Op. O.L.C. at 177 (quoting the 1963 House Subcommittee Report).

<sup>34</sup> The comment raising this language cited to an entry for “prevailing” in the online version of Merriam-Webster’s dictionary. The Department was not able to find that language at the cited location, but was able to find it in an online version of a thesaurus from the same publisher. *See Prevailing*, Merriam-Webster’s Thesaurus, <https://www.merriam-webster.com/thesaurus/prevailing>.

<sup>35</sup> 1963 House Subcommittee Report, at 8.

extensive, and prevalent); *Prevailing*, Oxford English Dictionary, Vol. VIII (1933) at 1334 (“2. Predominant in extent or amount; most widely occurring or accepted; generally current”); 5 Op. O.L.C. at 175. When there are only two kinds being compared, the “most frequent” or “most widely occurring” of the two kinds will be a majority, and thus only a majority will be prevailing. But the same is not true when a variety of kinds are compared. In such circumstances, even if a majority will still necessarily be prevailing, it does not follow that anything less than a majority cannot be considered prevailing. Rather, as the 1963 House Subcommittee Report concluded, “‘prevailing’ means only a greater number. It need not be a majority.”<sup>36</sup>

In opposing the proposal, AFP-I4AW noted that in the 1981–1982 rulemaking the Department had agreed with commenters that stated “a rate based on 30 percent does not comport with the definition of ‘prevailing[.]’”<sup>37</sup> The Department did not provide further explanation of this argument in the 1982 final rule, but had stated in the 1981 NPRM that the 30-percent rule “ignores the rate paid to up to 70 percent of the workers.” See 46 FR 41444. Several commenters that opposed the return to the 30-percent rule, including AFP-I4AW, Associated Builders and Contractors (ABC), and Clark Pacific, stated that they still found this reasoning persuasive.<sup>38</sup>

The Department disagrees. As an initial matter, the characterization of the 30-percent threshold as “ignoring” rates is not unique to that specific threshold. Rather, it is a feature of any rule based on a mathematical “mode,” in which the only value that is ultimately used is the value of the number that appears most frequently. This is in contrast to using a mean (average), in which the values of all the numbers are averaged

together, or a median, which uses only the midpoint value. Both the 30-percent threshold and the majority rule are modal rules in which the values of the non-prevailing wage rates do not factor into the final analysis. This feature of a modal analysis can be viewed as particularly helpful for avoiding an unwarranted downward or upward impact from outlier wage rates. As the International Association of Sheet Metal, Air, Rail and Transportation Workers and the Sheet Metal and Air Conditioning Contractors National Association (SMART and SMACNA) noted in a joint comment, “[w]hen using the mean, unusually low or high values distort the data; the mode, by contrast, eliminates from the analysis data that grossly deviate from what workers are actually paid and, therefore, would depress labor standards if included.”

Moreover, the characterization of the 30-percent threshold as ignoring up to 70 percent of wage rates distorts how the analysis is applied in practice. In the three-step process, the first step is to adopt the majority rate if there is one. Under both the proposed three-step process and the current majority-only rule, any wage rate that is paid to a majority of workers would be identified as prevailing. Under either method, the weighted average will be used whenever there is no wage rate that is paid to more than 30 percent of employees in the survey response. The difference between the current majority process and the three-step methodology is solely in how a wage rate is determined when there is no majority, but there is a significant plurality wage rate paid to between 30 and 50 percent of workers. In that circumstance, the current “majority” rule uses averages instead of the rate that is actually paid to that significant plurality of the survey population. This is true, for example, even where the same wage rate is paid to 45 percent of workers and no other rate is paid to as high a percentage of workers. In such circumstances, the Department believes that a wage rate paid to between 30 and 50 percent of workers—instead of an average rate that may be actually paid to few workers or none at all—is more of a “prevailing” wage rate.<sup>39</sup>

NABTU and other commenters in favor of the Department’s proposed return to the 30-percent threshold noted

that Congress specifically considered on numerous occasions whether to abolish the 30-percent rule and declined to do so.<sup>40</sup> Similarly, CEA commented that Congress’s repeated expansion and amendment of the Act from 1935 to 1982 without changing or addressing the definition of prevailing wage should be interpreted as “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)). The Department agrees that this legislative acquiescence is significant. It may not necessarily mean that the 30-percent rule was the only interpretation that was intended by Congress—especially in light of the subsequent Congressional acquiescence to the imposition of the majority-only rule.<sup>41</sup> However, the expansion of the Act, particularly in 1964 after the extensive hearings regarding the 30-percent rule, suggests that Congress did not believe that the 30-percent rule was “erroneous” at the time of its enactment or otherwise believe that it “did not comport” with the definition of prevailing. Cf. 5 Op. O.L.C. at 176 (noting Congress had acquiesced to the Department’s interpretation of the term prevailing as embodied in its 1935 regulations).

In addition to considering questions regarding Congressional acquiescence, the Department has also considered whether the length of time that the majority-only rule has been in place has led to reliance interests among regulated entities that would counsel against reversion to the three-step process. While some commenters referred to the length of time the rule had been in effect, their comments generally did not focus on related reliance interests. The Department does not believe that any potential reliance interests would be so significant as to outweigh the objectives of seeking to align the prevailing wage methodology better with the longstanding meaning of the term prevailing and of seeking to better protect workers against the depressive

<sup>36</sup> 1963 House Subcommittee Report, at 8.

<sup>37</sup> 47 FR 23644.

<sup>38</sup> Similarly, CEI opposed the use of the 30-percent rule because it stated that the fact that other workers may earn less than the wage determined to be the prevailing wage is “highly significant,” because it indicates that the labor market is “more competitive in terms of wages.” Under this reasoning, however, only an average rate would be sufficient, because any modal (or median) rate would not include all of the wage rates paid. Using only an average is not consistent with the Department’s long-held understanding of the meaning of the term “prevailing.” See 47 at FR 23644–45. Neither the text nor the legislative history of the Act suggests that the term prevailing wage was intended to necessarily capture and reflect all of the wage rates that are paid in an area. Instead, the Department has understood the statute as better carried out with a methodology that seeks to determine which among those wage rates is prevailing.

<sup>39</sup> As the OLC concluded in 1981, the use of an average instead of the 30-percent rule may be particularly inappropriate in circumstances where “there is a wide variation in rates of wages and a large minority of persons paid significantly lower wages; use of an average in such a case might result in a contract wage well below the actual wages paid a majority of employees.” 5 Op. O.L.C. at 177 n.3.

<sup>40</sup> See, e.g., Federal Construction Costs Reduction Act of 1977 (S. 1540, H.R. 6100); Davis-Bacon Act—Fringe Benefits (H.R. 404): Hearings Before the General Subcomm. on Labor of the H. Comm. on Educ. & Labor, 88th Cong. at 38–39, 125, 219, 225–230 (Mar. 1, 7, 12, 21, 22, and 26, 1963).

<sup>41</sup> One individual commenter opposing the Department’s proposal asserted that Congress’s inaction in reimposing the 30-percent rule should be considered evidence that the 30-percent rule “contravenes, rather than is required by, the statutory text.” But given the wide discretion the courts have found the DBA affords to the Secretary of Labor, the Department does not believe that the acquiescence to the Department’s decision to use one specific modal threshold can be understood as barring it from using another.

effect on wage rates of low-wage contractors. The Department's illustrative study of the proposed methodology change, in section V.D. below, suggests that the change may lead to higher required prevailing wage rates in some places and lower wage rates in others. The magnitude and direction of changes, however, should not be significantly different in their effect on contractors than the fluctuations in prevailing wage rates that already occur between wage surveys as a result of changes in local economies and shifts in regional labor markets. Even if the part 1 changes were to have significant effects on wage rates in certain local areas, any reliance interests of local contractors, governmental agencies, or workers on prior wage rates would be minimal, given that the changes to the wage determination processes generally will not affect current contracts—which will continue to be governed by the wage determinations incorporated at the time of their award, with limited exceptions. Most of the revisions to part 1 will only apply to wage surveys that are finalized after the rule becomes effective, and thus they will generally apply only to contracts awarded after such new wage determinations are issued.<sup>42</sup> Contractors will therefore be able to factor any new wage rates into their bids or negotiations on future contracts.

The Department received many comments in favor of and opposed to the use of the 30-percent threshold for other reasons. A number of commenters commented favorably on the use of 30 percent specifically as a reasonable modal threshold to choose. As the LCCHR, the National Women's Law Center, Oxfam America, and several other civil rights and worker advocacy organizations commented, the choice of

the 30-percent threshold appropriately aligns the rate selected with the actual wages paid to “significant shares” of workers in a covered job classification. The Dakotas Mechanical Contractors Association (DMCA) and the Sheet Metal, Air Conditioning and Roofing Contractors Association stated that if 30 percent are paid the same rate, it is likely the prevailing rate for skilled workers in the area. The Center for American Progress Action Fund noted that the 30-percent rule is also followed by some states in the implementation of their own State prevailing wage programs.<sup>43</sup> Some commenters argued that a 50-percent threshold for using a modal rate is simply too high for many geographic areas. The DMCA, for example, noted that when there are multiple large construction projects going on in the Dakotas, many contractors travel from outside the area, and counting wage rates from these out-of-town contractors can make it difficult for the actual local rate to satisfy a 50-percent threshold.

Several commenters opposing the proposed reversion to the 30-percent rule asserted that a reversion to the 30-percent rule would result in rates that are less accurate or less likely to reflect the actual wage and fringe benefit rates in a locality, and therefore are inherently not “prevailing” under the meaning of the statute. ABC stated that a survey of its Federal contractor members showed that only 12.6 percent of its respondents stated that the reversion to the 30-percent rule would increase the accuracy of wage determinations. The Modular Building Institute (MBI) commented that a 30-percent threshold is too small a sample on which to base a prevailing wage. According to the Taxpayers Protection Alliance, returning to the 30-percent rule “invites cherry-picking rather than serious analysis.” On the other hand, several commenters in favor of the Department's proposal asserted, similar to the minority of respondents to ABC's survey, that returning to the 30-percent rule would increase the accuracy of wage determinations.

In making arguments about accuracy, most commenters for and against the

proposal did not reference data or evidence to support their views. Commenters opposing the proposal that did cite data compared potential outcomes under the 30-percent threshold—or any modal determinations based on voluntary wage surveys—with average rates calculated by other sources or by reference to studies that found increases in total costs from the use of any prevailing wage at all. Commenters also argued that accuracy can be judged by the potential for the percentage of wage determinations based on CBAs to be higher than the union density in the local area.<sup>44</sup> The Department does not agree with these measurements of accuracy and instead understands these arguments as fundamentally about what the meaning of “prevailing” should be, or whether prevailing wage laws are good policy in the first place. While a comparison of costs in jurisdictions in which a State prevailing wage law applies with those where there is no such requirement may be helpful to understanding the cost impacts of prevailing wage requirements, that comparison is not helpful in understanding whether a certain prevailing wage methodology results in wage determinations that are “accurate” or not, because the point of the prevailing wage law is to eliminate the payment of substandard wage rates that may be paid in the absence of the law. For similar reasons, a comparison with average rates or union density does not reflect accuracy—rather it reflects different understandings of the term “prevailing.”<sup>45</sup>

AFP-14AW asserted that it is arbitrary to choose 30 percent instead of one of the other “infinite percentages that might be chosen between 0 and 50 percent.” The Department disagrees with the premise that the 30-percent threshold is arbitrary and therefore

<sup>42</sup> As explained in § 1.6(c), whenever a new wage determination is issued (either after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision as a general matter does not and will not apply to contracts which have already been awarded, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii), and they include where a contract or order is changed to include substantial covered work that was not within the original scope of work, where an option is exercised, and also certain ongoing contracts that are not for specific construction, for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. The final rule instructs contracting agencies to apply the terms of § 1.6(c)(2)(iii) to all existing contracts, without regard to the date of contract award, if practicable and consistent with applicable law. The Department does not anticipate that the application of the amended wage determination methodologies in these situations will result in unfair harm to reliance interests in a manner sufficient to outweigh the benefits of the final rule implementation as planned. See also section III.C. (“Applicability Date”) below.

<sup>43</sup> See, e.g., Haw. Code R. section 12–22–2(b) (30-percent threshold in Hawaii); 820 Ill. Comp. Stat. 130/4 section 4(a) (30-percent threshold in Illinois). Wyoming uses a version of the three-step process in which the prevailing wage is a majority, or 30-percent, unless more than one wage rate reaches the 30-percent threshold, in which case a weighted average is used. See <https://dws.wyo.gov/wp-content/uploads/2022/04/Labor-Standards-2022-Prevailing-Wage-Rates.pdf>. Minnesota and California use modal methodologies, but do not have specific thresholds. See Minn. Stat. section 177.42; Cal. Lab. Code section 1773.9(b)(1).

<sup>44</sup> ABC and the National Association of Home Builders (NAHB) cited data from a 2010 GAO report and subsequent data showing that as of 2010, a union rate prevailed in 63 percent of all then-existing wage determinations; in 2018, a union rate prevailed in 48 percent of determinations; and in 2022, a union rate prevailed in 42 percent of determinations. The commenters contrasted these numbers with data from the BLS that shows union density currently at less than 20 percent of the construction labor market.

<sup>45</sup> The Department also notes that, while the percentage of overall wage determinations based on collective bargaining rates nationwide has been higher than measures of union density in the construction industry generally, the percentage of wage determinations based on collectively bargained rates has significantly declined in recent years. NAHB and ABC pointed out that the 2011 GAO report stated that at the time 63 percent of published wage rates were union prevailing. See 2011 GAO Report, at 20. ABC notes current statistics from the Department show 42 percent are based on collectively bargained rates.

impermissible. As one commenter in favor of the proposal, the Iron Workers International Union (Iron Workers), stated, the “30 percent” rule can be seen as a “middle position” that the Department adopted in 1935. Among modal rates, the wage rate based on a 20 percent modal rate or even lower might also have been considered a reasonable interpretation of the term “prevailing wage,” rendering 30-percent a compromise among all of the different definitions being advanced at the time. *See Bldg. & Constr. Trades Dep’t v. Donovan*, 553 F. Supp. 352, 354 (D.D.C. 1982) (“There is nothing intrinsically appropriate or inappropriate to the thirty percent rule or to any other figure as representing the ‘prevailing wage.’”).<sup>46</sup> The fact that the Department could have chosen an even lower number, or no modal threshold at all, does not make the choice of 30 percent impermissible. The number is a familiar one that the Department used over five decades; as commenters noted, it represents at least a significant share of workers in a survey; and the Department has tested the potential outcome of returning to the number and found that it will alleviate concerns about overuse of average rates. *Cf. Ralph Knight, Inc. v. Mantel*, 135 F.2d 514, 518–19 (8th Cir. 1943) (holding the percentage threshold in an FLSA regulation was not arbitrary because it was reasonable).

The ABC and several other commenters criticized the Department for proposing to return to the 30-percent threshold without addressing concerns they have about the methodology of the wage survey program that produces the underlying numbers to which the three-step process would be applied. According to ABC and others, the Department should use more sophisticated representative sampling and statistical regression methods to come up with prevailing rates because of low response rates, low sufficiency thresholds and therefore small sample sizes, and response bias in the Department’s voluntary Davis-Bacon wage survey program. ABC and the National Association of Home Builders (NAHB) referenced reports by the Department’s OIG expressing concern about low response rates to WHD’s wage surveys, including a 2019 report in which OIG calculated that as many as 53 percent of eligible contractors had

not provided wage data on 7 surveys that were analyzed.<sup>47</sup> ABC and others argued that union contractors have a higher interest in responding to the wage surveys, and so the surveys tend to disproportionately reflect union rates and are therefore unreliable.<sup>48</sup> In a joint comment, a group of housing industry associations and entities stated that certain segments of the residential building industry have “no incentive to participate in a survey method that provides no direct benefit to their business.” Without making changes to the survey process to better account for non-union contractors, ABC argued, the Department should not be changing the threshold for identifying the prevailing wage. ABC stated that the survey process in its current form is “incapable of accurately determining whether a single rate is paid to 30% (or a majority) of local construction workers.”

ABC, NAHB, and other commenters stated that the Department should have considered using data from the BLS, which performs representative sampling on surveys with higher response rates and larger sample sizes and uses other more sophisticated regression methods, and therefore would be more accurate. According to ABC and an individual commenter, the use of BLS data would result in more timely wage determinations and decrease the costs of Federal construction, making more projects viable and increasing construction employment. ABC acknowledged that the Department has previously declined to use BLS data for DBA wage determinations for a number of reasons, including that BLS data does not have the same benefits information, data by county level, or by construction type. But ABC asserted that none of these reasons entirely foreclose the use of such data, and it cited the fact that the Department already uses BLS data

for wage determinations under the Service Contract Act (SCA), which has similar statutory parameters, as well as the Foreign Labor Certification Program, and with some statistical modeling, for Federal employee pay under the Federal Employee Pay Comparability Act. ABC also argued that the Department’s current use of larger county groupings to identify wage rates for counties with insufficient data and the proposal in the NPRM to remove the bar on cross-consideration of rural and metropolitan data both undercut the Department’s arguments against using BLS data. NAHB and the Mortgage Bankers Association (MBA) also suggested that the Department should consider outsourcing the wage data collection process to third-party organizations they believe would be better equipped to collect greater quantities of data.

A joint comment from the National Asphalt Pavement Association, National Ready Mixed Concrete Association, and National Stone, Sand & Gravel Association (NAPA, NRMPCA, and NSSGA) suggested that reverting to the use of a 30-percent threshold is “unnecessary” because there are other ways to improve the survey process. They suggested using the certified payrolls that are submitted on DBRA projects to help identify prevailing wages.<sup>49</sup> They also suggested updating and standardizing classifications that are “outdated” and confusing where they differ across political subdivisions. AGC suggested that the Department should revise the wage survey process to allow contractors to report wage information by individual craft classifications in each county by construction type, instead of broken-down project-by-project.

Several commenters stated that even if the 30-percent rule had been permissible previously, the Department could not reasonably return to it because the construction labor market has changed and prevailing rates “rarely occur in the modern economy.” ABC noted that union density has declined in the construction labor market from 34 percent in 1981 to under 14 percent in recent years. The Association of Washington Housing Authorities (AWHA) stated that the increase in

<sup>47</sup> See OIG, U.S. Department of Labor, No. 04–19–001–15–001, “Better Strategies are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates,” 8, 15 (2019). Available at <https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf>.

<sup>48</sup> As evidence that the Department’s Davis-Bacon wage surveys are statistically unrepresentative of the construction workforce, ABC asserted that average wages—both economywide and in specific occupations (construction or otherwise)—are consistently higher than median wages in the United States and most industrialized economies. For example, ABC points to BLS’s May 2021 Occupational Employment and Wage Statistics (OEWS) survey showing that, nationally, average wages exceed median wages in 51 of 64 detailed construction occupations. ABC argues that the Department’s surveys are unrepresentative because, in the wage determinations developed using the survey data and using the majority rule, the majority rate (which should be the same as the median) consistently exceeds wages calculated as survey averages.

<sup>49</sup> The Department appreciates this suggestion, but notes that using certified payrolls instead of the wage survey process would result in prevailing rates based entirely on data from DBRA-covered projects. While such data could be helpful in certain circumstances in which there is not sufficient data from private sources, it could not be used instead of the wage survey process because the DBA contemplates a wider analysis of wage rates that includes those on wholly privately funded projects where such data is available. *See generally infra* section III.B.1.iii.(B) (“29 CFR 1.3(d)”).

<sup>46</sup> The 1982 *Donovan* district court decision enjoined several elements of the 1981–1982 rulemaking but upheld the Department’s decision to eliminate the 30-percent threshold. In affirming the district court’s decision on the 30-percent threshold, the D.C. Circuit stated that it affirmed “generally for the reasons stated in [the district court’s] opinion.” *Donovan*, 712 F.2d at 616.

reliance on weighted averages actually reflects reality in certain construction types where union participation is lacking. AWhA also stated that there is no need to return to the 30-percent rule because there is better labor market wage information now available than there was when the 30-percent rule was last in effect, with both proprietary and public databases now containing “up-to-date wage and salary information on thousands of job classifications at varying geographic levels.”

Finally, comments from ABC and a group of U.S. Senators asserted that the Department’s reasoning for its proposal is contrary to the D.C. Circuit’s decision in *Building & Construction Trades’ Department v. Donovan*, 712 F.2d 611, 616–17 (D.C. Cir. 1983). In that decision, the Department’s 1981–1982 rulemaking eliminating the 30-percent threshold had been challenged. The D.C. Circuit stated that the Department’s new definition of “prevailing” as, first, the majority rate, and second, a weighted average, was “within a common and reasonable reading of the term” and “would not defeat the essential purpose of the statute, which was to ensure that federal wages reflected those generally paid in the area.” *Id.* at 616–17. ABC stated that this holding allowing the Department to eliminate the 30-percent threshold could not be squared with the Department’s reasoning in the NPRM that the overuse of averages was inconsistent with the text and purpose of the Act. See 87 FR 15704.

Considering these comments, the Department agrees with the commenters in favor of the proposal that the 30-percent threshold is a reasonable threshold that represents the best course for making wage determinations based on wage rates that are actually paid to workers in the relevant area. The Department also believes that returning to the use of the 30-percent threshold at the second step in the wage determination process is preferable for the same reasons that it is preferable to use a modal methodology at all instead of using averages or the median for all wage determinations. The mode is more consistent with the term “prevailing,” and it is in general more protective of prevailing wage rates against the depressive effect of low-wage contractors. Even when adopting the current majority threshold for modal wage determinations in 1982, the Department reiterated this long-held interpretation that the “most widely paid rate” should be the “definition of first choice” for the prevailing wage, and that wage determinations should “mirror, to the extent possible, those

rates actually paid in appropriate labor markets.” 47 FR 23645.

The Department disagrees that the D.C. Circuit’s *Donovan* decision precludes a return to the 30-percent threshold or prevents the Department from concluding that an overuse of averages is in tension with the Department’s long-held interpretation of the Act. In *Donovan*, the court stated that the majority-only rule was “within a common and reasonable reading” of the term prevailing, and “would not defeat the essential purpose of the statute.” 712 F.2d at 616–17. The court did not, however, state or even suggest that the majority rule represented the only proper reading of the statute. To the contrary, the court stated that it was upholding the new rule because “the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.” 712 F.2d at 616.

As the Department explained in the NPRM, there has been a significant increase in the use of weighted averages between 1983 and the present—from as low as 15 percent prior to the implementation of the current regulations to 63 percent in the Department’s review of 19 recent surveys. Several commenters noted that this increase in the use of averages appears to be far beyond what was expected at the time the Department implemented the majority-only rule and at the time of the D.C. Circuit opinion. For example, the unions that opposed the 1981–1982 rulemaking in court argued that it could result in “a third or more” of wage rates based on weighted averages. *Donovan*, 712 F.2d at 616. Now, nearly double that number—two thirds—of prevailing wage rates published from recent surveys have been based on weighted averages. These new circumstances represent a departure from the Department’s longstanding interpretation of the Act. 5 Op. O.L.C. at 176–77.

The Department also disagrees with comments suggesting the Department can only justify its return to the 30-percent threshold by finding that the current majority rule is per se not allowed by the statute and suggesting furthermore that the *Donovan* decision bars the Department from reaching that conclusion. As noted, however, the decision in *Donovan* reflects that there can be more than one possible threshold for determining whether a wage rate is prevailing, and that the statute delegates the decision about methodology to the Secretary of Labor. 712 F.2d at 616. The Department has concluded that the original three-step process is preferable to the majority-only rule because it is

more consistent with the meaning of the word “prevailing” and will be more protective against the depression of wage rates by low-wage contractors. Under these circumstances, the Department does not need to find that the current overuse of averages renders the majority-only rule effectively barred by the statute.

The Department also considered the comments critiquing the interface between the wage survey program and the Department’s use of a modal methodology to determine prevailing wages and the use of the 30-percent modal threshold in particular. The Department does not believe it is necessary or preferable to abandon the current Davis-Bacon wage survey process, or to require by regulation that survey data be adjusted with regression or other similar statistical analyses. The process of adjusting survey data using weighting, imputation, or other representative sampling methods would require additional data regarding the universe of projects and classifications of workers—divided by construction type—that does not currently exist and would be overly burdensome and costly to obtain.<sup>50</sup> Moreover, other commenters on the rule specifically opposed the use of sampling or other similar methodologies because the decisions about the underlying assumptions used in the calculations or modeling would give the Department too much discretion that would be difficult for stakeholders to scrutinize. Finally, such sampling or other statistical methods could also significantly increase the likelihood that the wage rates the Department publishes would be akin to weighted averages and would not be wage rates that are actually paid to workers in the relevant areas. The Department declines to impose such requirements in this final rule.

The Department also considered ABC’s and others’ arguments that it should entirely discontinue the Davis-Bacon wage surveys and instead use data from BLS surveys to determine prevailing wages in the first instance. As ABC recognized in its comment, the Department has explored this possibility on various occasions in the past at the recommendation of the GAO and others. For example, ABC cited a 2004 letter

<sup>50</sup> Similarly, the 2019 OIG report noted WHD officials’ concern that using statistical sampling during the clarification process instead of manual reviews of survey data might be less efficient and effective than current processes, and that “use of statistical sampling in lieu of comprehensive clarification would likely result in the publication of fewer, and less robust, wage determinations.” Report at 7, 43.

from the Assistant Secretary for Employment Standards, to the Department's OIG, noting the actions the Department had taken to consider this option, including funding pilot surveys to determine the feasibility of collecting fringe benefit data as part of BLS's National Compensation Survey (NCS), and working with BLS to examine the extent to which the Occupational Employment and Wage Statistics (OEWS) survey might provide detailed construction industry wage rate information by locality and occupation.<sup>51</sup>

The Department has repeatedly concluded that relying on BLS data sources to determine prevailing wages instead of continuing to conduct Davis-Bacon wage surveys is not preferable, and the Department again reaches this conclusion. No BLS survey publishes, at a county level, the wage data, fringe benefit data, data for sufficiently specific construction craft classifications, and data by construction type, that would align with the Department's interpretations of the statutory requirements to determine prevailing wages for "corresponding class[es]" of workers on "projects of a character similar" within "civil subdivisions of the State" in which the work is to be performed. 40 U.S.C. 3142(b).<sup>52</sup> The Department does not agree with ABC that the Department's current use of larger geographic groupings under certain conditions suggests that the Department should adopt BLS data that is compiled for areas larger than a county. The scope of consideration regulations at § 1.7 allow

the Department to consider data from larger geographic areas only when there is insufficient wage survey data in a given county. This reflects the Department's long-established position that the county level is the appropriate level at which to determine prevailing wage rates where possible, and as such that the wholesale adoption of BLS data compiled for larger areas generally would not be appropriate. The Department also considered whether it would be possible to combine BLS surveys or use underlying BLS microdata instead of the Department's wage surveys but determined that the BLS's methodology does not allow such a procedure because, among other reasons, BLS does not collect data on a project-by-project basis and therefore does not capture circumstances in which employees may be paid different hourly rates for work based on the type of project. Finally, the Department's conclusion is bolstered by the widespread practice of states, many of which have adopted prevailing wage laws, that have likewise determined that wage surveys are an appropriate mechanism to set prevailing wages.<sup>53</sup>

ABC is correct that the Department uses BLS data for wage determinations under the SCA, which has important statutory similarities with the DBA in that it requires payment of wages "in accordance with prevailing rates in the locality." 41 U.S.C. 6703(1). There are several reasons, however, why the Department's decisions have been different under the SCA than under the DBA. The first is that the SCA does not contain the same statutory text as the DBA requiring prevailing wages to be based on "projects of a character similar." 40 U.S.C. 3142(b). This distinction underscores the Department's need to survey DBA wage rates by construction type, a level of detail that does not exist in any BLS data source. In addition, the SCA contains an alternative mechanism that gives weight to collectively bargained rates by requiring them to govern certain successor contracts where the predecessor contract was covered by a CBA. 41 U.S.C. 6703(1).

<sup>53</sup> See, e.g., 26 Me. Rev. Stat. Ann. section 1308 (requiring the Maine Bureau of Labor Standards to determine prevailing wages through a regularly conducted wage and benefits survey); Minn. R. section 5200.1020 (providing for annual surveys to calculate prevailing wages on covered highway and construction projects); Mont. Code Ann. section 18-2-414 (authorizing the Montana Commission of Labor and Industry to either perform a wage survey or adopt the rates set by the United States Department of Labor); Tex. Gov't Code Ann. section 2258.022 (setting the state prevailing wage either through wage surveys or by incorporating the rates set by the United States Department of Labor).

Comparisons between the DBA and SCA can also be fraught because construction work is significantly different from most service work. As a Professor of Economics at the University of Utah commented on this rulemaking, the construction industry is based on a "craft classification" model—in which crafts are understood to be a collection of related skills that allow a craft worker to address a range of jobs as that worker goes from project to project, and which can only be supported with proper investment and skills training. Protecting craft classifications where they prevail was one of the core original purposes of the Davis-Bacon Act. See Charles Donahue, "The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions," 29 Law & Contemp. Probs. 488, 508 (1964) (noting the Department's deference to local craft organization in wage determinations because "[t]o do otherwise would destroy craft lines which the statute seeks to preserve"); see also *Donovan*, 712 F.2d at 625 (noting that Congress was "quite clear" in 1935 that it was an "evasion of the Act" to break down craft classifications where they prevail). This industrial organization and the legislative history support the Department's stricter approach under the DBA to protecting actual wage rates that prevail because when those rates are higher than the average wage, they are often higher because they are incorporating apprenticeship and other training costs that are critical for the maintenance of the craft organization of the local construction market.<sup>54</sup> It also explains why the Department does not agree with ABC's suggestions that the Davis-Bacon program should adopt the standardized national Standard Occupational Classification system for identifying construction worker classifications and also abandon the division of wage rates by "construction type," so as to align all Davis-Bacon classifications with the format of BLS program data. Similarly, the differences between the SCA and the DBA and the industry sectors they cover, and the craft-protection focus of the DBA, also explain why the Department does not believe it is appropriate, as ABC suggests, to adopt a single nationwide

<sup>54</sup> Notwithstanding these differences, under the SCA regulations, the Department also may publish prevailing collectively bargained rates rather than rely on BLS data. See 29 CFR 4.51(b) ("Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to prevail.").

<sup>51</sup> Letter from Victoria A. Lipnic, Assistant Secretary for Employment Standards, to Elliot P. Lewis, Assistant Inspector General for Audit (Feb. 18, 2004). Available at: <https://www.oig.dol.gov/public/reports/oa/2004/04-04-003-04-420x.pdf>.

<sup>52</sup> The BLS OEWS program produces employment and wage estimates for the nation as a whole, for individual states, for metropolitan areas delineated by the Office of Management and Budget (OMB), and nonmetropolitan areas, but it does not produce wage estimates at the county level, which is the default "civil subdivision" that the Department uses to determine prevailing wages. See Michael K. Lettau and Dee A. Zamora, BLS, "Wage estimates by job characteristic: NCS and OES program data" (2013). Available at: <https://doi.org/10.21916/mlr.2013.27>. Additionally, the data for metropolitan and nonmetropolitan areas do not allow for wage rates for occupations by industry. The NCS program provides measures of compensation trends and the incidence of employer-sponsored benefits, but only at the national and Census region levels. The BLS's Quarterly Census of Employment and Wages has data at the county level, but the data are not available by craft. Both the OEWS and NCS programs classify occupations based on job duties and responsibilities that apply nationwide in accordance with the Standard Occupational Classification system. WHD's survey program, on the other hand, has always considered local area practice in determining how work is classified for each occupation.



fringe benefit rate under the DBRA in the same way that it has under the SCA.

ABC commented that the Department should be more flexible with how it analyzes the statutory requirements and find that the statute permits the use of averages or modal approximations derived from statistical modeling rather than revert to the three-step process and retain the current wage survey process.

ABC and other commenters also suggested the use of BLS data would have other important benefits. ABC stated that directly using BLS data would improve the timeliness of wage determinations because BLS surveys are updated annually. ABC and the group of U.S. Senators stated that using BLS data would eliminate an impediment preventing small firms from bidding on Davis-Bacon contracts because it would eliminate the problem of missing classifications on wage determinations. The commenters said that such missing classifications can be an impediment for small firms because it is costly and complicated to request conformances. ABC suggested that the Department should consider transferring funding from WHD to BLS by contracting with BLS to provide data, with the additional funding to BLS going to address any ways in which BLS methods are deficient for DBRA purposes.

Having considered these arguments, the Department continues to believe that the best course of action is to adopt the proposed reversion from the majority rule to the three-step process as the methodology for making wage determinations. The Department agrees that it is important to continue seeking ways to improve contractor participation in its voluntary wage surveys, which will have the benefit of increasing sample sizes for wage determinations and making wage determinations possible for more classifications. The Department has initiated a process to revise the wage survey form (WD-10 form) that is used during wage surveys. In that process, it proposed a number of changes in order to decrease the burden on contractors of responding to the survey and lead to higher survey response rates. *See* 87 FR 36152, 36152–53 (June 15, 2022). The Department, through that process, is also considering updates to the directory of classifications that is listed on the form, and to procedures to assist in capturing information about local area practice and industry changes in classifications over time. Thus, the Department does not believe NAPA, NRMPCA, and NSSGA's concerns about outdated classifications is a persuasive reason not to adopt the changes to the methodology of determining prevailing

wages from survey data. Collecting more accurate data and returning to the 30-percent threshold are supplementary, not mutually exclusive, means to determining appropriate wage rates. The Department is therefore not only returning to the use of the 30-percent threshold in this final rule, but also will continue to promote greater participation in its surveys and take related steps, such as its revision to the WD-10 form outside this rulemaking, in order to increase the pool of data that is available to determine accurate prevailing wage rates.

While the Department appreciates AGC's suggestions regarding revising the wage survey process to allow contractors to report data for workers more generally instead of on a project-by-project basis, the Department notes that the statute discusses the determination of the prevailing wage on the basis of "projects of a similar character," 40 U.S.C. 3142(b), and that project-by-project reporting promotes accuracy in the survey process because it more readily enables the Department to identify the number of workers that were paid each reported rate (and hence to properly calculate the prevailing wage) in a given area. A data submission consisting solely of the wages and fringe benefits paid generally to a particular classification, particularly if such a submission did not identify how many workers received each identified rate, would at a minimum create challenges and inefficiencies in determining the prevailing wage rate.

The Department also agrees with commenters that addressing timeliness issues and the overuse of conformances are important goals. The use of BLS data, however, could cause its own problems with missing classifications. BLS's OEWS program, for example, uses the Office of Management and Budget's (OMB) Standard Occupational Classification (SOC) system when publishing wage estimates. The SOC system does not include a number of individual classifications that the Department commonly uses to appropriately account for local area practice and the craft system. For example, the Department often issues separate wage rates for Plumbers, Pipefitters, and Steamfitters. The OEWS program only issues a single wage rate in a given locality under SOC code 47–2152 ("Plumbers, Pipefitters, and Steamfitters"). For this reason, the Department believes that ABC's proposal to directly use the SOC system would result in less accurate craft classifications. As discussed further below, in this rulemaking, the Department is adopting new methods of

reducing the need for conformances and more frequently updating wage determinations, including through the limited use of BLS data where it can reasonably be used to estimate wage-rate increases in between voluntary surveys. The Department believes these changes, once implemented, will improve the wage determination program without making a significant departure from longstanding interpretations of the statutory text and purpose of the DBRA.

## (2) Comments Regarding Costs of the 30-Percent Threshold

In proposing the return to the 30-percent threshold, the Department also considered the other explanations it provided in 1982 for eliminating the rule in the first place—in particular, the potential for a possible upward pressure on wages, contract costs, or prices. In the 1982 final rule, the Department summarized comments stating that the rule is "inflationary because it sometimes results in wage determination rates higher than the average." 47 FR 23644. The Department did not explain exactly what the commenters meant by the term "inflationary." *See id.* Later, the Department stated simply that it "agree[d] with the criticisms of the 30-percent rule," without specifically referencing the wage-inflation concerns. *Id.* at 23645. Later still, in a discussion of the final regulatory impact and regulatory flexibility analysis, the Department estimated that eliminating the 30-percent rule could result in a cost savings of \$120 million per year. *Id.* at 23648. The Department then stated that it was adopting the new rule "not only because it will result in substantial budgetary savings, but also because it is most consistent with the 'prevailing wage' concept contemplated in the legislation." *Id.*

In the current rulemaking, many commenters opposing the Department's proposed reversion to the 30-percent threshold, including several housing industry associations and entities, referenced and restated the earlier concerns about an "inflationary effect." ABC and the group of Senators referenced criticism of the 30-percent rule by the GAO in the 1960's and 1970's, including the 1979 report that urged the repeal of the Act as a whole and related congressional hearings in which the GAO referred to the 30-percent rule as resulting in "inflated wage rates." <sup>55</sup> Several commenters

<sup>55</sup> *See Administration of the Davis-Bacon Act, Hearings before the Spec. Subcomm. on Lab. of the H. Comm. on Educ. & Lab., 87th Cong. 283 (1962) (testimony of J.E. Welch, Deputy General Counsel,*

pointed to two studies finding that prevailing wages under the DBA increase costs to taxpayers. The NAHB pointed to a 2008 study by the Beacon Hill Institute, finding that Davis-Bacon wage determinations increase the cost of Federal construction by “nearly 10 percent,”<sup>56</sup> and a study by the Congressional Budget Office (CBO) that estimated a \$12 billion reduction in Federal spending from 2019 through 2028 if DBA requirements were not applied to covered projects.<sup>57</sup> CEI, stating that no more recent data is available on the economic impact of the 30-percent rule, cited a 1983 CBO estimate that the DBA’s requirements added 3.7 percent to the overall cost of Federal construction projects.<sup>58</sup> They also cited a later estimate from after implementation of the majority rule, estimating that DBA requirements added 3.4 percent to the cost of Federal construction projects.<sup>59</sup> Comparing these two studies, CEI claimed, shows the difference between the 30-percent threshold and the majority-only rule accounts for about 8 percent in the overall cost of complying with the Act (or, presented differently, about 0.3 percent in the total cost of Federal construction projects).

Several commenters, in particular in the residential building industry, expressed general concern that higher labor costs could put some projects at risk of being financially infeasible. The NAHB stated that “relatively small price increases can have an immediate impact on low- to moderate-income homebuyers and renters who are more susceptible to being priced out of the market.”

General Accounting Office) (“Our experience indicates that the methods and procedures by which minimum wage requirements for Federal and federally assisted construction contracts are established and enforced under present law have not kept pace with the expansion and increased use of such requirements.”); *Oversight Hearing on the Davis-Bacon Act, Before the Subcomm. on Labor Standards of the H. Comm. on Educ. & Lab.*, 96th Cong. 4 (1979) (testimony of Comptroller General Elmer Staats) and 60–64 (testimony of Secretary of Labor Ray Marshall criticizing GAO methodology).

<sup>56</sup> Paul Bachman, Michael Head, Sarah Glassman, & David G. Tuerck, Beacon Hill Inst., “The Federal Davis-Bacon Act: The Prevailing Mismeasure of Wages,” (2008). ABC cited this 2008 report, as well as a subsequent Beacon Hill report, which updated it. See William F. Burke & David G. Tuerck, Beacon Hill Inst., “The Federal Davis-Bacon Act: Mismeasuring the Prevailing Wage,” (2022).

<sup>57</sup> CBO, “Repeal the Davis-Bacon Act,” Dec. 13, 2018, <https://www.cbo.gov/budget-options/54786>.

<sup>58</sup> CBO, “Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget,” July 1983, [https://www.cbo.gov/sites/default/files/98th-congress-1983-1984/reports/doc12-entire\\_0.pdf](https://www.cbo.gov/sites/default/files/98th-congress-1983-1984/reports/doc12-entire_0.pdf).

<sup>59</sup> CBO, “Toll Funding of U.S. Highways,” Dec. 1985, [https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/1985\\_12\\_tollfinancing.pdf](https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/1985_12_tollfinancing.pdf).

According to NAHB, there are already a number of other current difficulties with building housing that the proposed change does not address, including rising costs for materials, an increasingly transient and aging workforce, and the economic impact of COVID–19. The National Association of Housing and Redevelopment Officials (NAHRO) stated that Congress has underfunded affordable and public housing, and that because there is a limited amount of funding for such efforts, the number of units built will go down if costs go up. Because of this, the organization recommended that the HUD programs be excluded from the final rule.

Some commenters stated their opposition to the proposed reversion to the three-step process but appeared to misunderstand that the rule does not require, or always result in, the highest wage rate being identified as prevailing. AFP–I4AW, for example, stated that the 30-percent rule would “serve to inflate the wage determination by relying only on the highest wage earners in the locality.” This assumption is not correct. The 30-percent threshold does not distinguish between rates based on whether they are higher or lower. Rather, under the rule, the Department will determine that a wage rate is prevailing if that wage rate is earned by the most workers in a wage survey and if that number is also more than 30 percent of workers in the survey—whether that wage rate is higher or lower than any other wage rate in the survey, and whether it is collectively bargained or not. The Department’s review of recent wage surveys suggests that the return to the 30-percent threshold will in some cases result in wage rates that are higher than the currently used average and in other cases lower rates. See section V.D.1.ii. This is consistent with the results of the 30-percent threshold when it was last in effect before the 1981–1982 rulemaking. See 1979 GAO Report, at 53 (noting the data showed that under the 30-percent rule, where a lower hourly rate prevailed, the Department identified the lower rate as the prevailing rate).

In contrast to the commenters that opposed the proposal, many commenters that supported the proposal argued that the rule would not significantly increase project costs or increase inflation. Several of these commenters noted studies regarding the cost effects of prevailing wage regulations in general. For example, the III–FFC noted that the “economic consensus” today is that prevailing wage requirements generally do not raise total construction costs. III–FFC

cited a literature review that analyzed the 19 peer-reviewed studies that have been published since 2000 about the impacts of prevailing wage regulations in public construction (together covering more than 22,000 public works projects). See Kevin Duncan & Russell Ormiston, “What Does the Research Tell Us About Prevailing Wage Laws,” 44 *Lab. Stud. J.* 139, 141–42 (2018). A significant majority of those peer-reviewed studies did not find evidence that prevailing wages affected overall construction costs. As III–FFC noted, a key driver of this outcome is that contractors on covered projects will tend to hire higher-skilled workers and utilize more capital equipment. See William Blankenau & Steven Cassou, “Industry Differences in the Elasticity of Substitution and Rate of Biased Technological Change between Skilled and Unskilled Labor,” 43 *Applied Econ.* 3129–42 (2011); Edward Balistreri, Christine McDaniel, & Eina V. Wong, “An Estimation of U.S. Industry-Level Capital-Labor Substitution Elasticities: Support for Cobb-Douglas,” 14 *N. Am. J. of Econ. & Fin.* 343–56 (2003). Other commenters submitted similar research showing that prevailing wages are associated with higher productivity and that labor costs are only a small part of overall project costs in many segments of the construction industry, limiting the impact of any increased wage costs on overall project costs. See Frank Manzo & Kevin Duncan, Midwest Econ. Policy Inst., *Examination of Minnesota’s Prevailing Wage Law: Effects on Costs, Training, and Economic Development* 4 (2018); Nooshin Mahalia, Econ. Policy Inst., *Prevailing Wages and Government Contracting Costs* 3–4 (2008).

Several of these commenters specifically criticized the Department’s apparent reliance in 1982 on arguments that the 30-percent rule had an “inflationary effect.” These commenters noted that the concerns about an “inflationary effect” at the time were drawn from the same 1979 GAO report on which the opponents of the proposal now rely.<sup>60</sup> The Iron Workers, for

<sup>60</sup> The GAO issued a report in 1979 urging Congress to repeal the Act because of “inflationary” concerns. See Gov’t Accountability Office, HRD–79–18, “The Davis Bacon Act Should be Repealed” (1979) (1979 GAO Report). Available at: <https://www.gao.gov/assets/hrd-79-18.pdf>. The report argued that even using only weighted averages for prevailing rates would be inflationary because they could increase the minimum wage paid on contracts and therefore result in wages that were higher than they otherwise would be. The House Subcommittee on Labor Standards reviewed the report during oversight hearings in 1979, but Congress did not amend or repeal the Act, and instead continued to expand its reach. See, e.g., Cranston-Gonzalez National Affordable Housing

example, noted that in 1979 the Department had strongly criticized the GAO report's statistical methods. In 1979, the Department maintained that the GAO's conclusions lacked "statistical validity" because it was methodologically flawed and failed to consider important variables, such as productivity. *See* 1979 GAO Report, at 15. However, in its 1982 rulemaking, the Department did not acknowledge other evidence undermining the GAO's conclusions, or the Department's own prior position that the 1979 GAO report could not be relied upon. Another commenter noted that the GAO itself had conceded that its sample size was insufficient for projecting results with statistical validity. *Id.*

The commenters supporting the Department's current proposed reversion to the 30-percent rule also noted that, whatever its persuasiveness at the time, the 1979 GAO report cannot be relied on now because of its outdated statistical methods and because of the existence of other, more contemporary, evidence undermining its conclusions. Commenters noted that the three main studies relied on by opponents of the 30-percent threshold, including the GAO report, the Department's 1981–1982 regulatory flexibility analysis, and the Beacon Hill studies, were all based on a "wage differential" calculation methodology that has been discredited by peer-reviewed scholarship published since the 1981–1982 rulemaking.<sup>61</sup> In a comment, two Professors of Economics argued that "the results of any study that measures the cost of prevailing wages based on [the wage differential method] should be interpreted with extreme caution and is not suitable as a basis of public policy decisions." Commenters noted that more advanced statistical methods than those used by GAO have since established that in the construction industry, the substitution of lower-wage and lower-skilled workers for higher-paid and higher-skilled workers does not necessarily reduce project costs because the lower productivity of lower-skilled workers can offset incrementally higher wages

paid to more-skilled workers.<sup>62</sup> That is why, they asserted, the preponderance of peer-reviewed studies conclude that prevailing wage laws as a whole have little or no effect on overall project costs.<sup>63</sup> Given the evidence for prevailing wage laws as a whole, the commenters expressed skepticism that the return to the 30-percent rule would have an effect on project costs.

The Department agrees with those commenters that found the 1979 GAO Report and the Department's 1981–1982 analysis unpersuasive. The Department does not believe that these analyses are reliable or accurate.<sup>64</sup> For example, the Department's 1981–1982 analysis did not consider labor market forces that could prevent contractors from lowering wage rates in the short run. The analysis also did not attempt to address productivity losses or other costs of setting a lower minimum wage, such as higher turnover and a reduced ability to recruit high-skilled workers. For these reasons, the Department does not believe that the analysis in the 1982 final rule implies that the current proposed reversion to the 30-percent rule would have a significant impact on contract costs. Moreover, even if the Department were to rely on this analysis as an accurate measure of impact, such purported cost savings (adjusted to 2019 dollars) would only amount to approximately two-tenths of a percent of total estimated covered contract costs.

The two CBO reports from 1983 and 1985 cited in a comment by CEI are not persuasive for the same reason. The 1983 CBO study projected that the elimination of the 30-percent rule would save an average of \$112 million per year from 1984 to 1988. *Id.* at 36. That report, however, was based on the Department's own analysis in the 1981–1982 rulemaking, *id.* at xii, which was

flawed as previously noted. The 1985 CBO report did not contain an independent analysis and simply cited to the 1983 report. *See* 1985 CBO Report, at 16 n.2. Thus, the reports provide no additional helpful evidence and instead suffer from the same analytical problems as the Department's own 1981–1982 study and other simple wage-differential analyses.<sup>65</sup>

After considering the available data, and assuming for the purposes of this discussion that costs are in fact a permissible consideration in defining the term "prevailing wage," the Department is not persuaded that returning to the 30 percent threshold will cause a meaningful increase in Federal construction costs. Based on the Department's demonstration in the economic analysis of what the prevailing wage would be after applying the 30-percent threshold to a sample of recently published prevailing wage rates, the Department found no clear evidence of a systematic increase in the prevailing wage sufficient to affect prices across the economy. The illustrative analysis in section V.D. shows returning to the 30-percent rule will significantly reduce the reliance on the weighted average method to produce prevailing wage rates. Applying the 30-percent threshold, some prevailing wage determinations may increase and others may decrease, but the magnitude of these changes will, overall, be negligible. Even where wage determinations may increase, the Department is persuaded by recent peer-reviewed research, which generally has not found a significant effect from wage increases related to prevailing wage requirements on the total construction costs of public works projects.

For similar reasons, the Department is not persuaded that the reversion to the 30-percent threshold would have any impact on national inflation rates. Several commenters, including CEI and certain members of Congress, stated that the Department's proposal is ill-timed because of the current levels of

Act, Public Law 101–625, Sec. 811(j)(6), 104 Stat. 4329 (1990); Energy Independence and Security Act of 2007, Public Law No. 110–140, Sec. 491(d), 121 Stat. 1651 (2007); American Recovery and Reinvestment Act, Public Law 111–5, Sec. 1606, 123 Stat. 303 (2009); Consolidated Appropriations Act of 2021, Public Law 116–260, Sec. 9006(b), 134 Stat. 1182 (2021).

<sup>61</sup> *See* Kevin Duncan & Russell Ormiston, "What Does the Research Tell Us About Prevailing Wage Laws," 44 Lab. Stud. J. 139, 141–42 (2018). The Beacon Hill Report was not peer-reviewed. *Id.* at 141. The 2022 Beacon Hill Report uses the same methodology as the 2008 Beacon Hill Report.

<sup>62</sup> *See* William Blankenau & Steven Cassou, "Industry Differences in the Elasticity of Substitution and Rate of Biased Technological Change between Skilled and Unskilled Labor," 43 Applied Econ. 3129–42 (2011); Edward Balistreri, Christine McDaniel, & Eina V. Wong, "An Estimation of U.S. Industry-Level Capital-Labor Substitution Elasticities: Support for Cobb-Douglas," 14 N. Am. J. of Econ. & Fin 343–56 (2003).

<sup>63</sup> *See* Duncan & Ormiston, *supra* note 61, at 142–48 (collecting peer-reviewed studies).

<sup>64</sup> The Department has not attempted to assess the relative accuracy of the \$120 million estimate over the decades, which would be challenging given the dynamic nature of the construction industry and the relatively small impact of even \$120 million in savings. The Department at the time acknowledged that its estimate had been heavily criticized by commenters and was only a "best guess"—in part because it could not foresee how close a correlation there would be between the wage rates that are actually paid on covered contracts and the wage determinations that set the Davis-Bacon minimum wages. 47 FR 23648.

<sup>65</sup> The 1983 CBO study acknowledged these issues. It noted that the 1979 GAO study had been questioned because of inadequate sample sizes, the choice of projects covering small volumes of construction, and inappropriate assumptions. *See* 1983 CBO Report, at 48. It also noted that "questions have been raised regarding the general approach of translating wage increases directly into cost increases." Such an approach, the report notes, "may be incorrect . . . to the extent that workers at different wage levels may not be equally productive." *Id.* at 48–49. The 2018 CBO projection that NAHB cites does not explain its methodology, but it estimates savings from eliminating the entire Davis-Bacon Act as amounting to only 0.8 percentage points in project costs associated with a reduction in wages and benefits. *See supra* note 57, <https://www.cbo.gov/budget-options/54786>.

economy-wide inflation and the risks of a wage-price spiral. Returning to the 30-percent rule, CEI claimed, “would likely contribute to the pressures” that could create such a spiral. Although CEI referenced the 1983 CBO Report to support its argument that the 30-percent threshold would increase construction costs, CEI did not note the conclusion in that study that the DBA as a whole “seems to have no measurable effect on the overall rate of inflation.” 1983 CBO Report, at xii, 30–31.

One individual commenter asserted that the Department should be required to consider not only whether the 30-percent rule can alone cause inflation, but also whether the proposal, in combination with other regulatory and spending measures, would have an effect on inflation and what that effect would be. The commenter stated that the infusion of Federal infrastructure spending from the Infrastructure Investment and Jobs Act (IIJA), Public Law 117–58, will likely lead to substantial compensation premiums for construction workers. The commenter stated that such wage increases would occur “because a sudden increase in federal infrastructure spending does not necessarily lead to a commensurate increase in construction sector employment.”

The Department disagrees that this rule will substantially impact inflation. As noted, the Department’s illustrative analysis in section V.D. suggests that the reimplementation of the 30-percent threshold will result in some prevailing wage determinations increasing and others decreasing, but the magnitude of these changes will, overall, be negligible. In addition, even if this rule leads to an increase in some required prevailing wage rates, it will not have an equal impact on actual wages paid to workers on DBRA-covered contracts, because some workers may already be earning above the new prevailing wage rate.

If wages for potentially affected workers were to increase, the Department does not believe that it would lead to inflation. Recent research shows that wage increases, particularly at the lower end of the distribution, do not cause significant economy-wide price increases.<sup>66</sup> For example, a 2015

Federal Reserve Board study found little evidence that changes in labor costs have had a material effect on price inflation in recent years.<sup>67</sup> Even in the recent period of increased inflation, there was little evidence that the inflation was caused by increases in wages. A study of producer price inflation and hourly earnings from December 2020 to November 2021 found that inflation and wage growth were uncorrelated across industries.<sup>68</sup> Additionally, as two Professors of Economics commented, “since prevailing wages are not associated with increased construction costs, there is no reason to assume that the policy causes inflation in the macroeconomy.”

More importantly, DBRA-covered contracts make up a small share of overall economic output. Because federally-funded construction only makes up approximately 13 percent of total construction output and the number of potentially affected workers (1.2 million) is less than 1 percent of the total workforce, the Department does not believe that any wage increase associated with this rule would significantly increase prices or have any appreciable effect on the macroeconomy.<sup>69</sup>

In sum, the factual conclusions about “inflationary effects” underlying the 1982 elimination of the 30-percent rule are no longer supportable because they have been discounted over the past 40 years by more sophisticated analytical tools. Furthermore, the available evidence does not suggest that concerns about the 30-percent threshold

increasing project costs or national inflation rates are justified.

The Department also considered the comments that express concern about whether the 30-percent threshold may affect certain sectors or areas, and the residential construction industry in particular, differently than the national economy as a whole. As they are for other types of construction, respectively, prevailing wage rates for DBRA-covered residential construction are based on WHD wage surveys of residential construction projects. Residential construction can be distinguished from other construction types in several important ways: it tends to be less capital- and skill- intensive and thus generally has fewer barriers to entry for firms as well as for workers, projects tend to be of smaller and shorter duration, workers tend to move more often between firms, and firms tend to provide less training.<sup>70</sup> Wages also tend to be lower in residential construction than in nonresidential construction types, and unionization rates have historically been lower. Because of lower unionization rates in the residential construction industry, where the methodology for determining prevailing rates is based on the mode (whether majority or 30-percent threshold), the rates that prevail are more likely to come from non-union wage rates than from higher, collectively bargained rates. As a result, in comparison to other construction types, it is less likely—not more likely—that the 30-percent threshold will result in increases in prevailing wage rates on residential construction projects. However, in the more limited circumstances in which residential construction rates may change from averages to rates based on CBAs, the increases in wage rates could be larger given the generally lower wage floors in the industry.<sup>71</sup>

Moreover, even if implementation of the proposal were to lead in some areas to increased wages, and even assuming those increased wages resulted in increased project costs for federally financed residential construction, the

Inflation? Evidence from Vietnam,” ASEAN Economic Bulletin Vol. 28, No. 3 (2011), pp. 337–59, available at: <https://www.jstor.org/stable/41445397>; Magnus Jonsson & Stefan Palmqvist, “Do Higher Wages Cause Inflation?,” Sveriges Riksbank Working Paper Series 159 (Apr. 2004), available at: [http://archive.riksbank.se/Upload/WorkingPapers/WP\\_159.pdf](http://archive.riksbank.se/Upload/WorkingPapers/WP_159.pdf); Kenneth M. Emery & Chih-Ping Chang, “Do Wages Help Predict Inflation?,” Federal Reserve Bank of Dallas, Economic Review First Quarter 1996 (1996), available at: <https://www.dallasfed.org/-/media/documents/research/er/1996/er9601a.pdf>.

<sup>67</sup> Ekaterina V. Peneva & Jeremy B. Rudd, “The Passthrough of Labor Costs to Price Inflation,” Federal Reserve Board (2015), available at: <https://www.federalreserve.gov/econres/feds/the-passthrough-of-labor-costs-to-price-inflation.htm>.

<sup>68</sup> Josh Bivens, “U.S. Workers Have Already Been Disempowered in the Name of Fighting Inflation,” Figure A, Economic Policy Institute (Jan. 2022), available at: <https://www.epi.org/blog/u-s-workers-have-already-been-disempowered-in-the-name-of-fighting-inflation-policy-makers-should-not-make-it-even-worse-by-raising-interest-rates-too-aggressively/>.

<sup>69</sup> Federally funded construction as a share of total construction output can be calculated from the data in Table 3 (\$216,700,000,000 ÷ \$1,667,000,000,000 = 0.13). The estimate of 1.2 million potentially affected workers is calculated in section V.B.2.

<sup>70</sup> See Russell Ormiston et al., “Rebuilding Residential Construction,” in *Creating Good Jobs: An Industry-Based Strategy* 75, 78–79 (Paul Osterman ed., 2020).

<sup>71</sup> Although the transfer analysis presented in Section V.D.1 is simply illustrative and may not be representative of the impact of this rule, the results of this analysis reflect that only 5 percent of the residential fringe benefit rates analyzed were affected by the reversion to the 30-percent threshold, compared to 14 percent of building fringe rates, 19 percent of heavy fringe rates and 23 percent of highway fringe rates. In those limited circumstances where residential fringe rates were affected, however, they tended to increase more significantly given their largely nonunion baseline.

<sup>66</sup> See, e.g., J.P. Morgan, “Why Higher Wages Don’t Always Lead to Inflation” (Feb. 7, 2018), available at: <https://www.jpmorgan.com/commercial-banking/insights/higher-wages-inflation>; Daniel MacDonald & Eric Nilsson, “The Effects of Increasing the Minimum Wage on Prices: Analyzing the Incidence of Policy Design and Context,” Upjohn Institute working paper; 16–260 (June 2016), available at [https://research.upjohn.org/up\\_workingpapers/260/](https://research.upjohn.org/up_workingpapers/260/); Nguyen Viet Cuong, “Do Minimum Wage Increases Cause

effects on overall housing prices or rents would not be significant. DBRA-covered construction makes up only a very small percentage of the total new construction in the residential construction market—only 1 percent as of July 2022.<sup>72</sup> And, annual new residential construction itself tends to be less than 1 percent of all available residential units.<sup>73</sup> Among the residential construction covered by the DBRA, many projects would be unaffected by the proposed reversion to the 30-percent threshold. The Department's illustrative analysis suggests that the proposal would only affect the methodology for approximately one-third of new wage determinations, and of those, some would result in decreases in the required wage rate, not an increase. See section V.D.1.ii.<sup>74</sup> The most reasonable conclusion is that any limited potential increase in some construction costs for such a small percentage of the residential market would not affect housing prices or rents generally.<sup>75</sup>

The Department also considered the concerns commenters raised about the construction of publicly funded affordable housing in particular. In a comment, two Professors of Economics said that three studies have found that the application of prevailing wage laws in general may be correlated with increased project costs for affordable housing projects.<sup>76</sup> But, for two reasons, these studies are of limited value for forecasting the effects of reversion to the 30-percent rule. First, as noted, the Department's illustrative analysis of the effects of the 30-percent threshold, which included residential construction

survey data, does not show a systematic increase in prevailing wage rates. Second, the peer-reviewed studies showing potential increased project costs on affordable housing projects do not compare different prevailing wage methodologies, but instead compare whether projects are either covered or not covered at all by prevailing wage requirements. Where studies compare the existence of prevailing wage requirements at all (as opposed to a simple change in wage determination methodologies), other factors can explain project cost increases.<sup>77</sup>

The Department also considered the comments regarding the potential effects of economic conditions that may result from increased infrastructure spending. While it is true that increases in construction spending can lead to increases in construction wage rates in the short run,<sup>78</sup> this potential does not suggest the Department's proposal is unwarranted. Under the 30-percent threshold, as under the current majority rule or any other measure of prevailing wages, wage determinations will and should generally reflect increases in wage rates that result from separate policy decisions by Federal, State, or Local governments, or other macro-economic phenomena. The commenters did not suggest, and the Department did not identify, any specific mechanism through which the 30-percent threshold would interact with construction spending increases in a way that would materially affect the results of the Department's illustrative analyses or suggest outcomes other than those supported by the peer-reviewed literature. Finally, the prevailing wage methodology in this rule is not a short-term policy; it is intended to apply during timeframes when public infrastructure spending is lower, as well as those when it is higher, and during all phases of the construction industry business cycle.

Finally, the Department disagrees with NAHB that the proposal should be withdrawn because, among other reasons, the proposal does not address certain challenges in the residential building industry, including “an increasingly transient and aging workforce, increased building costs

resulting from supply shortages, and the economic impact of COVID-19, among other things.” NAHB explains, in addition, that the residential construction industry has been “suffering from a skilled labor shortage for many years.” The Department agrees with NAHB that these topics are important for policymakers to consider. NAHB does not explain why the methodology for determining the prevailing wage under the DBRA is relevant to addressing these challenges, or why a methodology other than the Department's proposed reversion to the three-step process would be more beneficial. However, to the extent that the 30-percent threshold could increase wage rates in some areas, as NAHB also asserts, such an outcome would be beneficial to the industry by attracting more workers to the construction labor market and allowing required prevailing wages to more often support the maintenance of apprenticeship and training costs that will contribute to the expansion of the skilled workforce.

In addition to all of these factual arguments about whether costs or inflation may increase, however, several unions and contractor associations argued that the Department should not be permitted as a legal matter to consider contract costs or other similar effects of any wage increases when it determines the proper prevailing wage methodology. The United Brotherhood of Carpenters and Joiners of America (UBC) and NABTU argued that the Department's apparent goal in 1981–1982 of reducing construction costs was not consistent with the purpose of the Act. NABTU stated that such a reliance on cost considerations was arbitrary and capricious under the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (*State Farm*), because it relied on a factor (cost) that Congress had not intended to be considered. To the contrary, commenters noted, statements in the legislative history suggest that Congress's “chief concern” was “to maintain the wages of our workers and to increase them wherever possible.” 74 Cong. Rec. 6513 (1931) (remarks of Rep. Mead); see also *United States v. Binghamton Constr. Co.*, 347 U.S. 171, 176–77 (1954) (noting that the legislative history demonstrates that the DBA was “not enacted for the benefit of contractors, but rather to protect their employees from substandard earnings”).

The Department agrees with these commenters that there is a legitimate question as to whether it would be appropriate to use a methodology that is

<sup>72</sup> According to the Census Bureau, the Seasonally Adjusted Annual Value of Private Residential Construction Put in Place, as of July 2022, was \$920.4 billion; public residential construction was \$9.3 billion. <https://www.census.gov/construction/c30/c30index.html>.

<sup>73</sup> See U.S. Census Bureau, National and State Housing Unit Estimates: 2010 to 2019, <https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-housing-units.html>.

<sup>74</sup> There are additional reasons why increasing labor costs do not have a one-to-one correlation with housing and rent prices. In recent decades, housing prices have significantly outpaced real construction costs. See Joseph Gyourko & Raven Molloy, “Regulation and Housing Supply,” (Nat'l Bureau of Econ. Rsch., Working Paper No. 20536, 2014), [https://www.nber.org/system/files/working\\_papers/w20536/w20536.pdf](https://www.nber.org/system/files/working_papers/w20536/w20536.pdf). Gyourko and Molloy conclude that, as a general matter, labor and material costs do not appear to act as a major constraint on residential development, in comparison to land-use policy constraints.

<sup>75</sup> In addition, the reversion to the 30-percent threshold will not result in any wage increases in the short-term. Any effect on wage increase will only occur after wage new residential construction-type surveys are initiated and completed, and then wage determinations based on those surveys are incorporated into new construction contracts.

<sup>76</sup> See also Duncan & Ormiston, *supra* n. 61, at 142–48 (discussing peer-reviewed studies).

<sup>77</sup> For example, cost differences may be attributable in part to reductions in independent-contractor misclassification, failure to pay overtime, and other basic wage violations that are disincentivized because of the prevailing-wage requirement to submit certified payroll. *Id.* at 146.

<sup>78</sup> One commenter suggested that increased infrastructure spending could lead to an increase in demand for construction workers, and that the supply of skilled workers might not be commensurate in the short term, which could lead to an increase in wage rates.

less consistent with the definition of “prevailing wage” in order to reduce contract costs. Such a determination would not seem to be consistent with Congressional intent. As Solicitor Donahue testified in the 1962 hearings on the Act, “Congress has not injected a cost factor into the Davis-Bacon Act as one of the standards to be used in determining which wage rates will apply.”<sup>79</sup> The “basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase costs to the [F]ederal [G]overnment.” *Bldg. & Constr. Trades Dep’t*, 543 F. Supp. at 1290. Congress considered cost concerns and enacted and expanded the DBA notwithstanding them. *Id.* at 1290–91; 1963 House Subcommittee Report, at 2–3; Reorganization Plan No. 14 of 1950, 15 FR 3176, 5 U.S.C. app. 1.<sup>80</sup>

Thus, even if concerns about an inflationary effect on government contract costs or speculative effects on the national macro economy were used to justify eliminating the 30-percent rule in 1982, the Department does not believe such reasoning now provides a persuasive factual basis or legal requirement to maintain the current majority rule. While the Department agrees with the commenters that are skeptical about the permissibility of considering costs or cost effects at all in deciding the appropriate definition of “prevailing,” the Department considered these cost-related arguments nonetheless and does not find them convincing, given the weakness of the wage-differential analyses on which they are based. However, even if the reversion to the 30-percent rule were to add 0.3 percent to total Federal construction contract costs (as CEI estimates and the Department disputes), and have idiosyncratic cost effects in certain localities or construction types, the Department would still conclude that this is the better course in order to more often ensure that the prevailing wage rates incorporated into covered contracts are rates that are actually paid to workers in an area and that are therefore, on balance, more protective of local construction wage rates.<sup>81</sup>

The Department also considered whether the 30-percent threshold gives “undue weight” to collectively bargained rates. In the 1982 final rule, the Department noted criticism of the 30-percent rule on that basis, and later—though without specifically discussing the issue—the Department stated generally that it agreed with the comments criticizing the rule. Now, certain commenters opposing the Department’s proposal to return to the 30-percent rule have made similar arguments. ABC pointed to the phenomenon of “wage dispersion,” which affects non-union contractors more than it does union contractors. According to ABC, non-union contractors more often base compensation on skills or productivity rather than job category, unlike union contractors. Thus, they argue, union contractors are more likely than non-union contractors to pay their workers the same rate.<sup>82</sup> AFP–I4AW commented that nothing in the NPRM contradicts the conclusion in 1982 that the 30-percent rule gives undue weight to collectively bargained rates.

On the other hand, commenters supporting a return to the 30-percent rule criticized the reasoning in 1982 that the 30-percent rule provided “undue weight” to collectively bargained rates. These commenters argued that this reasoning was a symptom of anti-union bias and had no basis in the statute. The Iron Workers quoted the 1962 congressional testimony of Solicitor of Labor Charles Donahue regarding the interface between the rule and union rates. As Solicitor Donahue pointed out, the 30-percent rule did not uniformly lead to the identification of union rates as prevailing, but, in any case, the question of whether union or non-union contractors are disadvantaged by the Department’s prevailing wage determinations is not something that the Department should be properly taking into consideration in making its wage determinations.<sup>83</sup> In a related comment, two Professors of Economics noted that the potential for union rates being identified as the prevailing rate does not

necessarily mean that project costs will increase. The comment cited several peer-reviewed studies that found no statistically significant cost difference between projects built with prevailing rates based on union rates and projects that were not.<sup>84</sup>

The Department is no longer persuaded that the 30-percent threshold gives undue weight to collectively bargained rates or that whatever weight it gives to collectively bargained rates is a convincing basis to maintain the status quo. The underlying concern in 1982 was, as ABC explained, that identification of a modal prevailing wage could give more weight to union rates that more often tend to be the same across companies. If this occurs, however, it is a function of the statutory term “prevailing,” which, as both the Department and OLC have concluded, refers to a predominant modal wage rate. If a modal methodology with a modal threshold is used, then the modal threshold—regardless of the number used—may on balance be more likely to be satisfied by collectively bargained rates than by non-collectively bargained rates. Said differently, the same weight is given to collectively bargained rates whether the Department chooses a 50-percent or 30-percent threshold; thus any “undue weight” to collectively bargained rates should not be a basis for distinguishing between these two thresholds. The Department, accordingly, now understands the concerns about undue weight to collectively bargained rates to be concerns about the potential outcome (of more wage determinations based on collectively bargained rates) instead of concerns about any actual weight given to collectively bargained rates by the choice of the modal threshold. To choose a threshold because the outcome would be more beneficial to non-union contractors—as the Department seems to have suggested it was doing in 1982—does not have any basis in the statute. *Donovan*, 543 F. Supp. at 1291 n.16 (noting that the Secretary’s concern about weight to collectively bargained rates “bear[s] no relationship to the purposes of the statute”).

The Department also notes that there appears to be confusion among some

<sup>79</sup> *Administration of the Davis-Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. & Lab.*, 87th Cong. 153 (1962).

<sup>80</sup> In his message accompanying Reorganization Plan No. 14, President Truman noted that “[s]ince the principal objective of the plan is more effective enforcement of labor standards, it is not probable that it will result in savings. But it will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.” 15 FR 3176; 5 U.S.C. app. 1.

<sup>81</sup> The Department also considered NAHRO’s narrower suggestion that HUD programs should be

excepted from the final rule because of concerns about potential cost impacts on affordable housing development. As discussed, the Department disagrees with the assertion that the reversion to the 30-percent threshold will necessarily raise costs to affordable housing projects in a significant or systematic manner so as to suggest the threshold should not be applied.

<sup>82</sup> See also 1979 GAO Report, at 52 (describing the difference between CBA pay scales and non-union contractor pay practices).

<sup>83</sup> *Administration of the Davis-Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. & Lab.*, 87th Cong. 819–20 (1962) (statement and submission of Charles Donahue, Solicitor of Labor).

<sup>84</sup> See Lamek Onsarigo et al., “The Effect of Prevailing Wages on Building Costs, Bid Competition, and Bidder Behaviour: Evidence from Ohio School Construction,” 38 *Constr. Mgmt. & Econ.* 917 (2020); Kevin Duncan & Jeffrey Waddoups, “Unintended Consequences of Nevada’s Ninety-Percent Prevailing Wage Rule,” 45 *Lab. Stud. J.* 166 (2020); Jaewhan Kim et al., “The Effect of Prevailing Wage Regulations on Contractor Bid Participation and Behavior: A Comparison of Palo Alto, California with Four Nearby Prevailing Wage Municipalities,” 51 *Indus. Rels.* 874 (2012).



commenters about what it means when the prevailing wage in a wage determination is set based on a collectively bargained wage rate. A comment on the Department's proposal from the group of U.S. Senators characterized the 1982 rule as having changed the definition of prevailing wage "to allow open-shop contractors to bid on DBRA covered contracts on an equal footing with their unionized counterparts." This description seems to conflate the basis of a wage determination with its effect on competition. Whether wage determinations are based on collectively bargained rates or on non-collectively bargained rates, both non-union and union contractors are on similar footing in that they have similar notice of the Department's wage determinations and are required to pay at least the same specified minimum rates. See 74 Cong. Rec. 6510 (1931) (Statement of Rep. Bacon) ("If an outside contractor gets the contract . . . it means that he will have to pay the prevailing wages, just like the local contractor.").<sup>85</sup> To the extent that a non-union contractor has to pay higher rates on a contract than it would have paid without the prevailing wage requirement, it is not unfairly harmed because all other bidders are required to pay at least the same prevailing rate.<sup>86</sup>

Regardless, the Department's regulatory impact analysis does not suggest that a return to the 30-percent rule would give undue weight to

collectively bargained rates. Among a sample of rates considered in an illustrative analysis, one-third of all rates (or about half of rates currently established based on weighted averages) would shift to a different method. Among these rates that would be set based on a new method, the majority would be based on non-collectively bargained rates. In the illustrative example, the Department estimates that the use of single (modal-based) prevailing wage rates that are not the product of CBAs would increase from 12 percent to 36 percent of all wage rates—an overall increase of 24 percentage points. See Table 6, section V.D.1.ii. The use of modal wage rates that are based on CBAs would increase from 25 percent to 34 percent—an overall increase of 9 percentage points. *Id.*<sup>87</sup>

Having considered the comments both for and against the Department's proposed reversion to the three-step process for determining the prevailing wage, the final rule adopts the amended definition of prevailing wage in § 1.2 of the regulations as proposed.

### (3) Former § 1.2(a)(2)

In a non-substantive change, the Department proposed to move the language currently at § 1.2(a)(2) that explains the interaction between the definition of prevailing wage and the sources of information in § 1.3. The Department proposed to move that language (altered to update the cross-reference to the definition of prevailing wage) to the introductory section of § 1.3. The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

### (4) Variable Rates That Are Functionally Equivalent

The Department also proposed to amend the regulations on compiling wage rate information at § 1.3 to allow for variable rates that are functionally equivalent to be counted together for the purpose of determining whether a wage

rate prevails under the proposed definition of "prevailing wage" in § 1.2. The Department generally followed this proposed approach until after the 2006 decision of the ARB in *Mistick Constr.*, ARB No. 04–051, 2006 WL 861357.

Historically, when reviewing wage survey data, the Department has considered wage rates that may not be exactly the same to be functionally equivalent—and therefore counted as the same—as long as there was an underlying logic that explained the difference between them. For example, some workers may perform work under the same labor classification for the same contractor or under the same CBA on projects in the same geographical area being surveyed and get paid different wages based on the time of day that they performed work—e.g., a "night premium." In that circumstance, the Department would count the normal and night-premium wage rates as the "same wage" rate for purposes of calculating whether that wage rate prevailed under the majority rule that is discussed in § 1.2. Similarly, where workers in the same labor classification were paid different "zone rates" for work on projects in different zones covered by the same CBA, the Department considered the difference between those rates to be compensating workers for the burden of traveling or staying away from home instead of reflecting fundamentally different underlying wage rates for the work actually completed. Variable zone rates would therefore be considered the "same wage" for the purpose of determining the prevailing wage rate.

In another example, the Department took into consideration "escalator clauses" in CBAs that may have increased wage rates across the board at some point during the survey period. Manual of Operations (1986), at 58–59. Wages for workers working under the same CBA could be reported differently on a survey solely because of the week their employer used in responding to the wage survey rather than an actual difference in prevailing wages. The Department has historically treated such variable rates the same for the purposes of determining the prevailing wages paid to laborers or mechanics in the survey area. *Id.* The Department has also considered wage rates to be the same where workers made the same combination of basic hourly rates and fringe rates, even if the basic hourly rates (and also the fringe rates) differed slightly.

In these circumstances, where the Department has treated certain variable rates as the same, it has generally chosen one of those rates to use as the

<sup>85</sup> As the AGC noted in a comment, the same is not necessarily true when the prevailing wage rate is set below a collectively bargained wage rate, as contractors bound by CBAs may not be able to pay their workers less than the collectively bargained rate on a covered project, while a non-union contractor could. For this reason, another commenter that is a member of a larger contractor association asserted the belief that its association was taking a position against the proposal because non-union contractors "do not appear to want to compete on a level playing field by paying rates consistent with the determination. Rather, their position indicates they prefer to be able to undercut the wage/benefit determination by paying rates below these to gain an advantage over competitors." Thus, to the extent that eliminating the 30-percent rule in 1982 led to a decrease in the use of collectively bargained rates to set the prevailing wage, the effect was not to place non-union contractors on "equal footing" as union contractors, but to give non-union contractors an advantage.

<sup>86</sup> As the Department explains in section V.F.1., significant benefits flow from ensuring that as many contractors as possible can bid on a contract. One study on the impact of bid competition on final outcomes of State department of transportation construction projects, demonstrated that each additional bidder reduces final project cost overruns by 2.2 percent and increases the likelihood of achieving a high-quality bid by 4.9 times. See Delaney, J. (2018). "The Effect of Competition on Bid Quality and Final Results on State DOT Projects." <https://www.proquest.com/openview/33655a0e4c7b8a6d25d30775d350b8ad/1?pq-origsite=gscholar&cbl=18750>.

<sup>87</sup> As discussed in the regulatory impact analysis, the Department found that fringe benefits currently do not prevail in slightly over half of the classification-county observations it reviewed—resulting in no required fringe benefit rate for that classification. See Table 6, section V.D.1.ii. This would be largely unchanged under the proposed reversion to the three-step process, with nearly half of classification rates still not requiring the payment of fringe benefits. Only about 13 percent of fringe rates would shift from no fringes or an average rate to a modal prevailing fringe rate. Overall, under the estimate, the percentage of fringe benefit rates based on CBAs would increase from 25 percent to 34 percent. The percentage of fringe benefit rates not based on collective bargaining rates would increase from 3 percent to 7 percent.

prevailing rate. In the case of rates that are variable because of an escalator-clause issue, it uses the most current rate under the CBA. Similarly, where the Department identified combinations of hourly and fringe rates as the “same,” the Department previously identified one specific hourly rate and one specific fringe rate that prevailed, following the guidelines in 29 CFR 5.24, 5.25, and 5.30.

In 2006, the ARB strictly interpreted the regulatory language of § 1.2(a) in a way that limited some of these practices. See *Mistick Constr.*, ARB No. 04–051, 2006 WL 861357, at \*5–7. The decision affirmed the Administrator’s continued use of the escalator-clause practice; but the ARB also found that the combination of basic hourly and fringe rates did not amount to a single “wage,” and thus the payment of the same combination of hourly and fringe rates could not justify a finding that the “same wage,” as used in § 1.2(a), had been paid. *Id.* The ARB also viewed the flexibility shown to CBAs as inconsistent with the “purpose” of the 1982 final rule, which the Administrator had explained was in part to avoid giving “undue weight” to collectively bargained rates. *Id.* The ARB held that, with the exception of escalator clauses, the Administrator could not consider variable rates under a CBA to be the “same wage” under § 1.2(a) as the regulation was written. *Id.* If no “same wage” prevailed under the majority rule for a given classification, the Administrator would have to use the fallback weighted average to determine the prevailing wage. *Id.* at \*7.

The ARB’s conclusion in *Mistick*—particularly its determination that even wage data reflecting the same aggregate compensation but slight variations in the basic hourly rate and fringe benefit rates did not reflect the “same wage” as that term was used under the current regulations—could be construed as a determination that wage rates need to be identical “to the penny” in order to be regarded as the “same wage,” and that nearly any variation in wage rates, no matter how small and regardless of the reason for the variation, might need to be regarded as reflecting different, unique wage rates.

The ARB’s decision in *Mistick* limited the Administrator’s methodology for determining a prevailing rate, thus contributing to the increased use of weighted average rates. As noted in the discussion of the definition of “prevailing wage” in § 1.2, however, both the Department and OLC have agreed that averages should generally only be used as a last resort for determining prevailing wages. See

section III.B.1.ii.A. As the OLC opinion noted, the use of an average is difficult to justify, “particularly in cases where it coincides with *none* of the actual wage rates being paid.” 5 Op. O.L.C. at 177.<sup>88</sup> In discussing those cases, OLC quoted from the 1963 House Subcommittee Report summarizing extensive congressional oversight hearings of the Act. *Id.* The report had concluded that “[u]se of an average rate would be artificial in that it would not reflect the actual wages being paid in a local community,” and “such a method would be disruptive of local wage standards if it were utilized with any great frequency.” *Id.*<sup>89</sup> To the extent that an inflexible approach to determining if wage data reflects the “same wage” promotes the use of average rates even when wage rate variations are based on CBAs or other written policies reflecting that the rates, while not identical, are functionally equivalent, such an approach would be inconsistent with these authorities and the statutory purpose they reflect.

As reflected in *Mistick*, the existing regulation does not clearly authorize the use of functionally equivalent wages to determine the local prevailing wage. See ARB No. 04–051, 2006 WL 861357, at \*5–7. Accordingly, the Department proposed in the NPRM to amend § 1.3 to include a new paragraph at § 1.3(e) that would permit the Administrator to count wage rates together—for the purpose of determining the prevailing wage—if the rates are functionally equivalent and the variation can be explained by a CBA or the written policy of a contractor.

The Department received a number of comments from unions and contractor associations that supported the proposed new language in § 1.3(e). These commenters noted that there are various ways that CBAs and management decisions can create slight compensation variations that may reflect special circumstances and not simply different wages paid for the same underlying work. NABTU explained that the same principle explains why the Department does not count an overtime premium as a separate wage rate from the worker’s base hourly rate for the purpose of calculating the prevailing wage.

The commenters in favor of the Department’s proposal asserted that the reversion to the pre-*Mistick* practice of counting functionally equivalent rates as the same is consistent with the DBA’s legislative history and the Department’s

longstanding preference for prevailing wages that reflect actual wages paid to workers instead of artificial averages. According to these commenters, the *Mistick* decision led to an increase in the unnecessary use of average rates for wage determinations, and it failed to adequately capture and reflect local area practice. See *Fry Bros. Corp.*, WAB No. 76–06, 1977 WL 24823, at \*6.<sup>90</sup> One commenter, MCAA, also asserted that the decision in the *Mistick* case was based on a “non-statutory aim, if not animus, of limiting the impact of CBA rates in the process.”

Conversely, ABC and several of its members stated that the Department’s proposal conflicts with the Department’s intended definition of “prevailing wage” and contradicts the ARB’s *Mistick* decision. Numerous other contractors and individual commenters, as part of an organized initiative, stated that the “functionally equivalent” proposal, in combination with the return to the three-step process and the elimination of the bar on cross-consideration of metropolitan and rural wage data, was likely to “further distort the accuracy” of WHD wage determinations, a process that the commenters stated was “already deeply flawed.” These commenters urged the Department to abandon these proposed changes to the rule, including the proposed language in § 1.3(e).

The Independent Electrical Contractors (IEC) and AFP–I4AW stated their opposition to the proposal because it would authorize the finding that rates are functionally equivalent on the basis of CBAs. AFP–I4AW stated that the modal analysis in the definition of prevailing wage in § 1.2 already favors the more uniform rates characteristic of CBAs, and that the functional equivalence proposal’s direction to the agency to look to these agreements for the analysis “will only increase the likelihood of finding union rates to be the prevailing rates, leading to the unjustified inflation of labor costs.” IEC stated that, while they appreciate the Department’s intention of obtaining additional data points for the purpose of determining a predominant wage rate, it

<sup>90</sup> In *Fry Brothers*, the Wage Appeals Board (WAB) described the importance of using CBAs to help determine classifications based on job content where collectively bargained rates prevail. 1977 WL 24823, at \*6. The WAB was the Department’s administrative appellate entity from 1964 until 1996, when it was eliminated and the ARB was created and provided jurisdiction over appeals from decisions of the Administrator and the Department’s ALJs under a number of statutes, including the Davis-Bacon and Related Acts. 61 FR 19978 (May 3, 1996). WAB decisions from 1964 to 1996 are available on the Department’s website at [https://www.dol.gov/agencies/oalj/public/dba\\_sca/references/caselists/wablist](https://www.dol.gov/agencies/oalj/public/dba_sca/references/caselists/wablist).

<sup>88</sup> See note 1, *supra*.

<sup>89</sup> See 1963 House Subcommittee Report, *supra*, at 7–8.

is not sufficiently clear what principle will guide the Department's finding that varied rates are nonetheless functionally equivalent.

The Department has reviewed the many comments received regarding the proposed language at § 1.3(e) and agrees with the commenters that advocated in favor of the proposal. The Department's intent in the proposal is to ensure that prevailing wage rates reflect wage rates paid for the same underlying work, and do not instead give undue weight to artificial differences that can be explained because workers are being compensated for something other than the underlying work. This is consistent with the text and purpose of the Davis-Bacon Act and has the salutary effect of reducing the unnecessary reliance on average wage rates that are less protective of local construction wages.

The Department disagrees with the comments, sent in response to an organized initiative, that the proposal conflicts with the Department's intended definition of "prevailing wage." The three-step process and the functional-equivalence rule are consistent because they both seek to reduce the reliance on averages and increase the use of wage rates that are actually paid to workers in the area. In doing so, they both seek to protect local prevailing wage rates and the craft classifications of local area practice, which is the core purpose of the DBRA. Moreover, the Department disagrees that there is any conflict between the two regulatory sections. The proposed language at § 1.3(e) explicitly cross-references the definition in § 1.2 and explains how it should apply to the real-world circumstances that WHD encounters when analyzing survey data. The new language in § 1.3(e) is an amendment to, and becomes an element of, the definition itself. The Department also does not agree that the new language contradicts the *Mistick* decision; rather, the new language changes the rule that would be interpreted by the ARB in the future. The *Mistick* decision was an interpretation of the text of the Department's 1983 regulations that required a determination of whether wage rates were the "same wage" and its fundamental holding was that the Department had not abided by the regulatory language as it was then written. There would be no basis for the ARB to come to the same conclusion under the proposed new language at § 1.3(e), which expressly authorizes the Administrator to count variable wage rates together as the "same wage" in appropriate circumstances.

While no commenter made the argument explicitly, the Department also considered whether the comments regarding the proposed departure from the post-*Mistick* status quo should be understood as assertions that contractors have reliance interests in the Department's recent practice. To the extent that any assertion of reliance interest was made, however, the Department concludes that it is not sufficient to override the value of the functionally equivalent analysis. The functionally equivalent analysis, like the return to the 30-percent threshold, is a change that will likely lead to increased use of modal prevailing wages and decreased use of averages on wage determinations. As with the 30-percent threshold, this change should reasonably be expected to lead in some circumstances to increases in prevailing wage rates and in other circumstances to decreases. Similar to the 30-percent rule and to other amendments to the wage determination process in part 1 of the regulations, the effects of this rule change will apply only to future wage determinations and the future contracts that incorporate them, with limited exception of certain ongoing contracts covered in § 1.6(d) of the final rule. Accordingly, contractors will generally be able to adjust their bids or price negotiations on future contracts to account for any effects of the regulatory change on prevailing wages in a particular area.

Many of the comments in opposition to the proposal, for example from IEC and AFP-I4AW, explained their opposition to be in part because of a perception that the use of CBAs to identify functionally equivalent rates would lead to more prevailing wage rates based on CBAs. At least some of these commenters appeared to misunderstand the proposal as only allowing for the use of CBAs to make an underlying determination. IEC, for example, stated that if the intent is to broaden the set of wage rates that can be used to determine that a certain wage rate is prevailing, then there is no reason the Department could not also find non-CBA wages "functionally equivalent" so long as they have the same acceptable variation proposed for CBA wages deemed functionally equivalent. The Department agrees. In the NPRM, the Department intended the functional equivalence analysis to be applicable to both collectively bargained and non-collectively bargained rates as appropriate. That is why the proposed text of § 1.3(e) expressly allowed for the determination of equivalence to be made based on a "written policy"

maintained by a contractor or contractors—in addition to a CBA.

The Department also disagrees with the other criticisms related to the use of collectively bargained rates. The Department disagrees with the write-in campaign comments stating that any potential for this proposal to increase the use of collectively bargained rates would mean that wage determinations would be less accurate. The commenters' conception of "accuracy" is not well explained in the context of the "functionally equivalent" analysis, but the Department assumes it is similar to the way the term was used in the criticisms of the 30-percent rule—in other words, how closely the "prevailing wage" hews to the average rate, what the market rate would be in the absence of the law, or whether the percentage of prevailing wage rates based on CBAs matches the union density in an area. As the Department has explained, these comparisons may demonstrate the differences between possible conceptions of the term "prevailing wage," but the Department disagrees that potential differences between these numbers necessarily represent differences in accuracy.<sup>91</sup>

The Department similarly disagrees with AFP-I4AW's argument that the proposal should be rejected because it could lead to an increase in the likelihood of finding collectively bargained rates to be the prevailing rates and therefore an "unjustified inflation of labor costs." The Department has addressed variations of this argument above with respect to the definition of prevailing wage. The cost effects associated with shifting from the use of an average rate to a modal prevailing rate are complicated for a variety of reasons—in particular because there can be significant productivity gains associated with an increase in required wage rates on projects. Given these countervailing effects, and the fact that Congress did not specify the potential cost to the government as a factor in determining prevailing wage rates, the

<sup>91</sup> ABC made a related argument that the proposed functional equivalence analysis would not improve accuracy because it is just a "tweak" of the data that the Department received from its wage survey, which ABC believes should be replaced by use of BLS data or augmented through representative sampling. As explained above with regard to the definition of prevailing wage, the Department disagrees with ABC that its suggested alternatives to the wage survey program are either preferable or required. Regardless, the functional equivalence analysis can be beneficial to the determination of prevailing wages because the Department can avoid mistakenly assigning value in a wage determination to apparent differences in wage rates that a further examination would reveal to be superficial and not reflecting different pay received for the same work.

Department is not persuaded that the potential cost effects AFP-I4AW identifies are sufficient reason to reject the proposal.

Several commenters, both supporting and opposing the proposed language, asked for additional guidance regarding types of wage differentials that might appropriately be considered functionally equivalent. The Department believes that the term “functionally equivalent” as described here provides sufficient guidance—the difference between two wage rates must be explained by something other than simply different pay for the same work for the wage rates to be functionally equivalent. Furthermore, as the Foundation for Fair Contracting (FFC) and the Northern California District Council of Laborers (NCDCL) stated, the Department’s specification that the functional-equivalence determination must be supported with reference to CBAs or the written policies represents a “necessary precaution” to appropriately limit the scope of the rule. The Department therefore has not added any additional language in § 1.3(e) delineating specific categories of wage differentials that may or may not fit the analysis.

While no amendment to the regulatory text is necessary, certain examples that commenters provided may be helpful to further illustrate the concept of functional equivalence. The Department does not mean for these examples to be an exhaustive list, but a discussion may be helpful in responding to commenters who asked for further clarification. For example, the NPRM mentioned the potential for different wages based on the time of day that hours are worked to be considered equivalent, but several commenters suggested a broader phrasing—to include differentials based on “undesirable” hours or shifts. This could include, for example, hours worked on certain undesirable days of the week or certain times of year. The Department agrees that where wage differentials are attributable to the timing of the work, they do not represent different wage rates for the same classification—and can be reasonably understood to be functionally equivalent.

Similarly, the UA and several other commenters requested that the Department identify hazard pay for working in hazardous conditions as a wage differential that would be considered functionally equivalent as the base rate. In another example, SMART and SMACNA described working forepersons who spend most of their time working in a specific

“mechanic” classification. While their base rate is that of a journeyperson in that classification, they also get paid a premium to compensate them for the foreperson duties they perform as well. NABTU and several other commenters described premiums for call-back work as another example of a differential wage rate that should not be treated as a separate wage rate from the worker’s underlying base hourly rate. All these examples are circumstances where two workers may be paid different amounts for work in the same classification but where the Department generally would not interpret those different amounts as representing different wage rates for the same underlying work. These are appropriate examples of variable rates that could be found to be functionally equivalent as long as the wage differentials are explained by CBAs or written policies.

SMART and SMACNA requested clarification regarding whether rates can be functionally equivalent if one rate is paid pursuant to a CBA and the other rate is not. This might apply, for example, if a CBA provided for a base hourly rate of \$20 per hour for a classification and a night premium rate of \$25 per hour for the same work, and one worker consistently earned a night premium rate of \$25 per hour under the CBA while another worker not working at night earned \$20 per hour for a different contractor and was not covered by the CBA. Under those circumstances, the Department could reasonably count both workers as earning the \$20 per hour base rate for the purposes of determining the prevailing wage for the classification. The Department does not believe such a clarification is necessary in the text of § 1.3(e) because the language of § 1.3(e) already allows for such a determination.

AGC asked whether the wage rates of various groups of workers on a specific California wage determination would be considered functionally equivalent. In the example presented, a wage determination lists a number of different subclassifications for power equipment operators, and all of the subclassifications have base hourly rates within \$5 of each other. AGC asked whether this differential of approximately 10 percent is an appropriate “slight variation” such that all of these wage rates should be considered functionally equivalent and counted as the same rate for purposes of determining a prevailing wage rate. The focus on the words “slight variation” in the NPRM is misplaced, because a slight variation between or among wage rates is not alone sufficient to render rates functionally equivalent. Rather, there

must be some explanation in a CBA or written policy that explains why the variation exists and supports a conclusion that the variation does not represent simply different pay for the same underlying work. Thus, although some of the individual wage rates AGC describes might reasonably be considered to be slight variations in terms of the magnitude of the difference between them, the types of variable wage rates they represent generally do not fit within the concept of functionally equivalent. Wage differentials between types of power equipment operators in the example are associated with sufficiently different underlying work—for example, as the comment notes, the different groups include “Cranes, Piledriving & Hoisting,” “Tunnel Work,” and “All Other Work.” This kind of wage differential is a distinct concept from functionally equivalent pay rates received for work within the same labor classification.

As previously discussed, Congress did not intend to create a single minimum wage rate with the DBA. Rather, generally speaking, the Act requires prevailing wage rates for different types of construction work to be calculated separately. The statute explicitly addresses this concept in two ways—requiring the Secretary to determine the prevailing wage for “corresponding classes” of workers, and for workers employed on projects of a similar “character” in the area. 40 U.S.C. 3142(b). Thus, when the Department gathers wage information to determine the prevailing wages in an area, it attempts to identify the appropriate classifications (corresponding class) and construction types (projects of a similar character) of work. Through this process, the Department can develop wage determinations that allow for different prevailing wages to account for the different skills that workers use or where there are otherwise material differences in the actual work that workers are doing. The Department does not intend for the functional equivalence concept to apply to these types of situations where wage differentials are attributable to fundamentally different underlying work that requires different skills, or to differences in construction type.<sup>92</sup>

<sup>92</sup> In explaining the limits of this concept of functional equivalence, the Department does not intend to remove the necessary discretion that the Department separately exercises in determining classifications and sub-classifications of work in a particular area. The Department has long recognized that the appropriate level and division of craft specificity can be different in different

AGC also questioned how the Department would decide which rate to identify on a wage determination among a set of multiple rates found in a survey to be functionally equivalent. AGC stated that the identification of the middle rate (or any rate that is less than the CBA rate in a wage determination that would otherwise use the CBA rates and classifications) could put contractors that are signatories to those CBAs at a competitive disadvantage in bidding, since the signatory contractors would be contractually obligated to pay the higher CBA rate while nonsignatory contractors would be free to pay the lower rate.

The Department agrees with AGC that WHD may need to be sensitive to the effects of identifying functionally equivalent wage rates, in particular where collectively bargained rates prevail. Where there are functionally equivalent wage rates, and only a single rate is published, that published wage rate may often be the base hourly rate (and not the higher rate including the relevant wage premium). This could lead to disadvantages for bidders bound by CBAs on projects that may require substantial work at the premium rate, such as substantial work that would be at a hazard pay rate or at night premiums. Thus, where collectively bargained rates prevail, an analysis of local area practice and the wage data received may suggest that WHD should include certain wage premiums (such as a project size premium or zone rates) as separate lines on a wage determination instead of counting them all as the same functionally equivalent underlying base rate.<sup>93</sup>

AGC also expressed concern that the concept of functionally equivalent wage rates might create incentives for contractors and unions to negotiate rates that preserve their competitiveness. As

noted in the NPRM, some variations within the same CBA may clearly amount to different rates, and one example is when a CBA authorizes the use of “market recovery rates” that are lower than the standard rate to win a bid. It may not be appropriate to combine market recovery rates together with the CBA’s standard rate as “functionally equivalent” in certain circumstances, because frequent use of such a rate could suggest (though does not necessarily compel) a conclusion that the CBA’s regular rate would not be prevailing in the area.

A few of the commenters in favor of the proposal suggested helpful changes to the proposed language of § 1.3(e). NABTU highlighted that the Department used the term “employee” in proposed § 1.3(e) to explain the principle of treating variable rates for “employees within the same classification” as functionally equivalent. NABTU noted that DBRA applies to workers even in the absence of an employment relationship, *see* 40 U.S.C. 3142(c)(1), and suggested revising to refer instead to “laborers and mechanics.” The Department agrees that the use of the term “employee” in the proposed language was imprecise considering the scope of the Act, and the language of § 1.3(e) in the final rule is therefore revised to refer to “workers” instead of “employees,” to be consistent with the language used elsewhere in § 1.3 and the rule as a whole.

NABTU, the Laborers’ International Union of North America (LIUNA), and the Iron Workers commented that the Department appeared to tether the “functional equivalence” analysis only to single CBAs or to written policies maintained by contractors. As the commenters noted, there are circumstances in which it may be appropriate to analyze multiple CBAs in order to identify whether rates in a survey are functionally equivalent. They suggested that the Department amend the text of proposed § 1.3(e) to allow a functional equivalence determination to be based on “one or more collective bargaining agreements” or “written policies” of a contractor or contractors instead of just “a collective bargaining agreement” or a “written policy.” The Department agrees that this change in the language is warranted because there are circumstances in which a comparison of multiple CBAs or written policies may be helpful to understanding the relationship between wage rates. For example, if different locals of the same union have parallel collective bargaining units with the same base rate and hazard pay rate, and the WHD survey captures rates from

workers working at the base rate under one of the CBAs and from workers working in the same classification but at the hazard pay rate under the other CBA, it would be reasonable to consider the rates to be functionally equivalent for the purpose of determining the prevailing wage. Accordingly, the final rule adopts this change.

A few other commenters that were largely supportive of the proposal made suggestions that the final rule does not adopt. The Iron Workers recommended that the Department further codify that combined fringe and benefit wage rates must be treated as functionally equivalent wherever two workers have the same total overall compensation. The Iron Workers provided alternative regulatory text that would reference the statutory definition for the term “wages” in 40 U.S.C. 3141. That definition includes both the basic hourly rate of pay and fringe benefit rate. As the Iron Workers noted, the NPRM explained that slightly differing base hourly rates can be considered functionally equivalent where workers have the same combined hourly and fringe rate. In other words, where the combination of hourly and fringe rates are the same, it is appropriate for the Department to count the base rate as the “same wage” for the purpose of determining the prevailing wage. In light of this clarification, the Department does not believe it is necessary to add the additional text to § 1.3(e) that the Iron Workers suggested.

Finally, LIUNA and NABTU, while supporting the Department’s proposal, urged that the language of proposed § 1.3(e) be changed from allowing the Department to treat functionally equivalent rates the same, to requiring it. These commenters noted that in the proposed language, the Administrator “may” treat variable wage rates as the same wage in appropriate circumstances, and they suggested that the language be revised to use the term “shall” instead. The Department declines to adopt this suggestion. During the survey process, respondents can assist the Department by identifying when wage differentials are due to elements of a CBA or written policy that are unrelated to the underlying work. However, as the Department has explained in this rulemaking, the wage survey and wage determination process can be resource-intensive and time-consuming for WHD, and the need for timely completion of surveys and wage determinations has been the subject of criticism levied against the current process.

Thus, while the identification of wage differentials that may be functionally

areas, and that the decisions that the Department must make to identify the appropriate classifications can be fact specific. *See Fry Bros. Corp.*, 1977 WL 24823, at \*6–7. An area practice survey in tandem with the wage survey can often be helpful in this process.

<sup>93</sup> This type of flexibility is consistent with the agency’s current and historical practice. For example, the Department has periodically identified zone rates on wage determinations. In the Alaska Statewide wage determination for building and heavy construction types, the Department recently published separate wage lines for Laborers North of the 63rd Parallel & East of Longitude 138 Degrees and for those South of the 63rd Parallel & West of Longitude 138 Degrees. As commenters in favor of the “functional equivalence” proposal noted, CBAs can be helpful in identifying how relevant differences in the work actually performed or the projects of a similar “character” are divided between classifications of workers in areas where collectively bargained rates prevail. *See Fry Bros. Corp.*, 1977 WL 24823, at \*4, \*6; Manual of Operations at 23.

equivalent can be an important tool for WHD in increasing the use of predominant modal wage rates as prevailing in wage determinations, LIUNA and NABTU's proposal would not be reasonable or administratively feasible, because it would require WHD to review individual CBA wage rates as well as request that contractors provide written policies about every wage rate submitted during a survey—even where the successful identification of wage rates that are functionally equivalent might have limited or no effect on the outcome of the wage determination.

The final rule therefore adopts the language at § 1.3(e) as proposed, with the limited changes identified above.

#### (B) Area

The Department also proposed changes to the definition of the term “area” in § 1.2. The regulations use the term “area” to describe the relevant geographic units that the Department may use to determine the prevailing wage rates that laborers and mechanics must, at a minimum, receive on covered projects. See 29 CFR 1.2, 1.3. The definition of area therefore has consequences for how the Department gathers wage rate information and how the Department calculates prevailing wages.

The core definition of “area” in § 1.2 states that the term “means the city, town, village, county or other civil subdivision of the State in which the work is to be performed.” This definition largely reproduces the specification in the Davis-Bacon Act statute, prior to its 2002 re-codification, that the prevailing wage should be based on projects of a similar character in the “city, town, village, or other civil subdivision of the State in which the work is to be performed.” See 40 U.S.C. 276a(a) (2002).

The geography-based definition of “area” in § 1.2 applies to federally assisted projects covered by the Davis-Bacon Related Acts as well as projects covered by the DBA itself. Some of the Related Acts have used different terminology to identify the appropriate “area” for a wage determination, including the terms “locality” and “immediate locality.”<sup>94</sup> However, the Department has long concluded that these terms are best interpreted and applied consistent with the methodology for determining the area

under the original DBA. See *Virginia Segment C-7, METRO*, WAB No. 71-4, 1971 WL 17609, at \*3-4 (Dec. 7, 1971).

While the definition of “area” provides for the use of various possible geographic units, the Department has, for several decades now, identified the county as the default unit for this purpose. See 29 CFR 1.7(a). This has a corollary for contracting agencies. In order to determine what wages apply to a given construction project, the contracting agency will generally need to identify the county (or counties) in which the project will be constructed and obtain the general wage determination for the correct type of construction for that county (or counties) from the System for Award Management (SAM).

The Department's choice of a geographic “area” to use for a wage determination has consequences for how the prevailing wage will be determined. The regulations, as amended in this rulemaking, explain that the Department will carry out a voluntary wage survey to seek wage data for a type of construction in an “area.” They will then apply the three-step process to that data to determine what wage rate in an “area” prevails for a specific labor classification. See III.B.1.ii.A and III.B.1.iii.

Because the Department uses the county as the default area for a wage determination, it will normally gather wage survey data for each county and carry out the three-step process for each classification of worker and construction type in that county. If there is sufficient current wage data for a classification of workers in a county, this process will result in the prevailing wage that will appear on a wage determination. The regulations at § 1.7(b) and (c) describe the Department's procedures for making the determination if there is not sufficient wage data in a county for a given classification of workers.

In the NPRM, the Department proposed to maintain the core definition of “area” in § 1.2 as currently written, with its list of possible geographic units that the Administrator may use. As discussed in section III.B.1.vii regarding § 1.7 and geographic aggregation practices, the Department similarly proposed to maintain the use of the county as the default area for most wage determinations. The Department also, however, proposed two limited additions to the definition of “area” in § 1.2 to address projects that span multiple counties and to address highway projects specifically.

#### (1) Multi-County Project Wage Determinations

Under WHD's current methodology, if a project spans more than one county, the contracting officer is instructed to attach wage determinations for each county to the contract for the project and contractors may be required to pay differing wage rates to the same employees when their work crosses county lines. This policy was reinforced in 1971 when the Wage Appeals Board (WAB) found that, under the terms of the then-applicable regulations, there was no basis to provide a single prevailing wage rate for a project occurring in Virginia, the District of Columbia, and Maryland. See *Virginia Segment C-7, METRO*, WAB No. 71-4, 1971 WL 17609.

Critics of this policy have pointed out that this can be inconsistent with how workers are paid on projects outside of the Davis-Bacon context. In any given non-DBRA project that might be completed in multiple counties, workers are very often hired and paid a single wage rate for all of their work on the project, and—unless there are different city or county minimum wage laws, or zone pay under a CBA—workers' pay rates often would not change as they move between tasks in different counties. The 2011 report by the GAO, for example, quoted a statement from a contractor association representative that the requirement of different wage rates for the same workers on the same multi-county project is “illogical.” See 2011 GAO Report, at 24.<sup>95</sup>

To address the concerns of these critics, the Department proposed adding language in the definition of “area” in § 1.2 to expressly authorize WHD to issue project wage determinations with a single rate for each classification, using data from all of the relevant counties in which a project will occur. Under the proposal, the definition of “area” would provide that where a project requires work in multiple counties, the “area” may include all the counties in which the work will be performed. The NPRM also included related language at § 1.5(b)(i) that authorized contracting agencies to request a project wage determination where the project involves work in more than one county and will employ workers who may work in more than one county. The Department solicited comments on whether this procedure should be mandatory for multi-jurisdictional projects or available at the request of the contracting agency or an interested party, if WHD determines that

<sup>94</sup> See, e.g., National Housing Act, 12 U.S.C. 1715c(a) (locality); Housing and Community Development Act of 1974, 42 U.S.C. secs. 1440(g), 5310(a) (locality); Federal Water Pollution Control Act, 33 U.S.C. 1372 (immediate locality); Federal-Aid Highway Acts, 23 U.S.C. sec 113(a) (immediate locality).

<sup>95</sup> See note 10, *supra*.



such a project wage determination would be appropriate.

Several commenters, including three contractor associations, a union, the Minnesota Department of Transportation (MnDOT), and the Council of State Community Development Agencies (COSCDA), generally supported the Department's proposal as written. COSCDA noted that the proposal could be helpful for broadband projects and AGC noted that it would be helpful for highway projects. According to AGC, the current practice can be particularly burdensome where the different county wage determinations that are applicable to the same project have differing craft classifications and job duties. AGC stated that the Department's proposal to allow a single wage determination to apply to an entire project is a proposal that "provides logical relief" and is "true modernization." A Professor of Economics who commented on the proposal stated that combining contiguous counties together on "horizontal projects" such as heavy and highway projects is a "conceptually appropriate way of designing a local labor market" because all of the counties in which the project occurs are counties from which the workers are likely to be drawn.

One commenter, Montana Lines Inc., supported making these single-rate project wage determinations mandatory for multi-county projects. Montana Lines Inc. stated that in Montana, construction workers are available across the state and travel to all parts of the state and, therefore, the prevailing wage for the whole state should be the same.

Conversely, NFIB strongly opposed the proposal. NFIB asserted that the statutory language referencing "civil subdivision of a state" in 40 U.S.C. 3142(b) requires the establishment of prevailing wages on a "subdivision by subdivision" basis and thus requires a separate prevailing wage for each subdivision in which work under the contract occurs. NFIB thus recommended regulatory language that would instead codify the current practice that, in multi-county projects, "each such civil subdivision in which work will be performed is a separate area."

Two commenters, LIUNA and Indiana-Illinois-Iowa Foundation for Fair Contracting (III-FFC) supported the Department's proposal, but strongly advocated that it be discretionary as opposed to mandatory and that the Department ensure that it is used only where appropriate. They advocated that the Department should only adopt the

proposal if it is limited to circumstances where the resulting wage determinations reflect local labor markets and do not undermine the highest rates paid in any included county under the governing general wage determination. LIUNA stated that the Department can maintain deference to established labor markets by analyzing available wage data, the jurisdictional coverage of CBAs, contractor bidding practices, geography, and/or administratively established areas under State law. The two commenters explained that these precautions are necessary to ensure that the procedure is consistent with the Davis-Bacon Act's purpose of preserving a wage floor in each local labor market.

The Florida Transportation Builder's Association, Inc. (FTBA) stated it supported the proposed change along with the proposal for using State highway districts as "areas" for highway projects. FTBA requested clarification regarding the methodology the Department would use in setting single rates for each job classification on project wage determinations for work that spans multiple counties. They proposed that the Department set rates based on the wage determination rates for the county where the majority of the work would occur on a covered project.

The Department considered these comments regarding the proposal to authorize multi-county "areas." The proposal does not provide, as FTBA suggested, for the opportunity to identify the county in which most of the construction will occur and then use the wage rates in that county for all other counties in which the project would take place. Rather, the proposal intersects with the definition of "prevailing wage" in § 1.2 and the Department's guidelines for obtaining and compiling wage rate information in § 1.3. Those regulations, as amended in this rulemaking, explain that the Department will carry out the three-step process to determine whether any wage rate prevails in a given "area." See section III.B.1.iii. Thus, if a multi-county area is used, then the wage data from all counties where the project will take place would be combined together before the Department determines whether there is a modal wage rate that prevails for each classification and construction type.

The Department disagrees with NFIB's argument that this procedure is not permissible. Using a project wage determination with a single "area" for multi-county projects is not inconsistent with the text of the DBA. The DBA and Related Act statutes themselves do not address multi-jurisdictional projects,

and "Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute." *Donovan*, 712 F.2d at 618. As other commenters noted, providing contractors with the ability to pay a single wage rate to workers within the same classification on a multi-county project is responsive to concerns that have been raised about administrative burdens of the program.

In addition, as a general matter, the creation of multi-county areas for projects covering multiple counties is consistent with the purpose of the DBA, which is to protect against the depression of local wage rates caused by competition from low-bid contractors from outside of the locality. Allowing the use of data from all counties in which the project is being carried out means incorporating wage data from workers who will generally have been working in the vicinity of some portion of the project and thus cannot reasonably be characterized as imported labor from outside of the project locality.

The Department, however, is sensitive to the concerns raised by LIUNA and III-FFC. In many circumstances, multi-county projects will satisfy these commenters' concerns that the counties involved are effectively within the same labor market. But it is certainly possible that a multi-county project could take place in counties that are particularly dissimilar and represent entirely different labor markets, such as may be the case if the project were to span a long string of counties across an entire state. In such circumstances, while a multi-county project wage determination could still be requested, it may not be appropriate to combine the county data by using a multi-county area. Instead, it could be more appropriate to use general wage determinations with separate county wage rates for counties that are in wholly different labor markets, or to create a project wage determination for certain counties that are part of the same labor market and use available general wage determinations for any other counties that are not.

Accordingly, the Department is disinclined to make multi-county areas mandatory for any multi-county project wage determination or to make them available as a matter of course at the request of interested parties other than the contracting agency. Instead, the final rule adopts the language as proposed, which allows the Department to use multi-county areas for multi-county

project wage determinations but does not require their use. The Department agrees with LIUNA that it will be important for the Department to ensure that the multi-county areas do not undermine the two important purposes of the statute of identifying actual prevailing wage rates where they exist and guarding against the depression of local wage standards. See 5 Op. O.L.C. at 176. Thus, as LIUNA noted, a multi-county area may be inappropriate for a classification of workers on a project wage determination if it would result in the use of an average rate where existing individual county wage determinations would otherwise identify prevailing wage rates under the Department's preferred modal methodology. Similarly, a single multi-county area for certain classifications of workers on a project wage determination might be inconsistent with the purpose of the statute if the procedure results in average wage rates that are substantially lower than the prevailing wage rate would be in one of the included counties under the default general wage determination.

## (2) State Highway Districts

The Department's other proposed change to the definition of "area" in § 1.2 was to allow the use of State highway districts or similar transportation subdivisions as the relevant wage determination area for highway projects, where appropriate. Although there is significant variation between states, most states maintain civil subdivisions responsible for certain aspects of transportation planning, financing, and maintenance.<sup>96</sup> These districts tend to be organized within State departments of transportation or otherwise through State and County governments.

In the NPRM, the Department explained that using State highway districts as a geographic unit for wage determinations would be consistent with the Davis-Bacon Act's specification that wage determinations should be tied to a "civil subdivision of a State." State highway districts were considered to be "subdivisions of a State" at the time the term was used in the original Davis-Bacon Act. See *Wight v. Police Jury of Par. of Avoyelles, La.*, 264 F. 705, 709 (5th Cir. 1919) (describing the creation of highway districts as "governmental subdivisions of the [S]tate"). The Department further explained that State

highway or transportation districts often plan, develop, and oversee federally financed highway projects. Accordingly, the provision of a single wage determination for each district would simplify the procedure for incorporating Federal financing into these projects.

Several commenters that supported the proposal for multi-county project wage determinations, such as MnDOT and FTBA, also supported the proposal to authorize WHD to adopt State highway districts as areas for highway projects. The New Jersey Heavy & Highway Construction Laborers District Council (NJHHCL) called the proposal a "common-sense revision" that will simplify how projects are structured and planned, allowing more resources to be devoted to the projects themselves instead of their administration. The American Road & Transportation Builders Association (ARTBA) supported the proposal because highway construction projects often span more than one county, and the use of a single area would ensure workers on the project are paid at the same rate regardless of the county in which they are working. As noted, AGC strongly supported the use of multi-county wage project wage determinations for highway projects. Although AGC did not specifically mention the use of state Highway districts as "areas," the two proposals would work in similar ways and have similar effects. NFIB recommended that the Department adopt the proposal, revised slightly to apply to highway districts and "other similar State agency geographical units" instead of the language the Department proposed referring to highway districts and "other similar State subdivisions."

LIUNA expressed a similar position regarding the State highway district proposal as it did for multi-county project wage determinations. They advocated that the Department should only adopt the proposal if the use is limited to circumstances where the resulting wage determinations reflect local labor markets and do not undermine the highest rates paid in any individual county under a general wage determination. III-FFC stated that they were "neutral" on the Department's proposal. They stated that the existence of State highway districts may be an appropriate consideration when establishing a project wage determination on a highway project but that this consideration should be secondary to "local labor market considerations."

The group of U.S. Senators submitted a comment strongly opposing the proposal. They argued that the Department lacks statutory authority to

interpret the term "civil subdivision of the State" in the DBA statute as including State highway districts. The comment asserted that the separate reference in the statutory text at 42 U.S.C. 3142(b) to the District of Columbia should limit the meaning of "other subdivision of the State" to subdivisions that the District of Columbia does not have. The comment also asserted that the Department's proposal runs counter to decades of agency practice, faulted it for failing to cite any legislative history to support its interpretation, and found the Department's citation to the 1919 *Wight* decision to be unconvincing. The Senators stated that not all State highway districts are the same, because not all States grant taxing and bonding authority or formal subdivision status to their highway districts. They also suggested that stakeholders had "come to rely upon" the current and prior regulations, which did not expressly provide for the use of State highway districts.

The Department generally agrees with the commenters that supported the highway districts proposal. The use of State highway districts or similar subdivisions as the areas for highway project wage determinations has the potential to reduce burdens and streamline highway projects that may cross county lines. These projects otherwise will require the use of multiple wage determinations for the same classification of workers and may often require the same individual workers to be paid different rates for doing the same work on different parts of the project.

The Department disagrees with the Senators that asserted the proposal is not permitted by the statute. The plain text of the Davis-Bacon statute supports the Department's interpretation. Congress has used the terms political subdivision and civil subdivision interchangeably, including with regard to the DBA's "civil subdivision requirement." See 1963 Subcommittee Report, at 5 ("There may be isolated areas where no rate can be found for the particular kind of project in the political subdivision of the State in which the project is located."); see also *Political Subdivision*, Black's Law Dictionary (11th ed. 2019) (defining political subdivision as a "division of a state that exists primarily to discharge some function of a local government."). As the *Wight* decision explained, during the time period leading up to the passage of the DBA, the funding and maintenance of roads was a function of subdivisions of State government, and

<sup>96</sup> See generally Am. Assoc. of State Highway and Transp. Offs., "Transportation Governance and Financing: A 50-State Review of State Legislatures and Departments of Transportation" (2016), available at: [http://www.financingtransportation.org/pdf/50\\_state\\_review\\_nov16.pdf](http://www.financingtransportation.org/pdf/50_state_review_nov16.pdf).

“many States” created subdivisions to exercise those functions. 264 F. at 709.

The Senators did not provide any authority to support their statement that at the time of the DBA’s passage “there was a widely accepted distinction between state highway districts and civil subdivisions” and that “Congress has always differentiated between the two.” If anything, the history of Federal highway funding statutes supports the opposite conclusion. In the Federal-Aid Road Act of 1916, Congress directly linked highway funding to “civil subdivisions” that were required to maintain the funded roads or else forfeit future Federal funding. Public Law 64–156, Sec. 7, 39 Stat. 355, 358 (1916). The current version of the Federal highway aid statute reinforces this understanding, as it ties funding to State highway districts or “other” political or administrative subdivisions of a State. 23 U.S.C. 116.<sup>97</sup>

The Department also disagrees that the meaning of the term “subdivision” in the DBA is constrained by the subsequent statutory reference to the District of Columbia. See 40 U.S.C. 3142(b). The Act provides for the determination of rates for the various potential “civil subdivisions of a State in which the work is to be performed,” followed by “or in the District of Columbia if the work is to be performed there.” The Department interprets this language as suggesting only that the District of Columbia may be the appropriate “area” to use for projects occurring there, and that for such projects it should not be necessary to further subdivide the District of Columbia into smaller areas.

The Department disagrees with the U.S. Senators’ suggestion that the final rule should not adopt the revised definition of “area” because stakeholders have come to rely on the prior definition. Any such reliance interests would not weigh strongly against adopting the multi-county and State highway district area proposals, because these area subdefinitions would only factor into the development of wage determinations that are finalized after this rule becomes effective. Any resulting new wage determinations would themselves generally have effect

once they have been incorporated into future contracts, allowing contractors to take any new rates into consideration as they develop their bids or negotiate contract pricing.<sup>98</sup>

The legislative history of the DBA, while it does not expressly address highway districts, is helpful because the text of the statute should be interpreted in a manner consistent with its purpose. Given that the purpose of the Act is to protect locally prevailing wage rates, the term “civil subdivision” necessarily must have a geographical component. Cf. *Jones v. Conway Cnty.*, 143 F.3d 417, 418–19 (8th Cir. 1998) (noting that the enumerated examples of “political subdivisions,” such as counties, municipal corporations, and school districts, can help to interpret that the term is meant to be limited to subdivisions that involve a “physical division of the state”).<sup>99</sup> The Department agrees with NFIB’s comment that a slight revision to the proposed language would be appropriate to communicate this understanding. The final rule therefore provides that, for highway projects, the “area” for wage determinations may be State department of transportation highway districts or other similar State “geographic” subdivisions.

The Department also agrees with LIUNA and III–FFC that while the use of State highway districts may at times be consistent with the purpose of the DBRA, they will not necessarily always

<sup>98</sup> As explained in § 1.6(c), whenever a new wage determination is issued (either after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision as a general matter does not and will not apply to contracts which have already been awarded, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii), and they include where a contract or order is changed to include substantial covered work that was not within the original scope of work, where an option is exercised, and also certain ongoing contracts that are not for specific construction, for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. The final rule instructs contracting agencies to apply the terms of § 1.6(c)(2)(iii) to all existing contracts, without regard to the date of contract award, if practicable and consistent with applicable law. The Department does not anticipate that the application of the amended wage determination methodologies in these situations will result in unfair harm to reliance interests in a manner sufficient to outweigh the benefits of the final rule implementation as planned. See also section III.C. (“Applicability Date”) below.

<sup>99</sup> For the same reason, there is no particular reason to interpret the term as requiring some element of exercise of particular State powers such as taxing and bonding authority. These factors may be helpful where the use of the term “political subdivision” implicates questions regarding the rights or duties of the governmental entity in charge of such a subdivision, but those characteristics are not particularly relevant to the economic and geographical context in which the term is used in the DBA.

be so. For this reason, the proposed language does not make it mandatory for the Department to use State highway districts as “areas” for highway projects, and instead gives the Department discretion to use them where they are appropriate. Relevant here, the Federal-Aid Highway Act of 1956 (FAHA), one of the Related Acts, uses the term “immediate locality” instead of “civil subdivision” for identifying the appropriate geographic area of a wage determination. 23 U.S.C. 113. The FAHA requires the application of prevailing wage rates in the immediate locality to be “in accordance with” the DBA, *id.*, and, as noted above, WHD has long applied these alternative definitions of area in the Related Acts in a manner consistent with the “civil subdivision” language in the original Act. The FAHA “locality” language, however, is helpful guidance for determining whether certain State highway districts, while within the broadest meaning of “civil subdivision of a State,” may be too large to be used as the default areas for general wage determinations.

Similarly, it would not be consistent with the purpose of the DBRA to use State highway districts as “areas” in a State where doing so would result in a significant increase in the use of average rates instead of modal prevailing wage rates on wage determinations. The Department therefore will need to take similar precautions with regard to the use of State highway districts as with multi-county project wage determinations.

Having considered the comments regarding the State highway district proposal, the final rule adopts the proposal with the addition of the word “geographic” to better describe the type of State agency transportation subdivisions that may be used.

#### (C) Type of Construction (or Construction Type)

The Department proposed to define “type of construction” or “construction type” to mean the general category of construction as established by the Administrator for the publication of general wage determinations. The proposed language also provided examples of types of construction, including building, residential, heavy, and highway, consistent with the four construction types the Department currently uses in general wage determinations, but did not exclude the possibility of other types. The terms “type of construction” or “construction type” are already used elsewhere in part 1 to refer to these general categories of construction, as well as in wage

<sup>97</sup> Similarly, in 1927 Congress enacted the Longshore and Harbor Workers Compensation Act (LHWCA), where it limited the workers compensation liability under the Act for “political subdivisions” of a State. See Public Law 69–803, Sec. 3, 44 Stat. 1424, 1426 (1927). As used in the LHWCA, “political subdivision” includes State-authorized transportation districts such as the Golden Gate Bridge, Highway & Transportation District. See *Wheaton v. Golden Gate Bridge, Highway & Transp. Dist.*, 559 F.3d 979, 984–85 (9th Cir. 2009).

determinations themselves. As used in this part, the terms “type of construction” and “construction type” are synonymous and interchangeable. The Department believes that including this definition will provide additional clarity for these references, particularly for members of the regulated community who might be less familiar with the terms.

The Department received no comments specifically addressing this proposal. However, the Department received several comments relating to the definitions provided in AAM 130 (Mar. 17, 1978) for the residential and building construction categories. AAM 130 provides a description of the four types of construction with an illustrative listing of the kinds of projects that are generally included within each type for DBRA purposes. Under AAM 130, apartment buildings of no more than four stories in height are classified as residential and apartment buildings of five or more stories are classified as building construction.

MBA, AWA, and NAHB urged the Department to adopt in the final rule an expanded definition of residential construction that would include all multifamily structures regardless of their story level. On the other hand, SMART and SMACNA argued AAM 130’s categorization of apartment buildings based on the story level has resulted in the misclassification of “mixed-use” buildings as residential and called for the reexamination of the classifications.

The Department believes the definition of what falls under each type of construction is best addressed through subregulatory guidance and intends to continue with that approach. The final rule therefore adopts the proposal without any changes.

#### (D) Other Definitions

The Department proposed additional conforming edits to 29 CFR 1.2 in light of proposed changes to 29 CFR 5.2. As part of these conforming edits, the Department proposed to revise the definition of “agency” (and add a sub-definition of “Federal agency”) to mirror the definition proposed and discussed in the preamble regarding § 5.2. The Department also proposed to add new defined terms to § 1.2 that were proposed in parts 3 and 5, including “employed,” “type of construction (or construction type),” and “United States or the District of Columbia.” As discussed in the preamble regarding § 5.2, the Department did not receive any comments on the proposed changes to the definition of “agency” or the addition of the definition of “United

States or the District of Columbia,” and therefore the final rule adopts these changes as proposed. The proposed addition of the terms “employed” and “type of construction (or construction type),” and comments associated with them, are discussed in the preamble sections III.B.1.ii.C (§ 1.2) and III.B.3.xxii (§ 5.2).

#### (E) Paragraph Designations

The Department also proposed to amend §§ 1.2, 3.2, and 5.2 to remove paragraph designations of defined terms and instead to list defined terms in alphabetical order. The Department proposed to make conforming edits throughout parts 1, 3, and 5 in any provisions that currently reference lettered paragraph definitions.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

#### iii. Section 1.3 Obtaining and Compiling Wage Rate Information

##### (A) 29 CFR 1.3(b)

The Department proposed to switch the order of § 1.3(b)(4) and (5) for clarity. This non-substantive change would simply group together the paragraphs in § 1.3(b) that apply to wage determinations generally and follow those paragraphs with one that applies only to Federal-aid highway projects under 23 U.S.C. 113.

The Department received no comments on this specific proposal. The final rule therefore adopts this change as proposed.

However, the Department received one comment in response to its proposed revision to § 1.3(b). Although the Department only proposed revisions to § 1.3(b)(4) and (5), the Iron Workers noted that § 1.3(b) provides guidelines concerning the types of information that WHD may consider when making prevailing wage determinations and suggested that the Department also amend § 1.3(b)(2) to further safeguard against the fragmentation of job classifications. Specifically, this commenter suggested the Department codify *Fry Brothers* in § 1.3(b)(2).

The Department appreciates the recommendation and notes that classification decisions are made in accordance with relevant legal precedent and subregulatory guidance, including the decision in *Fry Brothers* and subregulatory guidance such as AAM 213 (Mar. 22, 2013). Because the Department did not propose changes to § 1.3(b)(2), it declines to adopt the Iron Workers’ recommendation.

##### (B) 29 CFR 1.3(d)

The Department noted in the NPRM that it was considering whether to revise § 1.3(d), which addresses when survey data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements (hereinafter “Federal project data”) may be used in determining prevailing wages for building and residential construction wage determinations. The Department did not propose any specific revisions to § 1.3(d) in the NPRM, but rather sought comment on whether § 1.3(d)—particularly its limitation on the use of Federal project data in determining wage rates for building and residential construction projects—should be revised.

As the Department observed in the NPRM, for approximately 50 years (beginning shortly after the DBA was enacted in 1931 and continuing until the 1981–1982 rulemaking), the Department used Federal project data in determining prevailing wage rates for all categories of construction, including building and residential construction. The final rule promulgated in May 1982 codified this practice with respect to heavy and highway construction, providing in new § 1.3(d) that “[d]ata from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.”<sup>100</sup> The Department explained that “it would not be practical to determine prevailing wages for ‘heavy’ and ‘highway’ construction projects if Davis-Bacon covered projects are excluded in making wage surveys because such a large portion of those types of construction receive Federal financing.”<sup>101</sup>

With respect to building and residential construction, however, the 1982 final rule concluded that such construction often occurred without Federal financial assistance subject to Davis-Bacon prevailing wage requirements, and that to invariably include Federal project data in calculating prevailing wage rates applicable to building and residential construction projects therefore would “skew[] the results upward,” contrary to congressional intent.<sup>102</sup> The final rule therefore provided in § 1.3(d) that “in compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to

<sup>100</sup> 47 FR 23652.

<sup>101</sup> *Id.* at 23645.

<sup>102</sup> See *Donovan*, 712 F.2d at 620.

determine the prevailing wages in the absence of such data.” 29 CFR 1.3(d). In subsequent litigation, the D.C. Circuit upheld § 1.3(d)’s limitation on the use of Federal project data as consistent with the DBA’s purpose and legislative history—if not necessarily its plain text—and therefore a valid exercise of the Administrator’s broad discretion to administer the Act.<sup>103</sup>

As a result of § 1.3(d)’s limitation on the use of Federal project data in calculating prevailing wage rates applicable to building and residential construction, WHD first attempts to calculate a prevailing wage based on non-Federal project survey data at the county level—*i.e.*, survey data that includes data from private projects or projects funded by State and local governments without assistance under the DBRA, but that excludes data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements. *See* 29 CFR 1.3(d), 1.7(a); Manual of Operations at 38; *Coal. for Chesapeake Hous. Dev.*, ARB No. 12–010, 2013 WL 5872049, at \*4 (Sept. 25, 2013) (*Chesapeake Housing*). If there is insufficient non-Federal project survey data for a particular classification in that county, then WHD considers survey data from Federal projects in the county if such data is available.

Under the current regulations, WHD expands the geographic scope of the data that it considers when it is making a county wage determination when data is insufficient at the county level. This procedure is described below in the discussion of the “scope of consideration” regulation at § 1.7. For wage determinations for building and residential construction projects, WHD currently integrates Federal project data into this procedure at each level of geographic aggregation in the same manner it is integrated at the county level: If the combined Federal and non-Federal survey data received from a particular county is insufficient to establish a prevailing wage rate for a classification in a county, then WHD attempts to calculate a prevailing wage rate for that county based on non-Federal wage data from a group of surrounding counties. *See* 29 CFR 1.7(a), (b). If non-Federal project survey data from the surrounding-counties group is insufficient, then WHD includes Federal project data from all the counties in that group. If both non-Federal project and Federal project data for a surrounding-counties group is still insufficient to determine a prevailing wage rate, then WHD may expand to a “super group” of counties or even to the

statewide level. *See Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049, at \*6; PWRB, Davis-Bacon Surveys, at 6.<sup>104</sup> At each stage of data expansion for building and residential wage determinations, WHD first attempts to determine prevailing wages based on non-Federal project data; however, if there is insufficient non-Federal data, WHD will consider Federal project data.

As reflected in the plain language of § 1.3(d) as well as WHD’s implementation of that regulatory provision, the current formulation of § 1.3(d) does not prohibit the use of Federal project data in establishing prevailing wage rates for building and residential construction projects subject to Davis-Bacon requirements; rather, it limits the use of such data to circumstances in which “there is insufficient wage data to determine the prevailing wages in the absence of such data.” 29 CFR 1.3(d). As the Department explained in the NPRM, WHD often uses Federal project data in calculating prevailing wage rates applicable to residential construction due to insufficient non-Federal data. By contrast, because WHD’s surveys of building construction typically have a higher participation rate than residential surveys, WHD uses Federal project data less frequently in calculating prevailing wage rates applicable to building construction projects covered by the DBRA. For example, the 2011 GAO Report analyzed 4 DBA surveys and found that over two-thirds of the residential rates for 16 key job classifications (such as carpenter and common laborer) included Federal project data because there was insufficient non-Federal project data, while only about one-quarter of the building wage rates for key classifications included Federal project data. 2011 GAO Report, at 26.<sup>105</sup>

Notwithstanding the use of Federal project data in calculating prevailing wage rates for building and residential construction, the Department noted in the NPRM that some interested parties may believe that § 1.3(d) imposes an absolute barrier to the use of Federal project data in determining prevailing wage rates. As a result, survey participants may not submit Federal project data in connection with WHD’s surveys of building and residential construction, thereby reducing the amount of data that WHD receives in response to its building and residential surveys. The Department therefore strongly encouraged robust participation

in Davis-Bacon prevailing wage surveys, including building and residential surveys, and it urged interested parties to submit Federal project data in connection with building and residential surveys with the understanding that such data will be used in calculating prevailing wage rates if insufficient non-Federal project data is received. The Department specifically observed that in the absence of such Federal project data, for example, a prevailing wage rate may be calculated at the surrounding-counties group or even statewide level when it would have been calculated based on a smaller geographic area if more Federal project data had been submitted.

Although increased submission of such Federal project data thus could be expected to contribute to more robust wage determinations even without any change to § 1.3(d), the Department recognized in the NPRM that revisions to § 1.3(d) might nonetheless be warranted. The Department therefore solicited comments regarding whether to revise § 1.3(d) in a way that would permit WHD to use Federal project data more frequently when it calculates building and residential prevailing wages. For example, particularly given the challenges that WHD has faced in achieving high levels of participation in residential wage surveys—and given the number of residential projects that are subject to Davis-Bacon labor standards under Related Acts administered by HUD—the Department noted in the NPRM that it might be appropriate to expand the amount of Federal project data that is available to use in setting prevailing wage rates for residential construction.

The Department also observed that there might be other specific circumstances that particularly warrant greater use of Federal project data and that, more generally, if the existing limitation on the use of Federal project data were removed from § 1.3(d), WHD could in all circumstances establish Davis-Bacon prevailing wage rates for building and residential construction based on all usable wage data in the relevant county or other geographic area, without regard to whether particular wage data was “Federal” and whether there was “insufficient” non-Federal project data. The Department also noted in the alternative that § 1.3(d) could be revised in order to provide a definition of “insufficient wage data,” thereby providing increased clarity regarding when Federal project data may and may not be used in establishing prevailing wage rates for building or residential construction. The Department specifically invited

<sup>103</sup> *Id.* at 621–22.

<sup>104</sup> *See* note 19, *supra*.

<sup>105</sup> *See* note 10, *supra*.

comments on these and any other issues regarding the use of Federal project data in developing building and residential wage determinations.

Numerous commenters expressed support for a regulatory change that would result in increased use of Federal project data to establish prevailing wage rates for building and residential construction. LIUNA, the International Union of Operating Engineers (IUOE), UBC, CEA, SMACNA, NABTU, and III-FFC expressed support for returning to the Department's approach prior to the 1981–1982 rulemaking, when the Department used Federal project data in all instances in determining prevailing wage rates for building and residential construction. MCAA similarly supported allowing and perhaps even routinely using Federal project data in building and residential wage determinations. LIUNA, NABTU, and UBC, in particular, criticized the limitation on the use of Federal project data that was imposed by the 1981–1982 rulemaking and contended that the limitation has resulted in the exclusion of a significant amount of data on worker compensation in Davis-Bacon wage surveys. LIUNA and other commenters recognized that § 1.3(d) permits use of Federal project data in determining prevailing wage rates for building and residential construction when private project data is insufficient, but contended that the WHD Administrator's reliance on various sufficiency standards over the years to determine when Federal project data may be used has often caused large swaths of local wage data to be excluded based solely on a disproportionately de minimis amount of private data. LIUNA, NABTU, and III-FFC posited that using Federal project data in all circumstances would increase the amount of usable data and thereby increase the likelihood that wage rates could be calculated based on a substantial amount of wage data and/or at the county level.

The IUOE and III-FFC similarly commented that allowing greater use of Federal project data would promote clarity and efficiency and resolve some of the challenges associated with insufficient data. Relatedly, LIUNA and III-FFC observed that the current exclusion of Federal project data discourages the submission of such data in the first place, particularly since some interested parties believe that § 1.3(d) imposes an absolute barrier to the consideration of Federal project data, and that removing the limitation set forth in § 1.3(d) therefore would promote greater survey participation. The UBC, the IUOE, and MCAA further commented that revising § 1.3(d) to

provide for broader use of Federal project data would be consistent with the purpose of the DBA. The IUOE and III-FFC also commented that building projects that are likely to be subject to DBA requirements include detention facilities, institutional buildings, museums, post offices, and schools, and that it is essential that data from such projects are included in Davis-Bacon wage surveys as such data reflects the wages paid by skilled and experienced contractors on these types of projects.

Finally, NABTU encouraged the Department, should it decide to retain the current restriction on the use of Federal project data in residential and building construction wage determinations, to expressly state in § 1.3(d) that when the Department receives insufficient data for an individual county, it will first look to Federal and federally assisted projects before expanding its search to nearby counties. In proposing this regulatory revision, NABTU recognized that this has been a longstanding policy of WHD, but that it is not codified in the regulations and therefore, NABTU asserted, is not always uniformly applied in Davis-Bacon wage surveys.

SMART and SMACNA included a lengthy discussion of § 1.3(d) and noted that they support unrestricted use of Federal project data in building surveys but that, to be responsive to the NPRM's requests for specific information, they were also identifying “specific circumstances that particularly warrant greater use of Federal project data” and discussed the possibility of including a definition of “insufficient wage data” in § 1.3(d). They noted that the Federal government plays a significant role in building and residential construction in local labor markets and that “[s]ince the goal of the DBA is to prevent use of the federal government's purchasing power to depress labor standards, it makes little sense to ignore the federal government's impact on local markets in determining prevailing rates.” SMART and SMACNA further commented that if the Department “decides not to rescind § 1.3(d),” the Department should, at minimum, define the term “insufficient wage data” in the regulation so that it takes into account the total value of Davis-Bacon projects in a county relative to the total value of the private projects in the county.” SMART and SMACNA also noted that “a dearth of private data in two-thirds of residential surveys and in building surveys in isolated, sparsely-populated rural counties necessitates the use of federal and federally funded data in these surveys.”

In contrast to these comments in favor of revising § 1.3(d), numerous commenters opposed any change to § 1.3(d). Citing the DBA's legislative history, IEC contended that the DBA was intended to reflect prevailing rates established by private industry, and that to revise § 1.3(d) to allow for broader use of Federal project data in establishing prevailing wage rates for building and residential construction would violate the DBA's purpose and established case law. MBA (in comments submitted jointly with 10 other organizations) and NAHRO posited that the use of Federal project data in establishing prevailing wage rates for building and residential construction in all instances would skew prevailing wages upward and result in rates that would not reflect actual prevailing wages for residential and/or building construction. The NAHB, in addition to joining the comment submitted by the MBA, recommended that the Department maintain its policy of not factoring Davis-Bacon wages from covered projects in its initial calculation of prevailing wages. AGC similarly commented that they were not aware of any significant deficiencies in the sources of private data for building and residential construction that would necessitate a change in the current practice or regulation. Finally, the Small Business Administration (SBA) Office of Advocacy expressed opposition to greater use of Federal project data, though they (like certain other commenters) misinterpreted the NPRM as expressly proposing a regulatory change, when in fact the Department simply solicited comments in the NPRM as to whether a regulatory change was warranted.

After considering the comments supporting and opposing a regulatory change, the Department has decided not to revise § 1.3(d) and to continue to consider submitted Federal project data in all instances when calculating prevailing wage rates for heavy and highway construction and, in calculating prevailing wage rates for building and residential construction, to consider Federal project data whenever “it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data.” 29 CFR 1.3(d). As the current regulatory text reflects, § 1.3(d) does not erect an absolute barrier to considering Federal project data when determining prevailing wage rates for building and residential construction, but rather provides that Federal project data will be used whenever the Department has



determined that there is insufficient private data to determine such prevailing rates. The Department therefore will continue to solicit and receive Federal project data in all Davis-Bacon wage surveys of building and residential construction, and, consistent with § 1.3(d) and existing practice, will use such data in determining prevailing wage rates for those categories of construction whenever insufficient private data has been received. Moreover, in light of certain comments confirming that some stakeholders apparently believe that § 1.3(d) imposes an absolute barrier to the consideration of Federal project data, the Department will ensure that guidance materials and communications specific to Davis-Bacon wage surveys properly emphasize that the Department seeks the submission of Federal project data in all instances and that it will use such data to determine prevailing wage rates whenever appropriate under § 1.3(d).

In deciding not to revise § 1.3(d) to permit the use of Federal project data in all instances, the Department considers it significant that current § 1.3(d) does not prohibit in all circumstances the use of Federal project data in calculating prevailing wage rates for building and residential construction, but rather requires the use of such data whenever there is insufficient private data. In interpreting § 1.3(d), the Department's ARB has held repeatedly that the determination of whether or not there is "insufficient" private project data for purposes of § 1.3(d) depends on the circumstances, and that Federal project data should not be disregarded simply because the quantum of private data received minimally satisfied WHD's subregulatory sufficiency threshold for determining a prevailing wage rate (currently wage data for six workers employed on three projects). See *Road Sprinkler Fitters Local Union No. 669*, ARB No. 10–123, 2012 WL 2588591, at \*7 (June 20, 2012) ("[I]t seems illogical to conclude that data from merely three workers in a metropolitan county for a common job is 'sufficient data' to eliminate the need to . . . include data from federal jobs, as permitted by the DBA and its implementing regulations."); *Plumbers Local Union No. 27*, ARB No. 97–106, 1998 WL 440909, at \*5 (July 30, 1998) (under § 1.3(d), WHD could not establish a prevailing wage for the plumber classification by solely considering data reflecting the wages paid to six plumbers on private projects when the record indicated that WHD had received wage data for hundreds of plumbers on federally funded projects). The

Department agrees with this interpretation and believes that this precedent supports retaining § 1.3(d) as presently drafted rather than revising the provision to mandate the use of Federal project data in determining all prevailing wage rates.

The Department likewise has concluded that it is unnecessary to adopt the specific proposals, short of a complete rescission of the limitation on the use of Federal project data in determining prevailing wage rates for building and residential construction, that commenters identified. In response to NABTU's alternative recommendation that § 1.3(d) be revised to codify WHD's longstanding policy of looking to Federal project data before expanding its search to nearby counties when the Department receives insufficient data for an individual county, the Department believes that codifying the order of operations in determining prevailing wage rates for building and residential construction at this level of detail is not necessary. The existing text of § 1.3(d), which directs the use of Federal project data whenever there is insufficient private data, already provides for the consideration of Federal project data at the county level whenever there is insufficient county-level private data. Moreover, established WHD policies and procedures expressly provide that if there is insufficient non-Federal project survey data for a particular classification in a county, then WHD will consider available survey data from Federal projects in the county and will likewise integrate Federal project data at each level of geographic aggregation to the same extent and in the same manner it is integrated at the county level. Manual of Operations at 38; *Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049, at \*4. The Department appreciates the importance of adhering to this order of operations in all circumstances, however, and it will therefore continue to emphasize, through subregulatory guidance such as the Manual of Operations and internal and external communications, that, for building and residential construction wage surveys, Federal project data must always be considered when there is insufficient private data at the county level, and that a similar process of considering Federal project data must be followed each time the geographic area is expanded in accordance with the governing regulations and WHD's policies and procedures.

The Department also declines to adopt SMART and SMACNA's alternative proposal that the Department define the term "insufficient wage data"

in the regulation so that it takes into account the total value of Davis-Bacon projects in a county relative to the total value of the private projects in the county. WHD has long determined prevailing wages based on the wage data for workers on "projects of a character similar" that WHD receives through its wage survey program 40 U.S.C. 3142(b). As a general matter, projects of significantly greater value will employ more workers than smaller projects, and the size or value of a particular project for which wage data is submitted thus can be expected to influence the calculation of prevailing wages. To determine sufficiency based on general data regarding aggregate project values in a county without regard to the specific wage data received in a particular Davis-Bacon wage survey would represent a significant and complex shift away from WHD's current method of determining prevailing wage rates. The Department therefore believes that the sufficiency or insufficiency of private project data should continue to be determined based on WHD's "compiling of wage data," § 1.3(d), rather than on distinct, extra-survey information regarding relative project values. The current regulatory text, particularly as interpreted by the ARB, thus provides sufficient and appropriate direction to the Department in determining when Federal project data may be used to determine prevailing wage rates on building and residential construction. See *Road Sprinkler Fitters*, ARB No. 10–123, 2012 WL 2588591, at \*7; *Plumbers Local Union No. 27*, ARB No. 97–106, 1998 WL 440909, at \*5.

(C) 29 CFR 1.3(f)—Frequently Conformed Rates

The Department is also proposing changes relating to the publication of rates for labor classifications for which conformance requests are regularly submitted when such classifications are missing from wage determinations. The Department's proposed changes to this paragraph are discussed below in section III.B.1.xii ("Frequently conformed rates"), together with proposed changes to § 5.5(a)(1).

(D) 29 CFR 1.3(g)–(j)—Adoption of State/Local Prevailing Wage Rates

In the NPRM, the Department proposed to add new paragraphs (g), (h), (i), and (j) to § 1.3 to permit the Administrator, under specified circumstances, to determine Davis-Bacon wage rates by adopting prevailing wage rates set by State and local governments. The Department explained that this proposal was intended to reduce reliance on outdated

Davis-Bacon wage rates while enabling the WHD to avoid performing costly and duplicative prevailing wage surveys when a State or locality has already performed similar work.

About half of the States, as well as many localities, have their own prevailing wage laws (sometimes called “little” Davis-Bacon laws).<sup>106</sup> Additionally, a few states have processes for determining prevailing wages in public construction even in the absence of such State laws.<sup>107</sup> Accordingly, the Administrator has long taken prevailing wage rates set by States and localities into account when making wage determinations. Under the current regulations, one type of information that the Administrator may “consider[ ]” in determining wage rates is “[w]age rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.” 29 CFR 1.3(b)(3). Additionally, for wage determinations on federally funded highway construction projects, the Administrator is required by the FAHA statute to “consult” with “the highway department of the State” in which the work is to be performed, and to “giv[e] due regard to the information thus obtained.” 23 U.S.C. 113(b); see 29 CFR 1.3(b)(4).

In reliance on these provisions, WHD has sometimes adopted and published certain states’ highway wage determinations in lieu of conducting wage surveys in certain areas. According to a 2019 report by the OIG, WHD used highway wage determinations from 15 states between fiscal years 2013 and 2017. See 2019 OIG Report, at 10.

This same OIG report expressed concern about the high number of out-of-date Davis-Bacon wage rates, particularly non-union rates, noting, for example, that some published wage rates were as many as 40 years old. *Id.* at 5. The OIG report further noted that at the time, 26 states and the District of Columbia had their own prevailing wage laws, and it recommended that WHD “should determine whether it would be statutorily permissible and programmatically appropriate to adopt [S]tate or local wage rates other than those for highway construction.” *Id.* at 10–11. WHD indicated to OIG that in the absence of a regulatory revision, it viewed adoption of State rates for non-

highway construction as in tension with the definition of prevailing wage in § 1.2(a) and the ARB’s *Mistick* decision. *Id.* at 10.

In the NPRM, the Department explained that it shared OIG’s concerns regarding out-of-date rates, and that a regulatory revision would best ensure that WHD can incorporate State and local wage determinations when doing so would further the purposes of the Davis-Bacon labor standards. As noted above, the current regulations permit WHD to “consider” State or local prevailing wage rates among a variety of sources of information used to make wage determinations and require WHD to give “due regard” to information obtained from State highway departments for highway wage determinations. See 29 CFR 1.3(b)(3)–(4). However, they also provide that any information WHD considers when making wage determinations must “be evaluated in the light of [the prevailing wage definition set forth in] § 1.2(a).” 29 CFR 1.3(c). While some States and localities’ definitions of prevailing wage mirror the Department’s regulatory definition, many others’ do not. Likewise, because the current regulations at §§ 1.2(a) and 1.3(c), as well as the ARB’s decision in *Mistick*, suggest that any information (such as State or local wage rates) that WHD obtains and “consider[s]” under § 1.3(b) must be filtered through the definition of “prevailing wage” in § 1.2, the Department proposed a regulatory change to clarify that WHD may adopt State or local prevailing wage determinations under certain circumstances even where the State or locality’s definition of prevailing wage differs from the Department’s.

Under the Department’s proposal, WHD would only be permitted to adopt State or local prevailing wage rates if the Administrator, after reviewing the rate and the processes used to derive the rate, concludes that they meet certain listed criteria. The criteria the Department proposed, which were included in proposed new § 1.3(h), were as follows:

First, the Department proposed that 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. This proposed requirement was intended to ensure that WHD will not adopt a prevailing wage rate where the process to set the rate unduly favors certain entities, such as union or non-union contractors. Rather, the State or local process must reflect a good-faith effort to derive a wage that prevails for

similar workers on similar projects within the relevant geographic area within the meaning of the Davis-Bacon Act statutory provisions. The phrase “survey or other process” in the proposed regulatory text was intended to permit the Administrator to incorporate wage determinations from States or localities that do not necessarily engage in surveys but instead use a different process for gathering information and setting prevailing wage rates, provided that this process meets the required criteria.

Second, the Department proposed requiring that a State or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, and that each of these can be calculated separately. Thus, the Department explained that WHD must be able to confirm during its review process that both figures are prevailing for the relevant classification(s) and list each figure separately on its wage determinations. This reflects the statutory requirement that a prevailing wage rate under the Davis-Bacon Act must include fringe benefits, 40 U.S.C. 3141(2)(B); 29 CFR 5.20, and that “the Secretary is obligated to make a separate finding of the rate of contribution or cost of fringe benefits.” 29 CFR 5.25(a). This requirement also would ensure that WHD could determine the basic or regular rate of pay to determine compliance with the CWHSSA and the Fair Labor Standards Act (FLSA).

Third, the Department proposed that the State or local government must classify laborers and mechanics in a manner that is recognized within the field of construction.<sup>108</sup> The proposed rule explained that this standard is intended to ensure that the classification system does not result in lower wages than are appropriate by, for example, assigning duties associated with skilled classifications to a classification for a general laborer.

Finally, the Department proposed that the State or local government’s criteria for setting prevailing wage rates must be

<sup>106</sup> A list of such states, and the thresholds for coverage, can be found here: “Dollar Threshold Amount for Contract Coverage,” U.S. Dep’t of Lab., Wage and Hour Div., <https://www.dol.gov/agencies/whd/state/prevailing-wages>.

<sup>107</sup> These states include Iowa, North Dakota, and South Dakota.

<sup>108</sup> In the NPRM, the Department explained that it recognizes that differences in industry practices mean that the precise types of work done and tools used by workers in particular classifications may not be uniform across states and localities. For example, in some areas, a significant portion of work involving the installation of heating, ventilation, and air conditioning (HVAC) duct work may be done by an HVAC Technician, whereas in other areas such work may be more typically performed by a Sheet Metal Worker. Unlike in the case of the SCA, WHD does not maintain a directory of occupations for the Davis-Bacon Act. However, under this proposed rule, in order for WHD to adopt a State or locality’s wage rate, the State or locality’s classification system must be in a manner recognized within the field of construction.

substantially similar to those the Administrator uses in making wage determinations under 29 CFR part 1. The proposed regulation provided a non-exclusive list of factors to guide this determination, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for determining the appropriate geographic area(s). Thus, the more similar a State or local government's methods are to those used by WHD, the greater likelihood that its corresponding wage rate(s) will be adopted. While the proposed regulation listed the above factors as guidelines, it ultimately directed that the Administrator's determination in this regard will be based on the totality of the circumstances. The reservation of such discretion in the Administrator was intended to preserve the Administrator's ability to make an overall determination regarding whether adoption of a State or local wage rate is consistent with both the language and purpose of the DBA, and thereby is consistent with the statutory directive for the Secretary (in this case, via delegation to the Administrator), to determine the prevailing wage. *See* 40 U.S.C. 3142(b).

The Department proposed in § 1.3(g) to permit the Administrator to adopt State or local wage rates with or without modification. The Department explained that this was intended to encompass situations where the Administrator reviews a State or local wage determination and determines that although the State or local wage determination might not satisfy the above criteria as initially submitted, it would satisfy those criteria with certain modifications. For example, the Administrator may obtain from the State or local government the State or locality's wage determinations and the wage data underlying those determinations, and, provided the data was collected in accordance with the criteria set forth earlier (such as that the survey was fully open to all participants), may determine, after review and analysis, that it would be appropriate to use the underlying data to adjust or modify certain classifications or construction types, or to adjust the wage rate for certain classifications. Consistent with the Secretary's authority to make wage determinations, the regulation permits the Administrator to modify a State or local wage rate as appropriate while still

generally relying on it as the primary source for a wage determination. For instance, before using State or local government wage data to calculate prevailing wage rates under the DBA, the Administrator could regroup counties, apply the definition of "prevailing wage" set forth in § 1.2, disregard data for workers who do not qualify as laborers or mechanics under the DBA, and/or segregate data based on the type of construction involved. The Department explained that the Administrator would cooperate with the State or locality to make the appropriate modifications to any wage rates.

In proposed § 1.3(i), the Department proposed requiring the Administrator to obtain the wage rates and any relevant supporting documentation and data from the State or local entity before adopting a State or local government prevailing wage rate.

Finally, § 1.3(j) of the proposed rule explained that nothing in proposed § 1.3(g), (h), or (i) precludes the Administrator from considering State or local prevailing wage rates in a more holistic fashion, consistent with § 1.3(b)(3), or from giving due regard to information obtained from State highway departments, consistent with § 1.3(b)(4), as part of the Administrator's process of making prevailing wage determinations under 29 CFR part 1. For example, under the proposed rule, as under the current regulations, if a State or locality were to provide the Department with the underlying data that it uses to determine wage rates, even if the Administrator determines not to adopt the wage rates themselves, the Administrator may consider or use the data as part of the process to determine the prevailing wage within the meaning of 29 CFR 1.2, provided that the data is timely received and otherwise appropriate. The purpose of proposed § 1.3(j) was to clarify that the Administrator may, under certain circumstances, adopt State or local wage rates, and use them in wage determinations, even if the process and rules for State or local wage determinations differs from the Administrator's.

A diverse array of commenters—including labor unions, worker advocacy organizations, contractors, contractor associations, State government officials, and various members of Congress—expressed support for the Department's proposals to expand WHD's authority to adopt State or local prevailing wage rates. The most common reason offered for such support was that the adoption of State or local rates could help ensure that Davis-Bacon rates remain up to date. For

example, FFC and NCDCL stated in their comments that wage determinations by the State of California are updated with "significantly greater frequency" than WHD's. These commenters and others, such as NABTU, asserted that incorporation of more current State and local wage rates would help attract workers to the construction industry, which they viewed as an important policy priority in light of the increased number of construction projects financed by IJIA.

Other commenters expressed support for an expanded incorporation of State and local prevailing wage rates for efficiency reasons. For example, COSCDA said that the proposals may "avoid delays in identifying certain federal prevailing wages,"<sup>109</sup> while Pennsylvania government officials commented that "the proposal would streamline the wage determination process . . . and align DBA wages with State and local rates for projects covered by both sets of laws." CEA, NECA, and SMACNA identified this proposal as among those from the Department's proposed rule that would greatly improve the overall efficiency of the Act. IUOE, MCAA, and UBC asserted that the proposals would allow WHD to conserve its resources for improved administration and enforcement of the DBA, with MCAA characterizing the proposals as "sound good-government policy." MBA remarked that "[t]he added flexibility afforded to the Administrator in the proposed rule is a positive step in getting a deeper understanding of the relevant wages," and urged the Department to "go a step further" by "[e]xpanding the use of the data, not just when WHD does not have sufficient data to determine a wage, but in all circumstances . . . [to] provide a comparative wage and help gain a greater understanding whenever there are material discrepancies or when the overall respondent rate is low for a wage determined through the Davis-Bacon survey."

Several commenters expressed more qualified support for the Department's proposals regarding the incorporation of State and local prevailing wage rates. For example, the UA acknowledged that it "makes sense to use state and local rates . . . as a fall-back option for combatting stale rates," but

<sup>109</sup> While opposing the Department's proposals for other reasons, FTBA acknowledged that "[the] adoption of prevailing rates set by state or local officials has some appeal given the time intensive survey process which has resulted in delays in surveys and consequently delays in the issuance of new wage determinations based on updated wages and benefits data."

“encourage[d] [the Department] to continue to prioritize its own wage surveys as the first and best option.” Similarly, Contractor Compliance & Monitoring, Inc. (CC&M) “agree[d] with using state or local prevailing wage rate for wage rates, but only where there is otherwise insufficient information from BLS.” AGC stated that “[a]dopting state and local wage rates could improve the accuracy and timeliness of rates if done properly,” but opined that “[t]he viability and practicality of this proposal depends almost entirely on how much confidence one has in state procedures for collecting wage rate data and calculating prevailing wages.” NABTU cautioned that “[the Department] must . . . conduct meaningful independent review of local rates to avoid engaging in an impermissible delegation of authority,”<sup>110</sup> and “[a]bove all . . . retain the final decision-making authority over rates.”

While some commenters specifically approved of the limiting criteria specified in proposed § 1.3(h), *see, e.g.*, Fair Contracting Foundation of Minnesota and MCAA, others asked the Department to codify additional limitations on WHD’s discretion to adopt State or local prevailing wage rates. For example, several labor unions and worker advocacy organizations, including III–FFC, LCCHR, and UBC, requested the final rule to prohibit the use of State or local rates lower than an alternative Federal rate.<sup>111</sup> In support of this proposal, III–FFC asserted that “[a]dopting rates that are lower than those derived from the Department’s own methodology would run counter to the purpose of the Davis-Bacon Act to establish rates ‘for the benefit of construction workers.’ *Binghamton Constr. Co.*, 347 U.S. at 178.” Other commenters expressed concern about the risks of low State or local prevailing wage rates but stopped short of requesting the Department to categorically reject the adoption of lower State or local rates. For example, IUOE requested the Department to “add a clause to the final rule that the

Administrator shall closely scrutinize a state’s submissions if the state cannot demonstrate a 5-year history of successfully administering such a prevailing wage program,” explaining that such scrutiny would “allow the Administrator to not accept such wages if they significantly lower the wages already listed on the WD.”

Other commenters suggested methodological modifications. NABTU and the UA requested the Department to limit its adoption of State or local rates to communities where WHD has not completed a wage survey in the area for the applicable type of construction in more than 3 years.<sup>112</sup> NAHB urged the Department not to adopt wage rates from State and local governments that use a methodology that permits the cross-consideration of rural and metropolitan wage rates, asserting that wages resulting from such a methodology are not appropriately representative of a given area. And ABC requested that the Department modify proposed § 1.3(h)(1) to require that the State or local government “use appropriate statistical methods, such as sampling, weighting, or imputation, to obtain statistically representative results,” or, in the alternative, “clarify that statistically representative sampling, where all respondents have a proportionate likelihood of inclusion in the sample, qualifies as ‘full participation by all interested parties’ within the meaning of the regulation.”

The Department identified at least five comments which opposed an expanded use of State or local prevailing wage rates, submitted by AWhA, FTBA, IEC, NAHB, and the group of U.S. Senators, respectively. Unlike some of the commenters that voiced concern about the potential adoption of lower State or local wage rates, FTBA, IEC, and the group of U.S. Senators were chiefly concerned that the proposal could result in the adoption of State or local wage rates that are inappropriately high. For example, the group of U.S. Senators cited research asserting that New York’s prevailing wage law has inflated state and local construction costs by 13 to 25 percent, depending on the region. The group of U.S. Senators elaborated that “[m]any state prevailing wage laws, such as New

York’s, base their definition of prevailing rate of wage directly on compensation levels set in [a] CBA, rather than voluntary surveys, allowing contract administrative costs and union work rules to further inflate wages, at great detriment to the taxpayer.”

AWhA and FTBA expressed a different concern that expanding the use of State and local prevailing wage rates might inappropriately reduce WHD’s need or desire to regularly perform Federal wage surveys.<sup>113</sup> AWhA asserted that State and local governments “face similar, if not more pronounced, capacity and outreach challenges in conducting methodologically rigorous wage and hour surveys,” and further objected that the Department’s proposal to use local prevailing wage rates even in cases where the definitions and methods are different than the Federal standard was “at odds with the given rationale to return to the three-step process.” Highlighting the requirement in proposed § 1.3(h)(4) that State or local rates must be derived from “substantially similar” criteria to those the Administrator uses in making wage determinations under part 1, IEC asserted that “the ability to merely adopt—rather than consider—state and local wage determinations converts key provisions of the regulations governing wage determinations into mere suggestions.” And, as previously discussed, NAHB relayed concerns about incorporation of State or local rates to the extent that those rates are derived from methodologies that permit cross-consideration of rural and metropolitan areas.

Having considered the feedback in response to the proposed expansion of the use of State and local prevailing wage rates, the Department agrees with the 2019 OIG report and the overwhelming majority of the commenters that addressed these proposals that expanding WHD’s ability to incorporate State and local wage rates would be a significant improvement to the current regulations. Specifically, the Department believes that the provisions in proposed § 1.3(g)–(j) will give the Department an important tool to keep DBRA prevailing wage rates accurate and up to date, with appropriate safeguards to guard against the adoption of excessively high or low State or local rates. Accordingly, the final rule adopts new paragraphs (g), (h), (i), and (j) in § 1.3 as proposed in the NPRM.

<sup>113</sup> FTBA additionally asserted that the proposal might reduce WHD’s need to consult with the highway department of the State in which a project in the Federal-aid highway system is to be performed.

<sup>110</sup> III–FFC similarly cautioned that “DOL . . . must include an independent review process that ensures these [State and local] wage determination programs are methodologically sound and consistent with the requirements of Davis-Bacon labor standards,” but expressed its view that the NPRM “contain[s] a solid framework with relevant criteria to help DOL review state and local processes for setting prevailing wage rates.”

<sup>111</sup> LIUNA supported this proposed restriction, and additionally requested the Department to prohibit “replac[ing] a federal wage determination based on a collective bargaining agreement subject to annual updating with one that cannot be so escalated.”

<sup>112</sup> NABTU specifically requested the Department to “limit its adoption of local rates to communities where the SU rates are more than three years old and where such local rates are established through a data collection process that: (1) prioritizes the modal wage rate and utilizes weighed averages, means or medians as a last resort; (2) is carried out no less frequently than every three years; (3) is open to participation by, at least, those interested parties listed in 29 CFR 1.3(a); and (4) accepts the types of fringe benefits that DOL accepts.”

The Department declines to adopt additional limitations on its discretion to adopt State or local prevailing wage rates beyond those specified in the proposed rule. The final rule provides the Administrator with the ultimate responsibility to make an affirmative determination to adopt a State or local wage rate. This contemplates that WHD will engage in a careful and individualized review of State and local prevailing wages, and the criteria specified in proposed § 1.3(h) accomplish that objective while also providing appropriate safeguards. For example, the Department disagrees with NABTU and the UA's suggestion to prohibit the adoption of State or local prevailing wage rates where an applicable Federal rate exists that was determined from the prior 3 years. Although the Department agrees that in general, it will be less likely to adopt a State or local rate if the applicable wage determination is derived from more recent data, the Department believes that individual decisions whether or not to adopt particular rates are best left to the Administrator to determine on a case-by-case basis.

Similarly, the Department declines to adopt a categorical prohibition on the adoption of State or local prevailing wage rates that are lower than those provided in the most recent Federal wage determination. First, the Department expects that this outcome will be exceedingly rare, because one of the primary purposes of the new adoption provision is to fill in gaps in areas where WHD is unable to conduct regular surveys due to resource constraints. Thus, in most or all cases in which a State or local wage determination is adopted, WHD will not have a recent wage rate to use for comparison. Moreover, the purpose of a wage determination is to accurately reflect wages that prevail in the locality. As such, if the Administrator determines that a State or local rate is the most appropriate or accurate rate to use, it would not be appropriate to reject the State or local rate simply because it happens to be lower than the analogous rate in the most recent (and potentially outdated) WHD survey. In any event, as noted above, the Department anticipates that the regulatory criteria for adoption will prevent the adoption of rates that would deviate significantly from those that would apply if the Department were to conduct a wage survey itself.

The Department declines ABC's request to restrict the pool of State and local prevailing wages eligible for incorporation to those that "use appropriate statistical methods, such as sampling, weighting, or imputation, to

obtain statistically representative results." This restriction does not apply to WHD's own wage determination process, and the Department declines to impose it on State and local wage determinations. In response to ABC's concern that the language in proposed § 1.3(h)(1) referring to "full participation by all interested parties" could be read to only permit a process in which participants self-select into a survey, as noted above, the phrase "survey or other process" is specifically intended to permit the Administrator, where otherwise appropriate, to adopt not only wage rates that are set using surveys, but also rates set using a different process. The Department reaffirms that the intent of § 1.3(h)(1) is to ensure that WHD will not adopt a State or local rate where the process that the State or locality uses to determine the rate unduly favors certain entities.

The Department declines NAHB's request to require that State and local governments bar the cross-consideration of rural and metropolitan wage data. As explained in greater detail in section III.B.1.vii.A, the Department is eliminating this prohibition in connection with its own wage determination process, and likewise does not believe that imposing such a ban in new § 1.3(h) to limit the pool of State and local rates eligible for adoption would be necessary or helpful. As explained in section III.B.1.vii, the removal of the prohibition on cross-consideration of rural and metropolitan data in the context of WHD's own Davis-Bacon surveys provides for such cross-consideration in limited and appropriate circumstances, as described in that section, and will not lead to the widespread mixing of metropolitan and rural data in determining prevailing wages. Similarly, the extent to which State or local prevailing wage rates reflect the combining of metropolitan and rural data in limited circumstances of the type contemplated in § 1.7(b), as opposed to a significantly broader combining of metropolitan and rural data, would be a factor that the Administrator could consider in determining whether it would be appropriate to adopt or not adopt the State or local rates, or, alternatively, to obtain the underlying State or local data and reconfigure the data based on county groupings that are similar or identical to those used by the Administrator in analogous contexts. The Department also notes that consistent with § 1.3(d), the Administrator will also review the extent to which a State or local building or residential prevailing rate is derived

using Federal project data, but that a State or locality's use of such data to a greater or lesser extent than WHD uses such data in its own wage determinations will not categorically preclude adoption of the State or locality's rates. The Department also declines CC&M's suggestion to adopt State or local rates only when there is insufficient data from BLS. For the reasons explained at length above, the Department does not believe that the use of BLS data to set DBRA wage rates is generally appropriate. The Department notes that to the extent that a State or locality's system for making wage determinations raises similar concerns, such concerns would weigh significantly against the Department's adoption of such rates.

The Department appreciates commenter concerns about the adoption of inappropriately high State or local prevailing wage rates but believes that the criteria specified in new § 1.3(h) will serve as a safeguard against such outcomes. Moreover, WHD's expanded authority to adopt State and local rates under new § 1.3(g) is wholly discretionary, and may be done "with or without modification" of an underlying rate. While the Department acknowledges that the adoption of State or local rates will in many cases result in increases to the applicable Davis-Bacon prevailing wage rates due to the replacement of outdated and artificially low rates with more current State or local rates, such increases are entirely appropriate and result in rates that better reflect wages that actually prevail in the relevant locality. As a general matter, states and localities that conduct wage surveys more frequently than WHD may have stronger relationships with local stakeholders, enabling those bodies to determine prevailing wage rates with greater participation.<sup>114</sup> A wide swath of commenters—including contractors, contractor associations, and contracting agencies—agreed that with that reasoning, and asserted that the proposals would benefit the construction industry as a whole.

The Department disagrees that expanding WHD's ability to adopt State or local prevailing wage rates will hamper its ability or willingness to conduct Federal wage surveys. To the contrary, empowering WHD to adopt State and local rates in appropriate cases will give WHD the flexibility to better allocate its limited resources to

<sup>114</sup> The Department explained this in the NPRM, see 87 FR 15699–700, and several comments, including from III–FFC and the LCCHR and other civil rights and worker advocacy organizations, made similar arguments in support of the Department's proposals.

the classifications and localities most in need of attention.<sup>115</sup> As other commenters noted, an expanded use of State and local prevailing wages may achieve efficiencies that improve WHD's overall administration and enforcement of the DBRA.

The Department also disagrees that increased flexibility to adopt State and local rates is inconsistent with the final rule's restoration of the "three-step process" when WHD conducts its own wage surveys. Both regulatory revisions seek to further the same goal: the adoption of prevailing wage determinations that better reflect wages that are currently prevailing in a locality. Moreover, the final rule requires WHD to consider the extent to which a state's methodology is similar to, or deviates from, WHD's when determining whether to adopt a State or local rate, and whether to do so with or without modification. As the Department emphasized in the NPRM, the new provisions require the Administrator to make an affirmative determination that the criteria enumerated in § 1.3(h) have been met in order to adopt a State or local wage rate, and to do so only after careful review of both the rate and the process used to derive the rate. The criteria are intended to allow WHD to adopt State and local prevailing wage rates where appropriate while also ensuring that adoption of such rates is consistent with the statutory requirements of the Davis-Bacon Act and does not create arbitrary distinctions between jurisdictions where WHD makes wage determinations by using its own surveys and jurisdictions where WHD makes wage determinations by adopting State or local rates.<sup>116</sup> Thus, under the final rule, the Department may not simply accept State or local data with little or no review. Such actions would be inconsistent with the Secretary's statutory responsibility to "determine[]" the wages that are prevailing. 40 U.S.C. 3142(b). Adoption of State or local rates after appropriate review, however, is consistent with the authority Congress granted to the Department in the Davis-Bacon Act. The

DBA "does not prescribe a method for determining prevailing wages." *Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049, at \*4. Rather, the statute "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Donovan*, 712 F.2d at 616. The D.C. Circuit has explained that the DBA's legislative history reflects that Congress "envisioned that the Secretary could establish the method to be used" to determine DBA prevailing wage rates. *Id.* (citing 74 Cong. Rec. 6516 (1931) (remarks of Rep. Kopp)) ("A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.")).

Reliance on prevailing wage rates calculated by State or local authorities for similar purposes is a permissible exercise of this broad statutory discretion. In areas where states or localities are already gathering reliable information about prevailing wages in construction, it may be inefficient for the Department to use its limited resources to perform the same tasks. As a result, the Department is finalizing its proposal to use State and local wage determinations under specified circumstances where, based on a review and analysis of the processes used in those wage determinations, the Administrator determines that such use would be appropriate and consistent with the DBA. Such resource-driven decisions by Federal agencies are permissible. *See, e.g., Hisp. Affs. Project v. Acosta*, 901 F.3d 378, 392 (D.C. Cir. 2018) (upholding Department's decision not to collect its own data but instead to rely on a "necessarily . . . imprecise" estimate given that data collection under the circumstances would have been "very difficult and resource-intensive"); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 61–62 (D.C. Cir. 2015) (concluding that an agency's use of an "imperfect[]" data set was permissible under the Administrative Procedure Act).<sup>117</sup>

<sup>117</sup> The Federal Highway Administration's (FHWA) independent statutory obligation for the Department to consider and give "due regard" to information obtained from State highway agencies for highway wage determinations does not prohibit WHD from adopting State or local determinations, either for highway construction or for other types of construction, where appropriate. Rather, this language imposes a minimum requirement for the Secretary to consult with states and consider their wage determinations for highway construction. *See Virginia, ex rel., Comm'r, Virginia Dep't of Highways and Transp. v. Marshall*, 599 F.2d 588, 594 (4th Cir. 1979) ("Section 113(b) requires that the Secretary 'consult' and give 'due regard' to the information thus obtained.").

For the above reasons, the final rule adopts these revisions as proposed.

#### iv. Section 1.4 Report of Agency Construction Programs

Section 1.4 currently provides that, to the extent practicable, agencies that use wage determinations under the DBRA shall submit an annual report to the Department outlining proposed construction programs for the coming year. The reports described in § 1.4 assist WHD in its multiyear planning efforts by providing information that may guide WHD's decisions regarding when to survey wages for particular types of construction in a particular locality. These reports are an effective way for the Department to know where Federal and federally assisted construction will be taking place, and therefore where updated wage determinations will be of most use.

Notwithstanding the importance of these reports to the program, contracting agencies have not regularly provided them to the Department. As a result, after consideration, the Department proposed to remove the language in the regulation that currently allows agencies to submit reports only "to the extent practicable." Instead, proposed § 1.4 would require Federal agencies to submit the construction reports.

The Department also proposed to adopt certain elements of two prior AAMs addressing these reports. In 1985, WHD updated its guidance regarding the agency construction reports, including by directing that Federal agencies submit the annual report by April 10 each year and providing a recommended format for such agencies to submit the report. *See* AAM 144 (Dec. 27, 1985). In 2017, WHD requested that Federal agencies include in the reports proposed construction programs for an additional 2 fiscal years beyond the upcoming year. *See* AAM 224 (Jan. 17, 2017). The proposed changes to § 1.4 would codify these guidelines in the regulations.

The Department also proposed new language requiring Federal agencies to include notification of any expected options to extend the terms of current construction contracts. The Department proposed this change because—like a new contract—the exercise of an option requires the incorporation of the most current wage determination. *See* AAM 157 (Dec. 9, 1992); *see also* 48 CFR 22.404–12(a). Receiving information concerning expected options to extend the terms of current construction contracts therefore will help the Department assess where updated wage determinations are needed for Federal and federally assisted construction,

<sup>115</sup> Fair Contracting Foundation of Minnesota opined that the Department's proposals would "free[] up precious agency resources to focus on states that lack the requisite public infrastructure to conduct their own surveys."

<sup>116</sup> For example, in response to AWAHA's expressed concern about the adoption of "wage rates that have substantively different methods than those mandated at the federal level," the Department notes that § 1.3(h) requires that a State or local government's criteria for setting prevailing wage rates must be "substantially similar" to that used by the Administrator in order for the State or local wage rate to be adopted.



which will in turn contribute to the effectiveness of the Davis-Bacon wage survey program. The Department also proposed that Federal agencies include the estimated cost of construction in their reports, as this information also will help the Department prioritize areas where updated wage determinations will have the broadest effects.

In addition, the Department proposed to require that Federal agencies include in the annual report a notification of any significant changes to previously reported construction programs. In turn, the Department proposed eliminating the current directive that agencies notify the Administrator mid-year of any significant changes in their proposed construction programs. Such notification would instead be provided in Federal agencies' annual reports.

Finally, the Department proposed deleting the reference to the Interagency Reports Management Program because the requirements of that program were terminated by the General Services Administration (GSA) in 2005. *See* 70 FR 3132 (Jan. 19, 2005).

The Department explained that these proposed changes would not result in significant burdens on contracting agencies, as the proposed provisions request only information already on hand. Furthermore, any burden resulting from the new proposal should be offset by the proposed elimination of the current directive that agencies notify the Administrator of any significant changes in a separate mid-year report. The Department also sought comment on any alternative methods through which the Department may obtain the information and eliminate the need to require the agency reports.

A number of contractors, unions, and industry associations that submitted comments expressed general support for the Department's proposed change to require that reports include construction program information for an additional 2 fiscal years beyond the upcoming year and include notification of options to extend terms of current construction contracts or any significant changes to construction programs. *See, e.g.,* Minnesota State Building and Construction Trades Council; SMACNA; and Smith-Boughan, Inc. NECA supported the changes as necessary for ensuring that the Department is informed of where Federal and federally assisted construction will take place.

The UA supported the proposed change and further suggested that the reports be posted online to improve transparency or that the Department "provide a streamlined mechanism for interested parties to request the

reports." While appreciating the UA's interest in transparency, the Department does not believe codification of such a procedure is necessary, particularly given the amount of information regarding agency construction programs that is already in the public domain and available through resources such as USAspending.gov and agency operating plans.

The Department of the Army's Labor Advisor supported the proposal to change agency construction reports' due date to April 10, stating that the April date is "considerably more practicable than October 1," as contracting agency activity "is especially busy at the start of each fiscal year." This commenter, however, noted that the proposed language is confusing because it characterizes the requirement as one that is "[a]t the beginning of each fiscal year," even though fiscal years for the Federal government run from October 1 through September 30. The Department agrees that the proposed language may lead to confusion and has changed the description to require the reports "[o]n an annual basis."

The Department received a few comments expressing concerns about additional burdens from the proposal to remove the language in the regulation that currently allows agencies to submit reports only "to the extent practicable." NAHRO expressed concern that if agencies are required to submit reports, additional burdens will be placed on public housing authorities and other housing and community development organizations that provide information to HUD. The National Community Development Association was also concerned that the Department's proposal would result in HUD needing to impose additional information collection requirements on grantees and recommended that agencies only be required to report on projects "of such a scale as to be relevant to the stated goal of assisting [the Department] decide where updated wage determinations are needed or would be of most use." The Department of the Army's Labor Advisor recommended the Department add clarifying language that construction reports be "based on information already on hand." In response to comments received, and specifically in order to address the stated concerns about imposing potentially burdensome information collection requirements on recipients of Federal financial assistance, the Department has added language at the end of the opening sentence in § 1.4 of the regulatory text to clarify that a Federal agency's report should be based on information in the Federal agency's

possession at the time it furnishes its report. This language is intended to clarify that a Federal agency is not required to impose additional information collection requirements on grantees in order to fulfill the Federal agency's duty to submit construction program reports to the Department.<sup>118</sup>

Having considered the comments both supporting and opposing the proposed changes to the agency construction reporting requirements, the Department continues to believe it is appropriate to remove the language allowing the reporting to occur only "to the extent practicable." Accordingly, the final rule adopts the proposed revisions to § 1.4, with the limited changes specified above.

#### v. Section 1.5 Publication of General Wage Determinations and Procedure for Requesting Project Wage Determinations

The Department proposed a number of revisions to § 1.5 to clarify the applicability of general wage determinations and project wage determinations. Except as noted below, these revisions are consistent with longstanding Department practice and subregulatory guidance.

First, the Department proposed to retitle § 1.5, currently titled "Procedure for requesting wage determinations," as "Publication of general wage determinations and procedure for requesting project wage determinations." The proposed revision better reflects the content of the section as well as the distinction between general wage determinations, which the Department publishes for broad use, and project wage determinations, which are requested by contracting agencies on a project-specific basis. The Department also proposed to add titles to each paragraph in § 1.5 to improve readability.

Additionally, the Department proposed to add language to § 1.5(a) to explain 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. Likewise, the Department proposed to add language to § 1.5(b) to explain circumstances under which an agency

<sup>118</sup> While this rule change does not require Federal agencies to impose additional information collection requirements on grantees or other recipients of federal assistance, this language does not prevent them from doing so to the extent that additional or modified information requests may be helpful. The details of such information collection requests, however, are outside of the scope of this rulemaking.

may request a project wage determination, namely, where (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. The first of these three circumstances conforms to the proposed revision to the definition of “area” in § 1.2 that would permit the issuance of project wage determinations for multicounty projects where appropriate. The latter two circumstances reflect the Department’s existing practice. *See* PWRB, Davis-Bacon Wage Determinations, at 4–5.

The Department also proposed to add language to § 1.5(b) clarifying that requests for project wage determinations may be sent by means other than the mail, such as email or online submission, as directed by the Administrator. Additionally, consistent with the Department’s current practice, the Department proposed to add language to § 1.5(b) requiring that when requesting a project wage determination for a project that involves multiple types of construction, the requesting agency must attach information indicating the expected cost breakdown by type of construction. *See* PWRB, Davis-Bacon Wage Determinations, at 5. The Department also proposed to clarify that in addition to submitting the information specified in the regulation, a party requesting a project wage determination must submit all other information requested in the Standard Form (SF) 308. The Department proposed to discuss the time required for processing requests for project wage determinations in § 1.5(b)(5).

Finally, the Department proposed to clarify the term “agency” in § 1.5. In proposed § 1.5(b)(2) (renumbered, currently § 1.5(b)(1)), which describes the process for requesting a project wage determination, the Department proposed to delete the word “Federal” that precedes “agency.” This proposed deletion, and the resulting incorporation of the definition of “agency” from § 1.2, clarifies that, as already implied elsewhere in § 1.5, non-Federal agencies may request project wage determinations. *See, e.g.,* § 1.5(b)(3) (proposed § 1.5(b)(4)) (explaining that a State highway department under the Federal-Aid Highway Acts may be a requesting agency).

The Department received no substantive comments on these proposals other than comments regarding the availability of project wage determinations for multicounty projects; these comments were discussed above in the review of comments on the definition of “area” in § 1.2. The final rule adopts these changes as proposed, with one non-substantive change. The proposed language in § 1.5(b)(5), to address processing times for requests for project wage determinations, inadvertently duplicated language already found in § 1.5(c). Therefore, the final rule removes existing § 1.5(c) to avoid duplication.

#### vi. Section 1.6 Use and Effectiveness of Wage Determinations

##### (A) Organizational, Technical and Clarifying Revisions

###### (1) Terminology and Organization

The Department proposed to reorganize, rephrase, and/or renumber several regulatory provisions and text in § 1.6. These proposed revisions included adding headings to paragraphs for clarity; changing the order of some of the paragraphs so that discussions of general wage determinations precede discussions of project wage determinations, reflecting the fact that general wage determinations are (and have been for many years) the norm, whereas project wage determinations are the exception; adding the word “project” before “wage determinations” in locations where the text refers to project wage determinations but could otherwise be read as referring to both general and project wage determinations; using the term “revised” wage determination to refer both to cases where a wage determination is modified, such as due to updated CBA rates, and cases where a wage determination is reissued entirely (referred to in the current regulatory text as a “supersedes” wage determination), such as after a new wage survey; consolidating certain paragraphs that discuss revisions to wage determinations to eliminate redundancy and improve clarity; revising the regulation so that it references the publication of a general wage determination (consistent with the Department’s current practice of publishing wage determinations online), rather than publication of notice of the wage determination (which the Department previously did in the **Federal Register**); and using the term “issued” to refer, collectively, to the publication of a general wage

determination or WHD’s provision of a project wage determination.

The Department did not receive any comments on these proposed changes to terminology and the organization of the section. The final rule therefore adopts these changes as proposed.

###### (2) Use of Inactive Wage Determinations

The Department also proposed minor revisions regarding wage determinations that are no longer current, referred to in current regulatory text as “archived” wage determinations. First, the Department proposed to revise the regulatory text to instead refer to such wage determinations as “inactive” to conform to the terminology currently used on SAM. Second, the Department proposed to clarify that there is only one appropriate use for inactive wage determinations, namely, 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 (a procedure that is discussed in § 1.6(f)). 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. Third, the Department also proposed that agencies should notify WHD prior to engaging in incorporation of an inactive wage determination, and that agencies may not incorporate the inactive wage determination if WHD instructs otherwise. While the existing regulation requires the Department to “approv[e]” the use of an inactive wage determination, the proposed change would permit the contracting agency to use an inactive wage determination under these limited circumstances as long as it has notified the Administrator and has not been instructed otherwise. The proposed change was intended to ensure that contracting agencies incorporate omitted wage determinations promptly rather than waiting for approval.

The Department did not receive any comments on the proposed revisions relating to inactive wage determinations. Accordingly, the final rule adopts these changes as proposed.

###### (3) Incorporation of Multiple Wage Determinations Into a Contract

The Department also proposed revisions to § 1.6(b) to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The proposed language stated

that when a construction contract includes work in more than one “area” (as the term is defined in § 1.2), and no multi-county project wage determination has been obtained (as contemplated by the proposed revisions to § 1.2), 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 the DBA. The Department also proposed language stating that when a construction contract includes work in more than one “type of construction” (as the Department has proposed to define the term in § 1.2), the contracting agency must incorporate the applicable wage determination for each type of construction where the total work in that type of construction is substantial. This corresponds with the Department’s longstanding guidance published in AAM 130 (Mar. 17, 1978) and AAM 131 (July 14, 1978).<sup>119</sup> The Department also proposed to continue interpreting the meaning of “substantial” in subregulatory guidance.<sup>120</sup> The Department requested comments on the above proposals, including potential ways to improve the standards for when and how to incorporate multiple wage determinations into a contract.

The Department did not receive any comments on the proposed language relating to the incorporation of multiple general wage determinations when the construction contract includes work in more than one area, other than those comments regarding the use of multi-county areas that are addressed above in the discussion of the definition of area in § 1.2, and therefore the final rule adopts that language as proposed.

<sup>119</sup> AAM 130 states that where a project “includes construction items that in themselves would be otherwise classified, a multiple classification may be justified if such construction items are a substantial part of the project . . . . [But] a separate classification would not apply if such construction items are merely incidental to the total project to which they are closely related in function,” and construction is incidental to the overall project. AAM 130, at 2 n.1. AAM 131 similarly states that multiple schedules are issued if “the construction items are substantial in relation to project cost[s].” However, it further explains that “[o]nly one schedule is issued if construction items are ‘incidental’ in function to the overall character of a project . . . and if there is not a substantial amount of construction in the second category.” AAM 131, at 2 (emphasis omitted).

<sup>120</sup> Most recently, on Dec. 14, 2020, the Administrator issued AAM 236 (Dec. 14, 2020), which states that “[w]hen a project has construction items in a different category of construction, contracting agencies should generally apply multiple wage determinations when the cost of the construction exceeds either \$2.5 million or 20% of the total project costs,” but that WHD will consider “exceptional situations” on a case-by-case basis. AAM 236, at 1–2.

In contrast, the Department received comments related to the proposed language on the incorporation of multiple wage determinations when a construction contract includes work in more than one type of construction. CC&M expressed support for the Department’s position reflected in AAM 236 (Dec. 14, 2020) that work in another category of construction is generally considered substantial when it exceeds either \$2.5 million or 20 percent of total project costs. *See supra* note 118. While not explicitly taking a position on the proposed language or the existing subregulatory guidance, the UA recommended that the Department provide either regulatory or subregulatory guidance clarifying when it is appropriate for work to be classified as heavy or building in multiple wage determination situations.

MBA and National Council of State Housing Agencies (NCSHA) expressed opposition to the proposed language’s application to multifamily housing projects, recommending that the regulations instead specify that only a single residential wage determination should apply to such projects. These commenters asserted that HUD policy has long been that only a single residential wage determination need be applied to residential projects and that application of multiple wage determinations would be unnecessarily complex because it would require contractors to track when workers are performing work in different categories of construction and pay different rates accordingly. MBA further asserted that the use of a single residential rate in these scenarios would also be consistent with the Department’s own guidance and that work in other categories of construction on residential projects is actually of a character similar to residential work because wage rates for such work are more similar to residential wage rates, and are therefore more likely to be included in residential wage determinations. In the alternative, MBA argued that if multiple wage determinations are applied to multifamily housing projects, the threshold for substantiality should be increased to \$15 million, because current HUD standards consider Federal Housing Administration-insured loans to be large loans when the loan exceeds \$75 million (\$15 million is 20 percent of \$75 million). MBA also suggested \$5 million as a potential threshold. Finally, MBA requested that the Department provide more details as to the process that will be used to re-evaluate annually whether an update to the substantiality

threshold is warranted, as provided for in AAM 236.

The final rule adopts the language relating to the application of multiple categories of wage determinations as proposed. As an initial matter, the Department has decided to continue to interpret the meaning of “substantial” in its subregulatory guidance in accordance with its longstanding practice. With respect to the monetary threshold in particular, WHD anticipates issuing an AAM or other guidance containing additional information regarding both the methodology and frequency of updates to the threshold.

The Department appreciates the UA’s suggestion that the distinctions between building and heavy construction should be more precisely delineated and MBA’s suggestion that the Department should more precisely describe the methods used to update the dollar threshold, and will consider these suggestions when developing further guidance on this issue and when updating the threshold in the future. The Department also notes that stakeholders are always welcome to provide input as to data and methods that should be used in interpreting the meaning of “substantial” and updating the dollar threshold.

While the Department appreciates MBA’s and NCSHA’s goal of encouraging the development of multifamily housing projects, the Department declines the suggestion to exempt such projects from the requirement to incorporate wage determinations from multiple categories when a project has a substantial amount of work in another category of construction. Although HUD previously suggested that a single residential wage determination could be used in such circumstances, it has since issued guidance clarifying that multiple wage determinations should be incorporated into construction contracts for multifamily housing when there is a substantial amount of work in another category of construction, consistent with longstanding Department policy and this rulemaking. *See U.S. Dep’t of Hous. & Urb. Dev., Labor Relations Letter on Applicability of Department of Labor Guidance Concerning ‘Projects of a Similar Character’* (Jan. 15, 2021).<sup>121</sup>

Moreover, the Department’s existing guidance does not support an exception; rather, AAM 130 and 131 apply the substantiality standard to residential projects to the same extent as other types of projects. While MBA contends in its comment that language in AAM

<sup>121</sup> [https://www.hud.gov/sites/dfiles/OCHCO/documents/LR\\_21-01.pdf](https://www.hud.gov/sites/dfiles/OCHCO/documents/LR_21-01.pdf).

130 stating that residential construction includes “all incidental items, such as site work, parking areas, utilities, streets and sidewalks” indicates that a single residential wage determination may be applied to any such work related to a residential project. AAM 130 similarly describes “incidental grading, utilities, and paving” in building construction projects and states that highway construction excludes projects “incidental to residential or building construction.” These references to “incidental” work in AAM 130 (and similar references in AAM 131 and the Manual of Operations) reflect the policy explained in those documents that a single wage determination for a project involving more than one type of construction is only appropriate when construction items in the non-primary category are “‘incidental’ in function,” “and . . . there is not a substantial amount of construction in the second category.” AAM 131, at 2; *see also* AAM 130, at 2 n.1; Manual of Operations, at 29. Thus, although, as AAM 130 and the Manual of Operations suggest, site work and the construction of parking areas, utilities, streets, and sidewalks are often incidental in function to residential construction, these construction items may or may not be substantial in relation to a particular project’s overall cost. Nothing in those guidance documents suggests that residential projects are to be treated any differently from other types of projects in this regard or that substantial work in other categories should be assigned a residential wage determination.<sup>122</sup>

The Department also does not agree with MBA’s contention that the data on the rates paid to workers who perform work in another category of construction, where work in that other category of construction is substantial, are likely to be included in the applicable residential wage determination. To the contrary, when wage data submitted to the Department in connection with a Davis-Bacon wage survey reflects that a project in one category includes substantial construction in another category, the Department excludes the wage data for the work in the second category from

the dataset that will be used to establish prevailing wage rates for the primary category of construction, including in surveys for residential construction. Moreover, MBA has not provided any data to support its assertion that workers who perform the types of work in other categories of construction commonly found on residential projects are typically paid residential wage rates rather than the wage rates generally applicable to those categories of construction. Similarly, MBA has not provided any data suggesting that the local wages in other categories of construction are somehow more shielded from the potential impact on wages of a substantial amount of work in that category of construction on residential projects than on other types of projects.

Finally, the Department disagrees that any added complexity from the application of multiple wage determinations to multifamily housing projects justifies an exception. Davis-Bacon contractors across all types of projects are required to track the hours worked and to pay the corresponding prevailing wage rates due. These rates necessarily vary depending on the work performed, because workers work in different classifications and sometimes in different construction categories. The “substantiality” threshold for work in a second category of construction seeks to balance the benefits of applying the appropriate wage determinations—including the preservation of locally prevailing wages—against any associated administrative burden, by requiring that additional wage determinations be incorporated only where the work in the non-primary category is of a sufficient magnitude. There is no indication that this balance should be any different for multifamily housing projects.

For these reasons, the final rule adopts the language relating to the application of multiple categories of wage determinations as proposed and declines to create an exception for multifamily housing contractors.

#### (4) Clarification of Responsibilities of Contracting Agencies, Contractors, and Subcontractors

The Department also proposed to add language to § 1.6(b) clarifying and reinforcing the responsibilities of contracting agencies, contractors, and subcontractors with regard to wage determinations. Specifically, the Department proposed to clarify in § 1.6(b)(1) that contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project. In

§ 1.6(b)(2), the Department proposed to clarify that contractors and subcontractors have an affirmative obligation to ensure that wages are paid to laborers and mechanics in compliance with the DBRA labor standards.

The Department did not receive any comments on these proposed revisions, and therefore the final rule adopts these changes as proposed.

#### (5) Consideration of Area Practice

The Department also proposed to revise language in § 1.6(b) that currently states that the Administrator “shall give foremost consideration to area practice” in resolving questions about “wage rate schedules.” In the Department’s experience, this language has created unnecessary confusion because stakeholders have at times interpreted it as precluding the Administrator from considering factors other than area practice when resolving questions about wage determinations. Specifically, the Department has long recognized that when “it is clear from the nature of the project itself in a construction sense that it is to be categorized” as either building, residential, heavy, or highway construction, “it is not necessary to resort to an area practice survey” to determine the proper category of construction. AAM 130, at 2; *see also* AAM 131, at 1 (“[A]rea practice regarding wages paid will be taken into consideration together with other factors,” when “the nature of the project in a construction sense is not clear.”); *Chastleton Apartments*, WAB No. 84–09, 1984 WL 161751, at \*4 (Dec. 11, 1984) (because the “character of the structure in a construction sense dictates its characterization for Davis-Bacon wage purposes,” where there was a substantial amount of rehabilitation work being done on a project similar to a commercial building in a construction sense, it was “not necessary to determine whether there [was] an industry practice to recognize” the work as residential construction). The proposed rule explained that the regulatory directive to give “foremost consideration to area practice” in determining which wage determination to apply to a project arguably is in tension with the Department’s longstanding position and has resulted in stakeholders contending on occasion that WHD or a contracting agency must in every instance conduct an exhaustive review of local area practice as to how work is classified, even if the nature of the project in a construction sense is clear. The proposed language would resolve this perceived inconsistency and would streamline determinations

<sup>122</sup> Similarly, the absence of a specific example of a residential project in the examples of projects with multiple wage determinations in AAM 130 and AAM 131 in no way indicates that residential construction projects cannot have a substantial amount of work in another category of construction. The examples listed in AAM 130 and 131 were not intended to be an exclusive list of all possible situations in which a project might require the application of multiple wage determinations. AAM 131 plainly states that beyond the listed examples, “the same principles are applied to other categories.”

regarding construction types by making clear that while the Administrator should continue considering area practice, the Administrator may consider other relevant factors, particularly the nature of the project in a construction sense. This proposed regulatory revision also would better align the Department's regulations with the FAR, which does not call for "foremost consideration" to be given to area practice in all circumstances, but rather provides, consistent with AAMs 130 and 131, that "[w]hen the nature of a project is not clear, it is necessary to look at additional factors, with primary consideration given to locally established area practices." 48 CFR 22.404–2(c)(5).

The Department received one comment on this proposal. VDOT recommended that the Department retain the language in the existing regulation, expressing concern that if area practice is not the primary factor to be considered when determining what wage determinations are to be applied to a project, the Department could determine that a project is one type of construction even if area practice is to pay wage rates from another category of construction. VDOT opined that this would be contrary to the purpose of the DBA, which is to establish prevailing wage rates based on actual wage rates that contractors pay for a type of construction project.

While the Department recognizes VDOT's concerns, it does not believe they warrant deviating from the proposed rule. The Davis-Bacon labor standards require that covered workers receive at least the locally prevailing wages that are paid on projects of a similar character. As explained above, where the character of a project in a construction sense is clear, it is not necessary or appropriate to survey area practice to determine what category of construction applies; the applicable category is based on the nature of construction even if area practice is to pay wage rates associated with a different category. See *2900 Van Ness Street*, WAB No. 76–11, 1977 WL 24827, at \*2 (Jan. 27, 1977) ("The test of whether a project is of a character similar to another project refers to the nature of the project itself in a construction sense, not to whether union or non-union wages are paid or whether union or non-union workers are employed."); *Lower Potomac Pollution Control Plant*, WAB No. 77–20, 1977 WL 24840, at \*1 (Sept. 30, 1977) ("When it is clear from the nature of the project itself in a construction sense that it is to be categorized as either building, heavy or highway

construction . . . [t]he area practice with respect to wages could not convert what is clearly one category of construction into another category."). A highway cannot be a building, for example, regardless of how similar the wages paid on highway projects in a locality may be to the wages paid on building projects. The Department believes that the revision to the "area practice" language better reflects that principle by eliminating any implication that area practice could somehow outweigh the clear character of a project.

In contrast, the revision reflects that when it is unclear how a project should be categorized, while the Department considers area practice as to wage rates to assist in determining that project's category, area practice is not the only relevant information. As indicated in AAM 131, "area practice regarding wages paid will be taken into consideration *together with other factors*" when there is a genuine question as to the correct category of construction for a project (emphasis added). See also *Tex. Heavy-Highway Branch*, WAB No. 77–23, 1977 WL 24841, at \*4 (Dec. 30, 1977) ("Wages, however, are only one indication. It is also necessary to look at other characteristics of the project, including the construction techniques, the material and equipment being used on the project, the type of skills called for on the project work and other similar factors which would indicate the proper category of construction."). The proposed language is consistent with these principles and simply clarifies that area practice information is relevant to determining the type of construction project involved only when there is a genuine question as to the applicable category of construction, and that other relevant information is not excluded from consideration when making such a determination. The final rule therefore adopts the language as proposed.

#### (6) Section 1.6(e) and (g)

In § 1.6(e), the Department proposed to clarify that if, prior to contract award (or, as appropriate, prior to the start of construction), the Administrator provides written notice that the bidding documents or solicitation included the wrong wage determination or schedule, or that an included wage determination was withdrawn by the Department as a result of an ARB decision, the wage determination may not be used for the contract, regardless of whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred. Current regulatory text states that under

such circumstances, notice of such errors is "effective immediately" but does not explain the consequences of such effect. The proposed language is consistent with the Department's current practice and guidance. See *Manual of Operations*, at 35.

The Department did not receive any comments on these proposed revisions, and therefore the final rule adopts the changes as proposed, except that in a technical correction, the Department has moved certain language from § 1.6(e)(2) into § 1.6(e), as the language was intended to encompass the entire paragraph.

In § 1.6(g), the Department proposed a number of additional clarifying revisions. It proposed to clarify that under the Related Acts, if Federal funding or assistance is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated retroactive to the date of the contract award or the beginning of construction. The Department also proposed to delete language indicating that a wage determination must be "requested," as such language appears to contemplate a project wage determination, which in most situations will not be necessary as a general wage determination will apply. The Department also proposed to revise § 1.6(g) to clarify that it is the head of the applicable Federal agency who must request any waiver of the requirement that a wage determination provided under such circumstances be retroactive to the date of the contract award or the beginning of construction. The current version of § 1.6(g) uses the term "agency" and is therefore ambiguous as to whether it refers to the Federal agency providing the funding or assistance or the state or local agency receiving it. The proposed clarification that this term refers to Federal agencies was intended to reflect both the Department's current practice and its belief that it is most appropriate for the relevant Federal agency, rather than a State or local agency, to bear these responsibilities, including assessing, as part of the waiver request, whether non-retroactivity would be necessary and proper in the public interest based on all relevant considerations.

The Department did not receive any comments on these proposed revisions, and therefore the final rule adopts these changes as proposed.

#### (B) Requirement To Incorporate Most Recent Wage Determinations Into Certain Ongoing Contracts

The Department's longstanding position has been to require that

contracts and bid solicitations contain the most recently issued revision to the applicable wage determination(s) to the extent that such a requirement does not cause undue disruption to the contracting process. *See* 47 FR 23644, 23646 (May 28, 1982); *U.S. Army*, ARB No. 96–133, 1997 WL 399373, at \*6 (July 17, 1997) (“The only legitimate reason for not including the most recently issued wage determination in a contract is based upon disruption of the procurement process.”). Under the current regulations, a wage determination is generally applicable for the duration of a contract once incorporated. *See* 29 CFR 1.6(c)(2)(ii), 1.6(c)(3)(vi). For clarity, the NPRM proposed to add language to § 1.6(a) to state this affirmative principle.

The Department also proposed to add a new paragraph, § 1.6(c)(2)(iii), to clarify two circumstances where the principle that an incorporated wage determination remains applicable for the life of a contract does not apply. First, the Department proposed 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. The proposed change was consistent with the Department’s guidance, case law, and historical practice, under which such modifications are considered new contracts. *See U.S. Army*, 1997 WL 399373, at \*6 (noting that the Department has consistently “required that new DBA wage determinations be incorporated . . . when contracts are modified beyond the obligations of the original contract”); *Iowa Dep’t of Transp.*, WAB No. 94–11, 1994 WL 764106, at \*5 (Oct. 7, 1994) (“A contract that has been ‘substantially’ modified must be treated as a ‘new’ contract in which the most recently issued wage determination is applied.”); AAM 157 (explaining that exercising an option “requires a contractor to perform work for a period of time for which it would not have been obligated . . . under the terms of the original contract,” and as such, “once the option . . . is exercised, the additional period of performance becomes a new contract”). The Department proposed that 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. These circumstances do not include situations where the 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.

Additionally, the Department proposed a revision to address modern contracting methods that frequently involve a contractor agreeing to perform construction as the need arises over an extended time period, with the quantity and timing of the construction not known when the contract is awarded.<sup>123</sup> Examples of such contracts would include, but are not limited to: a multiyear indefinite-delivery-indefinite-quantity (IDIQ) contract to perform repairs to a Federal facility when needed; a long-term contract to operate and maintain part or all of a facility, including repairs and renovations as needed;<sup>124</sup> or a schedule contract or BPA whereby a contractor enters into an agreement with a Federal agency to provide certain products or services (either of which may involve work subject to Davis-Bacon coverage, such as installation) or construction at agreed-upon prices to various agencies or other government entities, who can order from the schedule at any time during the contract. The extent of the required construction, the time, and even the place where the work will be performed may be unclear at the time such contracts are awarded.

Particularly when such contracts are lengthy, using an outdated wage determination from the time of the underlying contract award instead of the most current wage determination is a departure from the intent of the Davis-Bacon labor standards because it does not sufficiently ensure that workers are paid prevailing wages. Additionally, in the Department’s experience, agencies are sometimes inconsistent as to how they incorporate wage determination revisions into these types of contracts. Some agencies do so every time additional Davis-Bacon work is obligated, others do so annually, others only incorporate applicable wage determinations at the time the original,

underlying contract is awarded, and sometimes no wage determination is incorporated at all. This inconsistency can prevent the payment of prevailing wages to workers and can disrupt the contracting process.

Accordingly, the Department proposed to require, for these types of contracts, 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 Department for the alternative date. This proposal was consistent with the rules governing wage determinations under the SCA, which require that the contracting agency obtain a wage determination prior to the “[a]nnual anniversary date of a multiyear contract subject to annual fiscal appropriations of the Congress.” *See* 29 CFR 4.4(a)(1)(v). The Department further proposed that when any construction work under such a contract is obligated, the most up-to-date wage determination(s) incorporated into the underlying contract be included in each task order, purchase order, or any other method used to direct performance. Once the applicable wage determination revision is included in such an order, that revision would generally apply to the order until the construction items called for by that order are completed. With this proposal, the Department intended that a wage determination correctly incorporated into such an order would not need to be updated even if the duration of the order extends past the next anniversary date of the master contract (when the wage determination in the master contract is updated), unless the order itself involves the exercise of an option or is changed to include additional, substantial construction, alteration, and/or repair work not within the original scope of work, in accordance with proposed § 1.6(c)(2)(iii)(A). The NPRM explained that consistent with this discussion, if an option is exercised for one of these types of contracts, the most recent version of any wage determination(s) would still need to be incorporated as of the date the agency exercises its option to extend the contract’s term (subject to the exceptions set forth in proposed § 1.6(c)(2)(ii)), even if that date did not coincide with the anniversary date of the contract.

By proposing these revisions, the Department sought to ensure that workers are being paid prevailing wages

<sup>123</sup> Depending on the circumstances, these types of contracts may be principally for services and therefore are subject to the SCA, but contain substantial segregable work that is covered by the DBA. *See* 29 CFR 4.116(c)(2).

<sup>124</sup> The Department of Defense, for example, enters into such arrangements pursuant to the Military Housing Privatization Initiative, 10 U.S.C. 2871 *et seq.*



within the meaning of the Act; provide certainty and predictability to agencies and contractors as to when, and how frequently, wage rates in these types of contracts can be expected to change; and bring consistency to agencies' application of the Davis-Bacon labor standards. The Department also proposed to include language noting that contracting and ordering agencies remain responsible for ensuring that the applicable updated wage determination(s) are included in task orders, purchase orders, or other similar contract instruments issued under the master contract.

After consideration of the comments received, for the reasons detailed below, the final rule adopts these revisions as proposed with minor revisions and clarifications. The Department received several comments generally supporting the proposed changes. The Minnesota State Building and Construction Trades Council stated that these changes would improve the efficiency of enforcement and help make sure that prevailing wages paid to workers remain current. III-FFC stated that the proposed changes reflected existing guidance, case law, and historical practice, were consistent with the SCA requirements, and would better ensure workers are paid current prevailing wage rates on Davis-Bacon projects, consistent with the statutory purpose. The UA indicated that it strongly supported regulatory language that would ensure that wage determinations in such contracts remain up-to-date, but suggested a slight change to the proposed language to clarify that the requirement applies to both the unilateral exercise of options and the mutual exercise of options. The Department appreciates the UA raising this issue, as the intent was not to exclude mutually exercised options from the obligation to update wage determinations, but rather to make clear that the obligation applies even when the contracting agency exercises a unilateral option. The proposed language has therefore been adjusted to clarify that the requirement applies whenever an option is exercised generally.

A few commenters opposed the proposed change or alternatively suggested revisions. FTBA stated that contracting agencies and contractors generally cannot know at the bidding stage whether a contract is going to be extended or amended or what the prevailing wage rates will be when and if the contract is amended, further noting that many contracts are now being extended due to global supply issues beyond either the contracting agency or the contractor's control. FTBA

stated that if the proposed change is retained, the Department should add a price adjustment clause to require that contractors are reimbursed for additional costs resulting from the incorporation of updated wage determinations into their contracts or funding agreements. CC&M suggested that the price adjustment should be a 150 percent increase change order. MnDOT argued that the proposed changes would place an additional administrative burden on contracting agencies, requiring change orders, changes to contract terms, and increases or decreases in contract funding, and would probably impact contractors' bids. MnDOT suggested that rather than requiring an annual update of wage determinations for multiyear IDIQ contracts, the Department instead require contracting agencies to annually increase the applicable prevailing wage rates for each classification by a percentage (e.g., 2 percent of base and fringe rates) to allow contractors and contracting agencies to predict the potential increases at the time of bidding.

As an initial matter, the Department does not believe that these changes will affect contracts that are simply extended due to supply chain issues or other circumstances that interfere with the timely completion of a contract. Such circumstances expressly fall within the events described in the rule that do not require the incorporation of a new wage determination, namely, situations where the contractor is simply given additional time to complete the construction that the contractor committed to perform at the time of the initial award.

Regarding the comments on how the proposed changes will affect pricing and cost, the Department recognizes that contracting agencies and contractors may not know at the bidding stage or even at initial contract award whether that contract will be extended or amended, or, in the case of IDIQ and other similar contracts, how much work will ultimately be requested by the agency and performed by the contractor. However, the Department believes that issues related to budgeting, pricing, and costs associated with these types of contracts can be addressed between the contractor and the agency as part of the contracting process. For example, where a contract is amended to require the contractor to perform additional construction work or to perform work for an additional time period not originally obligated, agencies and contractors can come to an agreement about what additional compensation the contractor will receive for this additional work and will be able to take

the updated wage determination into account during such negotiations. Where a contract includes option clauses or involves construction of an unknown amount and at unknown times over an extended period, this will be clear when the contract is solicited and at the time of contract award, allowing for the inclusion of contractual provisions for any increases to the compensation due to the contractor to reflect updated wage determinations. *See, e.g.*, 48 CFR 52.222–32 (price adjustment clause applicable to FAR-based DBA-covered contracts, providing that the contracting officer will “adjust the contract price or contract unit price labor rates to reflect” the contractor’s “actual increase . . . in wages and fringe benefits to the extent that the increase is made to comply with . . . [i]ncorporation of the Department of Labor’s Construction Wage Rate Requirements wage determination applicable at the exercise of an option to extend the term of the contract”).<sup>125</sup>

The Department similarly appreciates MnDOT’s concern about the logistics of inserting wage determinations in multiyear IDIQ contracts annually. However, the Department declines to adopt MnDOT’s alternative approach of an across-the-board percentage increase. While the Department has provided in this rule for the periodic adjustment of out-of-date non-collectively bargained wage rates during the interval between wage surveys, the Department does not believe that creating a separate mechanism for wage rate increases of the type proposed by MnDOT would be necessary or appropriate given that the Department will have already published revised wage determinations that are available to be incorporated into such contracts. Additionally, the Department’s position is that contracting agencies can include language in agency procurement policies, bid documents, and contract specifications that would give both contractors and contracting agencies notice, and an expectation from the time of bid solicitation planning, about the anticipated timing of updated wage determinations in multiyear IDIQ contracts and the likely potential for DBRA prevailing wage increases, even

<sup>125</sup> While the Department does not have information as to the universe of existing contracts to which this revision will apply, many such contracts may well have mechanisms requiring the contracting agency to compensate the contractor for increases in labor costs over time generally. *See, e.g., id.* Where outdated wage determination rates have been applied, it is similarly difficult to quantify the cost differential between updated prevailing wage rates and wage rate increases that contractors have already made due to labor market factors.

though the precise amount of those increases will not be known at the outset. Finally, contracting agencies have long administered a similar requirement for SCA contracts, *see* 29 CFR 4.4(c)(5), and the Department believes that it will be similarly feasible to do so for DBRA-covered construction contracts.

Naval Facilities Engineering Command Southwest (NAVFAC SW) did not comment on the proposed changes to § 1.6(c)(2)(iii) but proposed an additional related change to § 1.6(c)(2)(ii). Specifically, NAVFAC SW suggested that the provision applicable to sealed <sup>126</sup> bidding procedures, § 1.6(c)(2)(ii)(D)—which permits contracting agencies to decline to incorporate modifications published fewer than 10 calendar days before the opening of bids when there is not sufficient time available before bid opening to notify bidders of the modification—should be expanded to include negotiated contracts, which do not involve sealed bidding. While negotiated contracts are currently required to include the most recent applicable wage determination modifications up to the date of contract award, NAVFAC SW proposed permitting agencies to not include a wage determination modification issued fewer than 10 days prior to award date, where the agency finds that there is not a reasonable time still available before contract award to notify all offerors that have not been eliminated from the competition and provide them a reasonable opportunity to amend their proposals. NAVFAC SW argued that incorporating wage determination modifications shortly before the award date is administratively difficult, takes additional time and resources, and may delay award of the contract, and that these costs outweigh the benefits of what may be only minimal changes to wage rates in the updated wage determination. An individual commenter also made a similar request.

The Department appreciates that the incorporation of an updated wage determination within a few days of contract award may be challenging. However, as the Department did not propose a change to the provisions relating to the required timeline for the pre-award incorporation of applicable wage determinations into contracts, the Department believes that such a change would be beyond the scope of this rulemaking. The Department will,

however, consider these comments in future rulemakings, and welcomes the opportunity to discuss the points raised by NAVFAC SW with other stakeholders.

MBA proposed a different change to § 1.6(c)(2)(ii). This provision currently located at § 1.6(c)(3)(ii), states that for projects assisted under the National Housing Act, a revised wage determination must be applied to the project if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first. MBA suggested that this provision should be changed to instead only require the incorporation of a revised wage determination when it is published before the date that the developer submits an application for a firm commitment, or the start of construction, whichever comes first. MBA stated that such updates can trigger a need to revisit previously completed procedural steps, both for the developer and for HUD, resulting in potential disruption for the affected multifamily housing project. MBA stated that this proposed change would reduce the risk that the need to incorporate a revised wage determination would inhibit the successful completion of multifamily housing projects, though it also acknowledged that changes in the applicable wage determination would still be disruptive prior to the submission of an application. NAHB and NCHSA also critiqued what they described as disruptive cost changes due to revised wage determinations that are assigned late in the application process.

The Department finds that a change to the provisions in § 1.6(c)(2)(ii) for the initial incorporation of wage determinations into contracts would be beyond the scope of this rulemaking and does not believe such a change would be appropriate. It is well established that a prevailing wage should be a current wage. As a result, the regulations specifying the circumstances under which the most current wage determination need not be applied generally reflect the principle that only disruption of the contracting process justifies a failure to include the most recent prevailing wages as of, typically, the date of contract award or bid opening. *See, e.g., Modernization of the John F. Kennedy Fed. Bldg*, WAB No. 94–09, 1994 WL 574115 (Aug. 19, 1994); *Iowa Dep't of Transp.*, WAB No. 94–11, 1994 WL 764106. As such, in both the current and proposed regulations, the Department has sought to strike a balance between requiring the payment of current, prevailing wages to the

extent feasible while also minimizing disruption in the contracting process. To that end, the regulations' use of the initial endorsement date for certain housing contracts already reflects an earlier lock-in date for the application of wage determination modifications than the date of contract award or the bid opening date, which are the lock-in dates that apply to most other types of contracts. Pushing this date back even further to the time when the housing developer first applies for Related Act funding would undermine worker protections by using even more outdated wage rates for DBRA-covered laborers and mechanics on these projects. In addition, it would not be administratively practical to use so early a date. Initial endorsement occurs when all parties have agreed upon the design and costs. Prior to initial endorsement, and certainly at so early a point as the developer's application for a firm commitment to funding, the project design and costs may undergo significant alterations, resulting in changes to the classifications and potentially even to the categories of wage determinations that may be applicable.

It would be impractical to lock in the modification of a wage determination at a time when the applicable wage determination itself may yet be subject to change. It would also be inappropriate to lock in a particular wage determination before it is even clear whether the project will entail substantial construction in multiple categories of construction, and hence require the application of multiple wage determinations.

The Department also made additional minor revisions to the proposed regulatory text. After further consideration, the Department has decided to revise the scope of the potential exceptions to this process that contracting agencies may request. As proposed, the regulatory language would only permit agencies to request the Department's approval for an alternative anniversary date for the updating of wage determinations. However, the requirement that wage determinations be updated annually for certain contracts applies to a wide variety of contracting mechanisms, and input from Federal contracting agencies suggests that it would be helpful to allow the updating process to be tailored in appropriate circumstances to the specific contracting mechanisms. Accordingly, the Department has revised this language to permit agencies to request the Department's prior written approval for alternative updating processes, where such an

<sup>126</sup> The current regulation refers to "competitive" bidding procedures in this provision; in a non-substantive change, this rule changes the term to "sealed."

exception is necessary and proper in the public interest or to prevent injustice and undue hardship. After further consideration, the Department also clarified the language stating that the contracting and ordering agencies must include the updated wage determination revision into any task orders, purchase orders, or other similar contract instruments issued under these master contracts. To prevent any confusion, the revised language now clearly states that the contracting agency is responsible for ensuring that the master contract directs the ordering agency to include the applicable updated wage determination in such task orders, purchase orders, or other similar contract instrument while the ordering agency must accordingly incorporate the applicable update wage determinations into such orders.

In addition, the Department added language further clarifying whether wage determination revisions, once properly incorporated into a task order, purchase order, or similar contract instrument from the master contract, must be further updated. Once a wage determination revision has been properly incorporated into such an order, it will generally remain applicable for the duration of the order without requiring further updates, in accordance with the proposed language stating that the annually updated wage determination revision will apply to any construction work that begins or is obligated under such a contract during the 12 months following that anniversary date until such construction work is completed, even if the completion of that work extends beyond the 12-month period. The revised language notes this general principle, as well as two exceptions. The first exception notes that if such an order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work, the wage determination must be updated as set forth in paragraph (c)(2)(iii)(A). The second exception states that if the task order, purchase order, or similar contract instrument itself includes the exercise of options, the updated applicable wage determination revision, as incorporated into the master contract, must be included when an option is exercised on such an order.

The Department also provided additional clarification regarding master contracts that both call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project and also include the exercise of options. As explained in the NPRM and discussed above in this section, contracts calling

for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project may also include the exercise of options, and if so, the wage determination must be updated when the option is exercised. The Department revised the regulatory text to also include this requirement, while also clarifying that where this type of contract has extended base or option periods, wage determinations must still be incorporated on an annual basis in years where an option is not exercised.

Accordingly, for the foregoing reasons, the final rule adopts the changes to § 1.6(c)(2) as proposed with the two minor clarifications discussed.

#### (C) 29 CFR 1.6(c)(1)—Periodic Adjustments

The Department proposed to add a provision to 29 CFR 1.6(c)(1) to expressly provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates. The Department proposed that such rates (both base hourly wages and fringe benefits) would be updated between surveys so that they do not become out-of-date and fall behind wage rates in the area.

##### (1) Background

Based on the data that it receives through its prevailing wage survey program, WHD generally publishes two types of prevailing wage rates in the Davis-Bacon wage determinations that it issues: (1) modal rates, which under the current regulations must be paid to a majority of workers in a particular classification, and (2) weighted average rates, which under the current regulations are published whenever the wage data received by WHD reflects that no single wage rate was paid to a majority of workers in the classification. See 29 CFR 1.2(a)(1).

Under the current regulations, modal wage rates often reflect collectively bargained wage rates. When a CBA rate prevails on a general wage determination, WHD updates that prevailing wage rate based on periodic wage and fringe benefit increases in the CBA. Manual of Operations at 74–75; see also *Mistick Constr.*, ARB No. 04–051, 2006 WL 861357, at \*7 n.4.<sup>127</sup> 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 (currently designated as “SU” rates) on general wage determinations are not updated between surveys and therefore can become out-of-date. The Department’s proposal would expand WHD’s current practice of updating collectively bargained prevailing wage rates between surveys to include updating non-collectively bargained prevailing wage rates.

In the NPRM, the Department emphasized that WHD’s goal is to conduct surveys in each area every 3 years in order to avoid prevailing wage rates becoming out-of-date. WHD also noted that because of the resource-intensive nature of the wage survey process and the vast number of survey areas, many years can pass between surveys conducted in any particular area. The 2011 GAO Report found that, as of 2010, while 36 percent of “nonunion-prevailing rates”<sup>128</sup> were 3 years old or less, almost 46 percent of these rates were 10 or more years old. 2011 GAO Report, at 18.<sup>129</sup> As a result of lengthy intervals between Davis-Bacon surveys, the real value of the effectively frozen rates erodes as compensation in the construction industry and the cost-of-living rise. The resulting decline in the real value of prevailing wage rates may adversely affect construction workers whom the DBA was intended to protect. See *Coutu*, 450 U.S. at 771 (“The Court’s previous opinions have recognized that ‘[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers.’” (citations omitted)).

Program stakeholders have previously raised this issue with the GAO. According to several union and contractor officials interviewed in connection with the GAO’s 2011 report, the age of the Davis-Bacon “nonunion-prevailing rates” means they often do not reflect actual prevailing wages in a particular area. 2011 GAO Report, at 18.<sup>130</sup> As a result, the stakeholders said it is “more difficult for both union and nonunion contractors to successfully bid on federal projects because they cannot recruit workers with artificially low wages but risk losing contracts if their bids reflect more realistic wages.”

<sup>128</sup> “Nonunion-prevailing rates,” as used in the GAO report, is a misnomer, as it refers to weighted average rates that, as noted, are published whenever the same wage rate is not paid to a majority of workers in the classification, including when much or even most of the data reflects union wages, just not that the same union wage was paid to a majority of workers in the classification.

<sup>129</sup> See note 10, *supra*.

<sup>130</sup> See note 10, *supra*.

<sup>127</sup> WHD similarly updates weighted average rates based entirely on collectively bargained rates (currently designated as “UAVG” rates) using periodic wage and fringe benefit increases in the CBAs.

*Id.* Regularly updating these rates would alleviate this situation and better protect workers' wage rates. The Department anticipates that updated rates would also better reflect construction industry compensation in communities where federally funded construction is occurring.

The Department explained in the NPRM that the proposal to update non-collectively bargained rates is consistent with, and builds upon, the current regulatory text at 29 CFR 1.6(c)(1), which provides that wage determinations "may be modified from time to time to keep them current." This regulatory provision provides legal authority for updating wage rates, and has been used as a basis for updating collectively bargained prevailing wage rates based on CBA submissions between surveys. *See* Manual of Operations at 74–75. The Department proposed to extend the practice of updating prevailing wage rates to include non-collectively bargained rates based on ECI data. The Department stated its belief that "chang[ed] circumstances"—including an increase in the use of weighted average rates—and the lack of an express mechanism to update non-collectively bargained

rates between surveys under the existing regulations support this proposed "extension of current regulation[s]" to better effectuate the DBRA's purpose. *State Farm*, 463 U.S. at 42; *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) (explaining the Court was "unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes" absent "compelling evidence that such was Congress' intention").

The proposal also is consistent with the Department's broad authority under the Act to "establish the method to be used" to determine DBA prevailing wage rates. *Donovan*, 712 F.2d at 616. The Department stated its belief that the new periodic adjustment proposal will "on balance result in a closer approximation of the prevailing wage" for these rates and therefore is an appropriate extension of the current regulation. *Id.* at 630 (citing *Am. Trucking Ass'n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967)).

The Department emphasized that this proposed new provision is particularly appropriate because it seeks to curb a practice the DBA and Related Acts were enacted to prevent: payment of "substandard" wages (here, out-of-date non-collectively bargained prevailing

wage rates) on covered construction projects that are less than current wages paid for similar work in the locality. Regularly increasing non-collectively bargained prevailing wage rates that are more than 3 years old would be consistent with the DBA's purpose of protecting local wage standards by updating significantly out-of-date non-collectively bargained prevailing wage rates that have fallen behind currently prevailing local rates. The Department emphasized that updating such out-of-date construction wages would better align with the DBRA's main objective.

The Department further explained that periodically updating existing non-collectively bargained prevailing wage rates is intended to keep such rates more current in the interim period between surveys. The Department asserted that it is reasonable to assume that non-collectively bargained rates, like other rates that the Secretary has determined to prevail, generally increase over time like other construction compensation measures. *See, e.g.,* Table A (showing recent annual rates of union and non-union construction wage increases in the United States); Table B (showing ECI changes from 2001 to 2020).

TABLE A—CURRENT POPULATION SURVEY (CPS) WAGE GROWTH BY UNION STATUS—CONSTRUCTION

Year	Median weekly earnings		Percentage of differential	
	Members of unions	Non-union	Members of unions (%)	Non-Union (%)
2015 .....	\$1,099	\$743		
2016 .....	1,168	780	6	5
2017 .....	1,163	797	0	2
2018 .....	1,220	819	5	3
2019 .....	1,257	868	3	6
2020 .....	1,254	920	0	6
2021 .....	1,344	922	7	0
Average .....			3	4

Source: Current Population Survey, Table 43: Median weekly earnings of full-time wage and salary workers by union affiliation, occupation, and industry, BLS, <https://www.bls.gov/cps/cpsaat43.htm> (last modified Jan. 20, 2022).

Note: Limited to workers in the construction industry.

TABLE B—ECI, 2001–2020, TOTAL COMPENSATION OF PRIVATE WORKERS IN CONSTRUCTION, AND EXTRACTION, FARMING, FISHING, AND FORESTRY OCCUPATIONS  
[Average 12-month percent changes (rounded to the nearest tenth)]

Year	Average annual total compensation, 12-month % change
2001 .....	4.5
2002 .....	3.5
2003 .....	3.9
2004 .....	4.5
2005 .....	3.1
2006 .....	3.5
2007 .....	3.5
2008 .....	3.6
2009 .....	1.7

TABLE B—ECI, 2001–2020, TOTAL COMPENSATION OF PRIVATE WORKERS IN CONSTRUCTION, AND EXTRACTION, FARMING, FISHING, AND FORESTRY OCCUPATIONS—Continued

[Average 12-month percent changes (rounded to the nearest tenth)]

Year	Average annual total compensation, 12-month % change
2010 .....	1.9
2011 .....	1.6
2012 .....	1.4
2013 .....	1.8
2014 .....	2.0
2015 .....	2.0
2016 .....	2.4
2017 .....	2.7
2018 .....	2.2
2019 .....	2.8
2020 .....	2.4
2021 .....	3.0

Source: ECI Historical Listing Volume III, Table 5: ECI for total compensation, for private industry workers, by occupational group and industry, BLS, <https://www.bls.gov/web/eci/eci-current-nominal-dollar.pdf> (updated Mar. 2022).

## (2) Periodic Adjustment Proposal

In the NPRM, the Department noted that the proposal sought to update non-collectively bargained prevailing wage rates that are 3 or more years old by adjusting them regularly based on total compensation data to keep pace with current construction wages and fringe benefits. Specifically, the Department proposed to add language to § 1.6(c)(1) to expressly permit adjustments to non-collectively bargained prevailing rates on general wage determinations based on BLS ECI data or its successor data. The Department's proposal provided that non-collectively bargained rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication, continuing until the next survey results in a new general wage determination. This proposed interval would be consistent with WHD's goal to increase the percentage of Davis-Bacon wage rates that are 3 years old or less. Under the proposal, non-collectively bargained prevailing wage 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, any non-collectively bargained prevailing wage rates published after this rule becomes effective may be updated if they are not re-surveyed within 3 years after publication. The Department anticipates implementing this new regulatory provision by issuing modifications to general wage determinations.

The Department stated its belief that ECI data is appropriate for these rate adjustments because the ECI tracks both wages and fringe benefits and may be used as a proxy for changes in

construction compensation over time. Therefore, the Department proposed to use a compensation growth rate based on the change in the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations to adjust non-collectively bargained prevailing wage rates (both base hourly and fringe benefit rates) published in 2001 or after.<sup>131</sup>

In addition, because updating non-collectively bargained prevailing wage rates would be resource-intensive, the Department did not anticipate making all initial adjustments to such rates that are 3 or more years old simultaneously, but rather considered it more likely that such adjustments would be made over a period of time (though as quickly as is reasonably possible). Similarly, the Department stated that particularly due to the effort involved, the process of adjusting non-collectively bargained rates that are 3 or more years old was unlikely to begin until approximately 6–12 months after a final rule implementing the proposal became effective.

The Department sought comments on the proposal and invited comments on alternative data sources to adjust non-collectively bargained prevailing wage rates. The Department considered proposing to use the Consumer Price Index (CPI) but noted that the CPI is less

<sup>131</sup> Because this particular index is unavailable prior to 2001, the Department proposed to use the compensation growth rate based on the change in the ECI total compensation index for the goods-producing industries (which includes the construction industry) to bring the relatively small percentage of non-collectively bargained prevailing wage rates published before 2001 up to their 2000 value. The Department would then adjust the rates up to the present value using the ECI total compensation index for construction, extraction, farming, fishing, and forestry occupations.

appropriate to use to update non-collectively bargained prevailing wage rates because the CPI measures movement of consumer prices as experienced by day-to-day living expenses, unlike the ECI, which measures changes in the costs of labor in particular. The CPI does not track changes in wages or benefits, nor does it reflect the costs of construction workers nationwide. The Department nonetheless invited comments on use of the CPI to adjust non-collectively bargained rates.

The Department received many comments about the proposal. Most of the commenters expressed general support for the proposal, and many of them supported the proposal in its entirety. Other commenters recommended modifications to the Department's proposal, and several commenters opposed the proposal entirely. In general, there was an overarching consensus about the need to regularly update out-of-date non-collectively bargained prevailing wage rates. For example, NABTU and WA BCTC gave examples of outdated non-collectively bargained wage rates, including some that reflected amounts less than the local minimum wage. AGC noted that periodic adjustments can improve the accuracy of "woefully out-of-date open shop rates." FTBA stated that updating non-collectively bargained rates would help eliminate the widening compensation gap between collectively bargained prevailing wage rates that are updated at least annually, and non-collectively bargained rates that are frozen in time, sometimes for a decade or longer.

The Economic Policy Institute (EPI) noted that this proposal is critical to ensure that DBRA prevailing wage rates

contribute to stabilizing rather than eroding workers' wages, which EPI stated have been lower in inflation-adjusted terms than they were in 1970 despite decades of economic growth and a higher national income. LIUNA stated that weighted averages are susceptible to annual wage erosion as inflation eats away at worker earnings. The IUOE made a similar point, noting that the lengthy stagnation and lack of escalation of non-collectively bargained prevailing wage rates dilute the value of such rates. IUOE pointed to the 2019 OIG Report's identification of decades-old rates that were applicable to particular DBRA projects, highlighted the OIG's recommendation that WHD use a wage escalator (like the CPI) to bring non-collectively bargained rates current, and applauded the Department for proposing to do so.

A number of supporting commenters concurred that periodic updates would appropriately implement the Department's broad authority to curb a practice the DBA and Related Acts were enacted to prevent: payment of "substandard" wages (here, out-of-date non-collectively bargained rates). Such commenters noted that while it is preferable for Davis-Bacon prevailing wage rates to reflect actual wages paid to workers in their communities and not weighted averages, where the Department's wage determination is based on weighted averages it is critical that the Department not allow those rates to become stagnant. *See* Brick and Allied Craftworkers Local4 INKY, Building and Construction Trades Council of Northern Nevada (BAC NNV), III-FFC, and WA BCTC. DMCA commented that prevailing rates in North and South Dakota are often very old and not reflective of actual wages being paid—a problem that the updates should help fix by providing rates more reflective of the marketplace. Similarly, the North Dakota State Building and Construction Trade Union supported this "critical" proposal so rates do not become stagnant and gave examples of North Dakota non-collectively bargained rates that are over 22 years old. The joint SMART and SMACNA comment identified some non-collectively bargained rates that were roughly equivalent to collectively bargained rates that prevailed for similar classifications at the time these rates were published. SMART and SMACNA then observed that whereas the non-collectively bargained rates became stale during the long intervals between Davis-Bacon surveys, the collectively bargained rates increased during that time, resulting in a growing disparity

between the two types of prevailing wage rates.

Various commenters provided additional justification for the proposal, including benefits for the regulated community. COSCDA asserted that workers, contractors, and program administrators would all benefit from the proposal. LIUNA similarly noted that the proposal should reduce uncertainty for contracting agencies and contractors who rely upon published wage determinations for bidding and awarding contracts under DBRA. UBC likewise supported the proposal's anticipated relief for workers and improved competitiveness for contractor-bidders who had already been granting increases in wages and benefits. MCAA remarked that among member mechanical contractor firms that do not currently compete for prevailing wage work, low and out-of-date wage determinations were part of the reason they did not bid on these projects.

Supporters and opponents agreed about the need to address the construction labor shortage, particularly in light of the IJJA, which is expected to further increase demand for construction workers. *See, e.g.,* BAC NNV, NABTU, ABC. Supporters asserted that updating non-collectively bargained rates under the proposal would reflect labor market changes and improve contractors' ability to attract, develop, and retain skilled workers. *See, e.g.,* III-FFC. Brick and Allied Craftworkers Local #15 MO-KS-NE commented that it is critical that survey rates are not allowed to become stagnant because stagnant rates both undermine the purpose of the DBA to protect local area wages and discourage new workers from considering a career in the trades. Several other union commenters likewise emphasized the importance of keeping non-collectively bargained prevailing wage rates up-to-date because outdated and artificially low wages could discourage workers from entering the construction workforce. These organizations commented that this circumstance is particularly problematic in an industry in which workers' average age, 61, is approaching retirement age.

Various union, labor-management, and contractor group commenters such as LIUNA, III-FFC, and IEC supported using BLS ECI to update non-collectively bargained rates. LIUNA noted the ECI's suitability because it captures both wage and benefit data. AGC observed that the ECI has a large sample size, is calculated using "scientifically sound principles," and is publicly released quarterly.

In response to the Department's NPRM request for comments about using data sources other than the ECI, such as the CPI, MCAA opposed using the CPI and III-FFC preferred ECI to the CPI for urban consumers because the ECI reflects labor market trends and includes fringe benefits. LIUNA also preferred the ECI instead of a consumer-based index. The MBA, *et al.*, on the other hand, opposed the Department's proposal to adopt the ECI, stating that the ECI's participation rate over the past 10 years had dropped. They also noted that it is unclear whether the ECI's Construction industry category covers residential construction and whether the index includes both CBA and non-CBA wages.

Several commenters that supported the proposal also recommended additional regulatory provisions. NABTU and LIUNA recommended that the ECI should be used only to increase, not decrease, non-collectively bargained rates, and III-FFC and UBC suggested changing the proposed regulation to require more frequent periodic updates—at least every 3 years, instead of no sooner than every 3 years. These two commenters explained that more frequent adjustments would help ensure that DBA rates do not stagnate.

Other commenters recommended using ECI data to update non-collectively bargained rates only as a method of last resort, noting that the ECI does not capture actual wages paid to workers in their home communities. *See* NABTU, NCDCL, and UA. These commenters instead recommended replacing out-of-date non-collectively bargained prevailing wage rates with existing state and local prevailing wage rates derived through methods that closely resemble the Department's method. The UA also emphasized that the Department's proposal is no substitute for greater efforts to conduct surveys within 3 years and encouraged the Department to continue to prioritize its own wage surveys as the first and best option. The UA recognized the Department's improvements in the survey process—citing the 2019 OIG report's finding that the Department's "time to complete a wage survey decreased from an average of five-to-seven years in 2002 to 2.6 years in 2015"—but also welcomed the fallback option of using ECI data to update rates when necessary since surveys are time consuming and the Department's resources are limited.

A number of commenters—both that supported and opposed the proposal—expressed concerns about using ECI data. NABTU, AGC, FTBA, and ABC took exception to using nationwide data



such as the ECI data the Department anticipated using. FTBA preferred that the Department use county-specific data that is the “legal lynchpin for the setting of prevailing wages under the [DBA].” FTBA and AGC expressed concern that the ECI includes certain payments that are statutorily excluded from Davis-Bacon fringe benefits, such as disability insurance, unemployment insurance, employer taxes, workers compensation, overtime, and non-production bonuses. The group of U.S. Senators criticized the ECI for merely accounting for the net increase or decrease in the cost of labor, but for not “as the DBRA commands, account[ing] for prevailing wages paid to ‘corresponding classes of laborers and mechanics.’” The MBA, *et al.* cautioned that “indexing a wage rate that is potentially forty years old is problematic as the validity of that wage is unknown.”

Several commenters, some of whom did not expressly oppose the proposal, asserted that it was inconsistent or arbitrary of the Department to update certain non-collectively bargained prevailing wage rates with ECI data from BLS while not also using BLS data to determine the underlying prevailing wages. For example, while NAHB did not endorse using BLS data to set prevailing wages, NAHB stated that it would be inconsistent to use BLS data for periodic updates but not to calculate the underlying prevailing wage rates using BLS data. NAHB also criticized the Department’s Davis-Bacon wage methodology as being greatly flawed and argued that the proposed periodic updates would only allow WHD’s flawed survey methodology to persist. AFP–I4AW opposed the proposal, which they asserted would mix two different methodologies for determining prevailing wages and use an unrelated BLS escalator to unjustifiably inflate what they claimed to be unreliable and inaccurate rates.

Among the commenters opposing the proposal in its entirety, AFP–I4AW, ABC, the group of U.S. Senators, a group of members of the U.S. House of Representatives Committee on Labor & Employment, and a few individuals objected to the proposal in the context of an overall criticism of WHD’s survey method, which they recommended replacing with BLS data to determine prevailing wages. ABC, for example, suggested using BLS data to determine prevailing wages because it asserted BLS data is more timely and accurate. ABC stated that BLS surveys are conducted scientifically, have high response rates from large sample sizes, and therefore are superior to WHD’s wage survey process. By comparison,

ABC contended the Department’s proposal to adjust certain non-collectively bargained prevailing wage rates on a rolling basis no more frequently than every 3 years would be less effective and less accurate than using BLS data to determine prevailing wages in the first place. ABC also argued, along with the group of U.S. Senators and the group of members of the U.S. House of Representatives Committee on Labor & Employment, that this periodic adjustment proposal would only serve to perpetuate the *status quo* with inaccurate wage determinations remaining after the updates. See section III.B.1.ii.A.(1) for a discussion of why the Department has declined to replace WHD’s Davis-Bacon wage survey program with data from the BLS.

Commenters raised other general concerns about the proposal. While NAHB agreed that a mechanism is needed to update “grossly outdated wage rates,” they thought the proposal implied less incentive for WHD to conduct wage surveys more often moving forward. The Construction Industry Roundtable (CIRT) said that the proposal could work but would “require constant updates across dozens if not hundreds of individual salary scales” to keep up with the proposed cycles.

After considering the comments received on the proposed new periodic updates to certain non-collectively bargained prevailing rates, the Department adopts without modification the proposed new language in § 1.6(c)(1). By expressly authorizing the Department to periodically adjust non-collectively bargained prevailing wage rates between surveys under specified circumstances in order to maintain the currency of those rates, this section plays an important role in WHD’s efforts to improve the Davis-Bacon prevailing wage program. As the Department emphasized in the NPRM, this new provision advances the DBA’s purpose of maintaining local wage standards and protecting construction workers—in this case by safeguarding against a decline in the real value of prevailing wage rates over time. This periodic adjustment rule implements a concrete and incremental mechanism to address the criticism, noted by various commenters, that as non-collectively bargained prevailing rates become out-of-date, they decreasingly reflect the prevailing rates currently paid. The periodic adjustment of non-collectively bargained wage rates is particularly important given that the change to the definition of “prevailing wage” in the 1981–1982 rulemaking has resulted in the increasing overuse of

weighted average wage rates, most of which are the very type of rates that are not adjusted under the Department’s current procedures. This change warrants extending the express regulatory authority under which WHD updates collectively bargained prevailing wage rates between surveys based on CBA submissions to non-collectively bargained rates updated based on ECI data. The Department anticipates that periodic adjustments will occur less often over time, as it conducts surveys more frequently and adopts more state or local prevailing wage rates.

While the Department has considered the suggested changes to its proposal, the Department declines to adopt the suggestions. Specifically, the Department declines to adopt the recommendation to limit periodic updates to increases only. The ECI historically has increased over time, and it appears unlikely that the compensation growth index would result in a decrease over a 3-year interval. Moreover, the purpose of this provision is to periodically adjust otherwise out-of-date non-collectively bargained prevailing wage rates. In the unlikely event that a downward adjustment of an otherwise stagnant rate were warranted based on a 3-year period of ECI data on which the Department would be relying, making such an adjustment would be appropriate and consistent with wage rate changes resulting from an entirely new prevailing wage survey, which can result in both increases and decreases in published prevailing wage rates.

The Department also declines to require that the periodic updates occur more frequently than every 3 years and maintains that this provision of the final rule will not reduce WHD’s incentive to conduct Davis-Bacon wage surveys. This provision to periodically update out-of-date non-collectively bargained prevailing wage rates that are 3 or more years old enables the Department to adjust such rates between surveys based on total compensation data, allowing prevailing wage rates to better keep pace with construction wage and benefit growth and remain more in line with local prevailing rates. The proposed 3-year minimum interval is consistent with WHD’s goal to increase—primarily through the wage survey program—the percentage of Davis-Bacon wage rates that are 3 years old or less and therefore would not need to be periodically updated. The periodic adjustments will be effectuated in conjunction with WHD’s other efforts to increase the frequency with which the results of new wage surveys are published, including

surveys conducted under State or local law and adopted by the Department under the circumstances specified in section III.B.1.iii.D. The Department, therefore, has calibrated the frequency of periodic updates so that they better align with these other changes to the Davis-Bacon wage survey program. In addition, more frequent updating might disincentivize stakeholders from participating in the Davis-Bacon survey process.

The Department agrees with LIUNA that ECI data should only be used for the narrow purpose specified in this proposed rule. The new periodic adjustment rule will “on balance result in a closer approximation of the prevailing wage,” *Donovan*, 712 F.2d at 630, for these out-of-date non-collectively bargained rates and, therefore, is an appropriate extension of the authority reflected in current § 1.6(c)(1) to modify wage determinations “from time to time to keep them current.” The periodic adjustments will update certain existing non-collectively bargained prevailing rates, supplementing, but not replacing, the Department’s survey-based wage determination process which the Department is committed to continuing and striving to improve as discussed in this section below and in section III.B.1.ii.A.

The Department notes that various commenters, such as ABC, the group of U.S. Senators, and the group of members of the U.S. House of Representatives Committee on Education & Labor, opposed the proposal and urged the Department to use BLS data instead of WHD’s wage survey program to determine prevailing wages. The Department declines to adopt the suggestion of such commenters that WHD should have chosen to, or is required to, use BLS data for its wage survey process in its entirety, instead of using ECI data for the limited purpose of periodic adjustments. For the reasons discussed below and in section III.B.1.ii.A.1, the Department’s decision to use the rule’s periodic adjustment mechanism to incrementally improve the quality of certain underlying prevailing wage rates is reasonable and within its broad statutory discretion, and it does not require that WHD adopt BLS data as the sole method of determining prevailing wage rates to begin with.

The DBA authorizes the Administrator to choose the method for determining prevailing wage rates. As a threshold matter, the DBA does not prescribe a method that the Administrator must or should use for determining prevailing wages, but rather

“delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing.” 712 F.2d at 616. The Secretary, thus, has broad discretion to determine the prevailing wage. Even though there may be multiple methods of determining prevailing wages under the DBA, WHD may choose which method to use to do so.

The Department disagrees with the premise underlying the claims of the group of U.S. Senators, ABC, and the MBA, *et al.* that it is inappropriate to adjust an underlying wage rate that is allegedly flawed, as the Department’s wage survey methodology operates comfortably within the authority granted by the DBA and constitutes a reasonable method of determining prevailing wage rates for laborers and mechanics on covered construction projects.

WHD has used and may continue to use various regulatory and subregulatory tools intended to refine and improve its prevailing wage survey process. Such tools include this rule’s periodic adjustments of certain non-collectively bargained rates with ECI data. WHD’s survey method for determining prevailing wages is not static. The agency consistently strives to improve its Davis-Bacon wage survey program and has made improvements over the years. For example, as of March 2019, WHD had successfully reduced the amount of time it takes to complete a wage survey by more than 50 percent since 2002 and was continuing to implement process improvements to reduce the time it takes to complete a survey. *See* 2019 OIG Report, at 34 app. B.

Other efforts to improve WHD’s DBRA wage survey program include this rule’s use of a modal prevailing wage rate when 30 percent or more of the wages are the same, and the provision regarding variable rates that are functionally equivalent, both of which seek to more closely reflect the prevailing (*i.e.*, predominant) wages paid to workers in an area and to decrease the prevalence of weighted average rates. Another recent endeavor is the June 2022 and March 2023 solicitations of comments about the proposed revision of the wage survey form (WD–10 form), which WHD uses to solicit information that is used to determine locally prevailing wages. *See* 87 FR 36152–53; 88 FR 17629 (Mar. 23, 2023) (Notice of availability; request for comments). Outside this rulemaking, the Department’s proposed changes to the WD–10 form would improve the overall efficiency of the DBA survey process and aim to streamline the

collection of data required for the survey and make the collection less burdensome for respondents. 87 FR 36153. The Department also proposed to add a new WD–10A collection instrument to be used pre-survey to identify potential respondents that performed construction work within the survey period in the survey area. *Id.*; *see also* 88 FR 17629–30.

The Department acknowledges that the ECI data it has selected includes wages and fringe benefit information for construction-related occupations nationwide, and that ECI benefits include some employer costs that are not bona fide fringe benefits under the DBA. Nevertheless, these ECI data characteristics, while not identical, are consistent with the DBA’s statutory requirements. As discussed in this section and section III.B.1.ii.A, the Department has developed its underlying methodology for determining prevailing wages to be consistent with the Act’s directive to determine prevailing wages for “corresponding classes” of workers on “projects of a character similar” within “civil subdivision[s] of the State” in which the work is to be performed. 40 U.S.C. 3142(b). This rule supplements WHD’s methodology. The ECI will be used to adjust prevailing wage rates only after WHD has determined the underlying rates for specific classifications of workers on projects of a similar character within the relevant locality. Moreover, the ECI simply reflects the rate of change in employer labor costs over time. Given the Department’s statutory and regulatory authority, the Department’s use of the ECI is reasonable even though the ECI may not mirror in every respect changes to certain labor costs on a classification-by-classification, project-by-project, and location-by-location basis.

The Department disagrees with the commenters who suggested that the index used for periodic updates must have the same level of detail that the Department uses to make its wage determinations in the first place. The ECI data that the Department has selected, while not perfect, is a reasonable option for the task. ECI contains data for construction-related occupations and includes both wages and fringe benefits. While the data is not delineated by county and the mix of fringe benefits is different than that required to be considered by the DBRA, the ECI’s general data characteristics are sufficient for the purpose of keeping certain non-collectively bargained rates better aligned with compensation changes over time, and better than any other index that the Department has

considered or commenters have suggested for periodic adjustments under the DBRA.

The Department's broad discretion about how to determine prevailing wages comfortably encompasses this mechanism to periodically update certain out-of-date survey-based prevailing wages pending completion of the next wage survey. Further, the DBA's legislative history supports this manner of trying to keep certain prevailing wage rates more current. Congress recognized that "[a] method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders." 74 Cong. Rec. 6516 (Feb. 28, 1931) (remarks of Rep. Kopp).

The Department also disagrees that using ECI or its successor data to periodically update certain non-collectively bargained wages while continuing to use the Department's longstanding survey process is arbitrary. The periodic adjustments are tethered to existing prevailing wage rates and seek to better approximate current prevailing rates. As stated in the NPRM, ECI data is appropriate for these proposed rate adjustments because the ECI tracks both wages and benefits and may be used to approximate the changes in construction compensation over time.

The Department notes in response to comments that the ECI data to be used includes private industry union and non-union workers, residential and non-residential construction, and is not seasonally adjusted. ECI data is a reasonable proxy for construction compensation growth to first bring non-collectively bargained rates that are more than 3 years old up to their present value, and then to update these rates no more often than every 3 years going forward. For these and the other reasons explained in this section, the final rule adopts this proposal without modification.

(D) 29 CFR 1.6(f)

Section 1.6(f) addresses post-award determinations that a wage determination has been wrongly omitted from a contract. The Department's proposed changes to this paragraph are discussed below in section III.B.3.xx ("Post-award determinations and operation-of-law"), together with proposed changes to §§ 5.5 and 5.6.

vii. Section 1.7 Scope of Consideration

The Department's regulations in § 1.7 address two related concepts. The first is the level of geographic aggregation of wage data that should be the default "area" for making a wage determination.

The second is how the Department 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. In the NPRM, the Department proposed changes to this paragraph to more clearly describe WHD's process for expanding the geographic scope of survey data and to modify the regulations by eliminating the current bar on combining wage data from "metropolitan" and "rural" counties when the geographic scope is expanded.

In the 1981–1982 rulemaking, the Department codified its practice of using the county as the default area for making a wage determination. 47 FR 23644, 23647 (May 28, 1982). Thus, while the definition of the term "area" in § 1.2 allows the Administrator to use other civil subdivisions of a State for this purpose, § 1.7(a) specifies that the area for a wage determination will "normally be the county." 29 CFR 1.7(a).

The use of the county as the default "area" means that in making a wage determination the WHD first considers the wage survey data that WHD has received from projects of a similar character in a given county. The Department typically collects the county-level data by construction type (e.g., building, residential, highway, heavy) to account for the statutory requirement to determine prevailing wages on projects of a similar "character." 40 U.S.C. 3142(b); see also AAM 130 (Mar. 17, 1978) (discussing construction types). If there is sufficient county-level data for a classification of covered workers (e.g., laborers or painters) working on those projects, WHD then makes a determination of the prevailing wage rate for that classification on that construction type in that county. See 40 U.S.C. 3142(b) (requiring prevailing wages to be determined for "corresponding classes" of laborers or mechanics); 29 CFR 1.7(a). In determining whether there is sufficient current wage data, WHD can use data on wages paid on current projects or, where necessary, projects under construction up to one year before the beginning of the survey. 29 CFR 1.7(a).

The second concept addressed in § 1.7 is the procedure that WHD follows when it does not receive sufficient current wage data at the county level to determine a prevailing wage rate for a given classification of workers in a given construction type. This process is described in detail in the 2013 *Chesapeake Housing* ARB decision. ARB No. 12–010, 2013 WL 5872049. In short, if there is insufficient data to

determine a prevailing wage rate for a classification of workers in a given county, WHD 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. First, WHD expands to include a group of surrounding counties at a "group" level. See 29 CFR 1.7(b) (discussing consideration of wage data in "surrounding counties"); *Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049, at \*2–3. If there is still not sufficient data at the group level, WHD considers a larger grouping of counties in the State, which has been called a "super group," and thereafter may use data at a statewide level. *Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049, at \*3; see 29 CFR 1.7(c).<sup>132</sup>

In the 1981–1982 rulemaking, the Department imposed a limitation on this process. The Department included, in § 1.7(b), a strict bar on combining data from "metropolitan" and "rural" counties when there is insufficient wage data in a given county. See 47 FR 23647. That proviso stated that projects in "metropolitan" counties may not be used as a source of data for a wage determination in a "rural" county, and vice versa. 29 CFR 1.7(b). The regulation did not define the terms metropolitan and rural.

To be consistent with the prohibition on cross-consideration in § 1.7(b), WHD developed a practice of using designations from the Office of Management and Budget (OMB) to identify whether a county is "metropolitan" or "rural." The OMB designations WHD has used for this purpose are called the core based statistical area (CBSA) standards. See 86 FR 37770 (July 16, 2021). As part of the CBSA designations, OMB identifies two types of statistical areas: metropolitan statistical areas (MSAs) and micropolitan statistical areas. The OMB standards do not specifically identify counties as "rural." However, because OMB identifies counties that have metropolitan characteristics as part of MSAs, the practice of the WHD Administrator has been to designate counties as "metropolitan" if they are within an OMB-designated MSA and

<sup>132</sup> For residential and building construction types, this expansion of the scope of data considered also involves the use of data from Federal and federally assisted projects subject to Davis-Bacon labor standards at each county-grouping level when data from non-Federal projects is not sufficient. See 29 CFR 1.3(d). Data from Federal and federally assisted projects subject to Davis-Bacon labor standards is used in all instances to determine prevailing wage rates for heavy and highway construction. *Id.*

“rural” if they are not. *See Mistick Constr.*, ARB No. 04–051, 2006 WL 861357, at \*8. If OMB designates a county as a micropolitan statistical area, WHD will identify the county as rural, even if it is contiguous with a nearby MSA. The ARB has determined that such proxy designations are reasonable. *See id.*<sup>133</sup>

The ban on combining metropolitan and rural county data that was implemented in the 1981–1982 rulemaking did not apply explicitly to the consideration of data above the surrounding-counties level. *See* 29 CFR 1.7(c). After that rulemaking, however, the Department implemented procedures that did not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

#### (A) “Metropolitan” and “Rural” Wage Data in Surrounding Counties

In the NPRM, the Department proposed to eliminate the language in § 1.7(b) barring the cross-consideration of metropolitan and rural wage data at the surrounding-counties level. In explaining this proposal, the Department noted prior feedback that the blanket bar had not adequately considered the heterogeneity of commuting patterns and local labor markets between and among counties that may be designated overall as “rural” or “metropolitan.” In its 2011 report, for example, the GAO noted criticism of the DBA program for using “arbitrary geographic divisions,” given that the relevant regional labor markets, which are reflective of area wage rates, “frequently cross county and state lines.” 2011 GAO Report, at 24.<sup>134</sup>

The NPRM explained that the Department understood the point in the GAO report to be that actual local labor markets are not constrained by or defined by county lines, and that the point applies even to those lines between counties identified (by OMB or otherwise) as “metropolitan” or “rural.” The Department noted that this is particularly the case for the construction industry, in which workers tend to have longer commutes than other professionals, resulting in geographically larger labor markets. *See*,

*e.g.*, Keren Sun et al., “Hierarchy Divisions of the Ability to Endure Commute Costs: An Analysis based on a Set of Data about Construction Workers,” *J. of Econ. & Dev. Stud.*, Dec. 2020, at 4.<sup>135</sup> Even within the construction industry, workers in certain trades have greater or lesser tolerance for longer commutes. Keren Sun, “Analysis of the Factors Affecting the Commute Distance/Time of Construction Workers,” *Int’l J. of Arts & Humanities*, June 2020, at 43.<sup>136</sup>

By excluding a metropolitan county’s wage rates from consideration in a determination for a bordering rural county, the strict ban implemented in the 1981–1982 rulemaking disregarded the potential for projects in neighboring counties to compete for the same supply of construction workers and be in the same local construction labor market. In many cases, the workers working on a metropolitan county’s projects may themselves live across the county line in a neighboring rural county and commute to the metropolitan projects. In such cases, under the current bar, the Department cannot use the wage rates of these workers to determine the prevailing wage rate for projects in the rural county in which they live, even where there is otherwise no data from that rural county to rely on. Instead, WHD would import wage rates from other “rural”-designated counties, potentially somewhere far across the State. As the Department noted in the NPRM, this practice can result in Davis-Bacon wage rates that are lower than the wage rates that actually prevail in a cross-county metropolitan-rural labor market.

For these reasons, the Department stated in the NPRM that it believed 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. To address this concern, the Department considered the possibility of using smaller basic units than the county as the initial area for a wage determination and expanding to labor market areas that do not directly track county lines. This could include cities or their equivalents, or even census blocks, which as noted above, are the basic units for the Census Bureau’s urban-rural classifications. The Department, however, concluded that continuing the longstanding practice of using counties as the civil subdivision basis unit is more administratively

feasible.<sup>137</sup> As a result, the NPRM instead proposed to eliminate the metropolitan-rural bar in § 1.7(b) and to allow the agency to use metropolitan data in appropriate circumstances to help set rural county prevailing wage rates where the survey has not resulted in sufficient current wage data from the rural county. Eliminating the bar will also allow the Department to use data from adjacent rural counties to help set a metropolitan county’s rates in circumstances where the survey has not resulted in sufficient current wage data from the metropolitan county.

The Department explained that eliminating the strict bar could have other benefits in addition to allowing WHD to account for actual construction labor market patterns. It could allow WHD to publish more rates at the surrounding-counties group level rather than having to rely on data from larger geographic areas, because it could increase the number of counties that may be available to supply data at that initial group level. Eliminating the bar could also allow WHD to publish more rates for more classifications overall by authorizing the use of both metropolitan and rural county data together when the Department must rely on statewide data. Combining rural and metropolitan data at the State level would be a final option for geographic expansion when otherwise the data could be insufficient to identify any prevailing wage at all. The Department stated that the purposes of the Act may be better served by using such combined statewide data to allow prevailing wages to be determined more often.

The Department also explained that eliminating the strict rural-metropolitan bar would result in a program that would be more consistent with the Department’s original practice between 1935 and the 1981–1982 rulemaking as well as the text and legislative history of the DBA. Congressional hearings shortly after the passage of the initial 1931 Act suggest that Congress understood the DBA as allowing the Secretary to refer to metropolitan rates where rural rates were not available, including by looking to the nearest city when there was insufficient construction in a village or “little town” to determine a prevailing wage. *See* 75 Cong. Rec. at 12366, 12377 (1932) (remarks of Rep. Connery). Likewise, the Department’s original 1935 regulations directed the Department to “the nearest large city” when there had been no

<sup>133</sup> The OMB standards are different from the Census Bureau’s classification of urban and rural areas. The OMB standards use counties or county-equivalents as the basic building blocks of their MSA designations. The Census Bureau’s urban-rural classification uses smaller “census blocks” as the “analysis unit (or geographic building block)” of its classification process. *See* Urban Area Criteria for the 2020 Census-Final Criteria, 87 FR 16706, 16709 (Mar. 24, 2022).

<sup>134</sup> *See* note 8, *supra*.

<sup>135</sup> [http://jedsnet.com/journals/jeds/Vol\\_8\\_No\\_4\\_December\\_2020/1.pdf](http://jedsnet.com/journals/jeds/Vol_8_No_4_December_2020/1.pdf).

<sup>136</sup> <http://ijah.cgrd.org/images/Vol6No1/3.pdf>.

<sup>137</sup> The Department also considered this option in the 1981–1982 rulemaking, but similarly concluded that the proposal to use the county as the basic unit of a wage determination was the “most administratively feasible.” *See* 47 FR 23647.

similar construction in the locality in recent years. *See* Labor Department Regulation No. 503 section 7(2) (1935).<sup>138</sup>

In the NPRM, in addition to eliminating the metropolitan-rural proviso language in § 1.7(b), the Department also discussed other potential changes to the methods for describing the surrounding-counties groupings procedure. Because the term “surrounding counties” was not defined in the 1981–1982 rulemaking, it has from time to time led to confusion about whether a county can be considered “surrounding” if it does not share a border with the county for which more data is needed. As noted, WHD’s current method of creating surrounding-counties groupings is to use OMB-designed MSAs to create pre-determined county groupings. This method does not require that all counties in the grouping share a border with (in other words, be a direct neighbor to) the county in need. Rather, at the surrounding-counties grouping, WHD will 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.<sup>139</sup>

For example, in the *Chesapeake Housing* case, one group of “surrounding counties” that WHD had compiled included the areas of Portsmouth, Virginia Beach, Norfolk, and Suffolk. ARB No. 12–010, 2013 WL 5872049, at \*1 n.1. That was appropriate because those jurisdictions all were part of the same contiguous OMB-designated MSA, and each jurisdiction thus shared a border with at least one other in the group—even if they did not all share a border with every other jurisdiction in the group. *See id.* at \*5–6. Thus, by using the group, WHD combined data from Virginia Beach and Suffolk at the surrounding-counties level, even though Virginia Beach and Suffolk do not themselves share a border. The ARB

concluded that this grouping strategy—of relying on OMB MSA designations—was consistent with the term “surrounding counties.” *See Mistick Constr.*, ARB No. 04–051, 2006 WL 861357, at \*7–8.

In the NPRM, the first option for the surrounding-counties group level that the Department discussed was to maintain the current group description without further amendment. The Department noted that the term “surrounding counties” itself is not so ambiguous and devoid of meaning that it requires additional definition. The Department stated that the term has been reasonably read to require that such a grouping be of a contiguous grouping of counties as the Department currently requires in its use of OMB MSAs (as described above), with limited exceptions. Thus, while the elimination of the metropolitan-rural proviso would allow a nearby rural county to be included in a surrounding-counties grouping with metropolitan counties that it borders, it would not allow WHD to append a faraway rural county to a surrounding-counties grouping made up entirely of metropolitan counties with which the rural county shares no border at all. Conversely, the term “surrounding counties” does not allow the Department to consider a faraway metropolitan county to be part of a surrounding-counties grouping of rural counties with which the metropolitan county shares no border at all.

The second and third options the Department outlined in the NPRM were to add more precise definitions to the term “surrounding.” The second option was to limit “surrounding counties” to solely those counties that share a border with the county for which additional wage data is sought. The Department noted that this proposal would generally ensure that the surrounding-counties grouping would not expand beyond the commuting range of the construction workers who would work on projects in the county at issue. However, the Department explained, the narrowness of such a limitation would also be a drawback, as it could lead to fewer wage rates being set at the surrounding-counties group level. It also would have a significant drawback in that it would not allow for the use of pre-determined county groupings that would be the same for a number of counties, because each county may have a different set of counties with which it alone shares a border. This could result in a substantial burden on WHD in developing far more county-grouping rates than it currently develops.

The third option was to include language that would define

“surrounding counties” as a grouping of counties that are all a part of the same “contiguous local construction labor market” or some comparable definition. The Department noted that, in practice, this methodology could result in similar (but not identical) groupings as the current methodology, as the Department could decide to use OMB designations to assist in determining what counties are part of the contiguous local labor market. Without the strict metropolitan-rural proviso, however, this option would allow the Department to use additional evidence on a case-by-case basis to determine whether the OMB designations—which do not track construction markets specifically—are too narrow for a given construction market.

#### (1) Comments Regarding Metropolitan and Rural Wage Data

A number of union and contractor association commenters generally agreed with the Department’s proposed changes to § 1.7(b). Commenters such as FTBA, MCAA, and NABTU supported eliminating the strict prohibition on combining data from rural and metropolitan areas, because eliminating the prohibition would allow the Department’s wage determinations to better reflect the complexities of the construction industry. As NCDCL noted, rural areas are frequently economically interconnected to nearby metropolitan areas. For this reason, commenters explained, the proposal is common sense because it does not limit the Department to the use of “arbitrary geographic designations.”

Several commenters supporting the proposal emphasized that it is important that the Department have the flexibility to create groupings instead of being bound by a rigid rule. SMART and SMACNA, for example, stated that the task of figuring out how to properly expand geographic scope is a complicated one “for which regional and demographic differences necessitate solutions that reflect the realities of local markets.” They agreed that “county lines do not dictate local labor markets” and that there is great diversity on a state-by-state basis in how county lines are drawn. SMART and SMACNA stated that under the bar on cross-consideration, the Department has effectively treated all rural counties as a “monolith” instead of as diverse entities with differing levels of integration with metropolitan counties and a wide range of populations and economic activity.<sup>140</sup>

<sup>138</sup> *See also* 29 CFR 1.8(b) (1982) (if no similar construction is in area, “wage rates paid on the nearest similar construction may be considered”); 21 FR 5801, 5802 (1956) (same).

<sup>139</sup> In addition, in certain limited circumstances, WHD has allowed the aggregation of counties at the “surrounding counties” level that are not part of a contiguous grouping of all-metropolitan or all-rural counties. This has been considered appropriate where, for example, two rural counties border an MSA on different sides and do not themselves share a border with each other or with any other rural counties. Under WHD’s current practice, those two rural counties could be considered to be a county group at the “surrounding counties” level even though they neither share a border nor are part of a contiguous group of counties.

<sup>140</sup> *See, e.g.*, Haya El Nasser, “More Than Half of U.S. Population in 4.6 Percent of Counties,” *Census.gov*: Big and Small America (Oct. 24, 2017),

They noted that “there is no single, universally preferred definition of rural” and no “single rural definition that can serve all policy purposes.” That variability makes “rigid rules banning the use of metropolitan data in rural counties unreasonable.”<sup>141</sup> LIUNA criticized the Department’s current “absolutist” approach that “prevents the Administrator from properly considering labor markets in instances where discretion is required.”

A number of the commenters, including LIUNA and NABTU, agreed with the Department’s reasoning in the NPRM that the strict bar has had a depressive effect in particular on the prevailing wage rates for rural counties that border—and have a level of labor-market integration with—metropolitan areas. The commenters noted that the Department’s rural county groupings have combined data from metropolitan-adjacent rural counties with other rural counties that may be geographically remote and have no connection to any metropolitan area. UBC, likewise, explained that this practice is counterintuitive given that wage rates are higher in metropolitan-adjacent counties than in remote rural counties because projects in the metropolitan-adjacent counties have to compete for the same workers as projects in the neighboring metropolitan areas. The UA asserted that eliminating the strict bar in § 1.7(b) should increase the accuracy of wage determinations for these types of metropolitan-adjacent counties by better reflecting actual labor markets and commuting patterns.

Several union commenters, including IUOE, West Central Illinois Building and Construction Trades Council, and others, agreed with the Department that the current binary approach to categorizing counties does not account for “realities of the construction industry, in which workers tend to commute longer distances than other professionals.” These commenters explained that this fact is in part related to the “cyclical nature of construction employment.” When one project ends, they explained, workers are forced to follow the next project that will provide gainful employment, even if it means traveling to surrounding communities.

A number of commenters, including industry associations such as ABC, NAHB, and IEC, opposed the Department’s proposal to eliminate the strict bar. These commenters asserted that adoption of higher average wages reflected in metropolitan county data will likely result in inflated wages in nearby rural counties that do not reflect local area prevailing wage rates. Numerous individual commenters, as part of an organized campaign, stated that the elimination of the bar, in combination with other aspects of the Department’s proposed rule, was likely to “further distort the accuracy” of WHD wage determinations. ABC issued a survey to its members and stated that only 14.4 percent of respondents agreed that “aggregating metropolitan and rural wage data” would “increase the accuracy” of wage determinations. IEC and the group of U.S. Senators stated that construction unions tend to be more heavily concentrated in metropolitan areas than in rural areas, so the proposal would lead to higher union rates being applied to rural areas that may not have a high union density. Several commenters opposing the proposal, including ABC and the group of U.S. Senators, said that the importation of metropolitan wages that may be higher than wages actually paid in a rural county would be inconsistent with the purpose and congressional intent underlying the DBRA.

Commenters opposing the proposal also stated that increased prevailing wage rates in rural counties would have negative effects. NAHB stated that increased wage rates would decrease production of affordable housing. IEC stated that “by equating rates between metropolitan and rural areas, the rule would disincentivize workers from taking on higher-paying jobs in metropolitan areas, which have numerous additional out-of-pocket expenses for such workers, including but not limited to commuting, parking, subsistence, and other related costs.” IEC further stated this would create a shortage of workers being willing to incur these expenses for work in metropolitan areas, thus driving up costs of metropolitan projects even further to attract workers. IEC also stated that using a metropolitan county’s wage rate for a rural county would inflate rural wage rates above what the local economy can support and would “undermine existing methods of incentivizing rural construction, such as subsistence pay to offset food and lodging.” The comment from the Senators argued that the proposal would “upset the local wage structure” and

result in small local contractors being “excluded from bidding on Federal projects.”

Commenters opposing the Department’s proposal also criticized the Department’s reasoning in the NPRM for proposing the change. NAHB argued that the Department’s explanation—that construction workers travel long distances for work and that nearby counties with different designations may be competing for the same supply of workers—is one that “contradicts” the system of MSAs set up by OMB. NAHB noted that OMB already analyzes commuting data in order to capture local labor markets when it designates MSAs, and that these areas are treated as “authoritative” and used by a variety of government agencies for important programs. They argue that these labor market definitions should not be ignored or contradicted without substantial evidence.

NAHB also stated that the two academic studies on construction-worker commuting time that the Department referenced were not persuasive because they were based on evidence from one city in California, did not show that construction commutes were substantially longer than the next longest commutes, and that any lengthier commute times could be explained by the need for workers to travel to different construction sites rather than to a single central office, and therefore do not necessarily mean commute times extend outside of metropolitan areas. NAHB also noted one of the two papers stated that construction workers travel long distances to projects in search of higher wages, and this, NAHB stated, did not support the idea that workers in metropolitan counties would travel to nearby rural counties for work.

The comment from the group of U.S. Senators criticized the proposal as allowing for rural wage determinations to be governed by “locality-distinct metropolitan wages” from metropolitan areas that may be “lacking both commonality and contiguousness with the rural locality.” The comment also argued that the process of geographic expansion at all—even the current process allowing the use of MSAs at the group level—inflates prevailing wages compared to the “actual prevailing wage BLS calculated.” ABC argued that “combining data from rural and metropolitan counties cannot improve accuracy so long as the underlying wage data comes from a self-selected, statistically unrepresentative sample.”

Various commenters supporting and opposing the proposal disagreed about the extent to which the Department’s

<https://www.census.gov/library/stories/2017/10/big-and-small-counties.html>.

<sup>141</sup> SMART and SMACNA cited an Issue Brief prepared for the Rural Policy Research Institute Health Panel that compared OMB and Census bureau statistical area designations and noted that 30 million “Census Bureau-defined rural people live in OMB-defined metropolitan areas, and 20 million urban people live in nonmetropolitan areas.” Andrew F. Coburn, et al., “Choosing Rural Definitions: Implications for Health Policy,” Rural Pol’y Rsch. Inst. 3 (Mar. 2007).



historical practice supports the proposal. On one hand, the comment from the group of U.S. Senators argued that the Department mischaracterized in the NPRM that the bar on combining data has existed only since the 1982 rulemaking. They noted that, as early as 1977, the Secretary's Operations Manual for the Issuance of the Wage Determinations Under the DBRA instructed that "[g]enerally, a metropolitan county should not be used to obtain data for a rural county (or visa [sic] versa)." *Donovan*, 712 F.2d at 618.<sup>142</sup> They cited the Carter Administration regulations that were suspended before enactment in 1981 as seeking to "formalize such a prohibition," and they cited a WAB decision from 1977 for the proposition that the WAB had warned against importing rates from non-contiguous counties.

On the other hand, a number of commenters supporting the proposal agreed with the Department that eliminating the strict bar was consistent with the legislative history of the DBA and the Department's historical practice from the enactment of the Act until the 1981–1982 rulemaking. NABTU stated that the legislative history "supports the proposition that [the Department] should first consider neighboring communities" when there is not sufficient wage data in a non-metropolitan area. The Iron Workers noted in particular the exchange in the 1932 hearings regarding amending the DBA where Congressman William Connery, the manager of the bill, used the example of the construction of the Hoover Dam (then referred to as the Boulder Dam) near the Arizona-Nevada line. *See* 75 Cong. Rec. at 12366, 12377 (1932) (remarks of Rep. Connery). Rep. Connery had explained how at the time there may have been a need to go 500 miles to find a city large enough to provide a sufficient amount of wage data to determine what prevailing wage rates should be for the project. As the Iron Workers explained, Rep. Connery's statement supports the conclusion that Congress intended to give the Secretary discretion to determine the necessary scope of geographic aggregation where there was insufficient wage data—to aggregate from a geographic scope that is "large enough to include wage data from a sufficient number of similar projects." SMART and SMACNA noted that the Department then, until the 1981–1982 rulemaking, consistently

relied on data from more populous areas in deriving prevailing rates for thinly-populated areas in appropriate circumstances.<sup>143</sup>

Commenters supporting and opposing the proposal also disagreed about whether the D.C. Circuit's decision in *Donovan* supports the proposal. The *Donovan* decision considered the reasons that the Department had provided in its 1981–1982 rulemaking for enacting the strict bar on cross-consideration and ultimately upheld the Department's rule as a permissible exercise of its discretion. 712 F.2d at 618. The comment by the group of U.S. Senators argued that the Department's reasons for enacting the bar in the 1981–1982 rulemaking had been "compelling," and that the D.C. Circuit had validated those reasons by stating that they "make sense." The Senators asserted that the Department's reasoning now is similar to the reasoning of the unions and others who opposed the 1981–1982 rulemaking, and that these arguments were "dismissed" by the D.C. Circuit. ABC stated that the Department's justifications now are inadequate in light of the *Donovan* decision.

The Iron Workers, on the other hand, emphasized that the D.C. Circuit's decision about the metropolitan-rural bar in *Donovan* was based on a deferential standard of review. The import of the decision, according to the Iron Workers, is that the Department is not bound by prior practice and can adopt new rules regarding geographic aggregation as long as they are consistent with the purposes of the DBA and not arbitrary. The Iron Workers and SMART and SMACNA also noted that the development of the program after the 1981–1982 rulemaking (and the *Donovan* decision) supports revisiting the strict bar. The 2011 GAO Report analyzed a group of surveys and found that in those surveys, the Department received increasingly insufficient current wage data at the county and surrounding-counties levels, which caused the Department to rely more heavily on super-group and statewide data to calculate prevailing wage rates. *See supra* note 10, at 21. This circumstance, the commenters argued, showed that the Department was too

often relying on far-away county data when the better alternative would be adding neighboring counties to the surrounding-counties group level and thus relying on data from within local construction labor markets.

## (2) Department's Decision Regarding Metropolitan and Rural Wage Data

The Department generally agrees with the commenters supporting the proposal. Given the wide variation in counties and construction labor markets, the current bar on cross-consideration of the binary categories of "metropolitan" and "rural" county data unnecessarily limits the Department's geographic aggregation methodology. Accordingly, the Department has decided to revert to the prior approach, pre-dating the 1981–1982 rulemaking, under which the regulations do not strictly bar the Administrator from using data from metropolitan counties to help set prevailing wage rates in other counties in appropriate circumstances. In doing so, the Department will be able to better distinguish between metropolitan-adjacent counties that are part of a larger metropolitan construction market and those rural counties that are not economically integrated with any nearby metropolitan areas, will be able to set more wage determinations at smaller levels of geographic aggregation, and will be able to include more classifications in wage determinations overall.

Some of the criticism of the Department's proposal may reflect underlying misunderstandings. The geographic aggregation provisions of § 1.7 apply only when there is not sufficient current wage data in a county to determine a prevailing wage for a particular classification for that county. This can happen for a variety of reasons. As one commenter, a Professor of Economics from the University of Utah, stated, there may be insufficient wage data in some counties because they are simply "too small to provide adequate numbers of survey responses," which is not uncommon given that there are counties in the United States with populations as low as 64 people. As this commenter noted, this challenge can also be common regardless of county size for specialized subclassifications on complex heavy construction projects (such as dams) because these types of projects "are often non-repeating, vast and unique in their design so that obtaining sufficient comparable wage data in one county is challenging." Only where there is not sufficient current wage data for a particular classification in a particular county will WHD expand

<sup>143</sup> For the Oahe Reservoir constructed in rural South Dakota in 1954, the Solicitor of Labor explained that "[t]he labor force for the project obviously had to be drawn from the entire state and beyond," since there were "no projects of a character similar in the civil subdivisions involved." Charles Donahue, "The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions," 29 Law & Contemp. Probs. 488, 510 (1964).

<sup>142</sup> In their comment, the U.S. Senators left out the word "generally" from their recitation of the language from the Manual. *See Donovan*, 712 F.2d at 618.

its geographic scope of consideration to consider data from other counties.<sup>144</sup>

The corollary of this structure is that the geographic aggregation provisions do not apply when there is already sufficient wage data for a classification at the county level in a WHD survey. It may be helpful to consider the example of a core metropolitan county, County A, and an outlier county, County B, that shares a border with County A. If the Department's wage survey produces sufficient current wage data for a certain classification in County A and separately produces sufficient current wage data for that classification in County B, then the Department's proposal would not result in any combination of data for the two counties. The proposal would only potentially apply if the wage survey did not produce sufficient current wage data for a classification in County A or County B. In that circumstance, the Department would need to consider how to set the prevailing wage rate for that classification and would look to wage data from outside of that county for that purpose.

The Department disagrees with ABC that the proposal to eliminate the strict bar on cross-consideration is a "dramatic change" from the 1981–1982 rulemaking. While eliminating the strict bar, the final rule does not require fundamental changes to the general underlying procedure for geographic aggregation described above. Under the final rule, as under current practice, the geographic aggregation provisions of § 1.7 apply only when there is not sufficient current wage data in a county to determine a prevailing wage rate for a particular classification for that county. See 29 CFR 1.7(b). In these circumstances, as under the current practice, the Department would first aggregate data from "surrounding counties" to set the prevailing wage for the county with insufficient data. *Id.* Further geographic aggregation would occur only if sufficient data is still not available at the "surrounding counties" group level. In that circumstance, the Department could aggregate data from other "comparable counties or groups of counties." *Id.* § 1.7(c). Finally, and only if there is no sufficient current wage data for the classification at this intermediate level, the Department could aggregate statewide data for the classification to set the prevailing wage rate in that county.

In addition, the elimination of the strict bar does not require WHD to abandon the use of OMB designations as helpful references in the aggregation process. As noted above, the Department's current use of OMB designations to identify appropriate counties for geographic aggregation has been found to be consistent with the term "surrounding counties" and a reasonable method of addressing circumstances where there is insufficient wage data for a classification in a given county. The final rule will allow the Department to continue this practice, although the rule will not require it. It will also allow the Department to consider additional information on a case-by-case basis to avoid artificially or unreasonably depressing prevailing wage rates in counties that are adjacent to metropolitan areas but not designated as part of the MSA by OMB and to enable the calculation of more prevailing wages at the surrounding-counties group level rather than based on data from larger, more disparate super group or even statewide areas.

The Department disagrees with NAHB that cross-consideration of data from outside of the same MSA "contradicts" these OMB designations. As an initial matter, OMB itself notes that "[c]ounties included in metropolitan and micropolitan statistical areas may contain both urban and rural territory and population." 86 FR 37772. It also disclaims that its standards "produce an urban-rural classification." *Id.* at 37776. OMB requires counties to achieve a relatively high level of economic integration in order to be included in the same MSA. An outlying county will only be included in an MSA if 25 percent or more of the workers living in the county work in the central county or counties of the MSA or 25 percent or more of the employment in the county is accounted for by workers who reside in the central or county or counties. *Id.* Given that construction workers may generally commute longer distances than other workers, it is reasonable that counties that are economically integrated—but to a somewhat lesser extent than are MSAs—may still be a part of the same local construction labor market.

One example that would be permissible under the final rule would be for the Department to take a new approach with counties that OMB designates as micropolitan statistical areas. As OMB notes, metropolitan and micropolitan statistical areas are "conceptually similar to each other, but a micropolitan area features a smaller

nucleus." 86 FR 37771.<sup>145</sup> The Department, however, has generally considered counties designated as micropolitan to be "rural" and thus not appropriately included in a metropolitan "surrounding county" grouping even where the micropolitan county shares a border with an MSA. Under the final rule, the Department could analyze micropolitan counties on a case-by-case basis to determine how to include them in surrounding-counties groupings.

Where a micropolitan county is not adjacent to any MSA, and is surrounded by rural counties with no urban population, the Department could continue (as it generally does under the existing strict bar) to include such a county within a surrounding-counties grouping of other adjacent and contiguous "rural" counties. In such circumstances, there would be no combining of metropolitan and "rural" data at the county or surrounding-counties group level for that county. However, where a micropolitan county is adjacent to one or more metropolitan counties, the Department might reasonably consider it to be a part of the same surrounding-counties grouping as those nearby counties within the MSA for the purpose of geographic aggregation. OMB's "combined statistical areas" concept could be useful in such a circumstance. OMB creates combined statistical areas by appending micropolitan counties to adjacent MSAs where there is a sufficient "employment interchange" between the two areas. 86 FR 37777–78. Although the final rule does not require as much, it would permit the Department to use data from metropolitan counties to set prevailing wages for micropolitan counties (for which there is not sufficient current wage data for a classification at the micropolitan county level) that are within the same combined statistical area.

Given the wide variety of counties and local construction labor markets, the Department does not believe it is appropriate to set overly simplistic rules that apply rigidly throughout the country. Rather, depending on resource availability, the Department should be permitted to analyze data and other evidence on a state-by-state basis to determine appropriate county groupings. For example, Rice County in Minnesota is a micropolitan county that is adjacent to the Minneapolis-St. Paul

<sup>144</sup> In addition, as the Department noted in the NPRM, if more interested parties participate in the wage survey, then there will be fewer counties without sufficient wage data for which the § 1.7 expansion process becomes relevant.

<sup>145</sup> An MSA is "based on Urban Areas of 50,000 or more population," and a micropolitan statistical area is "based on Urban Areas of at least 10,000 population but less than 50,000 population." 86 FR 37776.

MSA. In the most recent DBA wage determination process, the Department considered Rice County to be rural and therefore did not use any wage data from Minneapolis-St. Paul to assist in wage determinations. Because it satisfies the threshold for employment integration, however, OMB considers Rice County to be part of the Minneapolis-St. Paul Combined Statistical Area.<sup>146</sup> Likewise, Rice is also within the same union jurisdiction for various construction crafts as the metropolitan counties in the adjacent MSA. In a future survey, if there are classifications in Rice County for which there is not sufficient current wage data, it would be reasonable under these circumstances for the Department to expand to a surrounding-counties grouping that includes the other counties within the same Minneapolis-St. Paul Combined Statistical Area.

The Department has considered and disagrees with NAHB's criticism of the two academic papers that the Department used to illustrate that construction labor markets can be geographically larger than the average occupation's labor market. NAHB stated that the papers were not persuasive, but it did not cite to any studies or other data that contradicted them. NAHB first stated these papers were unconvincing because the average commute time they cited for construction workers—while the highest of all occupational groups—was only 1.6 minutes higher than the next highest occupational group. By comparing the commute times to the next highest number, however, NAHB ignored that the average commute times for construction workers in the study are significantly longer than many other common occupations. For example, they are 31 percent higher than sales workers, 44.5 percent higher than education workers, and nearly 52 percent higher than food service workers. *See* Sun et al. (Dec. 2020) *supra* note 135, at 1, 4.

NAHB also stated that any lengthier commute times for construction workers could be explained by the need for workers to travel to different construction sites rather than to a single central office, and therefore do not necessarily mean commute times extend outside of metropolitan areas. The Department agrees that lengthy construction worker commutes may in part be a result of commuting to project

sites instead of a central office.<sup>147</sup> However, the Department is not persuaded that such a distinction is relevant to whether these longer commutes cross metropolitan-rural county borders and reflect a larger construction labor market. The two academic papers, moreover, note a high percentage of particularly long commutes in the study area: 40 percent of the workers in the study commuted more than 50 miles from home to the project site, and 12 percent of workers commuted more than 80 miles. *See* Sun et al. (June 2020), *supra* note 136, at 40. It is reasonable to assume that commutes of this length can often extend across metropolitan-rural county borders.<sup>148</sup>

Finally, NAHB also noted that construction workers travel long distances to projects in search of higher wages, and this, they stated, did not support the idea that workers in metropolitan counties would travel to nearby rural counties for work. The Department agrees that as a general matter, construction contractors may need to pay a premium to motivate workers to commute longer distances. This does not, however, undermine the Department's reasoning. To the contrary, it suggests that if a rural county is within commuting distance of a metropolitan area and the rural county does not itself have sufficient construction workers in a particular classification, workers from the metropolitan area may need to be paid a premium to be willing to commute to the job. This is the concept underlying the "zone pay" premiums in CBAs,

<sup>147</sup> As another paper noted, it is reasonable to assume that commute times are higher for construction workers because commute times will generally be longer for workers (like construction workers) who have "greater uncertainty about future job location." Randall Crane and Daniel G. Chatman, "As Jobs Sprawl, Whither the Commute?," *ACCESS Mag.*, Fall 2003, at 14, 17.

<sup>148</sup> NAHB also criticized the two papers because they were based only on data from one city in California. The Department, however, does not find that criticism to be persuasive. The average commute times discussed in the papers were not local numbers, but were numbers derived from the nationwide U.S. Census data in the 2014 American Community Survey. *See* Sun et al. (Dec. 2020) *supra* note 135 (citing Dan Kopf, "Which Professions Have the Longest Commutes?," *Priceonomics* (Feb. 23, 2016), <https://priceonomics.com/which-professions-have-the-longest-commutes/>). While the commute mileage numbers were from a single California city, the Department's proposal is to increase the Administrator's flexibility to treat different construction labor markets differently. Thus, the potential that data from other cities in the country could show different commuting patterns for construction workers does not undermine the rationale for the proposal.

which are discussed above in section III.B.1.ii.(A)(4).<sup>149</sup>

The Department has also considered the comments from opponents of the proposal that the elimination of the strict bar will likely result in "inflated" wages in the rural counties in which metropolitan data is newly used. In support of this argument, the comment from the group of U.S. Senators referenced statements in the 1979 GAO Report and by then-Comptroller General Staats that criticized the importation of rates from one county to another. Also supporting this argument, NAHB cited testimony from an NAHB member asserting that it had constructed two projects—one in the Philadelphia metropolitan area and the other "outside of the Philadelphia area" that was "described as a more complex project"—and that the labor costs and cost-per-unit had been higher on the metropolitan project. NAHB, in addition, pointed to litigation over certain DBA rates in Nevada, where geographic aggregation led to the adoption of Las Vegas metropolitan rates in a smaller metropolitan area in Northern Nevada that included Reno.

The Department does not find the reference to the 1979 GAO Report to be persuasive. The GAO Report was criticizing the importation of rates from other counties "even though an adequate basis generally existed for issuing prevailing rates based on the labor force and construction data in the locality." 1979 GAO Report, at 50. Later, the GAO referenced a project where it stated that the Department had not even attempted to survey a rural county and instead adopted a wage rate from a metropolitan county that did not even share a border with the rural county. *Id.* at 174.<sup>150</sup> This is not what the Department proposed in the NPRM. Rather, the proposal would not change the fundamental threshold for

<sup>149</sup> A comment from The Pacific Companies, an affordable housing developer and owner of affordable housing, provided another example of this phenomenon. The comment noted that it prefers to use modular construction to reduce the need for labor and offset labor costs in rural areas "where labor is more scarce and costs can be higher."

<sup>150</sup> Similarly, the U.S. Senators cited to the WAB decision in *Texas Paving & Utilities Rates*, WAB No. 77-19, 1977 WL 24839 (Dec. 30, 1977), to support the argument that importing wage rates could violate the plain language of the DBRA by "establishing new wage rates rather than reflecting local wages." In the *Texas Paving* decision, however, the Administrator had not surveyed the area at issue and set rates notwithstanding the lack of a survey. This would not be an issue under the proposed scope-of-consideration rule, as the Department's current methodology requires the use of surveys, and geographic aggregation only occurs if a survey has resulted in insufficient current wage data in the county at issue.

<sup>146</sup> *See* U.S. Census Bureau, "Minnesota: 2020 Core Based Statistical Areas and Counties," [https://www2.census.gov/programs-surveys/metro-micro/reference-maps/2020/state-maps/27\\_Minnesota\\_2020.pdf](https://www2.census.gov/programs-surveys/metro-micro/reference-maps/2020/state-maps/27_Minnesota_2020.pdf).

geographic expansion in the regulation at § 1.7(b), which only expands the scope when the Department has surveyed a county and the survey has not resulted in sufficient current wage data to make a wage determination.

The Senators also cite language in the GAO Report stating that “the use of wage rates from another area is not in accord with the act’s intent[.]” 1979 GAO Report, at 50. The Department interprets this statement as referencing the practices that the GAO was criticizing—of using rates from another area without even attempting to survey the county at issue—and not a broader statement that the use of wage rates from another area is never permitted. However, to the extent that the GAO Report intended a broader rejection of the practice of geographic aggregation, that position was subsequently undermined by the D.C. Circuit in the *Donovan* decision upholding the geographic aggregation provisions in § 1.7. In *Donovan*, the D.C. Circuit concluded from the legislative history of the DBA that the practice of using data from outside the area where necessary was permissible and consistent with the statute. As the court explained “if a prevailing wage could not be set in a given county by looking only to projects in that county, it was essential to the attainment of the general purpose of Congress—the predetermination of locally prevailing wages—that another mechanism be found.” 712 F.2d at 618.

The Department also does not agree that the proposal will lead to an impermissible adoption of inaccurate and “inflated” wage rates. The Department agrees that different areas can have different wage structures; that is the basic concept underlying the Act. However, as the D.C. Circuit noted, the Department is tasked with finding a way to make wage determinations even where there is not sufficient current wage data from a given county to make the determination. *Donovan*, 712 F.2d at 618. In such circumstances, the Department must consider a number of factors in determining how to proceed, including consistency with local area practice, as well as administrative feasibility, publishing as many wage determinations as possible, and reducing the need for conformances. As the Department noted in the NPRM, there is no perfect solution for identifying county groupings in the geographic aggregation procedure. However, on balance, the Department has concluded that the better approach is not to constrain the agency with strict limits based on an overly simplistic binary categorization of counties.

The Department agrees that there is a possibility that increased flexibility may lead to higher prevailing wage rates in certain counties that are adjacent to metropolitan areas. The Department agrees with the commenters that supported the proposal that the current geographic aggregation methodology can have a depressive effect on the prevailing wage rates for rural counties that border—and have a level of labor-market integration with—metropolitan areas.

Conversely, however, increased flexibility in geographic aggregation may in other circumstances lead to lower prevailing wage rates. Under the current ban, where a survey does not result in sufficient current wage data for a classification in a metropolitan county, the Department may need to use a super group of metropolitan counties from different parts of the state to make a wage determination for that classification. This can result in relying on data from far away metropolitan areas that may have less in common with the metropolitan county than neighboring micropolitan counties (that are currently treated as “rural”). Without the ban, the Department could instead look to the adjacent rural county that is within commuting distance from the metropolitan county for which there is not sufficient current wage data for the classification at issue. The result in that instance could be a lower rate in the wage determination, but one that might better reflect the prevailing wage in the specific local construction labor market.<sup>151</sup>

A similar effect can be anticipated for rural areas that are adjacent to small metropolitan areas. Under the current approach, if there were insufficient data in a rural metropolitan-adjacent county, the Department would look to other “rural” areas elsewhere in the state where wage rates might be driven by rates in micropolitan counties with markedly higher rates. For example, in a recent survey of Utah, WHD determined that the combined prevailing wage and fringe benefit rate in a smaller metropolitan county, Weber County, for a Laborer: Mason Tender/Cement Concrete was \$14.93. In

<sup>151</sup> The same is true for prevailing wage rates based on CBAs. IEC speculated that the end of the absolute bar could lead to metropolitan area CBA rates being applied to neighboring rural counties. However, it is equally as likely that small metropolitan MSAs that have insufficient data and would be subject to a CBA-based rate at a metropolitan “super group” level under the existing regulations, will, under the final rule, have the potential to instead reach sufficiency at the surrounding-counties group level with a combination of metropolitan and rural county data that may not be CBA-based.

neighboring Rich County, a rural county, there was no sufficient current wage data, and WHD calculated the prevailing wage for the same classification by looking to other rural counties statewide, resulting in a determination of \$19.33. If instead WHD had been able to combine the metropolitan data from neighboring Weber County with the rural Rich County, the prevailing wage in Rich County would be lower than it has been calculated under the existing strict bar on cross-consideration of “metropolitan” and “rural” data.

This same phenomenon can occur even when the metropolitan area is not a particularly small one. For example, in a recent survey of Tennessee, WHD determined that the prevailing wage for an Electrician in a number of counties within the MSA of Nashville-Davidson-Murfreesboro was \$22.53. In neighboring Lawrence County, a micropolitan county that is part of the larger combined statistical area, but still considered to be a “rural” county under the current rules, there was not sufficient wage data to make a wage determination for the Electrician classification. WHD thus calculated the prevailing wage for Electricians in Lawrence County by looking to other “rural” counties at a super-group level, resulting in a determination of \$26.25. If instead WHD had been able to combine the “metropolitan” data from the neighboring MSA with micropolitan Lawrence County, the prevailing wage in Lawrence would have been lower.

Overall, while it is reasonable to expect that ending the strict bar on cross-consideration may in some counties lead to increases in the published prevailing wage rates, the Department does not agree that such increases would be unwarranted or inaccurate, or that they would have significant negative effects that outweigh their benefits. In addressing these questions, the Department has considered the arguments that were made during the 1981–1982 rulemaking and subsequent litigation, as well as the comments received on the current proposal. Many of these arguments are similar, and many mirror the arguments that the same commenters made regarding the proposed reversion to the 30-percent rule, such as NAHB’s statement that increased wage rates would decrease production of affordable housing, and IEC’s statement that using a metropolitan county’s wage rate for a rural county would inflate rural wage rates “above what the local economy

can support.”<sup>152</sup> The Department does not find these arguments to be persuasive for the same reason that they are not persuasive with regard to the 30-percent rule. *See* section III.B.1.ii.

The comments identifying potential negative effects on rural contractors also do not provide persuasive reasons to reject the proposal. The Department does not agree with the comment from the Senators that eliminating the strict bar would result in small local contractors being “excluded from bidding on Federal projects.” In support of this argument, the Senators cited the 1979 GAO Report in which the GAO speculated that for certain contracts in rural counties, the lack of local contractors could be attributed to these contractors declining to bid on contracts with higher “metropolitan” prevailing wage rates because they did not want to “disrupt their wage structures.” 1979 GAO Report, at 73–74. In addition, the Department’s 1981–1982 NPRM noted a comment from the National Utility Contractors Association that “in the past” the “importation” of metropolitan rates into rural areas had “disrupted labor relations in rural areas, because employees who received high wages on a Davis-Bacon project were unwilling to return to their usual pay scales after the project was completed.” 47 FR 23647.

The Department is not persuaded by the concerns about “labor disruption” for several reasons. As an initial matter, the comment assumes a significant discrepancy between the wage that construction workers are paid in a rural county and the prevailing wage that the Department would set through the geographic aggregation process. Among the counties that the Department has identified as potentially affected by this rule change are metropolitan-adjacent counties—within commuting distance of the metropolitan core—in which the Department does not have sufficient current wage data from the county to make a determination. In many or most such circumstances, it will be reasonable to assume that the wage rate from a neighboring county is not significantly different and therefore that there is no reason to assume labor disruption from setting the same prevailing wage rate. Moreover, where non-metropolitan counties are next to metropolitan areas, the workers in these counties generally already live within

commuting range of earning the metropolitan rates that could potentially be designated as prevailing. Thus, it does not follow that the potential for additional projects—all within the same commuting range—to be governed by these rates would result in a disruption of labor relations.<sup>153</sup>

It also does not follow that the requirement to pay certain higher base rates would, as the IEC asserts, “undermine existing methods of incentivizing rural construction, such as subsistence pay to offset food and lodging.” Prevailing wage rates do not operate as a maximum rate that can be paid; if contractors provide additional pay to cover food and lodging so as to ensure that metropolitan-based workers are willing to commute to a rural job, then they are permitted to provide such additional incentives above and beyond the prevailing wage rate.

Finally, even if using wage rates from a metropolitan county to set the prevailing wage rate in an adjacent rural area were to result in a higher prevailing wage rate than under the current policy, such a result would not “exclude” any bidders. As noted above in response to the Senators’ comments on the 30-percent rule proposal, a higher required prevailing wage rate does not exclude bidders because all bidders are equally required to pay the same wage rate. *See* section III.B.1.ii.A. The potential that some contractors might choose not to bid on covered contracts is also not a persuasive reason to abandon the proposal. In any type of county, not just rural counties, it may be possible that contractors that derive competitive advantage only by paying the lowest wages might be disincentivized from bidding on contracts covered by prevailing wage requirements. Studies have shown, however, that this potential may be generally offset by the incentive that prevailing wage requirements provide for higher-skilled contractors to bid where they might not otherwise. *See* section V.F.1.<sup>154</sup> This conclusion is also supported by commenters on the current proposal. Many comments from contractor

associations supporting the current proposal stated that appropriate enforcement of prevailing wage requirements provides more contractors with the ability to pay their workers fairly and bid on contracts on the basis of skill and quality instead of on which contractor will pay the lowest wage rates. Accordingly, the Department is not convinced that the elimination of the strict bar will have net negative effects on local rural contractors or rural construction workers generally.

Although commenters did not expressly assert as much, the Department also considered whether the concerns about “disruption” of rural wage structures (and other comments regarding the scope-of-consideration regulation at § 1.7) amounted to assertions of reliance interests in the current regulations that would weigh against adopting the changes in the final rule. Contractors have not asserted, and the Department does not believe, that the rural wage rates or practices that the commenters have mentioned have been set in reliance on the Davis-Bacon wage determination methodology. However, to the extent they have been, and required prevailing wage rates may rise as a result of the rulemaking, the barriers for such contractors to increase wage rates when working on DBRA-covered projects are not unreasonably high, given that any new wage rates will apply only to new contracts—with limited exceptions reflected in § 1.6(c)(2)(iii) and discussed in section III.C. (“Applicability Date”) below—and contractors can adjust their bids or future negotiations on contract pricing as necessary to accommodate them. In instances where required wage rates may fall instead of rise, and specifically where they may fall from a CBA rate, the potential for disruption may be greater. In those circumstances, it is possible that contractors who have agreed to be bound by a CBA may have done so in part relying on the existence of CBA-based prevailing rates for work on Federal contracts. Notwithstanding this possibility, the Department has determined that it is preferable to eliminate the absolute bar on cross-consideration to allow the determination of wage rates to more often occur based on smaller geographic groupings.

The Department has also considered that the concern about labor disruption was discussed by the D.C. Circuit when it upheld the strict bar in 1983. *See Donovan*, 712 F.2d at 618–19. The *Donovan* decision noted the Department’s apparent reliance on the labor-disruption argument in the 1981–1982 rulemaking, and the court then

<sup>152</sup> Similarly, the comment from the group of U.S. Senators stated that wages would be inflated if they were compared to “actual prevailing wage[s] BLS calculated,” and ABC argued that the proposal regarding metropolitan and rural data cannot improve accuracy so long as the Department continues to use its current voluntary survey process.

<sup>153</sup> The Department notes that IEC, while generally disagreeing with the Department’s proposal, agreed that the labor disruption argument is not at issue where the cross-consideration of rates is occurring within the same commuting area.

<sup>154</sup> In 1979, when the GAO sought the Department’s comment on its preliminary findings, the Department criticized GAO’s conclusion that the Department was implementing the Act in a way that harmed local contractors in rural counties. *See* 1979 GAO Report, at 224–225 (appending letter from the Department). The Department stated that the GAO has based its conclusions on a statistically insignificant sample of projects and on mistaken understandings about the specific projects.

broadly stated that the Department's reasoning "makes sense." *Id.* at 619. The underlying holding in *Donovan*, however, was that situations "where there is insufficient data from a given civil subdivision to determine a prevailing wage," represent "interstitial areas" of the statute, regarding which Congress had granted the Department broad authority to "implement[] the Act in the way necessary to achieve its purposes." *Id.* at 618.

Under these circumstances, a prior holding that a rule was reasonable does not prohibit the Department from coming to a different conclusion at a later date. *See Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1092 (D.C. Cir. 2015) (holding that the Supreme Court's decision that prior rule was "reasonable" did not preclude different approach in new rule, where the matter was interstitial in nature and within the agency's discretion). Likewise, two opposing arguments can both "make sense." Where they do, the Department has to determine what it believes to be the best course, taking into consideration its expertise and any new factual circumstances that have arisen after the earlier decision. As various commenters have correctly observed, the strict bar in the 1981–1982 rulemaking has led to an increasing reliance on data from super group and statewide levels to calculate prevailing wage rates. *See* 2011 GAO Report, at 21. Considering this trend, the Department has concluded that the better option is to allow a more case-by-case analysis of local construction labor markets—and thus increase the number of wage determinations that can be made with smaller geographical aggregations of data.

The Department disagrees with the Senators' comment that the proposal is not permissible or reasonable because the D.C. Circuit in *Donovan* "dismissed" the arguments that the Department is now making regarding the need to have flexibility in geographic aggregation because of heterogeneity in commuting patterns. In the 1981–1982 rulemaking, unions had argued that "importing" rates from nearby metropolitan areas is justified because workers from metropolitan areas often perform the work in rural areas due to shortages of skilled labor in rural areas. 47 FR 23647. The Department had responded, stating that if those commenters were correct that "large numbers" of workers from metropolitan areas typically work at higher metropolitan wage rates on projects in rural areas, then "those higher wages would be found and receive proper weight in surveys of

wages paid in such areas." *Id.* The D.C. Circuit's did not "dismiss" the reasonableness of the unions' argument or suggest that Department would have been prohibited from agreeing with the unions. To the contrary, the court acknowledged that "it might be true" in some cases that looking to far away rural counties "would not reveal the higher wages that should be paid in the project county." 712 F.2d at 619. The court held, however that the unions had not provided a sufficient factual basis to "overturn the Secretary's informed exercise of authority." *Id.*

In the years since the *Donovan* decision, the practical experience of making wage determinations based on the strict bar has highlighted a flaw in the Department's prior reasoning. The Department's hypothetical during the 1981–1982 rulemaking, and the court's analysis of it, did not grapple with factual circumstances in which the geographical aggregation rule in fact applies. In practice, the question of cross-consideration of metropolitan and rural county data only arises when a wage survey finds that there is not sufficient current wage data in a county to determine a prevailing wage rate for a particular classification. Only then does the Department consider looking to "surrounding counties" for comparable data. The fact that there may not have been sufficient similar projects in a county during the most recent survey period, as measured by the wage survey, however, does not reflect on what the wage rates are or would be on such projects when they do occur. In such a circumstance, the relevant question is not whether "large numbers" of workers from the metropolitan county have been working in the adjacent county during the survey period at metropolitan rates sufficient to set the prevailing wage. Rather, the question is whether the metropolitan-adjacent rural county is sufficiently part of a local construction labor market that it is reasonable to set the prevailing wage rate closer to the rates in the nearby metropolitan counties that are also part of that labor market than to a lower (or higher) rate of a farther-away rural county. As noted, wage rates in a metropolitan-adjacent rural county may be similar to a nearby metropolitan county not only because metropolitan-county workers may routinely travel to the adjacent county to work, but also because workers who live in the rural county can command a similar wage rate to the adjacent metropolitan area because the rural county is sufficiently economically intertwined with it.

At the time this question reached the D.C. Circuit in *Donovan*, it was

sufficiently abstract that the court reasonably deferred to the Department's expertise. However, the imposition of the strict bar has given rise to many examples where the Department has overlooked indicia of economic integration solely because a county is not a part of an OMB-designated MSA. As discussed above, one example is where a micropolitan county is part of a combined statistical area with a neighboring MSA—thus sharing a certain level of measurable economic integration—or where there is evidence that a particular contractor community operates regularly in a geographic area that transcends an MSA's boundaries. Under such circumstances, there is sufficient reason to use data from the neighboring MSA to set wage rates where there otherwise is not sufficient current wage data in the county. The D.C. Circuit's decision in *Donovan* does not suggest otherwise.

The Department has also considered IEC's argument that the proposal would incentivize workers to work on rural projects instead of taking jobs in metropolitan areas, leading to an increase in the costs of metropolitan projects to attract workers. The Department agrees with the principle underlying IEC's comment—that if two projects are in counties that are within commuting distance, then they will likely be competing for the labor of many of the same construction workers. This principle explains why the Department believes it can be appropriate to consider a metropolitan county's wage rates when there is not sufficient data in a neighboring rural county instead of relying on a farther away rural county or counties that may have much more limited connections to any metropolitan labor market.

The Department, however, does not believe that adopting a metropolitan county's prevailing wage rates for an adjacent rural county will have the broad effect IEC anticipates so as to warrant maintaining the strict bar. The first problem with IEC's argument is that it begins with the assumption that the "true" prevailing rate in the rural county is significantly different than the rate in the neighboring metropolitan county, even though the two counties may be within commuting distance of one another and therefore within the same local construction labor market. As a related matter, IEC also necessarily must be assuming that most construction workers in the two-county market live in the rural county and would therefore be willing to accept a lower rate in order to avoid commuting. While this may be true in some labor markets, it will not be true in others. If

most skilled construction workers reside in populous metropolitan counties, it may already be necessary for projects in nearby rural counties to pay wages commensurate with metropolitan rates (or even a premium above metropolitan rates) to attract sufficient workers from the metropolitan core, as is exemplified by the structure of many CBA “zone rates,” discussed in section III.B.1.ii.(A).(4). Finally, IEC’s hypothetical assumes a finite number of workers, which ignores the potential that additional significant construction projects (and any related increase in wage rates) may attract new workers to a labor market. In sum, there is significant variation in construction labor markets, and this variation suggests that the Department should have the flexibility to create county groupings through which it can attempt to account for these differences.

The D.C. Circuit’s decision in *Donovan* is helpful for addressing the question that the Senators raised regarding whether the proposal to relax the strict bar is consistent with the legislative history of the Act and with the Department’s historical practice prior to the 1981–1982 rulemaking. In *Donovan*, the district court had struck down the strict bar, as the D.C. Circuit explained, “almost exclusively on what it saw as a longstanding and consistent administrative practice contrary to the proposed regulations.” 712 F.2d at 619 (citing the two district court decisions below). The D.C. Circuit noted that the Department’s administrative practice had not been “quite as consistent” as the district court had stated. *Id.* (citing the 1977 Manual of Operations and the Carter Administration rule). Nonetheless, the D.C. Circuit opinion did not turn on this question. Rather, it stated that “[m]ore fundamentally” it was reversing the district court and upholding the strict bar because “prior administrative practice carries much less weight when reviewing an action taken in the area of discretion,” such as the interstitial question of how to make wage determinations in counties that do not have sufficient current wage data. *Id.*

In any case, the current proposal to relax the strict bar is consistent with the Department’s prior practice before the 1981–1982 rulemaking. In that rulemaking, the Department acknowledged that the strict bar was a departure from the prior status quo, stating that the Department had determined “that its past practice of allowing the use of wage data from metropolitan areas in situations where sufficient data does not exist within the area of a rural project is inappropriate.”

47 FR 23647. As both the D.C. Circuit and the Senators noted, although there was no strict bar on cross-consideration from 1935 until the 1981–1982 rulemaking, the Department’s procedures were not necessarily uniform over that time period. In the late 1970s, while no strict bar existed in the regulations, the Department’s Manual of Operations document provided that “generally” it would not mix such data. *See* 712 F.2d at 619 (citing the 1977 Manual of Operations). This description, however, would be a fair description of the expected effects of the Department’s current proposal.

There are two reasons why, as a practical matter, the Department will “generally” not combine metropolitan and rural data under the current proposal. First, aside from the exceptions of multi-county projects and highway projects described above, no cross-consideration will occur for any county (rural or metropolitan) for which a survey results in sufficient current wage data to make a wage determination. Second, even when there is no sufficient current wage data in a rural county, the Department will generally not need to combine the available rural wage data with metropolitan data as part of the surrounding-counties grouping. For rural counties surrounded by other rural counties, the Department will usually look only to these neighboring rural counties as part of the surrounding-counties grouping. The only cross-consideration at the surrounding-counties grouping will generally be where a “rural county” shares a border with a metropolitan county and reasonably can be considered to be part of the local construction labor market.

While the Department’s proposal may not be exactly the same as prior administrative practice, *Donovan* instructs that the Department is not bound to apply geographic aggregation only in the same way as it has before as long as the Department has a reasonable basis for a new proposal that is consistent with the purposes of the Act. The Department believes that it is more consistent with the purpose of the Act to maintain sufficient flexibility in the wage determination process so as to adequately consider the heterogeneity of “rural counties” and avoid unnecessarily depressing (or increasing) prevailing wage rates in metropolitan-adjacent counties by referring to faraway rural counties before considering whether neighboring metropolitan county rates might reasonably be considered to prevail under the circumstances. It is also more consistent with the Act to seek to make prevailing

wage determinations at smaller levels of geographic aggregation in order to better track local area practices.

### (3) Defining “Surrounding Counties”

A number of commenters responded to the Department’s request for comment regarding whether there was a need for additional definition within the regulatory text of the first level of geographic aggregation, which is currently referred to in the regulations as “surrounding counties.” 29 CFR 1.7(b). Of the three options that the Department presented in the NPRM, commenters favored either Option 1 (to leave the description the same) or Option 3 (to include in the regulatory text a definition of “surrounding counties” as a “contiguous local construction labor market”).<sup>155</sup>

The III–FFC supported defining “surrounding counties” as contiguous construction labor markets because it would give the Department the flexibility to use OMB designations, but also allow the use of additional evidence on a case-by-case basis to determine if OMB designations are too narrow for a given construction market. III–FFC also supported this option because, unlike the second option the Department had proposed, it would allow the Department to make predetermined county groupings or make determinations on a case-by-case basis. The NCDCL noted that the California State prevailing wage rules contain a similar definition, instructing the consideration of rates “in the nearest labor market area.” Cal. Lab. Code section 1773.9(b)(1). NCDCL commented that a county grouping methodology based on the nearest labor market area is the best way to effectuate the purpose of the DBRA by “ensur[ing] that prevailing wage rates actually reflect the wages paid to workers in the labor market they work in.” The FTBA

<sup>155</sup> No commenters favored the second option, which would have relied only on counties sharing a border with the county in need. As noted, that option would have made predetermined groupings virtually impossible—even groupings based solely on OMB’s statistical area designations as under current procedures. The Department is not adopting the second option for that reason. In the NPRM, the Department also stated that it was considering one more option of more explicitly tailoring the ban on combining metropolitan and rural data so that it applies only at the “surrounding counties” level, but not at the statewide level or an intermediate level. The Department received no comments regarding this option. While limiting the ban to “surrounding counties” but allowing cross-consideration at higher levels would be more beneficial than the current regulations, it would not allow the Department the flexibility of identifying metropolitan-adjacent rural counties that can reasonably be added to metropolitan surrounding-counties groupings. Accordingly, the final rule does not adopt that option.



supported this definition as the best for reflecting the most relevant wage and benefits data “in areas in which the labor pool is not limited to a single county.”

Commenters opposed to the Department’s proposal stated that none of the Department’s proposed options adequately explained what other approaches it would be using (instead of relying on OMB “metropolitan” designations) to expand geographic aggregation when necessary. AGC stated generally that “metro and rural data should not be mixed”; it clarified, however, that it may be appropriate to combine county data when counties “are economically related and part of the same sphere of influence.” AGC also asserted that the Department should “retain flexibility in this matter instead of prescriptiveness” because “[e]very state, county, city and especially construction market is unique.” With regard to the Department’s specific proposals, AGC requested that the Department set specific definitions and limitations to how it would identify a “contiguous local construction labor market” and recommended the Department instead use “defined market approaches.”

The Department has elected to retain the reference to “surrounding counties” without further definition in the regulatory text, given that the term already has accrued meaning through litigation in the ARB. *See Chesapeake Housing*, ARB No. 12–010, 2013 WL 5872049. As noted, a surrounding-counties grouping generally should be a contiguous group of counties that approximate a local labor market, either through the adoption of OMB designations or on the basis of some other appropriate evidence of economic relationship between the included counties. The Department agrees with AGC that construction markets can be unique, and it makes sense to retain flexibility and avoid prescriptiveness.<sup>156</sup> Accordingly, while the Department has identified certain potentially appropriate types of surrounding-counties groupings (for example, following the lines of OMB “combined statistical areas”), there may be other methodologies to identify whether counties are reasonably within the same

local construction labor market and thus can be appropriately grouped together as “surrounding counties.” For example, as the Department noted in the NPRM, the Department could rely on county groupings in use by State governments for state prevailing wage laws, as long as they are contiguous county groupings that reasonably can be characterized as “surrounding counties.” Notwithstanding this flexibility, it will generally not be appropriate to include noncontiguous counties within a surrounding-counties grouping; all of the counties within a first-level grouping should border at least one other county in the grouping.

Having considered the comments received regarding the proposal to eliminate the strict bar and to retain the surrounding-counties grouping, the Department has decided to adopt the language of § 1.7(a) and (b) as proposed in the NPRM.

#### (B) Other Proposed Changes to § 1.7

The Department proposed several other changes to § 1.7. These included non-substantive changes to the wording of each paragraph in § 1.7 to clarify that the threshold for expansion in each one is insufficient “current wage data.” The Department also sought comment on whether the existing definition of “current wage data” should be retained or amended to narrow or expand its scope. The existing regulation now defines “current wage data” in § 1.7(a) as “data on wages paid on current projects or, where necessary, projects under construction no more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate.” The Department did not receive any comments regarding the definition or these non-substantive changes, and the final rule has accordingly adopted the non-substantive changes as proposed and does not modify the definition of “current wage data.”

The Department also proposed amendments to § 1.7(c) to better describe the process for expanding from the surrounding-counties level to consider data from an intermediary level (such as the current super-group level) before relying on statewide data. In the proposed regulatory text, the Department described this second level of county groupings as “comparable counties or groups of counties in the State.” The Department stated that this proposed “comparable counties” language in § 1.7(c) would allow the Department to continue to use the procedure described in *Chesapeake Housing* of combining various surrounding-counties groups (such as

MSAs) or various non-contiguous groups of rural counties to create super groups. The proposal also included reference in § 1.7(c) to the use of statewide data, but only “if necessary.”

The Department received only a few substantive comments regarding the proposal for clarifying the use of intermediate and statewide county groupings in § 1.7(c). The labor organization REBOUND requested additional information about how intermediate groupings would be selected and expressed concern that the analysis for determining comparable counties could involve statistical analyses that could be the subject of political manipulation. NAHB expressed concern about eliminating the bar on cross-consideration of rural and urban data at the super group and statewide level. They stated that the proposal did not provide sufficient clarity about whether at each level it would adopt a single rate that combines both metropolitan and rural data. The comment from the group of U.S. Senators disagreed with the Department’s reasoning that the purposes of the Act are better served by using combined statewide data to determine the prevailing wage, when the alternative could be to fail to publish a wage rate at all. Conversely, NCSHA supported the proposal, stating that it is important in particular in rural areas to ensure that as much data as possible can be considered so that there are more classifications published on wage determinations.

The Department intended the proposed changes to § 1.7(c) to be clarifying as opposed to substantive. The current regulation does not specifically mention the intermediate super-group county grouping. Rather, as the ARB stated in the *Chesapeake Housing* case, the existing regulations “implicitly” permit their use. ARB No. 12–010, 2013 WL 5872049, at \*1. In the *Chesapeake Housing* case, the ARB explained that WHD’s practice was to create “super groups” by using the same OMB designations that are currently used at the surrounding-counties level to create super groups of either rural or metropolitan counties. *Id.* at \*3. If there were still not sufficient data, WHD would expand further to a statewide level, still divided along metropolitan and rural lines, combining data for all rural counties or all metropolitan counties in the state. *Id.* While the ARB found that the existing regulations permitted the use of super groups, the Department believes it is preferable to have regulatory language that expressly notifies parties of the practice and provides basic guidance regarding how

<sup>156</sup> AGC did not explain what it meant by its suggestion to use “defined market” approaches. The Department interprets AGC comment as opposing the second option posed in the NPRM (of using only neighboring counties to the county with insufficient data), because such a policy would not allow the use of predetermined county groups that are the same for all of the counties in the group. The Department agrees that the second option would have been administratively infeasible and has not adopted it for that reason.

these intermediate groupings will be identified.

The Department, however, does not agree with REBOUND that further specificity is needed regarding the composition of intermediate groupings. The Department intends the word “comparable” in proposed § 1.7(c) to apply both to “counties” and “groups of counties.” Thus, in order for counties or groups of counties to be grouped together in an intermediate grouping for the purposes of § 1.7(c), WHD will need to identify county characteristics that are similar between the grouped-together counties and justify grouping them together as a fallback if there is not sufficient current wage data at the surrounding-counties group level. As with the surrounding-counties grouping, it would be consistent with this language to continue to identify intermediate groupings using OMB designations. Further specificity in the regulatory text is unwarranted because of the wide variety in size and composition of the states in which wage determinations are conducted. For some smaller states, as in the Virginia survey at issue in *Chesapeake Housing*, the intermediate groupings may effectively be statewide groupings of counties that share an OMB designation.<sup>157</sup> For others, there may be a sufficient number of counties and variation among them to justify the creation of intermediate groupings of counties that do not encompass all of a certain OMB-designated (or otherwise specified) category of counties in a state.

The Department anticipates that the intermediate county groupings discussed in § 1.7(c) will generally be composed of combinations of comparable surrounding-counties groupings. Thus, if there are several surrounding-counties groupings in a state that are each based on an MSA-anchored combined statistical area, then it may be appropriate to create intermediate groupings by grouping together all of the counties that are included within those combined statistical areas. Likewise, intermediate groupings may be formed out of groups of counties that are included in multiple surrounding-counties groups that are made up solely of “rural” counties that

are not included in any combined MSA. Depending on the size of the State, number of counties, and complexity of local construction labor markets, it may also be appropriate to create multiple levels of intermediate groupings that initially combine only the most similar surrounding-counties groupings, before making larger intermediate-grouping combinations.

With regard to the final grouping—statewide data—NAHB requested clarification regarding whether “metropolitan” and “rural” counties will be grouped together statewide before (or instead of) considering a single rate that combines all counties. The proposal did not require a particular procedure. Given the flexibility discussed for the intermediate county groupings, the Department does not believe that there is need to specify that statewide data must be considered along binary “rural” and “metropolitan” lines before it is ultimately combined as a last fallback before older data can be used. This is because the highest level of intermediate grouping the Department can design will effectively be statewide grouping of comparable counties. The Department would only use fully combined statewide data (combining all counties in a state, without regard for any designation) if current wage data at the intermediate grouping level is not sufficient to make a wage determination.<sup>158</sup> The Department agrees with NCSHA that the proposal (and, specifically, the possibility of using fully combined statewide data) provides a valuable benefit of making it possible for the Department to publish more classifications on rural wage determinations in particular.

Having considered the comments regarding the intermediate and statewide county groupings procedure in § 1.7(c), the Department adopts the language of § 1.7(c) as proposed.

#### viii. Section 1.8 Reconsideration by the Administrator

In the NPRM, the Department proposed to revise §§ 1.8 and 5.13 to explicitly provide procedures for reconsideration by the Administrator of decisions, rulings, or interpretations made by an authorized representative of the Administrator. Parts 1 and 5 both define the term “Administrator” to mean the WHD Administrator or an authorized representative of the Administrator. *See* 29 CFR 1.2(c), 5.2(b). Accordingly, when parties seek rulings,

interpretations, or decisions from the Administrator regarding the Davis-Bacon labor standards, it is often the practice of the Department to have such decisions made in the first instance by an authorized representative. After an authorized representative issues a decision, the party may request reconsideration by the Administrator. The decision typically provides a time frame in which a party may request reconsideration by the Administrator, often within 30 days.

To provide greater clarity and uniformity, the Department proposed to codify this practice and clarify how and when a reconsideration may be sought. First, the Department proposed to amend § 1.8, which concerns reconsideration of wage determinations and related decisions under part 1. The Department proposed to provide that if a decision for which reconsideration is sought was made by an authorized representative of the Administrator, the interested party seeking reconsideration may send such a request to the WHD Administrator. The Department proposed that requests for reconsideration must be submitted within 30 days from the date the decision is issued, and that this time period may be extended for good cause at the Administrator’s discretion upon a request by the interested party. Second, the Department proposed to amend § 5.13, which concerns rulings and interpretations under parts 1, 3, and 5, to similarly provide for the Administrator’s reconsideration of rulings and interpretations issued by an authorized representative. The Department proposed to apply the same procedures for such reconsideration requests in § 5.13 as apply to reconsideration requests under § 1.8. The Department also proposed to divide §§ 1.8 and 5.13 into paragraphs for clarity and readability, and to add email addresses for parties to submit requests for reconsideration and requests for rulings or interpretations.

The Department received two comments regarding this proposal, one from REBOUND, a non-profit organization; and another from a former director of REBOUND. These comments did not oppose the proposed changes, but suggested that the regulations also explicitly provide for a level of review prior to review by the Administrator, and that such review be conducted by an individual who was not connected in any way with the original decision. The comments indicated that intermediate review often occurs under current practice, but rarely results in reversal of the original decision because the individuals who perform such review

<sup>157</sup> In *Chesapeake Housing*, WHD had used a “super group” intermediate grouping that consisted of all metropolitan counties and independent cities in eastern Virginia including those from the DC MSA, the Richmond MSA, and the Norfolk-Virginia Beach MSA. ARB No. 12–010, 2013 WL 5872049, at \*3. The ARB noted that this grouping was in fact the same as it would have been had the Department used “statewide” data segregated along metropolitan and rural county lines, because the “super group” included all of the MSAs in the state. *Id.* at \*5–6.

<sup>158</sup> In addition, the language of § 1.7(c) in the final rule permits, but does not require, the use of statewide data.

are often either the same individuals who rendered the original decision or their managers. The comments agreed that if done properly, intermediate review can resolve cases more promptly without the need to appeal to the Administrator, but suggested that without a requirement that such review be independent, it will not accomplish this goal because reviewers will be reluctant to overturn decisions that they made in the first instance.

After considering the comments above, the Department retains the language as proposed. The final rule permits an intermediate level of review without requiring it, and, as the commenters noted, in many instances an intermediate level of review is provided. The language similarly allows for reconsideration requests to be considered by agency personnel who were or were not involved in the original decision, as the circumstances warrant. The Department believes that it is important for the regulations to preserve such administrative flexibility when handling reconsideration requests so that the Department can properly allocate its resources. Agency staff are able to consider and help respond to reconsideration requests with objectivity regardless of whether they played any role in the underlying decision, and resource constraints make it infeasible to adopt a blanket rule that intermediate review cannot be handled by anyone who participated in the original decision. Moreover, as the commenters note, intermediate decisions are appealable to the Administrator. The Department therefore declines to codify specific procedures or requirements for intermediate-level reconsideration and adopts the change as proposed.

#### ix. Section 1.10 Severability

The Department proposed to add a new § 1.10, titled “Severability.” The proposed severability provision explained that each provision is capable of operating independently from one another, and that if any provision of part 1 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intended that the remaining provisions remain in effect.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed. An expanded discussion of severability is below in section III.B.5.

#### x. References to Website for Accessing Wage Determinations

The Department proposed to revise §§ 1.2, 1.5, and 1.6 to reflect, in more general terms, that wage determinations are maintained online, without a reference to a specific website.

The current regulations reference Wage Determinations OnLine (WDOL), previously available at <https://www.wdol.gov>, which was established following the enactment of the E-Government Act of 2002, Public Law 107–347, 116 Stat. 2899 (2002). *WDOL.gov* served as the source for Federal contracting agencies to use when obtaining wage determinations. See 70 FR 50887 (Aug. 26, 2005). *WDOL.gov* was decommissioned on June 14, 2019, and SAM, specifically <https://sam.gov/content/wage-determinations>, became the authoritative and single location for obtaining DBA general wage determinations.<sup>159</sup> The transition of wage determinations onto SAM was part of the Integrated Award Environment (IAE), a government-wide initiative administered by GSA to manage and integrate multiple online systems used for awarding and administering Federal financial assistance and contracts.<sup>160</sup> To avoid outdated website domain references in the regulations should the domain name change in the future, the Department proposed to use the more general term “Department of Labor-approved website,” which would refer to any official government website the Department approves for posting wage determinations.

The Department received a question from Montana Lines Inc. asking how the location of the Department-approved website would be communicated to contractors. The Department currently publicizes the online location of wage determinations, SAM, in various resource materials (fact sheets, frequently asked questions, and WHD’s PWRB) and in multiple prominent locations on the Department’s website. Promptly following publication of this final rule, WHD will update the PWRB and other resources to refer to the SAM website. Should there be a change in domain, the Department would announce such change and make changes to appropriate materials and websites. The Department believes that

such an approach is preferable to codifying the website location in regulatory text that can become outdated if the location changes.

HarringtonMitova LLC requested that the Department make all DBRA relevant information, presumably including wage determinations, accessible from a single website. The Department notes that while this specific proposal is beyond the scope of this rulemaking, WHD’s website contains extensive, well-organized materials regarding the DBRA, including information regarding Davis-Bacon wage surveys and compliance principles, and that general wage determinations are available through a single, government-wide website (specifically SAM, the official website of the U.S. Government for the Federal award process) for the ease and convenience of the contracting community. NFIB commented that the website for viewing wage determinations should be “at no cost and without any condition of access such as registration, a unique identifier, or submission of any information.” NFIB also suggested that such language be added to § 1.5(a). SAM, the current website, is an improved and streamlined government-wide website administered by GSA that integrates multiple online systems used for awarding and administering Federal financial assistance and contracts. Access to search or obtain wage determinations on this website is free and does not require registration or the submission of any information other than the details of the wage determination being requested (project location and/or construction type). The Department intends to maintain these features in the future and does not believe it is necessary to codify them in the regulations.

The UA commented that the proposal does not substantively alter the practice for publication of wage determinations and suggested that the Department require the applicable wage determination(s) for a specific project, as well as any conformances that were granted for the project, to be published online. Although the Department appreciates this suggestion, it is beyond the scope of the current rulemaking, which did not address whether to require the online publication of the specific wage determinations and conformances applicable to each particular DBRA-covered project. The Department also notes that interested parties such as contracting agencies and contractors should be able to identify the wage determination that applies to a given project, as such wage determinations are included in the contract documents, and that 29 CFR

<sup>159</sup> “WDOL.gov Decommissioning Approved by IAE Governance: System Set to Transition to beta.SAM.gov on June 14, 2019,” GSA Interact (May 21, 2019), <https://interact.gsa.gov/blog/wdolgov-decommissioning-approved-iae-governance-system-set-transition-betasamgov-june-14-2019>.

<sup>160</sup> About This Site, System for Award Management, <https://sam.gov/content/about/this-site>.

5.5(a)(1)(i) already requires contractors and subcontractors to post wage determinations, including conformed classifications and wage rates, in a prominent and accessible place at the site of the work where it can be easily seen by the workers.

The final rule therefore adopts this change as proposed.

xi. Appendices A and B to Part 1

The Department proposed to remove Appendices A and B to 29 CFR part 1 and make conforming technical edits to sections that reference those provisions. Appendix A lists statutes related to the Davis-Bacon Act that require the payment of wages at rates predetermined by the Secretary of Labor, and Appendix B lists local offices of the WHD. As the Department explained in the NPRM, these appendices are no longer current and updated information contained in both appendices can be found on WHD's website at <https://www.dol.gov/agencies/whd/>. Specifically, a listing of statutes requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act can be found at <https://www.dol.gov/agencies/whd/government-contracts>, and a listing of WHD local offices can be found at <https://www.dol.gov/agencies/whd/contact/local-offices>.

The Department received one comment in response to this proposal. The UA supported the Department's approach, stating that outdated information presents problems, such as suggesting a narrower scope of Davis-Bacon coverage (Appendix A), or directing potential complainants to incorrect resources (Appendix B). The Department agrees and adopts this change as proposed.

xii. Frequently Conformed Rates

The Department proposed to revise §§ 1.3 and 5.5 to provide that, where WHD has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted, WHD nonetheless may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that the three basic criteria for conformance of a classification and wage and fringe benefit rate have been satisfied: (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. The Department specifically proposed that the wage and fringe benefit rates for these classifications be determined in accordance with the "reasonable relationship" criterion that is currently used in conforming missing classifications pursuant to current 29 CFR 5.5(a)(1)(ii)(A). The Department welcomed comments regarding all aspects of this proposal.

WHD determines DBA prevailing wage rates based on wage survey data that contractors and other interested parties voluntarily provide. See 29 CFR 1.1–1.7. When WHD receives robust participation in its wage surveys, it is able to publish wage determinations that list prevailing wage rates for numerous construction classifications. However, in some instances survey participation may be limited, particularly in surveys for residential construction or in rural areas, thereby preventing WHD from receiving sufficient wage data to publish prevailing wage rates for various classifications generally necessary for a particular type of construction.

When a wage determination lacks a wage rate for a classification of work that is necessary for performance of DBA-covered construction, the missing classification and an appropriate wage rate must be added to the wage determination on a contract-specific basis through the conformance process. Conformance is the process by which a classification and wage and fringe benefit rate are added to an existing wage determination applicable to a specific DBA-covered contract. See 29 CFR 5.5(a)(1)(ii)(A). When, for example, a wage determination lists only certain skilled classifications such as carpenter, plumber, and electrician (because they are the skilled classifications for which WHD received sufficient wage data through its survey process), the conformance process is used at the request of a contracting agency to provide a contractor that has been awarded a contract with minimum wage rates for other necessary classifications (such as, in this example, painters and bricklayers).

"By design, the Davis-Bacon conformance process is an expedited proceeding created to 'fill in the gaps'" in an existing wage determination, with the "narrow goal" of establishing an appropriate wage rate for a classification needed for performance of the contract. *Am. Bldg. Automation, Inc.*, ARB No. 00–067, 2001 WL 328123, at \*3 (Mar. 30, 2001). As a general matter, WHD is given "broad discretion" in setting a conformed wage rate, and the Administrator's decisions "will be

reversed only if inconsistent with the regulations, or if they are unreasonable in some sense[.]" *Millwright Loc. 1755*, ARB No. 98–015, 2000 WL 670307, at \*6 (May 11, 2000) (internal quotations and citations omitted). See, e.g., *Constr. Terrebonne Par. Juvenile Justice Complex*, ARB No. 17–0056, 2020 WL 5902440, at \*2–4 (Sept. 4, 2020) (reaffirming the Administrator's "broad discretion" in determining appropriate conformed wage rates); *Courtland Constr. Corp.*, ARB No. 17–074, 2019 WL 5089598, at \*2 (Sept. 30, 2019) (same).

The regulations require the following criteria be met for a proposed classification and wage rate to be conformed to a wage determination: (1) the work to be performed by the requested 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 proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates in the wage determination. See 29 CFR 5.5(a)(1)(ii)(A).

Pursuant to the first conformance criterion, WHD may approve a conformance request only where the work of the proposed classification is not performed by any classification on the wage determination. WHD need not "determine that a classification in the wage determination actually is the prevailing classification for the tasks in question, only that there is evidence to establish that the classification actually performs the disputed tasks in the locality." *Am. Bldg. Automation*, 2001 WL 328123, at \*4. Even if workers perform only a subset of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate. See, e.g., *Fry Bros. Corp.*, WAB No. 76–06, 1977 WL 24823, at \*6 (June 14, 1977). In instances where the first and second conformance criteria are satisfied and it has been determined that the requested classification should be added to the contract wage determination, WHD will address whether the third criterion has also been satisfied, i.e., whether "[t]he proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates" in the wage determination.

WHD typically receives thousands of conformance requests each year. In some instances, including instances where contractors are unaware that the work falls within the scope of work performed by an established

classification on the wage determination, WHD receives conformance requests where conformance plainly is not appropriate because the wage determination already contains a classification that performs the work of the proposed classification. In other instances, however, conformance is necessary because the applicable wage determination does not contain all of the classifications that are necessary to complete the project. The need for conformances due to the absence of necessary classifications on wage determinations reduces certainty for prospective contractors in the bidding process, who may be unsure of what wage rate must be paid to laborers and mechanics performing work on the project, and taxes WHD's resources. Such uncertainty may cause contractors to underbid on construction projects and subsequently pay less than the required prevailing wage rates to workers.

To address this issue, the Department proposed to revise 29 CFR 1.3 and 5.5(a)(1) to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process. Under this proposal, for key classifications or other classifications for which conformance requests are regularly submitted,<sup>161</sup> the Administrator would be authorized to list the classification on the wage determination along with wage and fringe benefit rates that bear a "reasonable relationship" to the prevailing wage and fringe benefit rates contained in the wage determination, using essentially the same criteria under which such classifications and rates are currently conformed by WHD pursuant

to current § 5.5(a)(1)(ii)(A)(3). In other words, for a classification for which conformance requests are regularly submitted, and for which WHD received insufficient data through its wage survey process, WHD would be expressly authorized 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 those classifications of work. WHD would list such classifications and wage and fringe benefit rates on wage determinations where: (1) the work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (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 prevailing wage rates contained in the wage determination. The Administrator would establish wage rates for such classifications in accordance with proposed § 5.5(a)(1)(iii)(A)(3). Contractors would be required to pay workers performing work within such classifications at no less than the rates listed on the wage determination. Such classifications and rates on a wage determination would be designated with a distinct term, abbreviation, or description to denote that they essentially reflect pre-approved conformed rates rather than prevailing wage and fringe benefit rates that have been determined through the Davis-Bacon wage survey process.

These rates would apply to the applicable classification without the need to submit a conformance request in accordance with current § 5.5(a)(1)(ii)(A)–(C). However, if a contracting agency, contractor, union, or other interested party has questions or concerns about how particular work should be classified—and, specifically, whether the work at issue is performed by a particular classification included on a wage determination (including classifications listed pursuant to this proposal) as a matter of local area practice or otherwise, the contracting agency should submit a conformance request in accordance with § 5.5(a)(1) or seek guidance from WHD pursuant to 29 CFR 5.13. Moreover, under the proposal, contracting agencies would still be required to submit conformance requests for any needed classifications not listed on the wage determination, which would be approved, modified, or disapproved as warranted after award of the contract, as required by the

regulatory provisions applicable to conformance requests.

The Department also proposed to add language to § 5.5(a)(1) to state that the conformance process may not be used to split or subdivide classifications listed in the wage determination, and that conformance is appropriate only where the work which a laborer or mechanic performs under the contract is not within the scope of any classification listed on the wage determination, regardless of job title. This language reflects the principle that conformance is not appropriate when the work of the proposed classification is already performed by a classification on the wage determination. *See* 29 CFR 5.5(a)(1)(ii)(A)(1). Even if workers perform only some of the duties of a classification, they are still performing work that is covered by the classification, and conformance of a new classification thus would be inappropriate. *See, e.g., Fry Bros. Corp.*, WAB No. 76–06, 1977 WL 24823, at \*6 (contractor could not divide carpentry work between carpenters and carpenter tenders in order to pay a lower wage rate for a portion of the work; under the DBA, it is not permissible to divide the work of a classification into several parts according to the contractor's assessment of each worker's skill and to pay for such division of the work at less than the specified rate for the classification). The proposed regulatory language is also in line with the principle that WHD must base its conformance decisions on the work to be performed by the proposed classification, not on the contractor's own classification or perception of the workers' skill. *See* 29 CFR 5.5(a)(1)(i) ("Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits . . . for the classification of work actually performed, without regard to skill . . ."); *see also, e.g., Tele-Sentry Sec., Inc.*, WAB No. 87–43, 1987 WL 247062, at \*7 (Sept. 11, 1987) (workers who performed duties falling within the electrician classification must be paid the electrician rate regardless of the employer's classification of workers as laborers). The Department encouraged comments on this proposal.

The Department also proposed to make non-substantive revisions to current § 5.5(a)(1)(ii)(B) and (C) to more clearly describe the conformance request process, including by providing that contracting officers should submit the required conformance request information to WHD via email using a specified WHD email address.

The Department also proposed changes relating to the publication of

<sup>161</sup> As explained in WHD's PWRB, WHD has identified several "key classifications" normally necessary for one of the four types of construction (building, highway, heavy, and residential) for which WHD publishes general wage determinations. *See supra* note 19, Davis-Bacon Surveys at 6. The PWRB contains a table that lists the key classifications for each type of construction. The table, which may be updated periodically as warranted, currently identifies the key classifications for building construction as heat and frost insulators, bricklayers, boilermakers, carpenters, cement masons, electricians, iron workers, laborers (common), painters, pipefitters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, tile setters, and truck drivers; the key classifications for residential construction as bricklayers, carpenters, cement masons, electricians, iron workers, laborers (common), painters, plumbers, power equipment operators (operating engineers), roofers, sheet metal workers, and truck drivers; and the key classifications for heavy and highway construction as carpenters, cement masons, electricians, iron workers, laborers (common), painters, power equipment operators (operating engineers), and truck drivers. *Id.*

rates for frequently conformed classifications. The Department's proposed changes to this paragraph are discussed in section III.B.1.xii ("Frequently conformed rates"), together with proposed changes to § 1.3.

The Department also proposed to add language to the contract clauses at § 5.5(a)(1)(vi), (a)(6), and (b)(4) requiring the payment of interest on any underpayment of wages or monetary relief required by the contract. This language is consistent with and would be subject to the proposed discussion of interest in 29 CFR 5.10 (Restitution, criminal action), which requires that calculations of interest be carried out at the rate specified by the Internal Revenue Code for underpayment of taxes and compounded daily.

#### (A) Discussion of Comments

A number of contractors, unions, industry trade associations, and elected officials expressed support for the proposed change. *See, e.g.,* Braswell DM; International Brotherhood of Electrical Workers (IBEW); NABTU; SMACNA; several members of the U.S. House of Representatives from Illinois. Many unions, associations, and individual commenters stated that proactively adding "missing classifications to wage determinations using existing standards under the conformance process, will guard against abuses, and enhance predictability in bidding." International Union of Bricklayers and Allied Craftworkers; *see also* West Central Illinois Building and Construction Trades Council. Many of these same commenters also stated that the Department's proposal is in line with Congressional intent to preserve key craft classifications, quoting the admonition in *Fry Brothers* that there would be little left of the Davis-Bacon Act if contractors were permitted to "classify or reclassify, grade or subgrade traditional craft work" as they wished. WAB No. 76-06, 1977 WL 24823, at \*6. Many commenters also voiced concern that unscrupulous contractors frequently subdivide classifications listed on wage determinations under the current system in order to fabricate low wage subclassifications. *See, e.g.,* Affiliated Construction Trades Foundation. In expressing support for the Department's proposal, these commenters stated that proactively adding missing classifications to wage determinations when survey data is insufficient will help guard against such abuse.

III-FFC highlighted that "[p]re-approving frequently conformed rates will significantly improve a process that otherwise causes unnecessary delay and

is an inefficient use of WHD resources." They also stated that the Department's proposal "will significantly improve the conformance process to the benefit of all parties involved with Davis-Bacon covered projects." The Department agrees.

Several commentors agreed with the proposed changes but also offered suggestions for improvement. The Related Urban Development Group suggested that classifications for which conformance requests are regularly submitted "should more closely reflect industry standards," and said, for example, that glazing/windows, when delivered to a worksite, should be installed by carpenters and not glaziers. The Department notes that all relevant factors, including local area practice, are considered when resolving questions regarding the type of work performed by a classification. The Department reiterates that if a contracting agency, contractor, union, or other interested party has questions or concerns about how particular work should be classified—and, specifically, whether the work at issue is performed by a particular classification included on a wage determination (including classifications listed pursuant to this regulatory revision) as a matter of local area practice or otherwise—the contracting agency should submit a conformance request in accordance with § 5.5(a)(1) or seek guidance from WHD pursuant to 29 CFR 5.13.

AWHA encouraged the Department to identify in wage determinations which classifications and wage rates were pre-approved. The Department stated in the NPRM that such classifications and rates on a wage determination would be designated with a distinct term, abbreviation, or description to denote that they essentially reflect pre-approved conformed rates rather than prevailing wage and fringe benefit rates that have been determined through the Davis-Bacon wage survey process. AWAHA also urged the Department to "set a clear timeline for responding to the contracting entity" in cases where there is no pre-approved conformance and the Department still must respond to a conformance request. The Department notes that current 29 CFR 5.5(a)(1)(ii)(C) (which is being recodified at 29 CFR 5.5(a)(1)(iii)(C)) already states that the Administrator, or an authorized representative, will issue a determination within 30 days of receipt or will notify the contracting officer within the 30-day period if additional time is necessary.

While generally supportive of the Department's proposal, the International Union of Elevator Constructors (IUEC)

misinterpreted the Department's proposal to apply only to classifications that are considered a "key classification," *i.e.*, one that is "normally necessary for one of the four types of construction." Based on this misinterpretation, IUEC requested the Department acknowledge elevator mechanic as a "key classification" for at least building construction. As noted in its proposal, adding pre-approved classifications to wage determinations is not limited to "key classifications." Rather, the Department's proposal also encompassed other classifications for which conformance requests are regularly submitted.

AGC agreed that the proposal to include frequently conformed rates in wage determinations constituted a "logical preemptive action by the Department to provide contractors more information upfront in the contract bidding and award process." AGC, however, encouraged the Department to revise its wage survey process to increase the "collection of accurate utilizable wage data" through increased survey participation.

Several commentors generally supported the revisions to §§ 1.3(f) and 5.5(a)(1)(ii) and requested stakeholder involvement prior to implementation. LIUNA, for example, requested that pre-approved conformed rates not be designated unless stakeholders have an opportunity in advance to provide input to WHD. COSCDA similarly encouraged WHD to involve stakeholders and suggested a pilot or trial development on a smaller scale to help address any issues ahead of a wider launch. Other commenters requested additional clarification on the precise methodology that would be employed for pre-approving certain conformed classifications and wage rates. The FTBA asked whether the Department would set rates based on previously conformed rates and "whether or how conformed rates would be updated on wage determinations." SMART and SMACNA suggested adopting safeguards to ensure that the pre-approval process does not result in the "deskilling" of highly skilled trades. SMART and SMACNA proposed to include a prohibition (similar to proposed § 5.5(a)(1)(B)) against using the pre-approval process to split or subdivide classifications in § 1.3(f). SMART and SMACNA, while noting that AAM 213 was an improvement in WHD's administration of conformances, cautioned that WHD's use of an "overly broad 'skilled crafts' category advantages some trades and disadvantages others depending upon the relative skill levels of individual

trades.” Concerned that AAM 213 does not accurately address the disparity in skill sets among skilled crafts, SMART and SMACNA recommended the regulatory text be revised to explicitly require WHD to determine which classification already listed in the wage determination is “most comparable in terms of skill” to the class of employee being conformed.

As stated in the NPRM, the Department will ensure that (1) the work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined; (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 prevailing wage rates contained in the wage determination. The Administrator would establish wage rates for such classifications in accordance with proposed § 5.5(a)(1)(iii)(A)(3).

The Department believes that the conformance process, including the reasonable relationship process already discussed in detail in AAM 213 and in other publicly available resource materials, is responsive to the concerns commenters raised. AAM 213 states that “to determine a ‘reasonable relationship,’ the requested additional classification is compared to the classifications on the applicable wage determination within the same category.” AAM 213 illustrates that a “proposed skilled craft classification is compared to skilled classifications in the wage determination; a proposed laborer classification is compared to existing laborer classifications; a proposed power equipment operator classification is compared to existing power equipment operator classifications; and a proposed truck driver classification is compared to existing truck driver classifications.” AAM 213 further clarifies that when considering a conformance request for a skilled classification, WHD generally considers the entirety of the rates for the skilled classifications on the applicable wage determination and looks to where the proposed wage rate falls within the rates listed on the wage determination. AAM 213 notes that whether the wage rates in the applicable category (skilled craft, laborer, power equipment operator, truck driver, etc.) in the wage determination are predominantly union prevailing wage rates or predominantly weighted average wage rates should be considered when proposing rates for an additional classification. For example, if a wage determination contains predominantly union prevailing wage

rates for skilled classifications, it typically would be appropriate to look to the union sector skilled classifications in the wage determination and the rates for those classifications when proposing a wage rate for the additional classification. Conversely, if a wage determination contains predominantly weighted average wage rates for skilled classifications, it typically would be appropriate to look to the weighted average/non-union sector skilled classifications in the wage determination and the rates for those classifications when proposing a wage rate for the additional classification. The Department believes that the process for determining reasonable relationship is sufficiently explained in existing materials and does not need to be expanded in the regulation, particularly since the ARB has repeatedly affirmed WHD’s application of AAM 213. *See System Tech, Inc.*, ARB No. 2020–0029, at \*4 (ARB May 25, 2021); *Constr. Terrebbonne Par. Juvenile Justice Complex*, ARB No. 2017–0056, 2020 WL 5902440, at \*2; *Courtland Construction Corp.*, ARB No. 17–074, 2019 WL 5089598, at \*2; *Velocity Steel, Inc.*, ARB No. 16–060 (ARB May 29, 2018). Additional clarification, if needed, will be through subregulatory guidance.

Similarly, although the Department does not plan to implement this regulatory change on a pilot or trial basis, or to provide for stakeholder review of pre-approved conformed wage rates before they are issued, the Department will be available to respond to questions and concerns regarding particular rates, and interested parties may also challenge particular classifications pursuant to 29 CFR 1.8 and/or seek a formal response to questions or concerns regarding conformed wage rates pursuant to 29 CFR 5.13. In response to SMART and SMACNA’s specific concerns about the potential subdivision of classifications, the Department notes that classification decisions will be made in accordance with relevant legal precedent and subregulatory guidance, including the decision in *Fry Brothers* and other precedent regarding classification and subregulatory guidance such as AAM 213. The Department thus declines SMART and SMACNA’s proposal to revise the regulatory text to explicitly require WHD to determine which classification already listed in the wage determination is “most comparable in terms of skill” to the class of employee being conformed; rather, determinations of the appropriate wage rate will be made in accordance with currently

established principles, including those reflected in the existing conformance regulations, as revised by this rule, and AAM 213 and similar guidance.

The IEC opposed the proposal, contending that “this change eliminates contractors’ rights to dispute a proposed classification and wage rate, currently found at 29 CFR 5.5(a)(1)(ii)(C).” Although the dispute mechanism cited by the IEC will not apply to pre-approved classifications and wage rates, the Department notes that, as reflected above, interested parties have the right to dispute these classifications and wage rates prior to contract award pursuant to 29 CFR 1.8.

CC&M did not state whether they supported or opposed adding conformed rates to wage determinations, but they provided suggestions on how to improve the conformance process and related matters. In particular, this commenter proposed that contractors seeking a conformance be required to submit scopes of work and backup documentation relating to wage and fringe benefits proposed; that contractors should be allowed to apply a wage classification and rate from one wage determination to another type of work without submitting a conformance when multiple wage determinations are applicable to a project; and that contractors should be allowed to adopt conformed wage rates from the same county that are contained in a different determination, presumably including from wage determinations that are not included in the DBRA-covered contract. The Department is not adopting such suggestions, which could be viewed as beyond the scope of this rulemaking, as they would require regulatory changes that were not proposed, and which are contrary to established procedures and requirements applicable to conformed classifications and wage rates, including the settled principle that a contractor “may not rely on a wage determination granted to another party regardless of the similarity of the work in question” and also may not prospectively rely on WHD’s prior approval of conformed classifications and rates for application to a different contract performed at the same location. *E&M Sales, Inc.*, WAB No. 91–17, 1991 WL 523855, at \*2–3 (Oct. 4, 1991); *see also Inland Waters Pollution Control, Inc.*, WAB No. 94–12, 1994 WL 596585, at \*5 (Sept. 30, 1994). As for CC&M’s separate proposal that “once a conformance is granted, it could be included in the next update for the prevailing wage determination in that particular jurisdictional area,” the Department notes that the conformance-related regulatory change it is adopting concerns only classifications for which



conformance requests are frequently occurring, not all conformance requests. In certain instances, where conformance requests pertaining to a classification are sufficiently recurring, WHD may in fact publish a pre-approved conformed wage rate on the next modification of a particular wage determination.

In opposition to the Department's proposal, ABC stated that the Department can better meet its objectives in §§ 1.3 and 5.5(a)(1) by calculating missing prevailing wage rates using BLS data and using statistical modeling. The Department has explained in section III.B.1.ii.A.1 why the Department declines to use BLS data to determine prevailing wages. For the same reasons, using BLS data to determine a reasonable relationship to rates on the wage determination is inappropriate.

The Department does not believe additional language or further changes are necessary and the final rule adopts § 5.5(a)(1)(ii) and new § 1.3(f) as proposed.

## 2. 29 CFR Part 3

“Anti-kickback” and payroll submission regulations under section 2 of the Act of June 13, 1934, as amended, 40 U.S.C. 3145, commonly known as the Copeland Act, are set forth in 29 CFR part 3. This part details the obligations of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered by the Davis-Bacon labor standards; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

### i. Corresponding Edits to Part 3

The Department proposed multiple revisions to various sections in part 3 to update language and ensure that terms are used in a manner consistent with the terminology used in 29 CFR parts 1 and 5, update websites and contact information, and make other similar, non-substantive changes. The Department also proposed conforming edits to part 3 to reflect proposed changes to part 5, such as revising § 3.2 to clarify existing definitions or to add new defined terms also found in parts 1 and 5. The Department similarly proposed to change certain requirements associated with the submission of certified payrolls to conform to changes made to the recordkeeping requirements in § 5.5(a)(3).

To the extent that those proposed changes were substantive, the changes,

and any comments associated with them, are discussed below in §§ 5.2 and 5.5. The Department did not receive any comments regarding the incorporation of conforming changes to part 3. Accordingly, the Department adopts these changes as proposed, along with additional conforming changes to reflect revisions to corresponding language in part 5 in the final rule.

The Department requested comment on whether it should further consolidate and/or harmonize the definitions in §§ 1.2, 3.2, and 5.2 in a final rule, such as by placing all definitions in a single regulatory section applicable to all three parts. The Department received one comment in support of such a change. UBC noted that many of the same words and phrases are defined similarly across the different parts and supported consolidating the sections. UBC further noted in their comment that harmonizing the definitions will “benefit understanding and application of the rule by the regulated community and will thus decrease implementation costs.” The Department appreciates UBC’s input on this issue but declines to make this change at this time. While the Department received many comments specifically in response to proposed revisions to defined terms, no other commenters expressed support for consolidating all definitions in a single regulatory section. Particularly in the absence of any indication from other commenters that consolidating all definitions in a single section would be preferable to setting forth the relevant definitions at the beginning of each of the key parts of the DBRA’s implementing regulations, the Department believes that the regulated community will find it helpful to have the relevant definitions set forth at the beginning of parts 1, 3, and 5. Accordingly, the Department will maintain definitions in §§ 1.2, 3.2, and 5.2.

The Department also proposed to remove § 3.5(e) regarding deductions for the purchase of United States Defense Stamps and Bonds, as the Defense Stamps and Bonds are no longer available for purchase. Similarly, the Department proposed to simplify the language regarding deductions for charitable donations at § 3.5(g) by eliminating references to specific charitable organizations and instead permitting voluntary deductions to charitable organizations as defined by 26 U.S.C. 501(c)(3). The Department received no comments on these proposals. The final rule therefore adopts these changes as proposed.

Finally, the Department proposed to add language to § 3.11 explaining that

the requirements set forth in part 3 are considered to be effective as a matter of law, whether or not these requirements are physically incorporated into a covered contract, and cross-referencing the proposed new language discussing incorporation by operation of law at § 5.5(e). These proposed changes, and the comments related to them, are discussed further in the sections on operation-of-law.

## 3. 29 CFR Part 5

The regulations at 29 CFR part 5 establish rules providing for the payment of minimum wages, including fringe benefits, to covered workers engaged in construction activity covered by the Davis-Bacon and Related Acts, as well as establishing rules for the enforcement of these prevailing wage obligations. The regulations at this part also set forth contract clauses to be included in all covered contracts that specify contractors’ prevailing wage and other obligations on such contracts.

### i. Section 5.1 Purpose and Scope

The Department proposed minor technical revisions to § 5.1 to update statutory references and delete the listing of laws requiring Davis-Bacon labor standards provisions, given that any such list inevitably becomes out-of-date due to statutory revisions and the enactment of new Related Acts. In lieu of this listing in the regulation, the Department proposed to add new paragraph (a)(1) to refer to the current WHD website (<https://www.dol.gov/agencies/whd/government-contracts>) or its successor website on which a listing of laws requiring Davis-Bacon labor standards provisions is currently found and regularly updated.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

### ii. Section 5.2 Definitions

(C) Agency, Agency Head, Contracting Officer, Secretary, and Davis-Bacon Labor Standards

The Department proposed to revise the definitions of “agency head” and “contracting officer” and to add a definition of “agency” to reflect more clearly that State and local agencies enter into contracts for projects that are subject to the Davis-Bacon labor standards and that they allocate Federal assistance they have received under a Davis-Bacon Related Act to sub-recipients. These proposed definition changes also were intended to reflect that, for some funding programs, the responsible Federal agency has delegated administrative and

enforcement authority to states or local agencies. When the existing regulations referred to the obligations or authority of agencies, agency heads, and contracting officers, they were referring to Federal agencies and Federal contracting officers. However, as noted above, State or local agencies and their agency heads and contracting officers exercise similar authority in the administration and enforcement of Davis-Bacon labor standards. Because the existing definitions defined “agency head” and “contracting officer” as particular “Federal” officials or persons authorized to act on their behalf, which did not clearly reflect the role of State and local agencies in effectuating Davis-Bacon requirements, including by entering into contracts for projects subject to the Davis-Bacon labor standards and inserting the Davis-Bacon contract clauses in such contracts, the Department proposed to revise these definitions to reflect the role of State and local agencies. The proposed revisions also enabled the regulations to specify the obligations and authority held by both State or local and Federal agencies, as opposed to obligations that are specific to one or the other.

The Department received no comments on this proposal. The final rule therefore adopts these changes as proposed.

The Department also proposed to define the term “Federal agency” as a sub-definition of “agency” to distinguish those situations where the regulations refer specifically to an obligation or authority that is limited solely to a Federal agency that enters into contracts for projects subject to the Davis-Bacon labor standards or allocates Federal assistance under a Davis-Bacon Related Act.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

The Department also proposed to add the District of Columbia to the definition of “Federal agency.” The DBA states in part that it applies to every contract in excess of \$2,000, to which the Federal Government “or the District of Columbia” is a party. *See* 40 U.S.C. 3142(a). As described above, Reorganization Plan No. 14 of 1950 authorizes the Department to prescribe regulations to ensure that the Act is implemented in a consistent manner by all agencies subject to the Act. *See* 15 FR 3176, 5 U.S.C. app. 1. Accordingly, the proposed change to the definition of “Federal agency” in § 5.2 clarified that the District of Columbia is subject to the DBA and the regulations implemented by the Department pursuant to

Reorganization Plan No. 14 of 1950.<sup>162</sup> The proposed change was also consistent with the definition of “Federal agency” in part 3 of this title, which specifically includes the District of Columbia. *See* 29 CFR 3.2(g). The proposed change simply reflected the DBA’s applicability to the District of Columbia and was not intended to reflect a broader or more general characterization of the District of Columbia as a Federal Government entity.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

The Department also proposed a change to the definition of “Secretary” to delete a reference to the Deputy Under Secretary for Employment Standards. As noted, the Employment Standards Administration was eliminated in a reorganization in 2009, and its authorities and responsibilities were devolved into its constituent components, including WHD.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

Lastly, the Department proposed a minor technical edit to the definition of “Davis-Bacon labor standards” that reflected proposed changes to § 5.1, discussed above. The Department also made a clarifying, non-substantive change to the term “labor standards” by calling that term “Davis-Bacon labor standards.”

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

#### (B) Building or Work

##### (1) Energy Infrastructure and Related Activities

The Department proposed to modernize the definition of the terms “building or work” by including solar panels, wind turbines, broadband installation, and installation of electric car chargers to the non-exclusive list of construction activities encompassed by the definition. These proposed additions to the definition were clarifications intended to reflect the significance of energy infrastructure and related projects to modern-day

construction activities subject to the Davis-Bacon and Related Acts, as well as to illustrate the types of energy-infrastructure and related activities that are encompassed by the definition of “building or work.”

The Department received multiple comments on these proposed additions, several of which favored the proposed language. III–FFC strongly supported the proposal, stating that the inclusion of energy infrastructure projects on the non-exclusive list of examples of buildings or works ensures that Davis-Bacon definitions more accurately reflect the modern construction industry and will help ensure that workers on such projects will receive Davis-Bacon prevailing wages when applicable. SMART noted that the proposed additions will make it clear to the regulated community that such projects are considered buildings or work, thereby preventing potential litigation. LIUNA stated that this clarification will be helpful as Federal funding for such construction, generally performed by construction workers, has been increasing in recent years. Three LIUNA local chapters also commented that the proposed language was a useful clarification of coverage, as did the Alaska District Council of Laborers. The NCDCL also noted that the proposed clarifications were consistent with long-standing policy and that such projects were clearly construction work.

In contrast, other commenters opposed the proposed additions. ABC stated that the proposed language expanded coverage to green energy projects, creating a large administrative burden for developers and small contractors that would in turn inhibit the construction of such projects. In support of their claim, they cited to a 2010 GAO report and a 2010 U.S. Department of Energy (DOE) OIG report, stating that both reports indicated that the expansion of Davis-Bacon coverage to green energy and weatherization projects due to American Reinvestment and Recovery Act of 2009 (ARRA) funding delayed construction of such projects and increased costs.<sup>163</sup> An ABC

<sup>162</sup> The 1973 Home Rule Act, Public Law 93–198, transferred from the President to the District of Columbia the authority to organize and reorganize specific governmental functions of the District of Columbia, but does not contain any language removing the District of Columbia from the Department’s authority to prescribe DBA regulations pursuant to Reorganization Plan No. 14 of 1950.

<sup>163</sup> The GAO report stated that four Federal funding agencies and several State and local funding recipients indicated that because their programs had not previously received any Related Act funding prior to receiving funding to ARRA, they had to establish internal infrastructure and procedures to allow them to handle the large increase in funding and manage the accompanying Davis-Bacon requirements. GAO report “Project Selection and Starts Are Influenced by Certain Federal Requirements and Other Factors.” Feb. 2010. The DOE OIG report indicated that the need to determine prevailing wages for weatherization work and develop guidance for funding sub-

member write-in campaign similarly mentioned the proposed language as one of several changes that they asserted would increase the inflationary effects of prevailing wage requirements and increase the regulatory burden on contractors, as did two individual commenters. CIRT stated that the inclusion of green energy projects within the scope of Davis-Bacon coverage would be beyond the scope of the statute. A comment by the group of members of the U.S. House Committee on Education & Labor also stated that including green energy projects within the definition of building or work would increase the number of small businesses subject to the Davis-Bacon requirements, subjecting such small businesses to additional costs and uncertainty.

After considering these comments, the final rule adopts the revisions as proposed. As noted in the proposed rule, the inclusion of these energy infrastructure projects in the non-exclusive list of examples of a building or work simply provides clarification that such projects are among the types of buildings or works that may be covered by the DBRA, and therefore that Federal or federally assisted construction of these projects will be subject to Davis-Bacon prevailing wage requirements when all other requirements are met, including that the work is pursuant to a Federal contract under the DBA or federally funded under a Related Act, that the project is for construction, prosecution, completion, and/or repair, and that the work is performed by laborers and mechanics and, if required under the relevant statute, is done at the site of the work.

Opposing comments appear to be based on the assumption that such projects were not previously considered to be buildings or works that could be subject to Davis-Bacon coverage, and that the inclusion of these projects as examples of a building or work would expand this definition to previously uncovered energy projects. However, this is an inaccurate presumption, as such projects already clearly fit within the existing definition of a building or work, which includes “without limitation, buildings, structures, and improvements of all types.” The GAO and DOE OIG reports cited by ABC clearly show that energy infrastructure projects are already understood to be within the existing definition of building or work. For example, ARRA did not change the definition of

building or work; rather, it was a Related Act that provided that projects funded under its provisions, including various improvements to energy infrastructure, are covered by the Davis-Bacon labor standards. *See* ARRA sec. 406, 1606. Likewise, a number of other Related Acts cover government-funded energy projects,<sup>164</sup> and the existing regulation’s inclusion of projects such as dams, plants, power lines, and heavy generators makes clear that “building or work” has long included the construction of energy infrastructure projects. Because those energy infrastructure projects already were buildings or works under the existing definition, the additional Related Act funding triggered Davis-Bacon prevailing wage requirements for these energy infrastructure projects. Had such projects not already fit within the definition of building or work, however, Davis-Bacon prevailing wage requirements would not have applied. Therefore, pursuant to its authority under Reorganization Plan No. 14 of 1950 “to prescribe appropriate standards, regulations, and procedures” for the DBRA and to eliminate any potential confusion as to whether energy infrastructure projects should be considered buildings or works, and to provide some examples of those types of projects in the non-exhaustive list, the final rule retains the proposed language.

#### (2) Coverage of a Portion of a Building or Work

The Department proposed 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. The definition of “building or work” already states that the terms “building” and “work” “generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work,” and includes “without limitation, buildings, structures, and improvements of all types.” 29 CFR 5.2(i). In addition, the regulation already provides several examples of construction activity included within the term “building or work” that do not constitute an entire building, structure, or improvement, such as “dredging, shoring, . . . scaffolding, drilling, blasting, excavating, clearing, and landscaping.” *Id.* Moreover, the current regulations

define the term “construction, prosecution, completion, or repair” to mean “all types of work done on a particular building or work at the site thereof. . . including, without limitation . . . [a]ltering, remodeling, installation . . . ; [p]ainting and decorating.” *Id.* § 5.2(j).

However, to further make plain that “building or work” includes not only construction activity involving an entire building, structure, or improvement, but also construction activity involving a portion of a building, structure, or improvement, or the installation of equipment or components into a building, structure, or improvement, the Department proposed to add a sentence to this definition stating that “[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.” The Department also proposed to include 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.

The Department explained that these proposed revisions are consistent with the Davis-Bacon Act. The concepts of alteration or repair presuppose that only a portion of a building, structure, or improvement will be affected. By specifically including the alteration or repair of public buildings or works within its scope of coverage, the Davis-Bacon Act itself necessitates that construction activity involving merely a portion of a building or work may be subject to coverage.

The Department also noted that these proposed revisions are consistent with the Department’s longstanding policy that a “public building” or “public work” includes construction activity involving a portion of a building or work, or the installation of equipment or components into a building or work when the other requirements for Davis-Bacon coverage are satisfied. *See, e.g.,* AAM 52 (July 9, 1963) (holding that the upgrade of communications systems at a military base, including the installation of improved cabling, constituted the construction, alteration or repair of a public work); Letter from Sylvester L. Green, Dir., Div. of Cont. Standards Operations, to Robert Olsen, Bureau of Reclamation (Mar. 18, 1985) (finding that the removal and

recipients on Davis-Bacon requirements delayed states’ use of ARRA weatherization funding.

<sup>164</sup> *See* <https://www.dol.gov/agencies/whd/government-contracts> (List of Current Davis-Bacon and Related Acts).

replacement of stator cores in a hydroelectric generator was covered under the Davis-Bacon Act as the alteration or repair of a public work); Letter from Samuel D. Walker, Acting Adm'r, to Edward Murphy (Aug. 29, 1990) (stating that "[t]he Department has ruled on numerous occasions that repair or alteration of boilers, generators, furnaces, etc. constitutes repair or alteration of a 'public work'"); Letter from Nancy Leppink, Deputy Adm'r, to Armin J. Moeller (Dec. 12, 2012) (finding that the installation of equipment such as generators or turbines into a hydroelectric plant is considered to be the improvement or alteration of a public work).

The Department further explained that the proposed revisions are consistent with the Department's longstanding position that a "public building" or "public work" may include structures, buildings, or improvements that will not be owned by the Federal government when construction is completed, so long as the construction is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public. Accordingly, the Department has long held that the Davis-Bacon labor standards provisions may apply to construction undertaken when the government is merely going to have the use of the building or work, such as in lease-construction contracts, depending upon the facts and circumstances surrounding the contract. See *Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Admin.'s Lease of Med. Facilities*, 18 Op. O.L.C. 109, 119 n.10 (May 23, 1994) ("1994 OLC Memorandum") ("[T]he determination whether a lease-construction contract calls for construction of a public building or public work likely will depend on the details of the particular arrangement."); FOH 15b07. In AAM 176 (June 22, 1994), WHD provided guidance to the contracting community regarding the DBA's application to lease-construction contracts, and specifically advised that the following non-exclusive list of factors from the 1994 OLC Memorandum should be considered in determining the scope of DBA coverage: (1) the length of the lease; (2) the extent of Government involvement in the construction project (such as whether the building is being built to Government requirements and whether the Government has the right to inspect the progress of the work); (3) the extent to which the construction will be used for private rather than public purposes; (4) the extent to which the costs of

construction will be fully paid for by the lease payments; and (5) whether the contract is written as a lease solely to evade the requirements of the DBA.

In sum, as noted above, the term "building or work" has long been interpreted to include construction activity involving only a portion of a building, structure, or improvement. As also noted above, a public building or public work is not limited to buildings or works that will be owned by the Federal Government, but may include buildings or works that serve the general public interest, including spaces to be leased or used by the Federal Government. Accordingly, it necessarily follows that a contract for the construction, alteration, or repair of a portion of a building, structure, or improvement may be a DBA-covered contract for construction of a "public building" or "public work" where the other requirements for coverage are met, even if the Federal Government is not going to own, lease, use, or otherwise be involved with the construction of the remaining portions of the building or work. For example, as WHD has repeatedly explained in connection with one contracting agency's lease-construction contracts, where the Federal Government enters into a lease for a portion of an otherwise private building—and, as a condition of the lease, requires and pays for specific tenant improvements requiring alterations and repairs to that portion to prepare the space for government occupancy in accordance with government specifications—Davis-Bacon labor standards may apply to the tenant improvements or other specific construction activity called for by such a contract. In such circumstances, the factors discussed in AAM 176 must be considered to determine if coverage is appropriate, but the factors would be applied specifically with reference to the leased portion of the building and the construction required by the lease.

Finally, the Department noted that these proposed revisions would further the remedial purpose of the DBA by ensuring that the Act's protections apply to contracts for construction activity for which the government is responsible. *Walsh v. Schlecht*, 429 U.S. 401, 411 (1977) (reiterating that the DBA "was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects") (citation and internal quotation marks omitted); 1994 OLC Memorandum, 18 Op. O.L.C. at 121 ("[W]here the government is financially responsible for construction costs, the purposes of the Davis-Bacon Act may be

implicated."). If the Davis-Bacon Act were only applied in situations where the Federal Government is involved in the construction of the entire (or even the majority of the) building or work, coverage of contracts would be dependent on the size of the building or work, even if two otherwise equivalent contracts involved the same square footage and the government was paying for the same amount of construction. Such an application of coverage would undermine the statute's remedial purpose by permitting publicly funded construction contracts for millions of dollars of construction activity to evade coverage merely based on the size of the overall structure or building.

Accordingly, and as noted above, the Department proposed revisions to the definitions of "building or work" and "public building or public work" that served to clarify rather than change existing coverage requirements. However, the Department recognized that in the absence of such clarity under the existing regulations, contracting agencies have differed in their implementation of Davis-Bacon labor standards where construction activity involves only a portion of a building, structure, or improvement, particularly in the context of lease-construction contracts. Thus, as a practical matter, the proposed revisions would result in broader application of Davis-Bacon labor standards. The Department therefore invited comment on the benefits and costs of these proposed revisions to private business owners, workers, and the Federal Government, particularly in the context of leasing. After consideration of the comments received, for the reasons detailed below, the Department is adopting these proposed revisions in this final rule, with one additional clarification.

Several commenters expressed their general support for the proposed changes, indicating that they agreed that the proposed changes would provide additional clarification of Davis-Bacon coverage. More specifically, IUOE stated that this was an important change that helps bring Davis-Bacon coverage into the 21st century, allowing Davis-Bacon labor standards to continue to apply to public buildings and public works despite the increase in non-traditional funding and contracting methods such as public-private partnerships, complex bond finance schemes, leasing agreements, and other sorts of private involvement in public buildings and works. III-FFC and the UA both noted that the proposed changes would result in Davis-Bacon coverage being more consistently applied to contracts for construction activity for which the

government is responsible. UBC also commented favorably on the proposed changes, noting that they clarify that Davis-Bacon coverage can exist even when the building or work will not be owned by the Federal Government, while also suggesting revising the proposed language in the definition of “public building or public work” to include “the construction, prosecution, completion, *installation of equipment (where appropriate) of components*, or repair. . . .” [proposed addition in *italics*], to harmonize the proposed definition of “public building or public work” with the proposed language for “building or work.”<sup>165</sup>

SMART agreed with the Department that Davis-Bacon coverage should not be determined by the size of the building or work, or portion of the building or work, and stated that the proposed changes would ensure that the entire regulated community would have consistent information as to Davis-Bacon applicability when bidding for government contracts and meeting prevailing wage obligations. SMART also found the legal authority cited in support of the proposed change persuasive, noting that not only did the authority involve the application of Davis-Bacon coverage to portions of a building or work or the installation of equipment, but also that none of the cases considered the fact that the construction only involved a portion of a building or work to be in any way worthy of comment when applying coverage. SMART further agreed that the concept of alteration or repair, included in the DBA itself, pre-supposes that coverage is applicable to a portion of a building or work, pointing out that this position is “fully consistent with decades of interpretations of dozens of work functions and construction activities.” SMART further recommended that the Department amend the proposed definition of building or work to state that “[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work *at a primary construction site or a secondary construction site*” [proposed

addition in *italics*]. SMART stated that this proposed addition would clarify that the installation of equipment or components into a building or work being constructed at another site should be included in determining whether a “significant portion” of the building or work is being constructed at that other site, such that it should be considered a secondary site of work. SMART also requested that the Department add language stating that the proposed definition of “portion” in “building or work,” with no size parameter or limitation, has the same meaning in the definition of the “site of the work,” such that the construction of a “portion,” regardless of size, is covered work whether it takes place on the primary or secondary site.

The Department agrees with the above comments that the changes proposed by the Department codify long-standing principles of Davis-Bacon coverage, will result in a more consistent application of Davis-Bacon coverage, and will support the remedial purpose of the DBA. The Department analyzes the additional regulatory changes proposed by these commenters at the end of this section.

Some commenters disagreed with the Department’s proposal based on assertions that the proposed change conflicts with the decision of the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *District of Columbia v. Dep’t of Labor*, 819 F.3d 444 (D.C. Cir. 2016) (*CityCenterDC*). In particular, ABC stated that the court in *CityCenterDC* “found that lease agreements similar to agreements described in the NPRM did not qualify as ‘contracts for construction’ even though construction was contemplated on portions of buildings pursuant to the lease(s)” and that imposing Davis-Bacon “coverage in the absence of federal funding was unlawful.” AGC similarly asserted that *CityCenterDC* held that the “DBA cannot reasonably be read to cover construction contracts to which the [Federal government] is not a party,” and claimed that the proposed changes would unlawfully eliminate the coverage requirement that the Federal Government must be a party to a contract for construction. NAHB expressed the view that the portion of the existing definition of “public building or public work,” which provides that a public building or work must be “carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public” (emphasis added), was inconsistent with *CityCenterDC*, on the grounds that *CityCenterDC* made clear

that DBA coverage applies to publicly-funded construction projects and/or those which are owned or operated by the government, and not to projects that merely serve the “public interest.”

The Department does not find the comments relating to *CityCenterDC* persuasive. In that case, private developers leased land from the District of Columbia and entered into development agreements under which the land would be used as the site of a new mixed-use development, to include shops, restaurants, a hotel, other private retail business, and private residential units. *CityCenterDC*, 819 F.3d at 447. The developers paid the District of Columbia for the lease of the land, so that money flowed from the developers to the government rather than from the government to the developers. *Id.* The District of Columbia (1) did not provide any funding for the construction of the project, through a lease or any other contractual arrangement, as the developers were leasing from and paying money to the government, (2) would not own or operate any portion of the project upon its completion, and (3) did not propose to occupy any portion of the space or offer any services there. *Id.* On these unusual facts, the D.C. Circuit held that the District did not enter into a contract for construction of the project. *Id.* at 450–51 (explaining that the District entered into contracts that “refer[red] to the eventual construction that *the Developers would pay for*” (emphasis added)); *id.* at 453 (“DC did not expend funds for the construction of *CityCenterDC*. Quite the opposite. The Developers make substantial rental payment to DC”). In reaching this conclusion, the court observed that a finding of Davis-Bacon coverage would constitute a “sudden[] exten[sion]” of the Act. *Id.* at 450. The court therefore explicitly distinguished the *CityCenterDC* situation from various other cases where, over the course of decades, the DBA had been held applicable to leases, because those other cases involved situations where, “unlike [*CityCenterDC*], the Government was the lessee not the lessor, and the leases required construction for which the Government would pay *de facto* through its rental payments.”<sup>166</sup> *Id.* at 450 n.3.

<sup>165</sup> In suggesting this additional regulatory language, UBC indicated that this language was already contained in the Department’s proposed definition of “building or work.” However, the Department’s proposed definition of “building or work”—specifically, the language “*installation (where appropriate) of equipment or components*”—is slightly different than the language proposed by UBC. The Department interprets UBC’s comment as intending to propose that the Department include “*installation (where appropriate) of equipment or components*” in the definition of “public building or public work.”

<sup>166</sup> In distinguishing these cases, the court did not express disagreement with the Department’s longstanding interpretation that a contract is for construction if “more than an incidental amount of construction-type activity is involved in the performance of a government contract.” *Mil. Hous., Fort Drum*, WAB No. 85–16, 1985 WL 167239, at \*4 (Aug. 23, 1985) (determining that contracts to lease housing units for military families that were to be built on private land to the specifications of the Department of the Army were contracts for construction for purposes of the DBA). *See, e.g.,*

Separately from its conclusion that the District did not enter into a contract for construction, the D.C. Circuit determined that *CityCenterDC* was not a covered project for the independent reason that *CityCenterDC* was not a public building or work, stating that a project must at least have either public funding or government ownership or operation to be considered a public building or public work, and that *CityCenterDC* had neither. *Id.* at 451–54.

The proposed changes to the definition of a public building or work, adopted in this final rule, do not eliminate the requirement that the Federal Government enter into a contract for construction for the DBA to be applicable. As reflected not only in the *CityCenterDC* decision but also in the statute itself, coverage under the DBA applies to “every contract in excess of \$2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works.” 40 U.S.C. 3142(a). The requirement that the Federal Government enter into a contract for construction and the requirement that such a contract for construction must be for a public building or public work are two distinct requirements, both of which must be satisfied for the DBA to apply to a contract. The changes to the definitions of “building or work” and “public building or public work” described here simply provide that the construction of a portion of a building or work may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency. These revisions do not eliminate or affect the separate requirement under the DBA that the Federal government enter into a “contract . . . for construction.”

*Phx. Field Off., Bureau of Land Mgmt.*, ARB No. 01–010, 2001 WL 767573, at \*8–9 (June 29, 2001) (concluding that the DBA applied to a lease by the Bureau of Land Management of a building and storage facility to be built for the Bureau’s use); *Crown Point, Ind. Outpatient Clinic*, WAB No. 86–33, 1987 WL 247049, at \*2–3 (June 26, 1987) (holding that Davis-Bacon coverage applied to the Veteran Administration’s lease of an outpatient clinic to be constructed under the terms of the lease), *enforced sub nom., Bldg. & Constr. Trades Dep’t, AFL–CIO v. Turnage*, 705 F. Supp. 5, 6 (D.D.C. 1988). See also, e.g., *Choctawhatchee Elec. Coop., Inc.*, ARB Case No. 2017–0032, 2019 WL 3293926, at \*6 (June 14, 2019) (*CHELCO*) (distinguishing *CityCenterDC* based on its “controversial facts” and affirming WHD Administrator’s determination that an electric utility privatization contract was a “contract for construction” under the DBA where the privatization contract called for significant construction that was at least heavily funded by the Federal government).

Moreover, contrary to commenters’ contentions, *CityCenterDC* did not hold that lease-construction contracts like those discussed in the NPRM are not contracts for construction. As mentioned, the D.C. Circuit explicitly distinguished the *CityCenterDC* development from contracts in which the Federal Government or District of Columbia pays a third party to lease land and requires construction, alteration, or repair as a condition of the lease. *CityCenterDC*, 819 F.3d at 450 & n.3; AAM 222 (Jan. 11, 2017), at 7. Specifically, in *CityCenterDC*, the District of Columbia was leasing land to a private developer that was paying the government to use the land to build a new mixed-use development entirely for private use. There was no agreement that the District of Columbia would own, operate, lease, or even use any portion of the development once completed, and therefore there was no agreement requiring construction of a government-owned, operated or leased portion. In contrast, in the NPRM’s lease-construction agreement example, the Federal Government leases a portion of a building from a private developer or owner—and, as a condition of the lease, requires and pays for specific tenant improvements requiring alterations and repairs to the leased portion to ensure that the space meets the requirements for government occupancy or use.

The Department similarly does not agree that the proposed revisions extend Davis-Bacon coverage to any project involving a portion of a building or work that is in the general public interest. The revised definitions still require the construction, prosecution, completion, or repair of that portion of the building or work to be carried on directly by authority of or with funds of a Federal agency and that the construction of the portion of the building or work serve the interest of the general public.

Nor does the Department agree that maintaining the requirement that construction projects must serve the public interest contradicts the holding in *CityCenterDC*. The D.C. Circuit held that, at minimum, a public building or work must have *either* public funding or government ownership or operation, consistent with the existing definition and the proposed changes. See *CityCenterDC*, 819 F.3d at 452 n.5, 453 n.6 (suggesting that 29 CFR 5.2(k) requires public funding for construction but not government ownership or operation but explicitly noting that the court was not resolving the question of whether either one of the two characteristics was alone sufficient for a

project to be a public work). By stating that the construction of the building or work must serve the general public interest, the definition recognizes that while government ownership or operation is one indication that the building or work serves the public interest sufficiently to be considered a public building or work, a project that receives Federal funding without government ownership or operation may still fulfill a significant need or goal of the relevant Federal agency and serve the general public interest. See AAM 222, at 8; see also *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23, 28 (1942) (holding that a privately-owned library building at Howard University was a public work for purposes of the Miller Act, relying on the definition of “public works” in the National Industrial Recovery Act, Public Law 73–90, 48 Stat. 201 (June 16, 1933)—from which the Department’s regulatory definition is derived—because the project received Federal funding and because the “education of youth in the liberal arts and sciences” fulfills a public interest).

Some commenters also expressed concerns with the proposed changes on grounds that were unrelated to the *CityCenterDC* decision. NAHB noted that the proposed language does not include a threshold for the amount of or degree of work that must be performed to trigger Davis-Bacon requirements for buildings where the construction of a portion of the building is “carried on by authority of . . . a Federal agency to serve the interest of the general public.” NAHB recommended that such a limitation, similar to the “significant portion” language in the existing and proposed “site of the work” definition, be incorporated into the proposed “building or work” definition, or alternatively that the Department should adopt a monetary threshold. NAHB noted that although the proposed changes might be intended to clarify coverage, confusion among contracting agencies may still arise if agencies are inconsistent in their interpretation of the added language regarding Davis-Bacon coverage of portions of a building or work, or misunderstand the other elements of the definition, and that subregulatory interagency guidance therefore may also be needed to address such potential confusion. Commenters participating in a write-in campaign also expressed concern about the applicability of Davis-Bacon requirements to improvements to private buildings or works, with governmental leasing as one of multiple listed items that the commenters

contended would increase regulatory burdens and costs for contractors on projects that have not typically been subject to Davis-Bacon coverage. Such commenters, however, did not express any specific concerns regarding the definitions of “building or work” or “public building or public work.”

The Department also does not agree with NAHB’s assertion that the inclusion of an additional size or dollar threshold in the definition of “public building or public work” is necessary, because the DBA already imposes a dollar threshold for coverage. The revised definition does not alter this threshold, but instead merely clarifies that where the construction of a portion of a building or work is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, that portion of a building or work is a public building or public work to which DBA coverage applies if the Act’s \$2,000 dollar threshold is satisfied. The revised definition does not automatically extend DBA coverage in this scenario to construction not called for in the contract, *i.e.*, of the entire building or work. Nor does it alter the long-standing requirements and analysis needed to determine whether an entire building or work is a public building or public work. In other words, where the government has entered into a contract in excess of \$2,000 for the construction, alteration, or repair of a public building or public work, the contract will be subject to DBA requirements regardless of whether the contract applies only to a portion of a building or work or to an entire building or work. To apply an additional threshold beyond the statutory \$2,000 threshold to contracts for construction of a portion of a building or work would result in the arbitrary exclusion of otherwise-covered contracts from Davis-Bacon coverage.

The Department does not agree with SMART’s suggestion to add language to the regulation stating that the proposed definition of “portion” in “building or work”, without any size parameter or other threshold, has the same meaning as the word “portion” in the term “significant portion” in the existing definition of “site of the work.” The term “portion” is not defined, and the Department simply intends that it be given its ordinary meaning, that is, a part of a whole. However, the final rule specifically defines the term “significant portion” for purposes of the definition of a “secondary construction site.” The final rule explains that “significant portion” is limited to instances where an entire portion or module of a building or work, such as a completed

room or structure, is constructed offsite with minimal construction work remaining. This term is necessarily more limiting than “portion,” and is used in a specific context, and therefore the Department does not believe it would be helpful to insert any language that could be read to suggest that the two terms are equivalent.

The Department also declines to adopt SMART’s suggestion to amend the proposed definition of building or work to state that “[t]he term building or work also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work *at a primary construction site or a secondary construction site*” [proposed addition in *italics*]. Although the Department agrees, as explained above, that the installation of components and equipment into a building or work or portion thereof is construction work, the Department does not believe that it would be appropriate to incorporate references to “site of the work” elements into the definition of “building or work.” This is because the “building or work” requirement applies even under statutes whose application is not limited to the site of the work and so applies to all work performed by laborers and mechanics in the development of a project, as discussed further below.

Finally, the Department agrees with UBC’s suggestion to revise the proposed definition of “public building or public work” to include the installation (where appropriate) of equipment or components in order to harmonize the revised definition of “public building or public work” with the revised definition of “building or work.” As the examples discussed in the NPRM and earlier in this section clearly indicate, installation of equipment or components has long been considered to be covered construction activity, and the Department agrees that including corresponding language in both definitions may clarify that such installation may similarly be considered a public building or work when the other requirements are met. In such circumstances, the installation may be considered a public building or work even where the equipment or components are being installed in a larger structure that may not be a public building or work. For example, where the installation of equipment such as wind turbines or electric car chargers is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public, such installation would be considered a public building or work even where

such installation takes place at a private facility. Similarly, when a Federal agency enters into a long-term lease of office space in an otherwise privately owned and occupied building, and the lease provides for the installation of equipment, at government expense and in accordance with government specifications, in the portion of the building that the Federal Government is leasing and occupying in order to provide public services, the installation of such equipment would be the construction of a public building or public work subject to Davis-Bacon labor standards.

Accordingly, for the reasons discussed, the Department is adopting the proposed definitions of “building or work” and “public building or public work” in this final rule, with one clarification to the definition of “public building or public work,” as explained.

#### (C) Construction, Prosecution, Completion, or Repair

The final rule also adds a new sub-definition to the term “construction, prosecution, completion, or repair” in § 5.2, to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards.

As explained in the proposed rule, in general, the Davis-Bacon labor standards apply to contracts “for construction, alteration or repair . . . of public buildings and public works.” 40 U.S.C. 3142(a). Early in the DBA’s history, the Attorney General examined whether demolition fits within these terms and concluded that “[t]he statute is restricted by its terms to ‘construction, alteration, and/or repair,’” and that this language “does not include the demolition of existing structures” alone. 38 Op. Atty. Gen. 229 (1935). However, the Attorney General expressly distinguished, and declined to decide the question of whether the Davis-Bacon labor standards apply to “a razing or clearing operation provided for in a building contract, to be performed by the contractor as an incident of the building project.” *Id.*

Consistent with the Attorney General’s opinion, the Department has long maintained that standalone demolition work is generally not covered by the Davis-Bacon labor standards. See AAM 190 (Aug. 29, 1998); WHD Opinion Letter SCA–78 (Nov. 27, 1991); WHD Opinion Letter DBRA–40 (Jan. 24, 1986); WHD Opinion Letter DBRA–48 (Apr. 13, 1973); AAM 54 (July 29, 1963); FOH 15d03(a). However, the Department has understood the Davis-Bacon labor standards to cover demolition and removal under certain circumstances.



First, demolition and removal activities are covered by Davis-Bacon labor standards when such activities in and of themselves constitute construction, alteration, or repair of a public building or work. For example, the Department has explained that removal of asbestos or paint from a facility that will not be demolished—even if subsequent reinsulating or repainting is not considered—is covered by Davis-Bacon because the asbestos or paint removal is an “alteration” of the facility. *See* AAM 153 (Aug. 6, 1990). Likewise, the Department has explained that Davis-Bacon labor standards can apply to certain hazardous waste removal contracts, because “[s]ubstantial excavation of contaminated soils followed by restoration of the environment” is “construction work” under the DBA and because the term “landscaping” as used in the DBA regulations includes “elaborate landscaping activities such as substantial earth moving and the rearrangement or reclamation of the terrain that, standing alone, are properly characterized as the construction, restoration, or repair of a public work.” AAM 155 (Mar. 25, 1991); *see also* AAM 190 (noting that “hazardous waste removal contracts that involve substantial earth moving to remove contaminated soil and recontour the surface” can be considered DBA-covered construction activities).

Second, the Department has consistently maintained that if future construction that will be subject to the Davis-Bacon labor standards is contemplated at the location where the demolition occurs—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. *See* AAM 190. This position is also articulated in the Department’s SCA regulations at 29 CFR 4.116(b). Likewise, the Department has explained that certain activities under hazardous waste removal and remediation contracts, including “the dismantling or demolition of buildings, ground improvements and other real property structures and . . . the removal of such structures or portions of them” are covered by Davis-Bacon labor standards “if this work will result in the construction, alteration, or repair of a public building or public work at that location.” AAM 187, attach., at 1–2 (Nov. 18, 1996).

As noted in the proposed rule, while the Department has addressed these distinctions to a degree in the SCA regulations and in subregulatory guidance, the Department believes that clear standards for the coverage of demolition and removal and related activities in the DBA regulations will assist agencies, contractors, workers, and other stakeholders in identifying whether contracts for demolition are covered by the DBA. This, in turn, will ensure that Davis-Bacon contract clauses and wage determinations are incorporated into contracts where warranted, thereby providing contractors with the correct wage determinations prior to bidding and requiring the payment of Davis-Bacon prevailing wages where appropriate.<sup>167</sup>

Accordingly, the Department proposed to add a new paragraph (2)(v) to the definition of “construction, prosecution, completion, or repair” to assist agencies, contractors, workers, and other stakeholders in identifying when demolition and related activities fall within the scope of the DBRA. Specifically, the Department proposed to clarify that demolition work is covered under Davis-Bacon in 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 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.<sup>168</sup>

While a determination of whether demolition is performed in contemplation of a future construction project is a fact-specific question, the proposed rule also included a non-exclusive list of factors that can inform this determination, including the existence of engineering or architectural plans or surveys; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; the disposition of the site after

<sup>167</sup> The Department notes that under Federal contracts and subcontracts, demolition contracts that do not fall within the DBA’s scope are instead service contracts covered by the SCA, and the Department uses DBA prevailing wage rates as a basis for the SCA wage determination. *See* AAM 190. However, federally funded demolition work carried out by State or local governments that does not meet the criteria for coverage under a Davis-Bacon Related Act would generally not be subject to Federal prevailing wage protections.

<sup>168</sup> This third option accounts for Related Acts when broader language may provide greater coverage of demolition work.

demolition (*e.g.*, whether it is to be sealed and abandoned or left in a state that is prepared for future construction); and other factors. Based on these guidelines, Davis-Bacon coverage may apply, for example, to the removal and disposal of contaminated soil in preparation for construction of a building, or the demolition of a parking lot to prepare the site for a future public park. In contrast, Davis-Bacon likely would not apply to the demolition of an abandoned, dilapidated, or condemned building to eliminate it as a public hazard, to reduce likelihood of squatters or trespassers, or to make the land more desirable for sale to private parties for purely private construction.

The Department received several comments supporting the proposed revisions regarding demolition. LIUNA, for example, noted that providing clear guidance on when demolition is covered by the DBRA will ensure workers on covered projects receive the protections of the DBRA. LIUNA noted its ongoing concern that contracting agencies incorrectly classify demolition activities as not covered by the DBRA because of insufficient or conflicting guidance from the contracting agency and the Department. Other commenters, including the III–FFC, the IUOE, and Public Employees Local 71, Alaska, echoed these concerns and supported the proposed language as a means of clarifying the circumstances under which demolition work is covered, ensuring workers receive the protections of the Davis-Bacon labor standards when appropriate.

Conversely, the National Demolition Association (NDA) opposed the proposed revision and expressed concern that it would “expand the scope of demolition activities that could be subject to the Davis-Bacon Act requirements.” NDA also stated that the proposed change would add complexity to the implementation of the DBRA and pose an undue burden on small contractors. Other commenters, including ABC member campaign comments, also voiced opposition and termed the proposed revisions an “expansion” of coverage.

In the final rule, the Department adopts the language regarding demolition as proposed. As explained in the proposed rule, the revised language is not an expansion of Davis-Bacon coverage, but rather a codification and clarification of current Department policy that is already reflected in current DBRA subregulatory guidance and in SCA regulations. Thus, the revisions will not expand coverage or increase burdens or complexity. To the contrary, they will simplify and

streamline compliance efforts by explicitly setting these principles out in the DBRA regulations themselves so that contractors and contracting agencies can look to those regulations to determine whether or not the Davis-Bacon labor standards apply to particular demolition activities. This will improve the accuracy and consistency of coverage determinations prior to the submission of bids or the commencement of work, thus mitigating the need for investigations and costly corrective actions after work has started on a project. The change will also help ensure that all contractors have a better understanding of the circumstances under which demolition work is covered when bidding on federally funded or assisted construction projects.

(D) Contract, Contractor, Prime Contractor, and Subcontractor

The Department proposed non-substantive revisions to the definition of “contract” and also proposed new definitions in § 5.2 for the terms “contractor,” “subcontractor” and “prime contractor.” The definitions would apply to 29 CFR part 5, including the DBRA contract clauses in § 5.5(a) and (b) of this part.

#### (1) Definition of “Contract”

While neither the DBA nor CWHSSA contains a definition of the word “contract,” the language of the Davis-Bacon and Related Acts makes clear that Congress intended the prevailing wage and overtime requirements to apply broadly, to both prime contracts executed directly with Federal agencies as well as any subcontracts through which the prime contractors carry out the work on the prime contract. *See* 40 U.S.C. 3142(c); 40 U.S.C. 3702(b), (d). Thus, the Department’s existing regulations define the term “contract” as including “any prime contract . . . and any subcontract of any tier thereunder.” 29 CFR 5.2(h). The current definition of “contract” also states that it applies to prime contracts which are subject wholly or in part to the labor standards of any of the acts listed in § 5.1. This definition reinforces that it is intended to apply equally to direct Federal contracts covered by the DBA and also to contracts between Federal, State, or local government entities administering Federal assistance and the direct recipients or beneficiaries of that assistance, where such assistance is covered by one of the Related Acts—as well as the construction contracts and subcontracts of any tier financed by or facilitated by such a contract for assistance. *See id.*

In the NPRM, the Department stated that it was considering the creation of an expanded definition for the term “contract” in § 5.2, similar to the way that the term is defined in other Department regulations applying to Federal contracting statutes and Executive orders. In the regulations implementing Executive Order 13658 (Establishing a Minimum Wage for Contractors), for example, the Department defined contract as “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law” and listed many types of specific instruments that fall within that definition. 29 CFR 10.2. The Department’s SCA regulations, while containing a definition of “contract” that is similar to the current Davis-Bacon regulatory definition at 29 CFR 5.2(h), separately specify that “the nomenclature, type, or particular form of contract used . . . is not determinative of coverage” at 29 CFR 4.111(a).

In the NPRM, the Department noted that the term “contract” in the Davis-Bacon and Related Acts has been interpreted in a similarly broad manner, with the common law of contract as the touchstone. For example, in its 1994 memorandum, the OLC cited the basic common-law understanding of the term to explain that, for the purposes of the DBA, “[t]here can be no question that a lease is a contract, obliging each party to take certain actions.” 1994 OLC Memorandum, 18 Op. O.L.C. at 113 n.3 (citing 1 Arthur Linton Corbin, Corbin on Contracts §§ 1.2–1.3 (rev. ed. 1993)); *see also Bldg. & Const. Trades Dep’t, AFL–CIO v. Turnage*, 705 F. Supp. 5, 6 (D.D.C. 1988) (“The Court finds that it is reasonable to conclude, as the WAB has done, that the nature of the contract is not controlling so long as construction work is part of it.”). The Davis-Bacon and Related Acts thus have been routinely applied to various types of agreements that meet the common-law definition of a “contract”—such as, for example, leases, utility privatization agreements, individual job orders or task letters issued under basic ordering agreements, and loans or agreements in which the only consideration from the agency is a loan guarantee—as long as the other elements of DBRA coverage are satisfied.

In the NPRM, the Department also stated that it intends the use of the term “contract” in the DBRA regulations to apply also to any agreement in which the parties intend for a contract to be formed, even if (as a matter of the common law) the contract may later be considered to be void ab initio or

otherwise fail to satisfy the elements of the traditional definition of a contract. Such usage, the Department explained, follows from the statutory requirement that the relevant labor standards clauses must be included not just in “contracts” but also in the advertised specifications that may (or may not) become a covered contract. *See* 40 U.S.C. 3142(a).

In light of this discussion, the Department sought comments on whether it is necessary to include in the regulatory text itself a similarly detailed recitation of the types of agreements that may be considered to be contracts. The Department also proposed, in a non-substantive change, to move a sentence addressing whether governmental entities are “contractors” from the current definition of “contract” to the new definition of “contractor.”

Several commenters, including CEA, SMACNA, and the National Alliance for Fair Contracting (NAFC), expressed general support for the proposed definition of “contract” in the NPRM. No comments were submitted expressing a position regarding whether the proposed definition of contract should include the detailed list of agreements or legal instruments that could be considered to be “contracts” under the definition. As the Department noted in the NPRM, inclusion of a detailed list of types of contracts should not be necessary, given that such a list would follow directly from the use of the term “contract” in the statute.<sup>169</sup> Thus, the final rule adopts the definition of “contract” as proposed, with one conforming edit to ensure that the definition and the contract clauses that apply the defined term reflect the principle that employers meeting the definition of “material supplier” are not covered.<sup>170</sup> *See* section III.B.3.ii.(G).(1).c (“Material supplier exception”). While the Department has not included a list in the regulatory text of all of the various types of agreements that may be considered to be “contracts” under the definition, it continues to interpret the DBRA as applying broadly to any contract that fits within the common law definition, as well as to contracts-implied-in-law where the parties intended to enter into such a contract, as long as the contract satisfies the other

<sup>169</sup> The Restatement (First) of Contracts, published in 1932, defined a “contract” as “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” Restatement (First) of Contracts section 1 (Am. L. Inst. 1932).

<sup>170</sup> This conforming edit mirrors the language that the Department proposed, and adopts in the final rule, to similarly limit the definition of “contractor.”

statutory and regulatory elements of coverage.

## (2) Definition of “Contractor”

The Department proposed to include a new definition of the term “contractor” in § 5.2. The word “contractor” is not defined in the DBA or CWHSSA, and the existing DBRA regulations use the term “contractor” but do not define it. Paralleling the definition of “contract,” the Department proposed a definition of “contractor” to clarify that, where used in the regulations, it applies to both prime contractors and subcontractors. In addition, the proposed definition sought to clarify that sureties may also—under appropriate circumstances—be considered “contractors” under the regulations. As noted in the NPRM, this is consistent with the Department’s longstanding interpretation. See *Liberty Mut. Ins.*, ARB No. 00–018, 2003 WL 21499861, at \*6 (June 30, 2003) (finding that the term “contractor” included sureties completing a contract pursuant to a performance bond). As the ARB explained in the *Liberty Mutual* case, the term “contractor” in the DBA should be interpreted broadly in light of Congress’s “overarching . . . concern” in the 1935 amendments to the Act that the new withholding authority included in those amendments would ensure workers received the pay they were due. *Id.* (citing S. Rep. No. 74–1155, at 3 (1935)).

The proposed definition of “contractor” contained additional clarifications. It contained language reflecting the long-held interpretation that bona fide “material suppliers” are generally not considered to be contractors under the DBRA, subject to certain exceptions. As noted above, the Department also moved two sentences from the existing definition of “contract” to the new definition of “contractor.” This language clarifies that State and local governments generally are not regarded as contractors or subcontractors under the Related Acts in situations where construction is performed by their own employees. The exception is the subset of Related Act statutes that more broadly require payment of Davis-Bacon prevailing wages to all laborers and mechanics employed in the project’s development regardless of their employment by a contractor or subcontractor.<sup>171</sup> The Department proposed to supplement the language regarding State and local

governments to explain (as the Department has similarly clarified in the SCA regulations) that the U.S. Government, its agencies, and instrumentalities are also not contractors or subcontractors for the purposes of the Davis-Bacon and Related Acts. *Cf.* 29 CFR 4.1a(f).<sup>172</sup>

Several commenters, including CEA, SMACNA, and NAFC, expressed general support for the proposed definition of “contractor” in the NPRM. The Department did not receive any comments opposing the inclusion of sureties within the definition of “contractor” or opposing any of the other specific elements of the definition.<sup>173</sup> AGC did not oppose the proposed definition of contractor, but they sought clarification on the status of “business owners” in the definition of “contractor,” “prime contractor,” and “subcontractor.” Citing to FOH 15f06, AGC asserted that individuals who meet the definition of a “business owner” in the FLSA regulation at 29 CFR 541.101 are “exempt from DBA coverage” and should therefore not be included in the definition of contractor.

AGC’s comment appears to conflate two concepts: “contractors” and “laborers or mechanics.” If a person or business is a “contractor,” they have responsibilities under the DBRA contract clauses and regulations to ensure that any workers they employ (or whose labor they contract for by subcontract) are paid the required prevailing wage. If a person is a “laborer or mechanic,” then they must be paid a prevailing wage by the contractor or subcontractor for whom they work. FOH 15f06 addresses whether an individual is a “laborer or mechanic,” not whether they are a “contractor.”

Under the current DBRA regulations, the FLSA exemption from the minimum wage and overtime requirements for a “business owner” is relevant to whether an individual is a “laborer or mechanic” under the DBRA who therefore must receive the prevailing wage. The DBRA regulations define “laborer or mechanic” in part with a reference to the part 541 FLSA regulations that

provide tests for the administrative, professional, and executive exemptions from the minimum wage and overtime requirements under the FLSA. 29 CFR 5.2(m); 29 CFR 541.0. The “business owner” regulation at § 541.101 is a method of identifying employees who may be exempt under the FLSA exemption for executive employees.

Unlike the definition of “laborer or mechanic,” the DBRA definition of “contractor” does not involve the consideration of whether an individual or entity is a business owner under 29 CFR 541.101. The Department defines the term “contractor” as a person that “enters into or is awarded a contract” covered by the DBRA. If a person enters into a covered prime contract or subcontract, that person is a “contractor” to whom the DBRA requirements for contractors apply—requiring that they ensure that any laborers or mechanics they employ (or contract for) on the project are paid a prevailing wage.

Accordingly, the Department has not amended the definition of “contractor” to discuss the FLSA “business owner” exemption, and the final rule adopts the definition of “contractor” as proposed.

## (3) Definition of “Prime Contractor”

The Department also proposed to add a definition for the term “prime contractor” as it is used in part 5 of the regulations. Consistent with the ARB’s decision in *Liberty Mutual*, ARB No. 00–018, 2003 WL 21499861, at \*6, the Department proposed a broad definition of prime contractor that would prioritize the appropriate allocation of responsibility for contract compliance and enhance the effectiveness of the withholding remedy. The proposed definition would clarify that the label an entity gives itself is not controlling; rather, an entity is considered to be 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 began by identifying as a prime contractor any person or entity that enters into a covered contract with an agency. This would include, under appropriate circumstances, entities that may not be understood in lay terms to be “construction contractors.” For example, where a non-profit organization, owner/developer, borrower or recipient, project manager, or single-purpose entity contracts with a State or local government agency for covered financing or assistance with the construction of housing—and the other required elements of the relevant

<sup>171</sup> As discussed in section III.B.3.ii.G.2.e, the Department is including a new defined term, “development statute,” in the final rule, which refers to the Related Acts that have this broader scope of coverage.

<sup>172</sup> The Department has also considered work by Tribal governments using their own employees to be excluded from DBRA coverage in a similar manner and for the same reasons as work by the Federal agencies and instrumentalities and by State or local recipients of Federal assistance. Under the final rule, the Department will continue to interpret DBRA coverage in this manner.

<sup>173</sup> Several commenters opposed the Department’s definition of “material supplier” (which is incorporated into the definitions of contractor and subcontractor) as too narrow and therefore expanding the types of companies treated as DBRA-covered “contractors” or “subcontractors.” The Department has addressed these comments in the discussion of the definition of material supplier.

Related Act statute are satisfied—that owner/developer or recipient entity is considered to be the “prime contractor” under the regulations. This is so even if the entity does not consider itself to be a “construction contractor” and itself does not employ laborers and mechanics and instead subcontracts with a general contractor to complete the construction. *See, e.g., Phoenix Dev. Co.*, WAB No. 90–09, 1991 WL 494725, at \*1 (Mar. 29, 1991) (“It is well settled that prime contractors (‘owners-developers’ under the HUD contract at hand) are responsible for the Davis-Bacon compliance of their subcontractors.”); *Werzalit of Am., Inc.*, WAB No. 85–19, 1986 WL 193106, at \*3 (Apr. 7, 1986) (rejecting petitioner’s argument that it was a loan “recipient” standing in the shoes of a State or local government and not a prime “contractor”).

The proposed definition of “prime contractor” also included 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—could be considered to be “prime contractors” on the same contract. Accordingly, the proposal also explained that any of these related legal entities would be considered to be the “same prime contractor” for the purposes of cross-withholding.

Although the Department had not previously included a definition of prime contractor in the implementing regulations, the proposed definition was consistent with the Department’s prior enforcement of the DBRA. In appropriate circumstances, for example, the Department has considered a general contractor to be a “prime contractor” that is therefore responsible for the violations of its subcontractors under the regulations—even where that general contractor does not directly hold the contract with the Government (or is not the direct recipient of Federal assistance), but instead has been hired by the private developer that holds the overall construction contract. *See Palisades Urb. Renewal Enters. LLP.*, ALJ No. 2006–DBA–00001, slip op. at 16

(Aug. 3, 2007), *aff’d*, ARB No. 07–124, 2009 WL 2371237 (July 30, 2009); *Milnor Constr. Corp.*, WAB No. 91–21, 1991 WL 494763, at \*1, \*3 (Sept. 12, 1991); *cf. Vulcan Arbor Hill Corp. v. Reich*, 81 F.3d 1110, 1116 (D.C. Cir. 1996) (referencing agreement by developer that “its prime” contractor would comply with Davis-Bacon standards). Likewise, where a joint venture holds the contract with the government, the Department has characterized the actions of the parties to that joint venture as the actions of “prime contractors.” *See Big Six, Inc.*, WAB No. 75–03, 1975 WL 22569, at \*2, \*4 (July 21, 1975).

The proposed definition of prime contractor was also similar to the broad definition of the term “contractor” in the FAR part 9 regulations that govern suspension and debarment across a broad swath of Federal procurement contracts. In that context, where the Federal Government seeks to protect its interest in effectively and efficiently completing procurement contracts, the FAR Council has adopted an expansive definition of contractor that includes affiliates or principals that functionally control the prime contract with the government. *See* 48 CFR 9.403. Under the FAR part 9 definition, “Contractor” means any individual or entity that “[d]irectly or indirectly (e.g., through an affiliate)” is awarded a Government contract or “[c]onducts business . . . with the Government as an agent or representative of another contractor.” *Id.*<sup>174</sup> The Department has a similar interest here in protecting against the use of the corporate form to avoid responsibility for the Davis-Bacon labor standards.

The Department sought comment on the proposed definition of “prime contractor,” in particular, as it would affect the withholding contract clauses at § 5.5(a)(2) and (b)(3), the prime contractor responsibility provisions at § 5.5(a)(6) and (b)(4), and the proposed provisions in § 5.9 regarding the authority and responsibility of contracting agencies for satisfying requests for cross-withholding.

<sup>174</sup> The definition section in 48 CFR 9.403 specifies that it applies only “as used in this subpart”—referring to subpart 9.4 of the FAR. It thus applies only to the general suspension and debarment provisions of the FAR and does not apply to the regulations within the FAR that implement the Davis-Bacon labor standards, which are located in FAR part 22 and the contract clauses in FAR part 52. The DBRA-specific provisions of the FAR are based on the Department’s regulations in parts 1, 3, and 5 of subtitle 29 of the CFR, which are the subject of this rulemaking. The Department does not anticipate that this rulemaking will affect FAR subpart 9.4.

Several commenters, including LIUNA, UBC, and UA, expressed support for the proposed definition of “prime contractor.” These commenters supported the proposed definition of “prime contractor” because they believe the definition—in tandem with the modifications to the withholding contract clause—will help address violations on DBRA contracts by expanding the Department’s ability to recover back wages. Commenters emphasized that there has been documentation of widespread labor violations in the construction industry in recent decades, and that this problem has been exacerbated by various enforcement shortcomings.<sup>175</sup> As the UBC noted, the lack of meaningful enforcement in the industry has in turn led to “a breakdown of industry self-policing.” Commenters also stated that there has been an increase in recent

<sup>175</sup> WA BCTC and LIUNA, for example, pointed to the Department’s recent data showing that the construction industry is consistently one of the top two low-wage, high violation industries. *See* <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>. The comment from the Leadership Conference on Civil & Human Rights and other civil rights and worker advocacy organizations pointed to various studies showing that a significant number of construction employers misclassified workers as independent contractors or otherwise working “off-the-books.” *See, e.g.,* Mark Erlich, “Misclassification in Construction: The Original Gig Economy,” 74 Indus. & Lab. Rel. Rev. 1202 (2021); Nat’l Emp. L. Project, “Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries” (Oct. 2020), <https://www.nelp.org/publication/independent-contractor-misclassification-imposes-huge-costs-workers-federal-state-treasuries-update-october-2020>; Nathaniel Goodell & Frank Manzo IV, “The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois: Impacts on Workers and Taxpayers” (Jan. 2021), <https://midwestepi.files.wordpress.com/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf>; Mandy Locke, et. al., “Taxpayers and Workers Gouged by Labor-Law Dodge,” Miami Herald (Sept. 4, 2014), <https://www.miamiherald.com/latest-news/article1988206.html>; Russell Ormiston et al., *supra* note 70, at 75–113 (summarizing widespread labor violations in the residential construction industry). A comment from two Professors of Economics noted that the research documenting worker misclassification and wage theft in the U.S. construction industry is “extensive.” They noted one estimate using government data found between 12.4 percent and 20.5 percent of the U.S. construction workforce is misclassified, while other studies imply the proportion exceeds 30 percent in some locations. *See* Russell Ormiston et al., “An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry” (2020) at 37, <http://icerres.org/wp-content/uploads/2020/06/ICERES-Methodology-for-Wage-and-Tax-Fraud.pdf>; Workers Defense Project, “Building a Better Texas: Construction Conditions in the Lone Star State” (2013) at 2, <https://workersdefense.org/wpcontent/uploads/2020/10/research/Build%20a%20Better%20Texas.pdf>; Clayton Sinai et al., “The Underground Economy and Wage Theft,” Catholic Labor Network (2021) at 7, <https://catholiclabor.org/wpcontent/uploads/2021/04/Underground-Economy-and-Wage-Theft-Report-4.14.pdf>.

decades in the use of “contracting vehicles,” such as single-purpose limited liability companies (LLCs). NCDCL and FFC stated that they had witnessed the use of these vehicles by contractors to avoid liability for wage violations. According to the UA, it is “vital” that the Department clarify liability for back wages for those contractors that “jump from one project to the next under various names.”

As the comment from the LCCHR and other civil rights and worker advocacy organizations stated, the expanded definition of “prime contractor” will ensure that any person or entity that is entirely or mostly responsible for overseeing the contract will be accountable for following the law. Referencing the proposal, COSCDA stated that they concurred generally with the Department’s efforts to recover back wages. III–FFC stated that the prime contractor definition, as incorporated into the proposed cross-withholding provision, would help to protect workers against wage theft and will help to achieve the fundamental purpose of the Davis-Bacon Act.

Other commenters opposed the proposed definition. The Illinois Road & Transportation Builders Association (IRTBA), the Ohio Contractors Association (OCA), the Southern Illinois Builders Association (SIBA), and the American Pipeline Contractors Association (APCA) submitted comments arguing that the proposed definition would place an undue burden on contractors, increase their risk, and discourage them from bidding on work covered by the DBRA, thus making it harder for the government to find qualified contractors. These commenters, along with the FTBA, also argued that the new definition would not improve enforcement of the Davis-Bacon Act, and that the Department had not presented any evidence that the current standards for imposing liability are either ineffective or unworkable. The FTBA asserted that the Department’s sole justification was to create a “broader pot of funds if needed for withholding purposes.”

Other commenters did not directly oppose the definition of “prime contractor,” but they expressed concerns or requested additional clarification. NAHB expressed concern that the proposed definition of “prime contractor” (among other proposals) would introduce uncertainty as to liability for homebuilders, particularly multifamily builders that are highly dependent on subcontractors. In their comment, NAHB suggested that the definitions of “prime contractor” and “subcontractor” seem to remove the

“defining line” between general contractor and subcontractor liability. NAHB stated that the Department should clarify that the apportionment of liability between multiple entities should be governed by the “joint employer” standard under the FLSA. Likewise, AGC, in a manner similar to its comment regarding the definition of “contractor,” did not specifically oppose the proposed definition of “prime contractor,” but requested clarification that a “business owner” under the FLSA regulations is not included in the definition. Several other commenters opposed the Department’s cross-withholding provisions but did not expressly oppose the definition of “prime contractor.”

The Department agrees with the commenters that supported the proposed definition of “prime contractor” because it will promote compliance with the DBRA by specifying which entities are properly defined as prime contractors. As these commenters explained, recent studies have shown that there is widespread noncompliance with basic wage and hour laws in the construction industry as a whole, and in the residential construction industry in particular.<sup>176</sup> Under these circumstances, and given the very large number of DBRA-covered contracts for which the Department is in charge of enforcement, it is important that the regulations and contract clauses appropriately incentivize compliance.<sup>177</sup> By codifying a definition of “prime contractor,” the Department clarifies which entities may be held liable for noncompliance of subcontractors. Doing so puts these entities on notice that they will be held liable for violations of subcontractors on the contract under the liability and flow-down provisions of the contract clauses at § 5.5(a)(6) and (b)(4), which create an incentive for the prime contractors to ensure that subcontractors on the project will be in compliance with the DBRA before work commences.

The Department disagrees with commenters that opposed the proposed definition on the basis that the Department lacked sufficient evidence or analysis showing that the new definition is necessary. As noted above, the widespread compliance problems in the construction industry are well documented, *see supra* note 175, and, as explained in the NPRM, the Department has noted that the use of single-purpose

LLC entities and similar joint ventures and teaming agreements has been increasing in recent decades. *See, e.g.,* John W. Chierichella & Anne Bluth Perry, “Teaming Agreements and Advanced Subcontracting Issues,” TAASI GLASS–CLE A, at \*1–6 (Fed. Publ’ns LLC, 2007); A. Paul Ingrao, “Joint Ventures: Their Use in Federal Government Contracting,” 20 Pub. Cont. L.J. 399 (1991). This confluence of trends in construction contracting has created significant enforcement challenges for the Department, at times requiring exhaustive investigations and litigation to pierce the corporate veil.<sup>178</sup> One of the key reforms that experts analyzing these types of problems in the construction industry have recommended is a clarification of liability among upper-level entities that have control over the workplace.<sup>179</sup>

The Department also does not agree that the proposed definition would cause undue burdens or introduce uncertainty for contracting entities. The regulations in § 5.5(a)(6) and (b)(4) have long held prime contractors responsible for compliance by their subcontractors, and the Department has long interpreted the Act as allowing for piercing the corporate veil in appropriate circumstances. Codifying the proposed definition of prime contractor does not change the obligations of a prime contractor on a DBRA project; rather, it provides clarity on which entity or entities are properly identified as the prime contractor. The definition uses well understood terms, including “controlling shareholders or members” and “joint venturers or partners.” It also states that contractors have been delegated “all or substantially all of the responsibilities for overseeing any construction” will be considered prime contractors. This language provides clarity so that entities can recognize ahead of time whether they may bear potential liability for violations on a DBRA-covered contract and can protect themselves by using care in the choice of subcontractors and using indemnification agreements and similar instruments that will adequately address any increased risk.

The Department disagrees with NAHB that the liability of prime contractors should be limited to any liability as “joint employers” under the FLSA. Such a limitation on liability would be inconsistent with the longstanding interpretation of the DBRA of holding

<sup>176</sup> *See supra* note 175.

<sup>177</sup> The Department also addresses these arguments in its discussion of the cross-withholding provision in the DBRA contract clause, in section III.B.3.xxiii.

<sup>178</sup> *See, e.g.,* Letter from Cheryl M. Stanton, Adm’r to Hal J. Perloff (Sept. 17, 2020) (piercing the veil in DBRA matter involving a Military Housing Privatization Initiative project).

<sup>179</sup> *See, e.g.,* Ormiston et al. (2020), *supra* note 70 at 100–101.

prime contractors responsible for any back wages that are owed to the employees of subcontractors regardless of whether there is any employment relationship or even any knowledge of the violations that have taken place. *See* 29 CFR 5.5(a)(6); *M.A. Bongiovanni, Inc.*, WAB No. 91–08, 1991 WL 494751, at \*1 (Apr. 19, 1991). This longstanding interpretation follows from the Congressional intent in the DBRA that the Act ensure that laborers and mechanics that are employed on the site of the work are paid the required prevailing wage. *Bongiovanni*, 1991 WL 494751, at \*1.

The Department also does not agree with AGC that a person who may be a “business owner” under the FLSA regulations cannot be a “prime contractor” under the DBRA definition. As noted above with regard to the definition of “contractor,” AGC’s comment appears to conflate two concepts: first, whether an individual or business is a “prime contractor” and therefore must ensure that covered workers on the project are paid the required prevailing wage; and second, whether an individual is a “laborer or mechanic” to whom a prevailing wage must be paid. The provision of the FOH referenced by the AGC in its comment (FOH 15f06) addresses the latter question, not the former.

While the Department declines to limit the definition of prime contractor with reference to the FLSA regulations, the Department has decided that the definition should be amended to limit ambiguity in one respect. In the proposal, the definition included “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.” This language could have extended the definition to cover individual employees of a contractor regardless of their ownership interests, which was beyond the scope that the Department intended for the definition. This language has been removed from the definition in the final rule.

Other than the modification noted above, the final rule adopts the definition of prime contractor in § 5.2 as proposed.

#### (4) Definition of “Subcontractor”

In addition to new definitions of “contractor” and “prime contractor,” the Department also proposed a new definition of the term “subcontractor.” The definition, as proposed, affirmatively stated that a “subcontractor” is “any contractor that agrees to perform or be responsible for the performance of any part of a contract

that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1.” Like the current definition of “contractor,” the proposed definition of “subcontractor” also reflects that the Act covers subcontracts of any tier—and thus the proposed definition of “subcontractor” stated that the term includes subcontractors of any tier. *See* 40 U.S.C. 3412; *Castro v. Fid. & Deposit Co. of Md.*, 39 F. Supp. 3d 1, 6–7 (D.D.C. 2014). The proposed definition of “subcontractor” necessarily excluded material suppliers (except for narrow exceptions), because such material suppliers are excluded from the definition of “contractor,” as proposed, and that definition applies to both prime contractors and subcontractors. Finally, the proposed definition of “subcontractor” stated that the term did not include laborers or mechanics for whom a prevailing wage must be paid.

Several commenters expressed general support for the Department’s definition of “subcontractor.” The Department did not receive any comments expressly opposed to the definition. NAHB and AGC, however, expressed similar concerns about the definition as their concerns about the definitions of “contractor” and “prime contractor.” NAHB suggested that the definition removed defining lines around traditional concepts of subcontractor liability. AGC sought to clarify that “business owners” are “exempt” from being considered covered subcontractors.

In light of the comments from NAHB and AGC, the Department has reconsidered one aspect of the definition of subcontractor. The proposed definition excluded from inclusion as “subcontractors” those “ordinary laborers or mechanics to whom a prevailing wage must be paid regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.” This language was borrowed from the 1935 amendment to the DBA, which requires the payment of a prevailing wage “regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.” 40 U.S.C. 3142(c)(1). This language has been interpreted to ensure that the requirement to pay a prevailing wage extends beyond the traditional common-law employment relationship. *See* section III.B.3.xxii (discussing the definition of “Employed”).

Upon further consideration, the Department’s recitation of this statutory language in the proposed definition of

“subcontractor” could have been misconstrued as having the opposite of the intended effect. By including that language in the 1935 amendment to the DBA, Congress intended to emphasize that an individual could be a laborer or mechanic—and therefore be due a prevailing wage—regardless of whether they might be called a subcontractor or independent contractor. *See Bldg. & Const. Trades Dep’t, AFL–CIO v. Reich*, 40 F.3d 1275, 1288 (D.C. Cir. 1994) (analyzing House and Senate reports for the 1935 DBA amendments). In other words, an individual can both be referred to as a “subcontractor” who contracts for a portion of the work on the prime contract and also be a laborer who must be paid a prevailing wage by the prime contractor or upper-tier subcontractor that has brought them onto the project.

The conclusion that an individual can have dual roles as “subcontractor” and “laborer or mechanic” is consistent with the Department’s guidance on this issue. *See* DBRA–185 (July 28, 1993); DBRA–178 (July 31, 1992). In those letters, the Department responded to a request concerning the payment of prevailing wages to “independent contractors who are owners or working foremen.” After analyzing the statutory text of the DBA, the Department concluded that “individuals [or partners] who subcontract to perform a portion of a Davis-Bacon contract and who simultaneously meet the regulatory definition of a laborer or mechanic must be compensated at the prevailing wage rate by the prime contractor for any work so performed.” *Id.*<sup>180</sup>

<sup>180</sup> The Department’s guidance regarding “working subcontractors” has not been a model of clarity. In the 1950’s, the Department concluded that the statutory language of the 1935 amendments clearly indicated that individuals could be both owner-operators and also “laborers or mechanics” owed a prevailing wage—a position with which the Attorney General agreed. *See* Federal Aid Highway Program-Prevailing Wage Determination, 41 U.S. Op. Atty. Gen. 488, 489–503 (1960). Subsequently, after issuing several letters with similar positions, the Department then issued an AAM regarding “working subcontractors” in 1976, *see* AAM 123 (May 19, 1976), only to immediately revoke it, *see* AAM 125 (Aug. 30, 1976). The Department promised subsequent guidance, but in the meantime reminded contracting agencies of the statutory language that the DBA requirements must be met “regardless of any contractual relationship[.]” AAM 125. The Department did not issue a new AAM, but instead issued the 1981–1982 rulemaking, and then the subsequent ruling letters that clarified that individuals can be both “subcontractors” and “laborers or mechanics.” DBRA–185 (July 28, 1993); DBRA–178 (July 31, 1992). *See also* *Griffin v. Sec’y of Lab.*, ARB Nos. 00–032, 00–033, 2003 WL 21269140, at \*4, \*7 (May 30, 2003) (noting that the Department “considers even bona fide owner-operators performing DBA-covered work on a DBA-covered project to be due the prevailing rate.”), *aff’d sub nom Phoenix-Griffin Grp. II, Ltd. v. Chao*, 376 F. Supp. 2d 234, 242

AGC's comment regarding the "business owners" exemption in § 541.101 of the FLSA regulations throws this hypothetical circumstance into sharper relief. The Department's DBRA regulations explain that individuals "employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics." 29 CFR 5.2(h). The FLSA "business owner" regulation at § 541.101 is one method under part 541 of identifying an employee that fits within the FLSA's exemption from minimum wage and overtime pay requirements for "executive employees." *Id.* § 541.101(a). That FLSA regulation language provides that an "employee" falls under the executive exemption if the employee "owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management." *Id.* The subsequent section of the FLSA regulations, § 541.102, defines "management" as "[g]enerally" including a variety of different duties, largely (though not solely) related to hiring and supervising employees.

The DBA statute itself provides important context for responding to AGC's question regarding "business owners." As the Department highlighted in the NPRM, the DBA contains express language conveying Congress's concern that the payment of prevailing wages to workers on covered projects should not be evaded by characterizing workers as owner operators or subcontractors. *See BCTD v. Reich*, 40 F.3d at 1288; DBRA-185; DBRA-178. The statute requires the payment of prevailing wage "regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics." 40 U.S.C. 3142(c)(1). This language was intended to "eliminat[e] an evasive device whereby individual laborers formed partnerships under which the member partners received less than the prevailing wage." *BCTD*, 40 F.3d at 1280 (citing the 1935 House and Senate reports).

(D.R.I. 2005). The Department, however, has also stated that "as a matter of administrative policy" the requirements of the DBRA and CWHSSA are not applied to the wages of truck owner-operators who are bona fide independent contractors, even though they are laborers or mechanics within the meaning of the Acts. DBRA-54 (Nov. 1, 1977). The Department has explained in FOH 15e17 that this policy does not apply to owners of other equipment such as bulldozers, and that, as part of the policy, any employees hired by truck owner-operators are subject to the DBRA in the usual manner.

Accordingly, to find that an individual is not a "laborer or mechanic" and is not due the prevailing wage, it is not sufficient to simply assert that an individual has an ownership interest in a business. Rather, to be excepted from coverage under the DBRA, an individual must be employed in a "bona fide" executive capacity under the FLSA part 541 regulations. 29 CFR 5.2(h). In carrying out this analysis, the Department is mindful of the Congressional intent regarding the use of corporate entities and partnerships underpinning the 1935 amendments to the DBA.<sup>181</sup>

In any case, as with the definitions of "contractor" and "prime contractor," AGC has conflated the question of whether an individual may be exempt from being paid the prevailing wage as a "laborer or mechanic" with the question of whether an individual may be a "subcontractor." The FLSA definition of "business owner" is relevant to the "laborer or mechanic" definition under the DBRA, but is wholly distinct from whether an individual or entity is a "subcontractor" with associated duties under the DBRA, its regulations, and its contract clauses.<sup>182</sup>

Accordingly, the final rule adopts the proposed definition of "subcontractor," amended as discussed above to eliminate the reference to the statutory language from 40 U.S.C. 3142(c)(1).

<sup>181</sup> The FOH provision that AGC cites emphasizes the narrowness of the exemption. It states that regardless of ownership interest, an individual "who is required to work long hours, makes no management decisions, supervises no one and has no authority over personnel does not qualify for the executive exemption." FOH 15f06.

<sup>182</sup> Although not for the reason AGC asserted, it may be unlikely that an individual may be both a "subcontractor" under the DBRA and a "business owner" under the FLSA regulations. This is because the definition of "business owner" in the FLSA regulations includes any "employee" who owns a bona fide interest of at least 20 percent in "the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization[.]" 29 CFR 541.101. Under this language, an individual must actually be an employee of an enterprise or organization for which the individual has an ownership interest for the exemption to apply. This is so because of the terms of the regulation and because the FLSA's minimum wage and overtime pay requirements (the requirements from which part 541 provides exemptions) apply only to employees and not to bona fide independent contractors. The "business owner" exemption thus does not apply to an individual who is in business only as a bona fide sole proprietor or is not otherwise an employee of the enterprise or organization in which the individual has the ownership interest. Thus, to the extent such a sole proprietor (as opposed to an LLC or corporation) may subcontract for a portion of the prime contract, the individual would not meet the requirements for exemption as a "business owner" under § 541.101.

## (E) Apprentice and Helper

The Department proposed to amend the current regulatory definition in § 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, but ETA no longer reviews or approves on-the-job training programs, so this definition is unnecessary. *See* section III.B.3.iii.(C) ("29 CFR 5.5(a)(4) Apprentices"). The Department also proposed to modify the definition of "apprentice and helper" to reflect the current name of the office designated by the Secretary of Labor, within the Department, to register apprenticeship programs.

The Department received three comments in response to this proposal. CEA and SMACNA both agreed that ETA no longer reviews or approves on-the-job training programs and supported the Department's proposal to remove references to trainees. The Illinois Asphalt Pavement Association (IAPA) opposed the Department's proposal and stated that "eliminating trainees from the Davis[-]Bacon Act may have unintended consequences." IAPA noted that the Illinois Department of Transportation has a "Highway Construction Careers Training Program" with the U.S. Department of Transportation's (USDOT) Federal Highway Administration (FHWA), in which individuals receive intensive training in highway construction-related skills.<sup>183</sup> IAPA cautioned that these student trainees may not be able to work on Davis-Bacon projects if the trainee language is removed.

The Department notes that the proposed regulatory definition in § 5.2 retains the text currently found in § 5.2(n)(3), which states that the regulatory provisions do not apply to trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c). The Department believes that retention of this language makes clear that student

<sup>183</sup> *See* Ill. Dep't of Transp., "Highway Construction Careers Training Program," <https://idot.illinois.gov/Assets/uploads/files/About-IDOT/Pamphlets-&-Brochures/PA%20HCCTP%20story%201%20kg.pdf> (including "job site readiness, carpentry, concrete flatwork, blueprint reading orientation, introduction to tools, forklift operation and Occupational Safety and Health Administration 10 certification").



trainees who are enrolled in such programs may continue to work on Davis-Bacon projects as a recognized category of workers at wage rates determined by the Secretary of Transportation in accordance with 23 U.S.C. 113(c). Accordingly, the Department adopts the change to § 5.2 as proposed.

#### (F) Laborer or Mechanic

##### (1) Gender-Neutral Terminology

The Department proposed to amend the regulatory definition of “laborer or mechanic” to remove the reference to trainees and to replace the term “foremen” with the gender-neutral term “working supervisors.”<sup>184</sup> The Department received several comments on this proposal.

The General Contractors Association of New York (GCA), while appreciative of efforts to introduce gender-neutral terminology, recommended using the term “foreperson” instead of “working supervisor” as the latter term may be confused with managerial positions. ARTBA also recommended the term “foreperson” instead, as the term “working supervisor” is “nebulous and could apply to multiple people on a construction site.” Several commenters objected to the term “working supervisor,” noting that the term “working supervisor” does not appropriately describe the years of training and skill attainment necessary to achieve the stature of “journeyperson.” *See, e.g.,* SMART and SMACNA. This commenter also noted that the word “supervisor” has a specific meaning under the National Labor Relations Act (NLRA) and cautioned against importing the word into Davis-Bacon regulations.

Having considered the comments, the final rule adopts the proposed revision with modification. Rather than replacing the term “foremen” with “working supervisor,” the Department adopts the gender-neutral term “foreperson.”

##### (2) Survey Crews

The Department did not propose any additional substantive changes to this definition, but because it frequently receives questions pertaining to the application of the definition of “laborer or mechanic”—and thus the application of the Davis-Bacon labor standards—to members of survey crews, the Department provided information in the preamble of the NPRM to clarify when survey crew members are laborers or

mechanics under the existing definition of that term. The Department adopts that guidance in the preamble to this final rule, with an additional clarification in response to comments received.

Specifically, the NPRM stated that the Department has historically recognized that members of survey crews who perform primarily physical and/or manual work on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards.<sup>185</sup> Whether or not a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are “manual or physical in nature,” including the “use of tools or . . . work of a trade.” When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker’s different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they are not exempt as professional, executive, or administrative employees under part 541). If their work meets other required criteria (*i.e.*, it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.

The Department sought comment on issues relevant to the application of the current definition to survey crew members, especially the range of duties performed by, and training required of, survey crew members who perform work on construction projects and whether the range of duties or required training varies for different roles within a survey crew based on the licensure status of the crew members, or for different types of construction projects.

The Department received a number of comments in response to the clarifying information provided in the NPRM despite proposing no changes to the definition of “laborer or mechanic” that would impact the application of this term to members of survey crews. Many commenters misunderstood the information provided to mean that the

Department was proposing to categorically deem members of survey crews to be “laborers or mechanics” subject to the Davis-Bacon labor standards and wrote to support or oppose such a change. The Department did not make such a proposal and reiterates that whether a specific survey crew member is covered by the Davis-Bacon labor standards is a question of fact based largely on the actual duties performed. Similarly, some commenters opined that the work performed by survey crew members is “manual or physical in nature,” and thus within the definition of “laborer or mechanic,” or that such work is “mental” or “intellectual” in nature, and thus not within the definition, without addressing the range of duties performed by, and training required of, survey crew members who perform work on construction projects. However, the Department has long recognized that work performed by survey crew members “immediately prior to or during construction in direct support of construction crews” involves a range of duties, which are evaluated to determine whether a specific survey crew member or category of survey crew members are “laborers or mechanics.” AAM 16 (July 25, 1960); AAM 39 (Aug. 6, 1962); AAM 212 (Mar. 22, 2013).<sup>186</sup>

The duties of survey crew members described by commenters varied widely. As a preliminary matter, several commenters distinguished between the surveying work that typically occurs in direct support of construction crews and other work that survey crews may perform. The California Land Surveyors Association (CLSA) noted that “construction and construction-related land surveying work is a very small fraction of any land surveyor[']s work.” It further noted that “[c]onstruction land surveying field work is comprised of an ability to read engineering and architecture plans and convey this information to construction contractor’s tradesman so they may self-perform their land surveying work,” explaining that “[c]ontractors have the full capacity, due to technology, to perform

<sup>184</sup> The proposal addressing trainees is discussed in greater detail below in section III.B.3.iii.(C) (“29 CFR 5.5(a)(4) Apprentices.”).

<sup>185</sup> 87 FR 15729 (citing AAM 212 (Mar. 22, 2013)).

<sup>186</sup> Commenters that characterize the Department’s position as “flipflopping” on the issue of survey crew coverage fail to recognize the fact-specific nature of this coverage question. For example, AGC contended that the Department extended coverage to survey crew members in AAM 212 and “confirmed that surveying work is not covered” when it rescinded AAM 212. While AAM 212 was rescinded to allow the Department to seek a broader appreciation of the coverage issue and due to its incomplete implementation, *see* AAM 235 (Dec. 14, 2020), its rescission did not change the applicable standard, which is the definition of “laborer or mechanic” as currently set forth in 29 CFR 5.2(m), or the Department’s position that coverage depends on the range of duties performed.

any prospective land surveying work limited to manual or physical duties related to construction.” This was echoed by III–FFC, which explained that “survey work on a construction project is distinct from professional land surveying activities such as marking land boundaries or preparing a description for title or real property rights,” and by ARTBA, which described the need to “distinguish between the survey work performed by design professionals and the essential surveying tasks that take place as part of construction activities.” GCA similarly “distinguish[ed] between the survey work performed by licensed professionals who often work for design or consulting firms, and the survey work performed by construction crews that are essential to any construction project,” opining that the latter should “continue to be covered by prevailing wage requirements.” An individual commenter noted that as the technology has become more readily available, “construction companies have been able to purchase equipment and train individuals in their rudimentary measurements functions.” Another noted that many construction companies now have surveyors on staff.

The Department recognizes that survey work performed “immediately prior to or during construction in direct support of construction crews” may differ from survey work performed in other contexts and may vary in complexity. The Department has kept this in mind while reviewing the duties described by commenters, focusing on the duties performed by survey crew members on Davis-Bacon covered contracts. For instance, several commenters described work performed off the site of the work, including preliminary office work, such as preparing design information for use in the field; uploading design information to the total station, GPS device, or data collector; research; and postliminary office work, such as downloading and reviewing information from that day’s field work. IAPA; Illinois Professional Land Surveyors Association (IPLSA); IRTBA; OCA. Because such duties would not generally be performed on the site of the work, and thus would not be subject to the Davis-Bacon labor standards, the Department did not consider such duties to be an integral part of the work performed for the purposes of determining whether survey crew members are “laborers or mechanics” for the purposes of 29 CFR 5.2(m). Conversely, IAPA pointed out that the Department did not include in the clarifying information in the NPRM

its previous determination from AAM 212 that only survey crew members employed by contractors or subcontractors on a project may be covered laborers or mechanics. The Department agrees that only survey crew members employed by contractors or subcontractors on a project may be covered laborers or mechanics.

A number of commenters described the survey work performed on construction sites immediately prior to or during construction in direct support of construction crews. For instance, several commenters explained that this includes reestablishing land boundary monuments and control points, doing construction layout, and placing wooden stakes (known as lath and hubs) that mark the contours of the construction project. IAPA, IPLSA, IRTBA, Michigan Department of Transportation (MDOT), OCA, SIBA. “A general description of survey work on horizontal construction (e.g., a highway, road, or runway project) begins with laying out the control points provided on the engineer’s plans. Next, a survey crew or worker locates, marks, and installs lath and hub with a hammer and/or sledgehammer at certain points across the jobsite (e.g., every 25, 50, or 100 feet) for the initial excavation. A worker may initially use a GPS unit to measure for a ‘rough grade.’ Then, after initial excavation, the worker may use a robotic instrument for more accurate positioning and elevation and continue to mark various layers of subgrade, including utilization of robotics and GPS positioning for machine control (e.g., excavation, paving, drilling, and pile driving). Throughout the day the worker is physically driving lath and hubs into the earth or carrying, setting up and using equipment around the construction site. From start to finish on a construction project, survey crew members work in direct support of construction crews.” III–FFC. Of these duties, GCA explained that construction crews can perform duties “essential to any construction project,” including “layout for neat lines, rough excavation, footings, piers, piles, caissons anchor bolts, base plates, walls, major imbedded items, slurry walls, and other procedures that require layout of all lines and grades for vertical and horizontal control.”

Some commenters emphasized aspects of the work requiring the exercise of professional judgment, such as the need to “observe the progress of the project, read and interpret design data and methods on the construction plans, calculate and determine if the current site conditions meet the intent of the design, and recalculate and/or

design a solution in the field that satisfies the plans.” Michigan Society of Professional Surveyors (MSPS); *see also* MDOT. These commenters also emphasized the need to complete forms, perform calculations and technical and mental tasks, and the need to use complex electronic devices. MDOT; MSPS.

Other commenters emphasized physical and manual aspects of surveying work, including the use of tools. III–FFC explained: “To perform their job, survey crew members use data collectors, GPS units, robotic instruments (*i.e.*, robotic total stations), total stations, transits, drones, scanners, and ground penetrating radar. This equipment is used for construction purposes such as: survey control; building control including grid line layout, electrical, plumbing, communications, foundations, and heating, ventilation, and air conditioning (HVAC) systems; clearing; slope staking; rough grade; final/finish grade; drainage and utility layout; curb, sidewalk and other hardscape surface improvements; subdrains; structures; walks; channels’ culverts; and stakes or measurements for other related items . . . . Workers on a survey crew also use a variety of tools commonly associated with construction work, including sledgehammers to drive lath and hubs into the ground, hammers, nails, shovel, folding rule, scribe, tool belt, spray paint and ribbon . . . . While some methods have changed with technical advances, the physical nature of survey work has not.” Similarly, IUOE explained that “members of Surveyor Crews are on their feet most of the workday, often walking several miles a shift up and down slope. Crew members are often expected to carry 30–40 lbs. worth of equipment with them to perform their task including but not limited to: GPS receivers [and] staff, lathe rub and hack bag, sledgehammer, and shovel. Additionally, Survey Crew members are expected to carry manual tools on utility belts including a 16 oz hammer, gloves, goggles, hand tape and knives. Surveyors are often tasked with navigating rough terrain and working with a GPS to sink stakes, lathes, and hubs with a sledgehammer into the ground for equipment operators to use as a guide for excavating or grading.” Additionally, they noted that surveyors “are often tasked with chiseling into concrete with steel hammers to mark where other trades are to locate walls and put-up machinery.” A professional land surveyor and small business owner opined that “[c]onstruction survey personnel’s duties are considerably

more physically demanding and dangerous than those of power equipment operators who have always been considered labor. While providing construction surveying services does involve significant mental calculations in the interpretation of engineering plans, setting 100 to 1000 stakes per day on an active construction site is nothing but laborious.”

Commenters were also divided as to the impact that technological developments have had on survey crew members’ duties. IAPA, Professional Land Surveyors of Ohio, and several individual commenters stated that the use of sophisticated technology and field computers has reduced the amount of physical labor required and increased the intellectual requirements. One individual commenter noted that “such manual labor is now uncommon for our crews, who by the virtue of technology spend nearly all their time in intellectual labor with extremely complex, delicate and very expensive equipment.” CLSA explained that “technology has allowed contractors to perform their construction work with less involvement of a land surveyor. Machine guidance—GPS mounted to construction equipment for the purposes of determining precise grading—has eliminated the mass grading work and underground utilities staking work previously performed by land surveyors. Contractors rely on a land surveyor’s expertise in the limited capacities of establishment of three-dimension project control, development of digital design models, specialized training and certifications of the contractors’ work, such as building pad elevation and foundation form certifications.”

The wide range of duties described, as well as the differences between the scope of work performed by survey crews employed by surveying or design firms versus survey crews employed by construction companies, highlights the need to evaluate the specific duties performed by the survey crew members on a project. The Department reiterates its view set forth in the NPRM that whether a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are “manual or physical in nature,” including the “use of tools or . . . work of a trade.” Consideration of tool use is particularly important given the technological developments in surveying. The Department notes that while the computerized equipment used in surveying today is more sophisticated than the hand tools of the past, certain

uses of this new technology have made it easier for those with less training and academic background to perform surveying tasks required on construction jobsites. *See* ARTBA, CLSA, GCA. In light of these developments, the Department continues to believe that survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics (provided that they are not exempt as professional, executive, or administrative employees under part 541, as discussed). If their work meets other required criteria—*i.e.*, it is performed on the site of the work (where required) and immediately prior to or during construction in direct support of construction crews—it would be likely covered by the Davis-Bacon labor standards. Similarly, the Department considers duties such as walking and carrying equipment and setting stakes to be physical or manual for the purposes of determining whether a survey crew member is a “laborer or mechanic.”

A number of commenters, particularly those associated with professional surveying organizations, expressed strong disagreement with the Department’s view that survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics. *See, e.g.*, CLSA, IPLSA, National Society of Professional Surveyors (NSPS). In support of their position, they cite AAM 39 (which they refer to as the “Goldberg Standard”), characterizing it as ruling that members of survey crews were exempt from Davis-Bacon, and that such workers are covered only to the extent to which they “perform manual work, such as clearing brush and sharpening stakes.” NSPS. They further asserted that “[s]taking by survey crews on a job site is 1% the physical and manual task of putting a stake in the ground and 99% collecting and analyzing data and making judgments for determining where to set a stake.” NSPS. IPLSA contends that the NPRM was “the first time that the Department has ever referenced taking measurements as a physical or manual task.” IPLSA.

These characterizations of the Department’s proposal are somewhat overstated. Two years prior to issuing AAM 39, the Department issued AAM 16, in which it concluded that survey crew members who acted as “chainmen,” “rodmen,” and “instrument men” were laborers or mechanics for the purposes of applying the Davis-Bacon labor standards (in

contrast, the party chief was considered a bona fide supervisor excluded from the definition of “laborer or mechanic”). In reaching its decision, the Department evaluated the duties performed by these survey crew members. In addition to clearing brush and sharpening stakes, the determination noted that “chainmen and rodmen” also set stakes, handled the rod and tape, and performed other comparable duties. In evaluating the “instrument men” role, the Department considered that it involved, among other physical tasks, “occasionally perform[ing] the physical work of rodmen or chainmen,” “carry[ing] and plac[ing] the instruments . . . [and] operat[ing] them,” “mak[ing] the sighting and tak[ing] and record[ing] the readings,” as well as being required “to exercise discretion, judgment, and skill involving problems encountered in the field.” Notably, these physical tasks include several examples of using surveying tools.

While AAM 39 appears to take a narrower view of the duties performed by laborers and mechanics, reliance on this AAM is misplaced. As demonstrated by the numerous comments received, the duties performed by survey crew members are far different from those described in AAM 39 (even the earlier AAM 16 described a wider array of duties). Moreover, as several commenters indicated, the more sophisticated equipment available today actually makes them easier for survey crew members with less training and academic background to use. Finally, it is not clear that the narrow reading of “laborer or mechanic” in AAM 39 is consistent with the common meaning of those terms when the Davis-Bacon Act was enacted. While it distinguished the term “laborer” as “one who performs manual laborer or labors at a toilsome occupation requiring physical strength” from the term “mechanic,” a “skilled worker with tools, who has learned a trade,” it failed to articulate why the latter would not apply to a wider range of survey crew members who use tools or even to address other types of physical work performed by survey crew members, such as walking and carrying equipment.<sup>187</sup>

<sup>187</sup> The statutory term “laborer or mechanic” incorporates the meanings of the terms “laborer” and “mechanic” as these were commonly understood in 1931. *See* SMART and cases cited therein. Thus, any interpretation of “laborer or mechanic” that focuses solely on the meaning of “laborer” is inconsistent with the statute. For this reason, the Department finds unpersuasive the point raised by several commenters, *e.g.*, IRTBA, NSPS, that, because the BLS separately defines the terms “surveyor” and “laborer,” members of survey crews cannot be laborers or mechanics. In response

Several commenters asserted that surveyors, or survey crew members more generally, should be treated as “learned professionals” under 29 CFR part 541, and therefore excluded from the definition of “laborer or mechanic,” 29 CFR 5.2(m) (“Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.”), because surveying is recognized as a “professional service” akin to architecture or engineering under the Brooks Act, 40 U.S.C. 1101 *et seq.* American Council of Engineering Companies; IAPA; IRTBA; NSPS; OCA; SIBA. Commenters also highlighted the training and licensure requirements for surveyors and expressed the view that survey crew members “are either professional land surveyors or overseen by professional land supervisors” and should therefore not be considered “laborers or mechanics.” IAPA; IPLSA; IRTBA; OCA; SIBA. Specifically, NSPS noted that all 50 states license individuals to engage in the professional practice of surveying, and an individual commenter stated that most states require a 4-year college degree. CLSA explained that while “[e]very state recognizes a bachelor’s degree in land surveying as a qualification to becoming a licensed land surveyor,” 12 states require a 4-year degree in land surveying or an associated field and 38 require at least some formal education as a minimum qualification to becoming a licensed land surveyor. It further noted that a surveyor working in the field has training in engineering and that a construction surveyor has “a high level of technical training anchored in math, related professions, construction management, and electronic data management.” IAPA, IPLSA, IRTBA, OCA, and SIBA explained that Professional Land Surveyors licensed in Illinois must have a baccalaureate degree in land surveying or a related science field with 24 credits of land surveying course from an accredited college, pass two licensing exams, and

to such narrow interpretations, including the Department’s interpretation in AAM 39, SMART opined that the Department should modify the definition of “laborer or mechanic” to *inter alia* give effect to each of its component terms. The Department notes that it did not propose any substantive changes to the definition of “laborer or mechanic.” Moreover, it believes that the current definition adequately reflects the separate characteristics of “laborers” and “mechanics.” The Department also notes that to the extent SMART referred to the Department’s position about flaggers being laborers or mechanics, as reflected in AAM 141 (Aug. 16, 1985) since 1985, the revisions in this rule regarding flaggers do not address their status as laborers or mechanics, but rather clarify coverage of flaggers in connection with the site of the work.

serve as a surveyor in training for 4 years, and then continue to take continuing education to remain licensed. Similarly, MSPS stated that survey crew members working on construction projects operate as “highly knowledgeable, specially trained, technicians and paraprofessionals” whose education and certificates of achievement “provide advanced knowledge in the surveying profession necessary for taking or assisting in taking measurements and exceed the classification of ‘laborers or mechanics.’” An individual commenter noted that survey crews often employ individuals with associate’s or bachelor’s degrees, while another referred to such survey technicians as “future professionals.”

III—FFC noted that licensure status is not determinative as “[o]ther trades have licensing requirements . . . including plumbers, electricians, roofing contractors, water well contractors, and water pump installation contractors” and contended that “[e]ven if work under a particular classification must be performed by, or under supervision of, a licensed individual, this requirement does not exclude workers from coverage, including survey crew members.”

To the extent that licensed professional surveyors meet the definition of “learned professionals” in 29 CFR part 541, they are not “laborers or mechanics” subject to the Davis-Bacon labor standards. 29 CFR 5.2(m) (“Persons employed in a bona fide executive, administrative, or professional capacity as defined in part 541 of this title are not deemed to be laborers or mechanics.”); AAM 16. To qualify as a “learned professional,” for the purposes of part 541 and § 5.2(m), one’s primary duty “must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.” 29 CFR 541.301(a). Work requiring “advanced knowledge” means work which is “predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine, manual, mechanical or physical work.” 29 CFR 541.301(b). Thus, an employee who performs work requiring advanced knowledge “generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.” *Id.* A “field of science or learning” includes “occupations that have a recognized professional status as distinguished

from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.” 29 CFR 541.301(c). Specialized academic training must be a standard prerequisite for entrance into the profession (though this does not exclude the occasional professional who has “substantially the same knowledge level and perform[s] substantially the same work as the degreed employees, but who obtained the advanced knowledge through a combination of work experience and intellectual instruction”). 29 CFR 541.301(d). However, practitioners of occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through apprenticeship or training, will generally not be deemed “learned professionals.” *Id.*

While state requirements vary, based on the information received from commenters, the Department believes licensed surveyors may in some cases be “learned professionals” and thus excluded from the definition of “laborers or mechanics.” However, this conclusion may vary, particularly where state licensing requirements do not customarily require a prolonged course of specialized intellectual instruction. *See Goebel v. Colorado*, No. 93–K–1227, 1999 WL 35141269, at \*7 (D. Co. 1999) (concluding at summary judgment that, under state licensing requirements involving a combination of surveying courses and land surveying experience, but no college degree, that surveying did “not require the ‘advanced type of knowledge’ gained through ‘a prolonged course of specialized intellectual instruction and study’” necessary to fall into the category of “learned professionals”).

However, other members of survey crews, even if working under the supervision of a licensed surveyor, cannot be excluded from the definition of “laborer or mechanic” on this basis. Unlicensed survey crew members have not completed specialized academic training or demonstrated “substantially the same knowledge level” to state licensing authorities to secure a professional license. *See* 29 CFR 541.301(d). Because they must work under the supervision of a licensed surveyor, rather than independently, on any work requiring a license, they are generally not “perform[ing] substantially the same work” as licensed surveyors. *See id.* Unlicensed paraprofessionals are generally not considered “learned professionals.” *See* 29 CFR 541.301(e)(7) (paralegals are not

learned professionals) and (e)(2) (practical nurses and other similar health care employees, *even if licensed*, are not learned professionals because “possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations”). Nor does the inclusion of surveying as a professional service under the Brooks Act suggest that unlicensed survey crew members should be deemed “learned professionals” excluded from the protections of the Davis-Bacon labor standards. As discussed above, whether unlicensed survey crew members are deemed “laborers or mechanics” will depend, not on the application of the part 541 “learned professional” exclusion in § 5.2(m), but on whether the specific range of duties they perform are “manual or physical in nature (including . . . [the] use [of] tools or . . . the work of a trade), as distinguished from mental or managerial.” See 29 CFR 5.2(m).<sup>188</sup>

After considering the comments received, the Department adopts as guidance the clarifying language set forth in the NPRM with one modification: The Department has historically recognized that members of survey crews who perform primarily physical and/or manual work while employed by contractors or subcontractors on a DBA or Related Acts covered project on the site of the work immediately prior to or during construction in direct support of construction crews may be laborers or mechanics subject to the Davis-Bacon labor standards. Whether or not a specific survey crew member is covered by these standards is a question of fact, which takes into account the actual duties performed and whether these duties are “manual or physical in nature” including the “use of tools or . . . work of a trade.” When considering whether a survey crew member performs primarily physical and/or manual duties, it is appropriate to consider the relative importance of the worker’s different duties, including (but not solely) the time spent performing these duties. Thus, survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be

deemed laborers or mechanics (provided that they do not meet the tests for exemption as professional, executive, or administrative employees under part 541). If their work meets other required criteria (*i.e.*, it is performed on the site of the work, where required, and immediately prior to or during construction in direct support of construction crews), it would be covered by the Davis-Bacon labor standards.

#### (G) Site of the Work and Related Provisions

In the proposed rule, the Department proposed the following revisions related to the DBRA’s “site of the work” requirement: (1) revising the definition of “site of the work” to further encompass certain construction of significant portions of a building or work at secondary worksites, (2) clarifying the application of the “site of the work” principle to flaggers, (3) revising the regulations to better delineate and clarify the “material supplier” exemption, and (4) revising the regulations to set clear standards for DBA coverage of truck drivers.

As discussed further below, having reviewed and considered the comments received, the Department is making certain revisions to these proposals in the final rule. Specifically, the final rule limits coverage of secondary worksites to locations where specific portions of a building or work are constructed and were either established specifically for contract performance or are dedicated exclusively or nearly so to the contract or project; further clarifies the material supplier exemption; and clarifies coverage of truck drivers employed by contractors or subcontractors by codifying the Department’s current *de minimis* standard rather than using an analogous standard from the FLSA.

#### (1) Statutory and Regulatory Background

##### a. Site of the Work

The DBA and Related Acts generally apply to “mechanics and laborers employed directly on the site of the work” by “contractor[s]” and “subcontractor[s]” on contracts for “construction, alteration, or repair, including painting and decorating, of [covered] public buildings and public works.” 40 U.S.C. 3142(a), (c)(1). The Department’s current regulations define “site of the work” as encompassing three types of locations: (1) “the physical place or places where the building or work called for in the contract will remain,” (2) “any other site where a significant portion of the

building or work is constructed, provided that such site is established specifically for the performance of the contract or project,” and (3) “job headquarters, tool yards, batch plants, borrow pits, etc.” that are both “dedicated exclusively, or nearly so, to performance of the contract or project” and “adjacent or virtually adjacent to the site of the work” itself. 29 CFR 5.2(l)(1), (2). The “site of the work” requirement does not apply to Related Acts that extend Davis-Bacon coverage to all laborers and mechanics employed in the “development” of a project; such statutes include the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996. See *id.* § 5.2(j)(1); 42 U.S.C. 1437j(a); 25 U.S.C. 4114(b)(1), 4225(b)(1)(B); 42 U.S.C. 12836(a). As the Department has previously noted, “the language and/or clear legislative history” of these statutes “reflected clear congressional intent that a different coverage standard be applied.” 65 FR 80267, 80275 (Dec. 20, 2000) (2000 final rule); see *Griffin v. Sec’y of Lab.*, ARB Nos. 00–032, 00–033, 2003 WL 21269140, at \*13 n.5 (May 30, 2003) (noting that the United States Housing Act of 1937 “provides that all construction activity funded or assisted under its auspices is subject to DBA requirements if that work is performed ‘in the development’ of a covered project” and therefore “has no ‘site of the work’ restriction”); *L.T.G. Constr. Co.*, WAB No. 93–15, 1994 WL 764105, at \*4 (Dec. 30, 1994) (noting that “the Housing Act [of 1937] contains no ‘site of work’ limitation similar to that found in the Davis-Bacon Act”).

##### b. Offsite Transportation

The “site of the work” requirement is also referenced in the current regulation’s definition of “construction, prosecution, completion, or repair,” which provides that “the transportation of materials or supplies to or from the site of the work” is not covered by the DBRA, except for such transportation under the statutes to which the “site of the work” requirement does not apply, as described above in paragraph (a). 29 CFR 5.2(j)(2). However, the regulation explains that transportation to or from the site of the work is covered where a covered laborer or mechanic employed by a contractor or subcontractor transports materials between an “adjacent or virtually adjacent” dedicated support site that is part of the site of the work pursuant to 29 CFR 5.2(l)(2), or transports portions of the building or work between a site where a significant portion of the building or

<sup>188</sup> MnDOT would have the Department simplify its analysis under 29 CFR 5.2(m), by considering survey crew members “‘laborers or mechanics’ subject to prevailing wage rates when performing work under the contract unless they are licensed surveyors.” Given the range of duties performed by survey crew members on Davis-Bacon covered contracts, the Department does not believe it could implement such an approach without modifying § 5.2(m), which it did not propose doing in the NPRM.

work is constructed and that is established specifically for contract or job performance, which is part of the site of the work pursuant to 29 CFR 5.2(l)(1), and the physical place or places where the building or work will remain.<sup>189</sup> 29 CFR 5.2(j)(1)(iv)–(l)(2).

#### c. Material Supplier Exception

While not explicitly set out in the statute, the DBA has long been understood to exclude from coverage employees of bona fide “material suppliers” or “materialmen.” See AAM 45 (Nov. 9, 1962) (enclosing WHD Opinion Letter DB–30 (Oct. 15, 1962)); AAM 36 (Mar. 16, 1962) (enclosing WHD Opinion Letter DB–22 (Mar. 12, 1962)); *H.B. Zachry Co. v. United States*, 344 F.2d 352, 359 (Ct. Cl. 1965); FOH 15e16. This principle has generally been understood to derive from the limitation of the DBA’s statutory coverage to “contractor[s]” and “subcontractor[s].” See AAM 36, WHD Opinion Letter DB–22, at 2 (discussing “the application of the term subcontractor, as distinguished from materialman or submaterialman”); cf. *MacEvoy v. United States*, 322 U.S. 102, 108–09 (1944) (distinguishing a “subcontractor” from “ordinary laborers and materialmen” under the Miller Act); FOH 15e16 (“[B]ona fide material suppliers are not considered contractors under DBRA.”). Typically, these are companies whose sole responsibility under the contract or project is to furnish materials, such as sand, gravel, and ready-mixed concrete, rather than to perform construction work.

Like the “site of the work” restriction, the material supplier exception does not apply to work under statutes that extend Davis-Bacon coverage to all laborers and mechanics employed in the “development” of a project, regardless of whether they are employed by “contractors” or “subcontractors.” See 29 CFR 5.2(j)(1) (defining “construction, prosecution, completion, or repair” as including “[a]ll types of work done on a particular building or work at the site thereof . . . by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, all work done in the construction or development of the project)”; 29 CFR 5.2(i) (“The manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work within the meaning of the

regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.”).

#### d. Relevant Regulatory History and Case Law

The regulatory provisions regarding the site of the work were revised in 1992 and 2000 in two distinct fashions.

First, in response to a series of appellate court decisions in the 1990s, the provisions were revised to narrow the geographic scope of the site of the work and to preclude coverage of offsite transportation in most circumstances. Specifically, the language in § 5.2(l) that deems dedicated sites such as batch plants and borrow pits part of the site of the work only if they are “adjacent or virtually adjacent” to the construction site was adopted in 2000 in response to *Ball, Ball & Brosamer, Inc. v. Reich*, 24 F. 3d 1447 (D.C. Cir. 1994) and *L.P. Cavett Company v. U.S. Department of Labor*, 101 F.3d 1111 (6th Cir. 1996), which concluded that batch plants located only a few miles from the construction site (2 miles in *Ball*, 3 miles in *L.P. Cavett*) were not part of the “site of the work.” See 65 FR 80269–71.<sup>190</sup> The “adjacent or virtually adjacent” requirement in the current regulatory text is one that the courts in *Ball* and *L.P. Cavett* suggested, and which the ARB later concluded, to be consistent with the statutory “site of the work” requirement. See *L.P. Cavett*, 101 F.3d at 1115; *Ball, Ball & Brosamer*, 24 F.3d at 1452; *Bechtel Constructors Corp.*, ARB No. 97–149, 1998 WL 168939, at \*4 (Mar. 25, 1998). Similarly, the provision in § 5.2(j)(2) that excludes, with narrow exceptions, “the transportation of materials or supplies to or from the site of the work” from coverage stems from a 1992 interim final rule, see 57 FR 19204 (May 4, 1992) (1992 IFR), and was adopted in response to *Building & Construction Trades Dep’t, AFL–CIO v. U.S. Dep’t of Labor Wage Appeals Bd. (Midway)*, in which

<sup>190</sup> Prior to 2000, the Department had interpreted “site of the work” more broadly to include, in addition to the site where the work or building would remain, “adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the ‘site.’” 29 CFR 5.2(l) (1990); see 65 FR 80269; AAM 86 (Feb. 11, 1970). This interpretation encompassed the offsite batch plants in *Ball* and *L.P. Cavett* that the courts in those cases concluded were too far from the primary worksite. Accordingly, the Department revised the regulation in the 2000 final rule to adopt the “adjacent or virtually adjacent” standard.

the D.C. Circuit held that drivers of a prime contractor’s subsidiary who picked up supplies and transported them to the job site were not covered by the DBA for their time spent going to and from the site because “the Act applies only to employees working directly on the physical site of the public building or public work under construction.” 932 F.2d 985, 990 (D.C. Cir. 1991).<sup>191</sup>

Second, as discussed in more detail below in the discussion of “Coverage of construction work at secondary construction sites,” in response to developments in construction that had enabled companies in some cases to construct entire portions of public buildings or works offsite, the Department broadened the “site of the work” in the 2000 final rule by adding the provision in § 5.2(l)(1) that encompasses offsite locations “where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project.” 65 FR 80278.

#### (2) Regulatory Revisions

In the NPRM, the Department proposed the following regulatory changes related to the “site of the work” requirement: (1) revising the definition of “site of the work” to further encompass certain construction of significant portions of a building or work at secondary worksites, (2) clarifying the application of the “site of the work” principle to flaggers, (3) revising the regulations to better delineate and clarify the “material supplier” exemption, and (4) revising the regulations to set clear standards for DBA coverage of truck drivers. The following discussion explains, with regard to each issue, the proposal, the comments received, and the Department’s decisions in the final rule.

##### a. Coverage of Construction Work at Secondary Construction Sites

The current regulatory definition of “site of the work” includes a site away from the location where the building or work will remain where a “significant portion” of a building or work is constructed at the site, provided that the site is established specifically for the performance of the contract or project. § 5.2(l)(1). In the 2000 final rule in which this language was added, the Department explained that it was intended to respond to technological

<sup>191</sup> Prior to 1992, the Department had interpreted the DBA as covering the transportation of materials and supplies to or from the site of the work by workers employed by a contractor or subcontractor. See 29 CFR 5.2(j) (1990).

<sup>189</sup> For more detail on this topic, see the section titled “Coverage of Construction Work at Secondary Construction Sites.”

developments that had enabled companies in some cases to construct entire portions of public buildings or works offsite, leaving only assembly or placement of the building or work remaining. See 65 FR 80273 (describing “the innovative construction techniques developed and currently in use, which allow significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work”). The Department cited examples, including a dam project where “two massive floating structures, each about the length of a football field” were constructed upriver and then floated downriver and submerged; the construction and assembly of military housing units in Portland for final placement in Alaska; and the construction of modular units to be assembled into a mobile service tower for Titan missiles. See *id.* (citing *ATCO Constr., Inc.*, WAB No. 86–1, 1986 WL 193113 (Aug. 22, 1986), and *Titan IV Mobile Serv. Tower*, WAB No. 89–14, 1991 WL 494710 (May 10, 1991)).

The Department stressed that this new provision was a narrow one, intended to apply only to the “rare” situations where “such a large amount of construction is taking place that it is fair and reasonable to view such location as a site where the public building or work is being constructed.” 65 FR 80274, 80276. It further stated that the limit of such coverage to facilities that are established specifically for the performance of a particular contract or project was necessary to exclude “[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components,” which have long been understood to be outside the DBA. *Id.* at 80274. The Department explained that “[i]t [was] the Department’s intention in [that] rulemaking to require in the future that workers who construct significant portions of a federal or federally assisted project at a location other than where the project will finally remain, will receive prevailing wages as Congress intended when it enacted the Davis-Bacon and related Acts.” *Id.* Consistent with this amendment, the Department also revised § 5.2(j) to cover transportation of portion(s) of the building or work between such a site and the location where the building or work would ultimately remain, explaining that “under these circumstances[,] the site of the work is literally moving between the two work sites,” 65 FR 57269, 57273 (Sept. 21, 2000), and as such, “workers who are engaged in transporting a significant

portion of the building or work between covered sites . . . are ‘employed directly upon the site of the work.’” 65 FR 80276.

In the NPRM, the Department proposed to expand this aspect of the definition of “site of the work” to include “any . . . site(s) where a significant portion of the building or work is constructed, provided that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public.” The NPRM explained that since 2000, technological developments have continued to facilitate offsite construction that replaces onsite construction to an even greater degree and that the Department expects such trends to continue in the future, including in Federal and federally assisted construction. 87 FR 15731 (citing Dodge Data and Analytics, “Prefabrication and Modular Construction 2020” (2020), at 4, and GSA, Sched. 56—“Building and Building Materials, Industrial Service and Supplies, Pre-Engineered/Prefabricated Buildings Customer Ordering Guide” (GSA Sched. 56), at 5–7).<sup>192</sup> The Department further stated that “when ‘significant portions’ of a building or work that historically would have been built where the building or work will ultimately remain are instead constructed elsewhere, the exclusion from the DBA of laborers and mechanics engaged in such construction is inconsistent with the DBA.” *Id.* at 15732. Therefore, the Department proposed to eliminate the current regulation’s requirement that an offsite facility at which such “significant portions” are constructed must also be “established specifically for the performance of a particular contract or project” in order to be considered part of the “site of the work.” The Department explained that the goal of excluding “[o]rdinary commercial fabrication plants” and similar material supply facilities and factories could be better accomplished by elaborating on the definition of “significant portion,” which the Department proposed to define as “one or more entire portion(s) or module(s) of the building or work, as opposed to smaller prefabricated components, with minimal construction work remaining other than the installation and/or assembly.”

The Department received numerous comments regarding the proposal

concerning secondary construction sites.

Most labor unions and groups representing union-affiliated employers supported the proposal, agreeing that the extension of coverage was consistent with the intent of the DBA and would prevent businesses from paying non-prevailing rates for work that historically had been performed by DBA-covered workers at the primary worksite. Examples of such comments included those from NABTU, LIUNA, SMART, The Association of Union Contractors (TAUC), UA, and MCAA.<sup>193</sup>

Some commenters, such as NABTU, IBEW, LIUNA, and UA, urged the Department to expand coverage even further, contending that the NPRM’s limitation of coverage to locations where “entire portions or modules” of a public work are constructed, “as opposed to smaller prefabricated components,” was unwarranted, and that the proposed definition of “significant portion” should be changed to mean “one or more portion(s), module(s) and/or individualized fabricated component(s) that are integral to the building or public work,” to include even smaller custom components like custom pipe bends. NABTU and several other commenters that incorporated NABTU’s comments by reference further argued that *Midway, L.P. Cavett*, and *Ball* were wrongly decided and encouraged the Department to abandon the distinction between work performed at “primary” or “secondary” sites, suggesting the term “work” in the phrase “site of the work” does not refer to the public work or building being constructed, but to any work that is specific to, and customized for, a DBA project. The UA made similar arguments. SMART urged the Department to consider the impact of building information modelling (BIM), a software modeling process that enables “virtual construction of a building’s superstructure and mechanical, electrical, and plumbing systems before the off-site or on-site construction of the physical buildings, portions, modules, or components begins,” and to integrate a reference to BIM and similar technologies into the definitions of “secondary construction site(s).” Some commenters supporting the proposal provided examples of the use of offsite construction in Federal or federally funded projects; LIUNA, for example, cited the FHWA’s seeking to develop innovations in offsite bridge

<sup>192</sup> See [https://proddrupalcontent.construction.com/s3fs-public/SMR1219\\_Prefab\\_2020\\_small-compressed.pdf](https://proddrupalcontent.construction.com/s3fs-public/SMR1219_Prefab_2020_small-compressed.pdf); [https://www.gsa.gov/cdnstatic/SCHEDULE\\_56\\_-\\_ORDERING\\_GUIDE.pdf](https://www.gsa.gov/cdnstatic/SCHEDULE_56_-_ORDERING_GUIDE.pdf).

<sup>193</sup> MCAA, a group of union-affiliated contractors, noted in its comment that while its support of the proposal reflected the view of most of its member employers, some of its members dissented from that view.



construction, modular construction in airport expansion projects, prefabricated chemical storage buildings at DOE's national laboratories, and the use of prefabricated structures in Army Corps of Engineers navigation projects.

A few commenters recommended clarifications to the proposed definition of "significant portion." For example, the NECA and the New York State Metropolitan Transportation Authority (MTA) requested that the Department ensure the definition of "significant portions" not include smaller prefabricated components such as electrical racks, temporary power distribution centers, prefabricated tiled wall units, elevators and escalators, and bus and train wash units. NECA further stated that the Department should "consider when determining 'significant portion' that the prefabrication materials are specific and/or unique to the project itself and are not readily available to the general public or commercial market." The MTA also recommended that the Department clarify that, where required, the prevailing wage for offsite work should reflect the area where the offsite work is performed, as opposed to the area of the primary work site, and that no prevailing wage requirements apply to offsite fabrication that takes place in a foreign country. American Clean Power (ACP), while opposing the expansion in general, asserting that it was inconsistent with congressional intent, suggested in the alternative that "significant portion" be changed to eliminate any reference to size or modularity and instead to tie coverage or the lack thereof to a secondary site's "permanence, independence, and distance" from the primary worksite.

Except for groups representing union-affiliated employers, commenters representing employers generally opposed the proposed expansion of coverage of offsite work. Many of these commenters, including ABC and its member campaign comments, MBI, AGC, NAHB, OCA, and IRTBA, argued that the Department's proposal impermissibly exceeded the statutory restriction of coverage to "site of the work" as the term has been interpreted in *Midway, Ball*, and *L.P. Cavett*. Several commenters focused specifically on the proposal's potential impact on modular construction, arguing that proposed expansion would increase the cost of modular construction projects and imperil the modular industry and its workers. These commenters, including, for example, SG Echo, Parkline, Inc., Clark Pacific, Modular Solutions, Ltd., and IEC, described the modular industry as highly competitive and relatively low-margin, and argued that prevailing

wage rates would cause modular companies to become less competitive in the marketplace, leading to increased costs to taxpayers on public buildings and works. Some commenters pointed to what they asserted are advantages of modular construction in arguing against the proposed expansion. For example, MBI, California Housing Consortium (CHC), and others argued that in addition to being more predictable and efficient, construction in a factory-controlled environment is safer for workers and more environmentally friendly than traditional construction, and that those priorities would be adversely affected if the industry were impacted by the proposed coverage expansion. Enterprise Electrical, LLC asserted that offsite operations provide an entry point for less experienced workers to be introduced to a trade that will enable them to graduate to onsite locations where they can earn higher wages.

Several of these commenters, including Conscious Communities, the CHC, Cloud Apartments, Optimum Modular Solutions, Southeast Modular, The Pacific Companies, and Manufactured Housing Institute, commented that the "site of the work" expansion would negatively impact the affordable housing sector, noting that the efficiencies and cost savings of modular construction can increase the availability of affordable housing. They argued that by effectively removing the cost advantages of modular construction, the proposal will deter modular housing firms from working on DBRA-covered projects. One such commenter, The Pacific Companies, stated that if the proposed changes are implemented, it would cease using Federal funding that triggers Davis-Bacon coverage for the construction of affordable housing, and would shift its business to producing market-based housing or commercial developments.

Some commenters opposing the proposal cited a lack of clarity with regard to coverage scope and impact. For example, MBI and ACP argued that the Department's proposed definition of "significant portion" was unclear and would cause tremendous uncertainty, and that employers would have to guess whether or not certain work is covered and could face significant liability if their interpretation is later determined to be incorrect. ACP specifically expressed concern that the new definition of "significant portion" would be a deviation from the current one on which stakeholders are relying to seek Federal funding under the IJA. The SBA Office of Advocacy argued that the extent of the economic impact of the

proposed expansion, including the number of small businesses that will be newly DBA-covered under the proposal, was unclear and that the Department should undertake further analysis of these issues.

Some commenters also raised concerns regarding whether it would be feasible or appropriate to apply Davis-Bacon rates for onsite construction to an offsite environment. For example, Quartz Properties and Phoenix Modular Elevator argued that the tasks and skills of offsite factory workers differ substantially from those of onsite workers, and Blazer Industries contended that paying factory workers different rates for government contract or federally funded work that is otherwise identical to non-covered work would be administratively difficult, since such workers typically work on multiple projects in a given day, and could hurt employee morale if some workers earn more than others doing the same kind of work. FTBA similarly argued that construction activity will be difficult to segregate from commercial, non-DBA work, including work manufacturing materials covered by the Walsh-Healey Public Contracts Act, and that this will lead to confusion and inadvertent violations of law. ACP, GCA, and ARTBA noted that offsite work often occurs at locations far away from the public work's intended location and contended the Department's proposal could impose liability on parties who have no control over the manufacturing process. Two union-affiliated commenters, UBC and Signatory Wall and Ceiling Contractors Alliance, while not expressly opposing the proposal, raised concerns that it could interfere with existing collective-bargaining agreements that cover workers at offsite factories, and proposed that the site of the work not include facilities where in the normal course of business products are manufactured or fabricated for non-Federal or non-federally assisted projects.

After consideration of the comments received, the Department is modifying its proposal to narrow the scope of coverage at secondary construction sites. Specifically, the final rule provides that for a secondary construction site to be considered part of the site of the work, in addition to being a location where a significant portion of a building or work is constructed for specific use in the designated building or work, the site must be either established specifically for the performance of the covered contract or project or dedicated

exclusively, or nearly so, to the covered contract or project.

While the Department remains concerned that the trend toward offsite construction of portions of buildings or works that are otherwise covered by the DBA and its Related Acts may result in fewer workers earning Davis-Bacon wages, in derogation of Congress's intent in enacting these statutes, the Department believes that commenters have raised valid concerns regarding the specific proposal in the NPRM. Specifically, the Department agrees that further analysis of the potential economic impact of such a proposal is warranted, particularly given the concerns raised about potential adverse effects on CBAs and affordable housing.<sup>194</sup> Additionally, while the Department maintains that the interpretation of the term "site of the work" advanced in the proposed rule would be a permissible construction of the language of the Davis-Bacon Act, the Department is cognizant that a reviewing court could reach a contrary conclusion based on existing circuit court precedent and the Department does not wish to create unnecessary legal uncertainty surrounding this issue at this time without further analysis or information about potential impacts. Finally, the Department recognizes that it could be challenging and resource-intensive for companies operating what are essentially factory environments creating products potentially for multiple clients and projects to pay workers different rates depending on the particular project for which they are creating products at any given point in a day.

Instead, the Department is revising this component of the regulation to reflect a more incremental expansion of coverage of secondary construction sites where significant portions of public works are constructed for specific use in a particular building or work. Specifically, whereas the current regulation includes such sites only if

they are established specifically for a DBRA-covered project or contract, the revised regulation also includes any sites that are dedicated exclusively or nearly so to the performance of a single DBRA-covered project or contract—*i.e.*, sites that for a specific period of time are dedicated entirely, or nearly entirely, to the construction of one or more "significant portions" of a particular public building or work. The final rule further explains that a "specific period of time" in this context means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline.

The Department believes that this more limited approach will address the most significant concerns voiced by commenters. Specifically, as noted above, many commenters contended that tracking time and wage rates at facilities engaged in work on multiple projects at once would be infeasible and that the potential administrative costs would especially deter small businesses, which work on multiple projects at a time, from working on Federal or federally funded projects. MBI, for example, asserted that "the administrative costs of tracking multiple rates of pay and fringe benefits based on the type of project" would be "prohibitive." One small business owner stated that "[w]e always have multiple projects being constructed in our facility at any given time with man power bouncing back and forth between projects as needed." Another voiced concerns about the potentially "astronomical" "administrative costs of tracking multiple rates of pay based on the type of project." Another noted that "[i]n the plant our staff are multi-tasking all day long," that "small manufacturers everywhere . . . have cross trained employees that do multiple functions during the day on multiple projects," and that "documentation of which project they worked on and which project is federal would be a huge undertaking that may cause our small minority firm to take a second look at doing any federal work." Along similar lines, UBC and Signatory Wall and Ceiling Contractors Alliance predicted difficulties with implementing the proposed rule at facilities at which workers are employed on both DBRA-covered and non-DBRA-covered projects. These issues will no longer be significant under the final rule, which will only cover secondary sites established specifically for a particular

project or that are dedicated exclusively, or nearly so, to a single DBRA-covered project. Thus, sites at which work is being performed on more than one project at a time—whether DBRA-covered or not—will not be considered secondary construction sites (except for circumstances where work on a second project is merely token work, in which case the site would be deemed "nearly" exclusively dedicated to the main project and therefore covered).

Additionally, with a narrower scope of coverage, the Department expects that the impact of the final rule will be in line with the more limited impact of the 2000 final rule that provided for coverage of offsite locations where "significant portions" of public works were constructed only if those locations were established specifically for contract performance. In that rule, the Department stated that it anticipated that the number of instances in which the expansion would be implicated would be "rare" and that "the prevailing wage implications would not be substantial." 65 FR 80277. While this final rule expands coverage beyond the 2000 rule to include dedicated secondary construction sites even if they were not established for contract performance, the Department believes that the impact will be of a similarly limited order of magnitude and not of the type that will cause significant disruption, particularly given the numerous comments stating that modular construction facilities typically work on multiple projects at a time and would therefore be beyond the scope of this provision. Similarly, the Department believes that narrowing the scope of the rule's change largely addresses concerns noted above regarding stakeholders' reliance on the current definition in seeking Federal funding, and that any remaining such interests are outweighed by the benefits of ensuring that construction workers on DBRA projects are paid Davis-Bacon wages for time spent on the site of the work.

The Department believes that the more limited scope of the final rule also addresses concerns about the potential ambiguity of the term "significant portion." While the Department recognizes that there will be borderline cases, the Department anticipates, as it did in the 2000 final rule, that the distinction between a significant portion or module and a prefabricated component will be clear in the vast majority of cases. *See* 65 FR 80275 (stating that "where projects are constructed in this manner, application of this provision should normally be obvious"). The Department similarly

<sup>194</sup> Although the Department noted above that it anticipates that this rule's revisions to the definition of prevailing wage will at most result in a limited potential increase in construction costs for a small percentage of the market and will not significantly affect overall housing prices or rents, the Department is cognizant that the definition of "site of the work" impacts the scope of covered employers and workers, rather than the amount of the prevailing wage for those already covered. The Department agrees that it is advisable to more closely examine the potential effects of a regulatory revision that could expand coverage to a category of employers that have generally not previously been covered by the Davis-Bacon labor standards. The Department also believes that such closer examination will inform the extent to which Davis-Bacon classifications can easily be applied to an offsite environment in a broader fashion.

agrees with its assessment in the 2000 final rule that “a precise definition would be unwise because the size and nature of the project will dictate what constitutes a ‘significant portion.’” *Id.* However, the final rule adds some additional clarifying language, and now states that a “significant portion” “means one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain.” Given the final rule’s more limited scope, the Department anticipates that contractors and subcontractors can refer close questions to the Administrator and will be able to do so at an early stage in the contracting process. To the extent that questions arise frequently, the Department will consider elaborating on the definition of “significant portion” in subregulatory guidance.<sup>195</sup> The Department will also continue to solicit and review information regarding offsite construction and other developing trends in construction with Davis-Bacon implications.

The final rule further states explicitly that “[a] ‘significant portion’ does not include materials or prefabricated component parts such as prefabricated housing components.” The Department reiterates that the manufacture of such items has long been understood to be outside the scope of the DBA since the law’s inception, and the final rule does not alter this well-established principle. *See Midway*, 932 F.2d at 991 n.12 (citing 1932 House debate on the DBA as evidence that its drafters understood that offsite prefabrication sites would generally not be considered part of the site of the work). Such prefabrication, however, is distinguishable from “pre-engineering” or “modular” construction, in which significant, often-self-contained portions of a building or work are constructed and then simply assembled onsite “similar to a child’s building block kit.” GSA Sched. 56 at 5.

Under the latter circumstances, as the Department noted in 2000, “such a large amount of construction is taking place [at an offsite location] that it is fair and reasonable to view such location as a site where the public building or work is being constructed.” 65 FR 80274; *see also id.* at 80272 (stating that “the

Department views such [secondary construction] locations as the actual physical site of the public building or work being constructed”). The Department reached this conclusion in 2000 with respect to offsite locations established specifically for contract performance, and the Department concludes that it is equally consistent with the DBA, and with *Midway*, *Ball*, and *L.P. Cavett*, to apply this principle to locations dedicated exclusively or nearly so to contract performance. While the Department agrees that these appellate decisions generally place the primary focus of the “site of the work” inquiry on the physical proximity of a location to the intended location of the building or work, throughout the DBA’s long history the Department has recognized that under certain circumstances, the term can also encompass other locations with a sufficient nexus to a particular project based on the nature of the work performed there. *See AAM 7* (July 18, 1958) (concluding that DBA applied to sheet metal workers who alternated between the installation site and an off-site shop); *Titan IV Mobile Serv. Tower*, 1991 WL 494710, at \*7 (Rothman, J., writing separately) (opining that the removal of construction work from the final location “does not by the fact of removal alone lose . . . Davis-Bacon Act coverage”).

The final rule is consistent with the overarching principle, reflected in both the site of the work principle and the material supplier exemption, that Davis-Bacon coverage does not apply to activities that are independent of the particular contract or project. *See United Constr. Co., Inc.*, WAB No. 82–10, 1983 WL 144675, at \*3 (Jan. 14, 1983) (examining, as part of an inquiry into whether support activities are on the “site of the work,” “whether the activities are sufficiently independent of the primary project to determine that the function of the support activities may be viewed as similar to that of materialman”). As noted above, the Department continues to maintain that as a legal matter, it would be permissible for the Department to interpret the term “site of the work” to include any location where custom-made “significant portions” of a public building or work are constructed. However, the final rule’s restriction of coverage of such facilities to those that are either established for, or dedicated exclusively or nearly exclusively to, a particular project reflects a reasonable balance that the Department believes is supportable as a matter of law and policy in light of the countervailing

concerns raised by commenters. In particular, when an offsite location becomes dedicated exclusively, or nearly so, to actual construction of either the entirety or significant portions (as defined in the rule) of a single public building or public work, the character of the offsite location is such that it is “fair and reasonable” to view it as a construction site (and not simply a factory) and as a “site of the work” for purposes of the project to which it is exclusively (or nearly so) dedicated.

While some commenters voiced concerns that it will be challenging to apply Davis-Bacon classifications in an offsite environment, the Department notes that if the classification of a worker based on the set of the worker’s job duties is not straightforward, contractors, agencies, and other interested parties can bring questions to WHD and, if necessary, can submit conformance requests. The Department believes that the consultation and conformance processes, together with the final rule’s new procedures for publishing supplemental wage rates under certain circumstances, will adequately address these concerns. The Department fully intends to work with contractors, contracting agencies, and other interested parties to resolve those questions as early in the contracting process as possible. Additionally, to the extent that some of these concerns are grounded in the fact that workers at secondary sites may work in different capacities at different times, this situation is not unique to offsite facilities. To the contrary, the Department’s regulations and longstanding interpretation recognize that workers may perform work in more than one classification, and that employers may pay them at the rate for each classification based on the time worked therein, provided that the employer accurately tracks such time. *See 29 CFR 5.5(a)(1)(i); Pythagoras Gen. Contracting Corp.*, ARB Nos. 08–107, 09–007, 2011 WL 1247207, at \*7 (Mar. 1, 2011), *aff’d sub nom. Pythagoras Gen. Contracting Corp. v. U.S. Dep’t of Lab.*, 926 F. Supp. 2d 490 (S.D.N.Y. 2013).

For the reasons discussed above regarding the narrowing of the proposed rule, the Department declines commenters’ suggestions to expand coverage of offsite construction even further to include smaller custom-made components, or to reject the holdings in *Midway*, *Ball*, and *L.P. Cavett*. The principles announced by the courts in those decisions are now well-established, including in the Department’s own case law. Moreover, an even broader expansion of coverage than proposed in the NPRM would raise

<sup>195</sup> The Department notes that commenters raised similar concerns in the 2000 rulemaking regarding the ambiguity of the term “significant portions,” and that those concerns have not, to the Department’s knowledge, resulted in significant compliance issues in the 2 decades since.

the concerns regarding costs and impact discussed above, but to an even greater degree. The Department also believes that it is reasonable to distinguish between exclusively-dedicated support sites like batch plants, borrow pits, and prefabrication sites—which under case law and the Department’s regulations are part of the site of the work only if adjacent or nearly adjacent to a primary or secondary worksite—and exclusively-dedicated sites at which significant portions are constructed, which under the final rule are covered regardless of proximity to the primary worksite. Under the latter circumstances, the magnitude of construction activity taking place at the secondary location, and the near-completeness of the modules or portions, weigh much more heavily in favor of a conclusion that the secondary location is a “site of the work” and distinguish such circumstances from those in *Midway, Ball*, and *L.P. Cavett*.

Finally, in response to MTA’s questions, the Department agrees that the appropriate geographic area for the application of prevailing wages to secondary construction sites is the location of the secondary construction site, not the location of the primary worksite. The purpose of the Davis-Bacon labor standards is to ensure that laborers and mechanics are paid wages that prevail where they work; thus, it would not be appropriate to apply wage rates from a different area when there is sufficient wage data in the area in which they work. A contract involving both a primary and secondary construction site should include wage determinations for both areas. Regarding whether work performed outside the United States is covered, the language of the specific statute providing for application of the Davis-Bacon labor standards controls. For example, the DBA applies only within the geographical limits of the 50 states and the District of Columbia, as well as in the Commonwealth of the Northern Mariana Islands. Conversely, some Related Acts apply to construction in U.S. territories such as Guam, Puerto Rico, and the U.S. Virgin Islands.

#### b. Clarification of Application of “Site of the Work” Principle to Flaggers

The Department proposed to clarify that workers engaged in traffic control and related activities adjacent or virtually adjacent to the primary construction site are working on the site of the work. Often, particularly for heavy and highway projects, it is necessary to direct pedestrian or vehicular traffic around or away from the primary construction site. Certain workers of contractors or

subcontractors, typically called “flaggers” or “traffic directors,” may therefore engage in activities such as setting up barriers and traffic cones, using a flag and/or stop sign to control and direct traffic, and related activities such as helping heavy equipment move in and out of construction zones. Although some flaggers work within the confines of the primary construction site, others work outside of that area and do not enter the construction zone itself.

The Department has previously explained that flaggers are laborers or mechanics within the meaning of the DBA. *See* AAM 141 (Aug. 16, 1985); FOH 15e10(a); *Superior Paving Materials, Inc.*, ARB No. 99–065, 1999 WL 708177 (June 12, 2002). The Department proposed to clarify, in the definition of “nearby dedicated support sites,” that such workers, even if they are not working precisely on the site where the building or work would remain, are working on the site of the work if they work at a location adjacent or virtually adjacent to the primary construction site, such as a few blocks away or a short distance down a highway. Although the Department believes that any adjacent or virtually adjacent locations at which such work is performed are included within the current regulatory “site of the work” definition, given that questions have arisen regarding this coverage issue, the Department proposed to make this principle explicit.

As the Department has previously noted, such work by flaggers and traffic operators is integrally related to other construction work at the worksite and construction at the site would not be possible otherwise. *See* AAM 141; FOH 15e10(a). Additionally, as noted above in section III.B.3.ii.(G).(1).(d) and as the ARB has previously explained, the principle of adjacency or virtual adjacency in this context is consistent with the statutory “site of the work” limitation on DBA-covered work as interpreted by courts. *See Bechtel Constructors Corp.*, ARB No. 97–149, 1998 WL 168939, at \*5 (explaining that “it is not uncommon or atypical for construction work related to a project to be performed outside the boundaries defined by the structure that remains upon completion of the work,” such as where a crane in an urban environment is positioned adjacent to the future building site). This proposed change therefore is consistent with the DBA and would eliminate any ambiguity regarding these workers’ coverage.

The Department received a number of comments about the coverage of flaggers under the proposed revision of the definition of site of work. Some of the

commenters supported the proposal in its entirety, others opposed the proposal (including through comments submitted as part of an organized ABC member campaign), and a few commenters sought clarification on the proposal.

Supporting commenters agreed with the proposal’s intent to codify the Department’s interpretation of adjacency to the site of the work and ensure that flaggers receive Davis-Bacon protections. For example, LIUNA stated this clarification reflects existing practice and therefore will ensure that laborers employed as flaggers receive the benefits and protections of the DBA. LIUNA emphasized that this clarification is not only consistent with the original purpose of the DBA, but it also furthers the Secretary’s 1985 coverage decision reflected in AAM 141.

Both LIUNA and the NCDCL stated the work of flaggers is integrally related to the other construction work at the worksite, with NCDCL emphasizing that this is especially true on heavy and highway projects. LIUNA noted that construction at the site would not be possible without such integrally related flaggers’ work and pointed to LIUNA apprenticeship program curricula that demonstrate the integral nature of traffic control to construction work. Such apprenticeship training encompasses safety on construction sites related to protection of flaggers themselves, as well as of other workers and the driving and pedestrian public near the site. A number of commenters including LIUNA noted that a flagger may need to perform work outside the precise confines of the work site in order for them to effectively perform their duties, which are integrally related to the other work at the construction site.

LIUNA and NJHCL noted that the dangerous nature of flagger work underscores the importance of clarifying, and thus ensuring, Davis-Bacon coverage for flaggers. Flagger work includes keeping laborers and mechanics working on or near the worksite safe, as well as keeping the public safe and out of the work site. LIUNA cited FHWA and State department of transportation best practices and flagging instruction materials that noted that flagger stations must be located in places where the traveling public has sufficient distance to stop at an intended stopping point before entering the work space. They also noted that flagger stations should be preceded by advance warning signs and be at points of maximum visibility, such as on the shoulder of a highway and opposite active work areas. Another commenter echoed the importance of flagger work performed adjacent or

nearly adjacent to the construction site because flaggers are keeping those in and around the jobsite safe.

NJHHCL expressed approval of the Department's recognition that "workers handling the traffic control near the primary construction site are essential personnel to these projects." LIUNA similarly emphasized that over 60 percent of all fatal injuries at road construction sites are a result of vehicles striking workers who are on foot.

Commenters such as ABC and ARTBA opposed the proposal, characterizing it as an expansion of DBA coverage to flaggers whom they contend are not on the site of the work. In its comment, ABC argued that the proposed revision's "expansion of coverage to include . . . flaggers who do not perform work at the site of construction" violates the plain language of the DBA. ABC member campaign comments similarly claimed that the proposed rule would expand DBA regulations to work such as flaggers. These commenters also asserted that the Department's flagger and other proposals would increase the regulatory burden and costs on new industries and types of construction projects typically not subject to DBA regulations.

Likewise, ARTBA claimed the Department's flagger proposal extended DBA coverage to "off-site" flaggers. ARTBA opposed the proposal, claiming that it failed to recognize that flaggers working onsite directing personnel and equipment have special training. In contrast, according to ARTBA, "off-site" flaggers do not have special training and their primary responsibility is pedestrian management and directing people away from the worksite and they "are not physically present on the worksite." ARTBA argued that onsite flaggers are properly covered by the DBA while offsite flaggers should not be covered by the DBA because of their duties, location, and lack of specialized training.

Various individual commenters also claimed that the proposal was an "expansion of DBA regulations to . . . flaggers" who do not perform work on the construction sites,<sup>196</sup> and voiced concerns that it would increase the regulatory burden and costs for industries and types of construction projects that these commenters claimed were not typically subject to DBA regulations.

The Department reiterates that the rule does not change the meaning of

adjacent or nearly adjacent dedicated support sites or expand coverage to previously non-covered workers, but rather codifies the Department's interpretation that the site of the work encompasses flagger activities performed adjacent or virtually adjacent to the construction site. Codifying this policy is intended to assist contractors and other stakeholders with accurately assessing when flaggers are working on the site of the work and, therefore, covered by the DBA.

The Department thus disagrees with commenters who claimed the rule expands DBA coverage and would increase administrative burdens and costs on the regulated community. As explained in the NPRM, workers performing flagger activities adjacent or nearly adjacent to worksites are working on the site of the work under the DBA. Such work ensures that construction work in and around the active worksite proceeds in a safe and efficient manner, in part by protecting the laborers and mechanics doing the work, the flaggers themselves, and the public around the worksite. The Department notes that a worker's title is not determinative of whether the person performing flagger activities is on the site of the work, especially since, as LIUNA pointed out, there are numerous titles for people performing activities associated with directing vehicular or pedestrian traffic both on and around or away from the primary construction site.

Furthermore, the Department disagrees with ARTBA that only flaggers working "on-site directing personnel and equipment" and who have received specialized training should be covered by the DBA. Such a position is contrary to the Department's recognition that flaggers are laborers, *see, e.g.*, AAM 141, whose work, like the work of crane operators on building projects or of laborers setting up cones or cleaning up around heavy or highway projects, is "performed outside the boundaries defined by the structure that remains upon completion of the work." *Bechtel*, ARB No. 97-149, 1998 WL 168939, at \*5. These laborers work adjacent or virtually adjacent to the site of the work and are covered by the DBA. Additionally, ARTBA's emphasis on specialized training about directing personnel around work vehicles and operations that "on-site" flaggers receive is not relevant to whether a worker is performing flagger activities adjacent or virtually adjacent to the worksite.

AGC did not disagree with the proposal but emphasized that the Department should maintain the distinction between flaggers and

employees of traffic service companies that rent equipment to the prime contractor and perform only incidental functions at the site in connection with delivery of equipment. AGC noted that the Department's current guidance in FOH 15e10 and 15e16 draws this distinction, with 15e16 further providing that traffic service company workers are not covered by the DBA unless they spend a substantial amount of time (20 percent or more) in a workweek on the site.

The Department acknowledges the distinction between flaggers and workers of traffic service companies. As described in section c ("Clarification of 'material supplier' distinction"), the final rule codifies the distinction between contractors and subcontractors and material suppliers. Under the final rule, if a traffic service company's only contractual responsibility is to deliver equipment and to perform activities incidental to such delivery, such as loading and unloading, then assuming it meets the other enumerated criteria, it is considered a material supplier and its workers therefore are not subject to the Davis-Bacon labor standards unless the work is performed under a statute that applies to all work performed by laborers and mechanics in the development of a project. On the other hand, if the company's workers are engaged in construction work on the site that is not incidental to delivery, such as acting as flaggers, the company would be considered a subcontractor, and therefore, as discussed below, *see infra* section d ("Coverage of time for truck drivers"), its workers would be covered for any time spent in non-delivery-related construction work, as well as any onsite time essential or incidental to delivery that is not *de minimis*.

Finally, the SBA commented that the proposed rule may result in more small businesses covered by the DBA. The SBA recommended that the Department quantify the number of small businesses potentially affected by this and other proposals in the NPRM. The number of potentially affected small businesses is estimated in section VI ("Final Regulatory Flexibility (FRFA) Analysis").

For the foregoing reasons, the final rule adopts the language regarding flaggers as proposed.

#### c. Clarification of "Material Supplier" Distinction

The Department also proposed to clarify the distinction between subcontractors and "material suppliers" and to make explicit that employees of material suppliers are not covered by

<sup>196</sup> The Department understands that the ABC member campaign comments, which were ambiguous, opposed the flagger proposal on this basis, as did ABC.

the DBA and most of the Related Acts. Although this distinction has existed since the DBA's inception, the precise line between "material supplier" and "subcontractor" is not always clear and is sometimes the subject of dispute.

While the Davis-Bacon regulations have not previously included definitions of "contractor" or "subcontractor," this rule, as discussed, adds such definitions into § 5.2. The Department proposed to incorporate the material supplier exception into the proposed new definition of "contractor," which was incorporated into the proposed definition of "subcontractor." Specifically, the Department proposed to exclude material suppliers from the regulatory definition of "contractor," with the exception of entities performing work under "development statutes"—certain Related Acts that apply the Davis-Bacon labor standards to all laborers and mechanics employed in a project's development and thus are not limited to "contractors" or "subcontractors."

The Department proposed three criteria for the material supplier exception to apply to an employer. First, that the employer's only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery. Second, that the employer also supplies materials to the general public. Third, that the employer's facility manufacturing the materials, articles, supplies, or equipment is neither established specifically for the contract or project nor located at the site of the work. The proposed language further clarified that if an employer, in addition to being engaged in material supply and pickup, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier but a subcontractor. The Department explained that these criteria were intended to reflect case law and the Department's guidance. See 87 FR 15732 (citing *H.B. Zachry*, 344 F.2d at 359, AAM 5 (Dec. 26, 1957), AAM 31 (Dec. 11, 1961), AAM 36, AAM 45, and AAM 53 (July 22, 1963)); PWRB, DBA/DBRA Compliance Principles, at 7–8; FOH 15e16(c)).

The Department received comments both supporting and opposing this proposed change. Supportive comments generally agreed with the Department that a codification of the definition of material supplier would be helpful. III–FFC, for example, characterized the Department's clarification as "commonsense," and SMART stated that the revisions would "ensure that

workers who perform construction activities on a primary or secondary site are not deprived of coverage simply because one of their employer's functions is delivery."

In contrast, many of the comments in opposition contended that the Department was proposing to significantly expand coverage to material suppliers. IRTBA, for example, argued that the proposed rule would "essentially determin[e] that material suppliers are covered by the Act unless" they meet certain criteria. Several comments, including the Illinois Association of Aggregate Producers (IAAP), Virginia Asphalt Association, ABC, and a joint comment from NAPA, NRMPCA, and NSSGA, voiced concern that the proposed rule would cover workers at temporary material supply facilities that are established and located on the site of the work and that recycle materials onsite to produce materials that can then be used onsite, asserting that such locations are not currently covered. The SBA Office of Advocacy commented that small businesses at its roundtable expressed similar concerns. Other comments also appeared to presume that the proposal regarding material suppliers represented a significant expansion. See, e.g., the group of U.S. Senators. These commenters generally asserted that the proposed changes would significantly increase costs and would make it more difficult for small companies to compete on DBA projects.

Some commenters' objections were more limited or specific. For example, FTBA and AGC requested that any regulatory clarification more closely align with the Department's existing guidance, including the 20-percent threshold and the *de minimis* rule. IEC specifically opposed the proposed rule's requirement that to be a material supplier, an employer must supply products to "the general public," contending that the term was ambiguous and that a supplier's ability to service only a few clients should not transform it into a subcontractor.

After considering the comments received, the final rule adopts a regulatory definition of material supplier with certain modifications from the proposed rule. As an initial matter, the comments reinforced the Department's belief that it is necessary to codify and clarify the definition of "material supplier" in the Davis-Bacon regulations. Many of the comments received appeared to be premised on an overbroad understanding of the existing material supplier exemption, and therefore perceived the proposed revisions as making significant

substantive changes when they were largely intended to clarify and reflect existing coverage principles. As such, explicitly delineating the differences between subcontractors and material suppliers in the regulation will ensure that workers who are employed by contractors or subcontractors and work on the site of the work receive Davis-Bacon wages as appropriate.

Most notably, several comments contended that the proposed definitions would newly cover mobile or temporary materials manufacturing facilities located on the site of the work. These comments reflect a misconception that manufacturing or recycling of materials on the site of the work is outside the scope of the DBRA. To the contrary, the regulations have long covered such activities because the definition of "construction, prosecution, completion, or repair" explicitly includes "[m]anufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work." 29 CFR 5.2(j)(1)(iii) (emphasis added); see also § 5.2(i) (stating that "[t]he manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work") (emphasis added). The Department's case law is consistent with this principle. See, e.g., *Forrest M. Sanders*, ARB No. 05–107, 2007 WL 4248530, at \*4 (Nov. 30, 2007) ("[C]ontractors who furnish materials do engage in construction, and thus must pay DBA wages, when their activities occur on the site of the building or work."). Thus, while the commenters are correct that under the proposed rule, such facilities will be covered, this does not reflect a change from the existing framework. The Department believes it is important to clarify that companies supplying materials under such circumstances are subcontractors, not material suppliers.

In recognition of commenters' concerns, however, the Department is making certain revisions to the proposed criteria for material suppliers.

First, the Department is clarifying that to qualify as a material supplier, an employer's obligations for work on a contract must be limited to the supply of materials, articles, supplies, or equipment, which may include pickup in addition to, but not exclusive of, delivery,<sup>197</sup> and which may also include

<sup>197</sup> As noted in the NPRM, an employer that contracts *only* for pickup of materials from the site of the work is not a material supplier but a subcontractor, and that this would be consistent

activities incidental to such delivery and/or pickup, such as delivery, drop off, and waiting time.<sup>198</sup> This is intended to clarify that activities that are incidental to material supply, such as loading, unloading, and pickup, would not constitute construction activity that would render the material supply exemption inapplicable.

Second, the Department is eliminating the criterion that the employer must supply materials to the “general public” in order to be a material supplier. The Department agrees with the IEC that this term lends itself to ambiguity. In place of this criterion, the final rule clarifies that for the material supplier exception to apply, the employer’s facility or facilities being used for material supply of the contract either must have been established before opening of bids or, if it was established after bid opening, may not be dedicated exclusively, or nearly so, to the performance of a covered contract. The Department’s existing regulations, guidance, and case law show that either of these two options is indicative of a sufficient degree of independence from the contract for the facility to be deemed an operation of a material supplier. See *United Constr. Co., Inc.*, 1983 WL 144675, at \*3; 29 CFR 5.2(I) (describing material supplier facilities that were established before opening of bids, even where such operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract); FOH 15e16(d) (same); FOH 15e16(b) (explaining that even if a facility is set up for the purpose of fulfilling a contract and therefore was not established before bid opening, it “may undergo a change in its character to such an extent that it becomes the operation of a supplier,” such as “if it makes a sufficient quantity of sales from its producing facility to the general public”).

Finally, to harmonize the definition with other regulatory provisions, the final rule states that a material supplier’s facility manufacturing the materials, articles, supplies, or

equipment may not be located on the primary or secondary construction site, rather than, as the proposed rule stated, on the site of the work, a term that also encompasses adjacent or virtually adjacent dedicated support sites. The current regulation states that the site of the work does not include a material supplier’s facilities that are not on the primary or secondary worksite, even if the operations for a period of time may be dedicated exclusively or nearly so to the performance of a contract. § 5.2(I). This implies two additional principles: first, that a material supplier may have a facility on an adjacent or virtually adjacent support site without losing its status as a material supplier provided that the other conditions of independence from the project are met, and second, that on the other hand, when an employer operates a manufacturing or supply facility on the primary or secondary worksite itself, it is considered a subcontractor rather than a material supplier. Put differently, the existence of such a facility on the primary or secondary worksite itself demonstrates that it is not sufficiently independent of the project or contract to be deemed a material supply facility whose workers are outside the DBRA’s scope.

The Department emphasizes that contrary to commenters’ concerns, the only aspect of the “material supplier” definition in the final rule that arguably reflects a change from current practice is that the definition in the final rule strictly limits applicability of the exemption to companies whose only contractual responsibilities are material supply or activities incidental to material supply. It therefore excludes from the exemption companies that also perform any other onsite construction, alteration, or repair; such companies are instead deemed contractors or subcontractors even if they also engage in material supply. This principle is consistent with numerous statements in the Department’s current guidance. See PWRB, DBA/DBRA Compliance Principles, at 7 (material suppliers are companies “whose *only* contractual obligations for on-site work are to deliver materials and/or pick up materials”) (emphasis added); *id.* at 7–8 (“[I]f a material supplier, manufacturer, or carrier undertakes to perform a part of a construction contract as a subcontractor, its laborers and mechanics employed at the site of the work would be subject to Davis-Bacon labor standards in the same manner as those employed by any other contractor or subcontractor.”); FOH 15e16(c) (same). However, in tension with this

principle, the current guidance also provides that a company may be considered a material supplier even if its workers engage in some amount of non-delivery construction work onsite, such as a precast concrete item supplier that also repairs and cleans such items at the worksite or an equipment rental dealer that also repairs its leased equipment onsite. See FOH 15e16(c). The guidance provides that in such cases, the supplier’s workers are covered by the Davis-Bacon labor standards for all onsite time engaged in such non-delivery construction work, and that if they spend at least 20 percent of their workweek engaged in such work, then all of their onsite time during the workweek is covered. See *id.*; PWRB, DBA/DBRA Compliance Principles at 7–8.

While the Department recognizes that many stakeholders are familiar with the 20-percent threshold, it believes that eliminating the 20-percent threshold for purposes of the material supplier/subcontractor distinction is appropriate for a number of reasons. First, the Department believes that by creating a bright-line rule that ties this determination to a company’s obligations under a contract, rather than the amount of time its workers spend onsite engaged in particular activities in a given workweek, this change will reduce uncertainty about coverage and assist both bidders and agencies in predicting labor costs before bidding. Second, as noted in the proposed rule, the Department has observed that under its current guidance, there is considerable confusion regarding the 20-percent threshold and its application. Some employers, for example, believe that 20 percent is the *de minimis* threshold for coverage of onsite delivery work by truck drivers employed by contractors or subcontractors; however, the 20-percent threshold in the Department’s current guidance actually applies to material suppliers. Similarly, others incorrectly read the existing guidance as only requiring compensation for onsite non-delivery construction time if such time exceeds 20 percent of a workweek; however, the existing guidance actually requires compensation for all such time regardless of the amount, and additionally requires that if such time exceeds 20 percent of a workweek, all of a worker’s onsite time is covered. Such confusion can deprive workers of Davis-Bacon wages to which they are entitled. In contrast, the clarity in the final rule will facilitate compliance and is more consistent with both the language and purpose of the Davis-

with the plain meaning of the term “material supplier” and with the Department’s case law. See *Kiewit-Shea*, ALJ Case No. 84–DBA–34, 1985 WL 167240, at \*2 (Sept. 6, 1985), (concluding that companies whose contractual duties “called for hauling away material and not for its supply” were subcontractors, not material suppliers”), *aff’d*, *Md. Equip., Inc.*, WAB No. 85–24, 1986 WL 193110 (June 13, 1986).

<sup>198</sup> The Department notes that unloading of materials is considered incidental to delivery even if the materials are unloaded directly into a contractor’s mixing facilities at the work site. See FOH 15e16(a). Employers and contracting agencies are encouraged to submit any questions regarding whether onsite construction work qualifies as incidental to delivery to the Administrator.



Bacon labor standards, as it ensures that all laborers and mechanics performing any non-delivery construction work on the site of the work will receive prevailing wages for such work. The Department therefore concludes that the need for clarity and predictability outweighs any reliance interests implicated by the final rule's change from the subregulatory 20-percent threshold, particularly given that in many cases, such reliance appears to be premised on contractors' incorrect application of the threshold.

Accordingly, the Department declines to retain the 20-percent threshold. Rather, under the final rule, an entity is a material supplier if: (a) its only obligations for work on the contract or project are the delivery of materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and pickup; and (b) its facility or facilities that manufactures the materials, articles, supplies, or equipment used for the contract or project (1) is not located on, or does not itself constitute, the project or contract's primary or secondary construction site, and (2) either was established before opening of bids on the contract or project, or is not dedicated exclusively, or nearly so, to the performance of the contract or project. All other entities engaged in work on the site of the work are contractors or subcontractors.

The Department also notes that the material supplier exemption operates in tandem with the "site of the work" requirement, except for "development statutes" to which neither limitation applies. Thus, under the final rule, a worker employed by an employer meeting the criteria for the material supplier exemption is not employed by a contractor or subcontractor, and therefore is not entitled to prevailing wages and fringe benefits under the Davis-Bacon labor standards at all even for time spent on the site of the work. In contrast, workers employed by contractors or subcontractors are entitled to Davis-Bacon wages, but only for time spent on the site of the work. Thus, for example, if a company establishes a facility near, but not on, the site of the work for the exclusive or nearly-exclusive purpose of furnishing materials to a particular project, even though the company is considered a subcontractor rather than a material supplier, its workers are only subject to the Davis-Bacon labor standards for time they spend on the site of the work as defined in this final rule.

Finally, in addition to the changes described above, the Department is making a conforming edit to ensure that the regulation as written reflects the principle that employers meeting the material supplier exemption are not covered, with the exception of employers performing work under development statutes to which the exemption does not apply. Specifically, the Department is amending the definition of "contract" in § 5.2 by adding language stating explicitly that with the exception of work performed under a development statute, the terms contract and subcontract do not include agreements with employers that meet the definition of a material supplier under § 5.2.

#### d. Coverage of Time for Truck Drivers

The Department also proposed to revise the regulations to clarify coverage of truck drivers under the DBRA. As explained in the proposed rule, the Department's current guidance differs depending on whether truck drivers are employed by material suppliers or contractors or subcontractors. As noted above, employees of material suppliers are only covered for onsite time engaged in non-delivery construction work, or for all of their time onsite if such construction work constitutes 20 percent or more of their workweek. FOH 15e16. In contrast, truck drivers employed by contractors or subcontractors are covered under a broader range of circumstances, including: (1) performing work on the site of the work that is not related to offsite hauling, including hauling materials or supplies from one location on the site of the work to another location on the site of the work, *see* 65 FR 80275; FOH 15e22(a)(1) (stating that drivers are covered "for time spent working on the site of the work"); (2) hauling materials or supplies from a dedicated facility that is "adjacent or virtually adjacent to the site of the work," 65 FR 80275–76; *see also* 29 CFR 5.2(j)(1)(iv)(A); FOH 15e22(a)(3); (3) transporting "significant portion(s)" of the building or work between a secondary worksite established for contract performance and the primary worksite, 65 FR 80276; *see also* 29 CFR 5.2(j)(1)(iv)(B); FOH 15e22(a)(4); and, finally, (4) time spent on the site of the work that is related to hauling materials to or from the site, such as loading or unloading materials, provided that such time is more than *de minimis*—a standard that as currently applied excludes drivers "who come onto the site of the work for only a few minutes at a time merely to drop off construction materials." 65 FR 80276; *see also* FOH

15e22(a)(2); PWRB, DBA/DBRA Compliance Principles, at 6–7.

As noted in the NPRM, there is significant uncertainty regarding this topic, including, for example: the distinction between drivers for material supply companies versus drivers for construction contractors or subcontractors; what constitutes *de minimis*; and whether the 20-percent threshold for construction work performed onsite by material supply drivers is also applicable to delivery time spent on site by drivers employed by a contractor or subcontractor. Moreover, the Department's Administrative Law Judges (ALJs) have come to different conclusions on similar facts. *Compare Rogers Group*, ALJ No. 2012–DBA–00005 (May 28, 2013) (concluding that a subcontractor was not required to pay its drivers prevailing wages for sometimes-substantial amounts of onsite time, as much as 7 hours 30 minutes in a day, making deliveries of gravel, sand, and asphalt from offsite), *with E.T. Simonds Constr. Co.*, ALJ No. 2021–DBA–00001, 2022 WL 1997485 (May 25, 2021), *aff'd*, ARB No. 21–054, 2022 WL 1997485 (May 13, 2022) (concluding that drivers employed by a subcontractor who hauled materials from the site of the work and spent at least 15 minutes per hour—25 percent of the workday—on site were covered for their onsite time).

Taking this into account, the Department proposed to clarify coverage of truck drivers. First, as discussed above, the Department proposed to codify a definition of "material supplier" in a manner that would reduce ambiguity regarding the subcontractor/material supplier distinction by restricting the material supplier exemption to employers whose sole contractual responsibility is material supply and, in so doing, eliminate the subregulatory 20-percent threshold pertaining to material suppliers' drivers who engage in onsite construction work. Second, the Department proposed to amend its regulations concerning the coverage of transportation by truck drivers who are included within the DBA's scope generally (*i.e.*, truck drivers employed by contractors and subcontractors, as well as any truck drivers employed in project construction or development under development statutes) by amending the definition of "construction, prosecution, completion, or repair" in § 5.2 to include "transportation" under five specific circumstances: (1) transportation that takes place entirely within a location meeting the definition of site of the work (for example, hauling materials

from one side of a construction site to the other side of the same site); (2) transportation of portion(s) of the building or work between a “secondary construction site” and a “primary construction site”; (3) transportation between a “nearby dedicated support site” and either a primary or secondary construction site; (4) a driver or driver’s assistant’s “onsite activities essential or incidental to offsite transportation” where the driver or driver’s assistant’s time spent on the site of the work is not so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded; and (5) any transportation and related activities, whether on or off the site of the work, by laborers and mechanics under a development statute. The Department explained that proposals (1), (2), (3), and (5) set forth principles reflected in the current regulations, but in a clearer and more transparent fashion, whereas proposal (4) sought to resolve the ambiguities discussed above regarding the coverage of onsite time related to offsite transportation.

The Department received comments expressing support for these proposals and the “site of the work” proposals in general, including from III–FFC, REBOUND, and an individual commenter. III–FFC specifically emphasized that most of the proposed revisions regarding truck drivers reflect principles that are in the current regulations, interpreted in case law, and explained in WHD regulatory guidance, but that clarity would nonetheless be helpful given stakeholder uncertainty. It cited onsite loading and unloading of equipment, which is a several-step, time-consuming process, as one fact pattern that can prompt coverage disputes, and indicated that it was hopeful that regulatory revisions would reduce such disputes and increase compliance.

The Department also received several comments opposing these proposals. Some appeared to argue that any coverage of material delivery truck drivers for onsite time is inconsistent with the D.C. Circuit’s decision in *Midway*. OCA, IRTBA, SIBA, and IAPA also argued that case law under the NLRA supports the exclusion of delivery drivers from coverage even if they spend time on the site of the work. Some commenters similarly contended that the proposed rule’s mere specification of “transportation” as a type of “construction, prosecution, completion, or repair” was itself outside the Department’s statutory authority, whereas others suggested that while the DBRA covers wholly onsite transportation, such as hauling

materials from one location on the site of the work to another, it does not cover any time spent onsite that is associated with delivery from offsite.

Other commenters specifically took issue with the proposal to cover truck drivers employed by contractors or subcontractors for any onsite delivery-related time that is “practically ascertainable,” arguing that it would effectively eliminate the current *de minimis* principle and impose burdensome recordkeeping requirements. IAAP argued that the Department’s proposed standard could compromise safety by creating pressure on truck drivers to perform any onsite activities as quickly as possible. AGC argued that the Department should instead codify its current guidance, including the *de minimis* and 20 percent principles. AGC also argued that the Department should expand application of the *de minimis* principles to include all covered workers and activities, not only truck drivers. And FTBA suggested that the proposal would in some cases impose burdens without benefits since many truck drivers are owner-operators to whom the Department, as a matter of administrative policy, has not applied the DBRA. *See supra* n. 180.<sup>199</sup>

As an initial matter, the Department maintains that it is important to clarify the application of the DBRA to truck drivers, and to do so in the regulatory text. As noted above and in the discussion regarding the material supplier exemption, there remains considerable confusion about these principles, including conflation of the *de minimis* standard with the current 20-percent threshold related to material suppliers. Additionally, for the reasons discussed above in section III.B.3.ii.(G).(2).(b), the Department is retaining, with some clarification, its proposal to codify a definition of material supplier that is restricted to employers whose sole contractual responsibility is material supply. As such, any employer whose truck drivers engage in other construction activities will be considered contractors or subcontractors who are subject to the regulations’ new provisions concerning transportation. This renders moot the subregulatory 20-percent threshold pertaining to onsite time for material suppliers’ drivers who also engage in onsite construction work.

<sup>199</sup> AGC also suggested that the final rule codify the Department’s policy in FOH 15e17 regarding truck driver owner-operators. Because the Department did not make any proposals along these lines in the NPRM, it declines to do so in the final rule.

The Department disagrees that *Midway*, *Ball*, or *L.P. Cavett* preclude coverage of onsite time for delivery drivers employed by contractors or subcontractors. None of those cases speak to this precise issue; rather, these cases concerned the geographic scope of the “site of the work” and the coverage for time driving on locations *outside* the site of the work. As noted in the NPRM, *Midway* expressly declined to decide whether the DBA covers work that a driver performs onsite if the amount of such work is more than *de minimis*—because no party had raised it. *Midway*, 932 F.2d at 989 n.5 (“No one has argued in this appeal that the truckdrivers were covered because they were on the construction site for this brief period of the workday.”). If anything, *Midway* is best read to show that the DBA does cover non-“determinative of the [DBA’s] coverage.” 932 F.2d at 991.<sup>200</sup>

Accordingly, the Department has consistently maintained since *Midway* that truck drivers, and their assistants, employed by contractors or subcontractors, are covered for onsite work associated with offsite delivery, provided that such onsite time exceeds a certain threshold. *See* 65 FR 80276; 57 FR 19205–06; FOH 15e22(a)(2); PWRB, DBA/DBRA Compliance Principles, at 6–7; *ET Simonds*, ALJ No. 2021–DBA–00001, 2022 WL 1997485, at \*3–4.

The Department similarly disagrees that cases construing the NLRA preclude such coverage. Section 8(e) of the NLRA prohibits certain “contract[s] or agreement[s]” between employers and unions but does not prohibit “an agreement . . . relating to . . . work to be done at the site of the . . . work”). 29 U.S.C. 158(e). Some commenters contended that judicial and National Labor Relations Board decisions construing this language support a conclusion that truck drivers transporting materials to or from construction sites are not considered to be performing work on the site of construction, even if they spend time onsite, and that the DBA should be construed similarly. These cases,

<sup>200</sup> To the extent that some language in *Midway* could be read to support the notion that even onsite time of delivery drivers employed by contractors and subcontractors is not covered, *see, e.g., Midway*, 932 F.2d at 992 (“Material delivery truck drivers who come onto the site of the work merely to drop off construction materials are not covered by the Act.”), such language is dicta given the D.C. Circuit’s express statement that it was *not* deciding whether the DBA covers a more than *de minimis* amount of work that a driver performs onsite, *id.* at 989 n.5. *See Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

however, hold only that a rule similar to the DBA's *de minimis* principle applies under section 8(e) of the NLRA, which excludes "small" amounts of onsite work that are "necessarily" performed in delivering materials and merely "incidental" to a driver's primarily offsite work. See *In re Techno Constr. Corp.*, 333 NLRB 75, 82 (2001) ("[T]hese incidental tasks do not bring the Respondent within the building and construction industry as contemplated by [the NLRA]."); *Teamsters Loc. 957*, 298 N.L.R.B. 395, 399 (1990) (ALJ Op.) ("[E]mployees involved in such work have only 'incidental contact with the site.' . . . With rare exception, the haulage of [material] by the [drivers] in the instant case involves such 'incidental contact' with job sites."), *aff'd*, *Gen. Truck Drivers, Chauffeurs, Warehousemen & Helpers of Am., Loc. No. 957 v. NLRB*, 934 F.2d 732, 737 (6th Cir. 1991) (quoting ALJ with approval); *Joint Council of Teamsters No. 42*, 248 NLRB 808, 816 (1980) ("[T]he Board has repeatedly held that the proviso does not apply to jobsite deliveries (or, by logical inference, pickups) which are only a small part of basically offsite transportation activity."); *Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Emp. & Helpers Loc. Union No. 695 v. NLRB*, 361 F.2d 547, 552 (D.C. Cir. 1966) (Section 8(e) does not cover work a delivery driver "necessarily" performs onsite). Thus, these cases stand only for the idea that section 8(e) of the NLRA apparently does not cover *de minimis* onsite work, the same principle that the Department has applied under the DBA.<sup>201</sup> None of these cases held that the NLRA excludes work that a driver performs onsite that is more than *de minimis*.<sup>202</sup>

The Department also rejects the notion that it is improper to include "transportation" as a covered activity under the specific circumstances listed in the regulation. It has never been in

serious dispute that the transportation of materials, equipment, and the like is within the scope of the types of activities covered by the DBA. Rather, in cases where workers performing these activities have been determined not to be covered, the basis for such determinations has been either because they were deemed employees of bona fide material suppliers or because they were not working on the site of the work. The current regulations expressly recognize that transportation and the furnishing of materials are covered construction activities, either if they take place on the site of the work or if they are performed as part of work under a development statute. See § 5.2(j)(1)(iii), (iv), 5.2(j)(2). The proposed rule did not reflect any expansion of coverage in this regard.

However, after considering the comments received, the Department is not adopting the NPRM's proposal to require compensation for onsite time related to offsite delivery as long as it is not "so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded." While the Department maintains that such a standard would be consistent with the DBA's "site of the work" principle, see 65 FR 80275–76 (explaining that the Department does not understand *Midway* as precluding coverage of any time that drivers spend on the site of the work, "no matter how brief"), the Department also recognizes that it could impose unnecessary burdens on contractors for comparatively marginal benefits.

Instead, the final rule codifies the Department's current guidance by requiring contractors and subcontractors to pay Davis-Bacon wages to delivery drivers for onsite time related to offsite delivery if such time is not *de minimis*. The Department believes it is important to codify this principle, as commenters agreed that depending on the circumstances, including what is being delivered, traffic, and other factors, such drivers can spend significant portions of their day on the site of the work. Consistent with its pronouncements since *Midway*, the Department believes that such time is compensable under the DBA.

However, whereas the proposed rule sought to borrow language from the Department's regulatory definition of *de minimis* under the FLSA, see 29 CFR 785.47, the final rule is not defining *de minimis* in the regulation for several reasons. First, the Department did not propose a definition for the term in the NPRM. Second, the Department's historical practice has been to evaluate *de minimis* under the DBA on a case-

by-case basis, and a recent decision by the ARB suggests that such an approach is reasonable. See *ET Simonds*, ARB No. 2021–0054, 2022 WL 1997485, at \*8 (concluding that "the analysis of whether a material transportation driver is covered is contextual in nature and should include a discussion of the totality of the circumstances"). To the extent warranted, the Department will consider whether to further elaborate on the definition of *de minimis* in subregulatory guidance. However, the Department notes two general principles here.

First, the *de minimis* standard under the DBA is independent of the *de minimis* standard under the FLSA. As noted in the NPRM, the FLSA *de minimis* rule "applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." 29 CFR 785.47. Moreover, under the FLSA, "an employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him." *Id.* This strict standard is suitable for the FLSA, a statute that requires payment of a minimum wage for every hour worked. The DBA's *de minimis* principle, on the other hand, informs the different inquiry of whether a worker is "employed directly on the site of the work." Thus, the Department has generally held that it excludes periods of "a few minutes" onsite just to drop off materials, even though such time generally is considered hours worked under the FLSA.

Second, the Department intends that under circumstances where workers spend a significant portion of their day or week onsite, short periods of time that in isolation might be considered *de minimis* may be aggregated. For example, in its recent decision in *ET Simonds*, the ARB concluded that it was reasonable for the Administrator to aggregate such periods throughout a workday where the record showed that workers spent a total of 15 minutes per hour on the website. Thus, the Department's position is that the total amount of time a driver spends on the site of the work during a typical day or workweek—not just the amount of time that each delivery takes—is relevant to a determination of whether the onsite time is *de minimis*.

The Department declines AGC's suggestion to expand the *de minimis* principle beyond the context of truck

<sup>201</sup> In *Local No. 957*, the Sixth Circuit emphasized that the drivers performed only 10 percent of their work onsite—the same amount as in *Midway*. *Loc. No. 957*, 934 F.2d at 737; see also *Midway*, 932 F.2d at 989 n.5.

<sup>202</sup> The Department also notes that even if section 8(e) of the NLRA were construed to have a narrower scope, the DBA's "site of the work" language would nonetheless be consistent with the Department's interpretation here. Section 8(e) concerns an "agreement" for work done onsite, a term the DBA does not use. 29 U.S.C. 158(e). Even if an "agreement" which is primarily for offsite delivery work, which necessarily entails some incidental onsite work, does not necessarily "relat[e] to" onsite work under the NLRA, *id.*, any onsite work performed is still done at the "site of the work" under the DBA. *Accord Smith v. Berryhill*, 139 S. Ct. 1765, 1776 (2019) ("[they] are different statutes, and courts must remain sensitive to their differences").

drivers. First, such a change would be beyond the scope of the proposed rule. Second, the Department developed the *de minimis* principle for truck drivers given that such workers frequently alternate between time spent on and off the worksite. The Department does not believe it is necessary to extend the principle to other types of workers. Additionally, while FTBA expressed concern that truck drivers that are owner-operators might have to be added to certified payrolls even though DOL policy does not require that they be compensated at DBRA rates, this is not a consequence of the final rule; as discussed above, even under the guidance in place prior to this rule, truck drivers employed by contractors or subcontractors have been subject to the DBRA for time spent on the site of the work that is not *de minimis*.

#### e. Non-Substantive Changes for Conformance and Clarity

The Department proposed to amend § 5.2 to use the term “secondary construction sites” to describe the covered locations at which “significant portions” of public buildings and works are covered provided all of the conditions discussed above are met and to use the term “primary construction sites” to describe the place where the building or work will remain. Although, as discussed above in “Coverage of Construction Work at Secondary Construction Sites,” the Department received numerous comments on the substance of these proposals, the Department did not receive comments on this conforming change, and the final rule retains these descriptive terms.

The Department additionally proposed to use the term “nearby dedicated support site” to describe locations such as flagger sites and batch plants that are part of the site of the work because they are dedicated exclusively, or nearly so, to the project, and are adjacent or nearly adjacent to a primary or secondary construction site. AGC voiced concern that the term “nearby” was confusing and could be read to indicate a broader geographic scope of coverage than the “adjacent or nearly adjacent” standard permits. As such, the final rule instead adopts the term “adjacent or nearly adjacent dedicated support site.”

The Department also proposed to define the term “development statute” to mean a statute that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project, and to make conforming changes to § 5.5 to incorporate this new term. The

Department noted that the current regulations reference three specific statutes—the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996—that fit this description, but do not consistently reference all three, and that replacing those references with the defined term “development statute” would improve regulatory clarity and ensure that the regulations would not become obsolete if existing statutes meeting this description are revised or if new statutes meeting this description are added.

Regarding this proposal, AGC commented that the Sixth Circuit in *L.P. Cavett* concluded that coverage principles such as site of the work applicable to the Davis-Bacon Act apply to the Related Acts even if the Related Acts may contain different wording. See 101 F.3d at 1116. It stated that if the Department nonetheless wishes to apply a different coverage standard to Related Acts, it should engage in separate rulemaking. However, while the Department has previously voiced agreement with the general conclusion in *L.P. Cavett* regarding coverage principles under the vast majority of the Related Acts, it has explained that the three housing statutes noted above are distinguishable because their “language and/or clear legislative history” “reflected clear congressional intent that a different coverage standard be applied.” 65 FR 80275. The current regulations reflect this conclusion, as its references to both the site of the work and the material supplier exemption specifically exempt these statutes (though, as noted above, the regulations do not do so consistently in every instance). See §§ 5.2(i), (j)(1), (j)(1)(iii), (j)(2); 5.5(a)(1)(i), (a)(2), (a)(3)(i). Thus, the proposed rule’s use of the defined term “development statute” does not make any substantive change from the current regulations with respect to these three statutes. However, to ensure that the revision is faithful to the Department’s previous statements agreeing that identical coverage principles apply to all of the Related Acts except the above three, the final rule specifically names the three housing statutes in the definition of “development statute,” and requires that for any other statute to be deemed a development statute, the Administrator must make an affirmative determination that the statute’s language and/or legislative history reflected clear congressional intent to apply a coverage standard different from the Davis-Bacon Act itself.

In addition to the above changes, the Department proposed a number of revisions to the regulatory definitions related to the “site of the work” and “material supplier” principle to conform to the above substantive revisions and for general clarity. The Department proposed to delete from the definition of “building or work” the language explaining that, in general, “[t]he manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work,” and proposed instead to clarify in the definition of the term “construction (or prosecution, completion, or repair)” that “construction, prosecution, completion, or repair” only includes “manufacturing or furnishing of materials, articles, supplies or equipment” under certain limited circumstances, namely, either on the site of the work or under development statutes. Along the lines of its comments noted above, FTBA expressed concern that this change could expand coverage to include material suppliers. While no substantive change was intended, in recognition of this concern, the Department is clarifying the definition of “construction, prosecution, completion, or repair” to read that such activities are only covered if done by laborers or mechanics who are employed by a contractor or subcontractor (*i.e.*, not a material supplier) on the site of the work, or who are working in the construction or development of a project under a development statute.

Additionally, the Department proposed to remove the citation to *Midway* from the definition of the term “construction (or prosecution, completion, or repair).” Finally, the Department proposed several linguistic changes to defined terms in § 5.2 to improve clarity and readability. Apart from the numerous substantive comments regarding these terms discussed at length above, the Department did not receive comments on these proposed conforming and clarifying changes and the final rule therefore adopts them as proposed.

#### (H) Paragraph Designations

The Department also proposed to amend § 5.2 to remove paragraph designations of defined terms and instead to list defined terms in alphabetical order. The Department proposed to make conforming edits throughout parts 1, 3, and 5 in any provisions that currently reference lettered paragraphs of § 5.2.

The Department received no comments on this proposal. The final

rule therefore adopts this change as proposed.

### iii. Section 5.5 Contract Provisions and Related Matters

The Department proposed to remove the table at the end of § 5.5 related to the display of OMB control numbers. The Department maintains an inventory of OMB control numbers on <https://www.reginfo.gov> under “Information Collection Review,” and this table is no longer necessary to fulfill the requirements of the Paperwork Reduction Act. This website is updated regularly and interested persons are encouraged to consult this website for the most up-to-date information.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

The final rule includes a number of technical changes and other minor revisions to § 5.5, including to the proposed regulatory text of the DBRA and CWHSSA contract clauses, that were not in the proposed rule. The final rule adds a parenthetical to § 5.5(a) that clarifies that the requirement in the FAR is to incorporate contract clauses by reference, as distinguished from the non-FAR-covered contracts into which the contract clauses must be inserted “in full.”

The final rule also updates the § 5.5(b) contract clauses by adding a reference to the new anti-retaliation provision at § 5.5(b)(5) and using gender neutral terminology (“watchpersons”). The term “watchpersons” has been substituted for “watchmen” in this and various other regulations. This change in terminology is not a substantive change.

Additional minor changes to § 5.5 include that § 5.5(b)(2) has been updated to reflect the Department’s Civil Penalties Inflation Adjustment Act Annual Adjustment for 2023, which was published in the January 13, 2023 **Federal Register**. This adjustment is required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. Section 5.5(c) has also been revised so that the CWHSSA-required records are referred to in terms that conform with the new terminology for different types of records in § 5.5(a)(3). That section refers to basic records (including regular payroll) and certified payroll. *See also* § 3.3. Finally, “CWHSSA” has been added to the heading in § 5.5(b) to identify the acronym for the Contract Work Hours and Safety Standards Act.

### (A) 29 CFR 5.5(a)(1)

The Department’s proposed changes to this section are discussed above in

section III.B.1.xii (“Frequently conformed rates”).

### (B) 29 CFR 5.5(a)(3)

The Department proposed a number of revisions to § 5.5(a)(3) to enhance Davis-Bacon compliance and enforcement by clarifying and supplementing existing recordkeeping requirements. Conforming changes to § 5.5(c) are also discussed here.<sup>203</sup>

The Department received many comments supporting the proposed changes to § 5.5(a)(3) and the corresponding changes to § 5.5(c). These comments generally expressed the view that the proposed changes would enhance transparency and improve enforcement of Davis-Bacon labor standards requirements. Conversely, the Department received comments from the group of U.S. Senators and a few contractor associations expressing the view that the proposed changes were unduly burdensome to contractors. Specifics of these comments are addressed in the discussion below.

#### (1) 29 CFR 5.5(a)(3)(i)

The Department proposed to amend § 5.5(a)(3)(i) to clarify this recordkeeping regulation, consistent with its longstanding interpretation and enforcement, as requiring contractors to maintain and preserve basic records and information, as well as certified payrolls. The Department explained that required basic records include, but are not limited to, regular payroll (sometimes referred to as “in-house” payroll) and additional records relating to fringe benefits and apprenticeship. The Department similarly explained that the term “regular payroll” refers to any written or electronic records that the contractor uses to document workers’ days and hours worked, rate and method of payment, compensation, contact information, and other similar information that provides the basis for the contractor’s subsequent submission of certified payroll.

The Department also proposed changes to § 5.5(a)(3)(i) to clarify that regular payrolls and other basic records required by this section must be preserved for a period of at least 3 years after all the work on the prime contract is completed. The proposed change was intended to make it clear that even if a project takes more than 3 years to

complete, contractors and subcontractors must keep payroll and basic records for work on the project for at least 3 years after all the work on the prime contract has been completed. For example, a subcontractor that performed work during the second year of a 5-year project would need to keep their payroll and basic records for at least 3 years after all work on the project had been completed, even though that may be 6 years after the subcontractor completed their own work on the project. This revision expressly stated the Department’s longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3).

The Department also proposed a new requirement that records required by § 5.5(a)(3) and (c) must include last known worker telephone numbers and email addresses, reflecting more modern and efficient methods of communication between workers and contractors, subcontractors, contracting agencies, and the Department’s authorized representatives.

Another proposed revision in this section, as well as in § 5.5(c), clarified the Department’s longstanding interpretation that these recordkeeping provisions require contractors and subcontractors to maintain records of each worker’s correct classification or classifications of work actually performed and the hours worked in each classification. *See, e.g., Pythagoras Gen. Contracting Corp.*, ARB Nos. 08–107, 09–007, 2011 WL 1247207, at \*7 (“If workers perform labor in more than one job classification, they are entitled to compensation at the appropriate wage rate for each classification according to the time spent in that classification, which time the employer’s payroll records must accurately reflect.”). Current regulations permit contractors and subcontractors to pay “[l]aborers or mechanics performing work in more than one classification . . . at the rate specified for each classification for the time actually worked therein,” but only if “the employer’s payroll records accurately set forth the time spent in each classification in which work is performed.” 29 CFR 5.5(a)(1)(i). The proposed revisions similarly recognized that laborers or mechanics may perform work in more than one classification and more expressly provided that, in such cases, it is the obligation of contractors and subcontractors to accurately record information required by this section for each separate classification of work performed.

By proposing these revisions to the language in § 5.5(a)(3)(i) and (c) to

<sup>203</sup> As an initial matter, the Department proposed to replace all references to employment (*e.g.*, employee, employed, employing, etc.) in § 5.5(a)(3) and (c), as well as in § 5.6 and various other sections, with references to “workers” or “laborers and mechanics.” These proposed changes are discussed in greater detail in section III.B.3.xxii (“Employment Relationship Not Required”).

explicitly require records of the “correct classification(s) of work actually performed,” the Department intended to clarify the requirements consistent with its longstanding interpretation of the current recordkeeping regulations that contractors and subcontractors must keep records of (and include on certified payrolls) hours worked segregated by each separate classification of work performed. The Department noted that it would continue to be the case that if a contractor or subcontractor fails to maintain such records of actual daily and weekly hours worked and correct classifications, then it must pay workers the rates of the classification of work performed with the highest prevailing wage and fringe benefits due.

Current § 5.5 expressly states that records that contractors and subcontractors are required to maintain must be accurate and complete. *See also* 40 U.S.C. 3145(b). The Department proposed to put contractors and subcontractors on further notice of their statutory, regulatory, and contractual obligations to keep accurate, correct, and complete records by adding the term “actually” in § 5.5(a)(3)(i) and (c) to modify “hours worked” and “work performed.” The current regulations require maintenance of records containing “correct classifications” and “actual wages paid,” and this proposed revision did not make any substantive change to the longstanding requirement that contractors and subcontractors keep accurate, correct, and complete records of all the information required in these sections.

Several commenters specifically noted that the clarification that contractors are required to maintain the required records for at least 3 years after work on the prime contract has been completed will reduce wage underpayment and enable more efficient enforcement of Davis-Bacon labor standards. *See* LIUNA, Electrical Training Alliance (Alliance), NCDCL, TAUC. LIUNA further noted that requiring all contractors to maintain required records for 3 years past the completion of work on the prime contract is particularly important in enforcing compliance standards when some or all of the workers may no longer be onsite, while NCDCL expressed the view that the proposed requirement would reduce the likelihood that records would be created or even falsified after the work has been performed. NECA similarly generally supported the proposed changes, though they also requested that the Department establish a cutoff time period for subcontractors to maintain the required records, as some projects may continue

for several years after a subcontractor has performed any work on the project, thereby making it potentially burdensome for subcontractors to maintain the required records for such an extended period.

III—FFC and Alliance also specifically expressed support for the clarification that contractors must maintain accurate records of workers’ classifications and the number of hours worked in each classification, indicating that misclassification of workers is a serious problem that would be reduced by the proposed clarification. III—FFC also commented favorably on the proposal to require contractors to maintain a record of workers’ last known telephone numbers and email addresses, noting that this information is particularly important when the Department must interview workers as part of the enforcement process. Another commenter suggested that the Department should add to § 5.5(a)(3) a requirement that contractors maintain contact information for workers. The Department notes that such a requirement was part of its proposal and that the current regulations require that contractor records contain worker addresses. UBC also noted that contractors do not always maintain the required records for workers who have been classified, correctly or not, as independent contractors, and requested that language be added to the regulations requiring contractors to maintain time records for workers, jobsite orientation information, contact information for workers, names, contact information of subcontractors, and records of payments to independent contractors and/or subcontractors.

The Department also received two comments from contractor associations opposing the proposed requirement that contractors maintain a record of workers’ last known telephone numbers and email addresses. ABC expressed the view that such a requirement would be an invasion of privacy and would increase the risk of identity theft and that the regulations should at least require that the phone numbers and email addresses be redacted, a position that appears to reflect the misimpression that the proposed change would require the worker phone numbers and email addresses to be included on the certified payrolls submitted to contracting agencies. IEC stated that “it is one thing to maintain this contact information so that a contractor can contact its employees, and yet quite another to make this a regulatory requirement.” IEC also noted that workers may not want to provide telephone numbers or email addresses

or even might not have them. IEC further stated that the proposed requirement conflicts with the Privacy Act of 1974, as the information would not be relevant or necessary to accomplish the DBA’s statutory purposes.

After consideration of the comments on this topic, the Department is adopting the changes to § 5.5(a)(3)(i) as proposed. As the various comments in support indicate, the proposed changes will clarify the recordkeeping requirements for contractors, discourage misclassification of workers, and increase the efficiency of the Department’s enforcement. While the Department appreciates ABC’s concerns for workers’ privacy and the need to protect workers from the risk of identity theft, the change will not require contractors to provide workers’ telephone numbers or emails on certified payrolls or post them on a publicly available database. The contractor will merely have to maintain records of the workers’ last known telephone numbers and email addresses in the contractor’s own internal records in the workers’ personnel files or other suitable location, and to make that information available to the Department or the contracting agency upon request. Contractors will typically already have contact information, including phone numbers and email addresses, stored in their records in whatever manner the contractor has deemed appropriate in light of privacy concerns. The proposed requirement to maintain such a record for those workers who perform work on Davis-Bacon contracts for at least 3 years after work has concluded on the project and allow authorized representatives of the Department or the contracting agency access to that information on request, should not pose a material increased risk of identity theft for workers.

The Department acknowledges IEC’s point that on occasion there may be workers who do not have telephone numbers or email addresses or who would prefer not to provide them to the contractor. However, workers also may prefer not to provide their home address, or may not have a permanent home address, but contractors have nevertheless been required to maintain a record of workers’ last known home address and have generally done so without issue. Moreover, on the rare occasions when the contractor is unable to obtain a worker’s telephone number or email address despite diligent efforts to do so, and has noted that fact in their records, the contractor will have satisfied this requirement by, in effect, documenting the worker’s “last known”

telephone number and email address. As discussed below, having a record of workers' telephone numbers and email addresses is extremely useful for enforcement purposes. The Department believes that these benefits outweigh any slight additional administrative or privacy burden that this requirement may impose.

The Department does not agree with IEC's claim that this information is not necessary or relevant to the DBA's statutory purposes. The Department, as well as the contracting agencies, is responsible for enforcing the Davis-Bacon prevailing wage requirements on covered contracts. Enforcement of prevailing wage requirements for a Davis-Bacon project requires the Department to obtain accurate and detailed information as to workers' classifications, hours of work, and wages paid at all stages of a project. Interviews are necessary to, among other reasons, confirm that the information provided on certified payrolls and basic records is correct and to fill in any gaps in a contractor's records. However, worksite interviews may not be possible (or suitable) for a variety of reasons: some workers may not be onsite at the time an investigation is conducted; some subcontractors may have already completed their portion of the work; certain work crews may not be necessary at that stage of construction; some contractors may attempt to interfere with WHD's investigation by, for example, telling workers to leave the worksite or lie to investigators; or some workers may have voluntarily separated from employment or been terminated. Information that can be obtained from such workers may be valuable or even necessary to determine whether contractors are in compliance with the Davis-Bacon labor standards. The requirement to maintain a record of workers' telephone numbers and email addresses should make it considerably easier and more efficient for the Department—and contracting agencies—to reach workers who are not on the worksite at the time of the Department's investigation and will therefore increase the effectiveness of the Department's enforcement efforts.

The Department also understands NECA's concern that the requirement to maintain the required records for at least 3 years after all the work on the prime contract is completed may be more burdensome for subcontractors that may complete work on their subcontract well before all work on the prime contract has been completed. However, allowing subcontractors to maintain the required records for a shorter period of time would be

inconsistent with the Department's longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3), and could impede enforcement of the Davis-Bacon labor standards. The obligation to ensure that the Davis-Bacon labor standards have been met and workers have received the applicable prevailing wage rates does not end when a subcontractor completes their portion of work on the project, and the Department may investigate compliance with the Davis-Bacon labor standards after a subcontractor is no longer working onsite. The required records are a key component in the Department's enforcement efforts. Such records are particularly helpful when workers are no longer working on the project, as other commenters noted. Accordingly, the Department does not believe it is appropriate to only require subcontractors to maintain records for a more limited period of time. The Department notes that nothing in the regulations prohibits a prime contractor from requesting, or requiring, its subcontractors provide a copy of the required records to the prime contractor, so that the prime contractor can ensure that these records are available for the required timeframe, as the prime contractor is responsible for ensuring subcontractor compliance under § 5.5(a)(6). Such an approach does not relieve subcontractors of their obligations to maintain the required records. If they also provide those records to the prime contractor, however, required records may be more readily available when needed by the Department or the contracting agency.

The Department also appreciates UBC's concerns that contractors may not maintain adequate records for workers when the contractor considers the workers to be independent contractors or subcontractors, making it more difficult to determine whether such workers were paid the applicable prevailing wage rates for their hours worked. Contractors are required to pay applicable prevailing wage rates for hours worked by laborers and mechanics on the site of work, regardless of any contractual relationship which may be alleged to exist between the contractor and those workers. A worker's classification as an independent contractor, even where such a classification is correct, does not relieve a contractor of the obligation to pay prevailing wages to that worker. Therefore, the regulatory language as proposed already requires that contractors keep all of the required

records described in § 5.5(a)(3) for such workers, unless such workers meet the requirements for the executive, administrative, or professional exemption as defined in 29 CFR 541. These required records therefore already include time records for all workers (including workers' attendance at jobsite orientation, as this would be considered hours worked), contact information for all workers, and a record of payments made to all workers, including individuals classified as independent contractors.

(2) 29 CFR 5.5(a)(3)(ii)

The Department proposed to revise the language in § 5.5(a)(3)(ii) to expressly apply to all entities that might be responsible for maintaining the payrolls a contractor is required to submit weekly when a Federal agency is not a party to the contract. Currently, the specified records must be submitted to the "applicant, sponsor, or owner" if a Federal agency is not a party to the contract. The proposed revision added the language "or other entity, as the case may be, that maintains such records" to clarify that this requirement applies regardless of the role or title of the recipient of Federal assistance (through grants, loans, loan guarantees or insurance, or otherwise) under any of the statutes referenced by § 5.1.

The Department also proposed to revise § 5.5(a)(3)(ii) by replacing the phrase "or audit of compliance with prevailing wage requirements" with "or other compliance action." This proposed revision clarified that compliance actions may be accomplished by various means, not solely by an investigation or audit of compliance. A similar change was proposed in § 5.6. Compliance actions include, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations. The proposed revision expressly set forth the Department's longstanding practice and interpretation of this current regulatory language to encompass all types of Davis-Bacon compliance actions currently used by the Department, as well as additional compliance tools the Department may use in the future. The proposed revision did not impose any new or additional requirements upon Federal agencies, applicants, sponsors, owners, or other entities, or on the Department, contractors, or subcontractors.

The Department also proposed to add language to § 5.5(a)(3)(ii)(A) to codify the Department's longstanding policy that contracting agencies and prime contractors can permit or require contractors to submit their certified



payrolls through an electronic system, provided that the electronic submission system requires a legally valid electronic signature, as discussed below, and the contracting agency or prime contractor permits other methods of payroll submission in situations where the contractor is unable or limited in its ability to use or access the electronic system. *See generally* PWRB, DBA/DBRA Compliance Principles, at 26. As noted in the proposal, the Department encourages all contracting agencies to permit submission of certified payrolls electronically, so long as all of the required information and certification requirements are met. Nevertheless, contracting agencies determine which, if any, electronic submissions systems they will use, as certified payrolls are submitted directly to the contracting agencies. The Department explained that electronic submission systems can reduce the recordkeeping burden and costs of record maintenance, and many such systems include compliance monitoring tools that may streamline the review of such payrolls.<sup>204</sup>

However, under the proposed revisions, agencies that require the use of an electronic submission system would be required to allow contractors to submit certified payrolls by alternative methods when contractors are not able to use the agency's electronic submission system due to limitations on the contractor's ability to access or use the system. For example, if a contractor does not have internet access or is unable to access or use the electronic submission system due to a disability, the contracting agency would be required to allow such a contractor to submit certified payrolls in a manner that accommodates these circumstances.

The Department also proposed a new paragraph, § 5.5(a)(3)(ii)(E), to reiterate the Department's longstanding policy that, to be valid, the contractor's signature on the certified payroll must either be an original handwritten signature or a legally valid electronic signature. Both of these methods are sufficient for compliance with the Copeland Act. *See* WHD Ruling Letter (Nov. 12, 2004) ("Current law establishes that the proper use of electronic signatures on certified

payrolls . . . satisfies the requirements of the Copeland Act and its implementing regulations."').<sup>205</sup> The proposal specified that valid electronic signatures include any electronic process that indicates acceptance of the certified payroll record and includes an electronic method of verifying the signer's identity. Valid electronic signatures do not include a scan or photocopy of a written signature. The Department recognized that electronic submission of certified payroll expands the ability of contractors and contracting agencies to comply with the requirements of the Davis-Bacon and Copeland Acts. The proposal noted that as a matter of longstanding policy, the Department has considered an original signature to be legally binding evidence of the intention of a person with regard to a document, record, or transaction. In its proposal, the Department acknowledged that modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete.

Several commenters expressed support for the proposed language clarifying that agencies may permit or require electronic submission of certified payrolls, indicating that this method would result in more streamlined and efficient submission and maintenance of certified payrolls. *See, e.g.,* COSCDA, MnDOT, UBC, REBOUND. MnDOT also requested that the Department provide a process by which wage determination data could be incorporated into an electronic payroll system to more effectively ensure compliance with prevailing wage requirements. Although MnDOT's request is outside the scope of this rulemaking, as the NPRM did not refer to or otherwise address the possibility of incorporating wage determination data into electronic payroll systems, the Department appreciates MnDOT's request and will consider as a separate, subregulatory matter whether wage determination data can be provided in a format that would enable it to be readily incorporated into electronic payroll systems.

Although comments on the proposed revisions were generally supportive, several commenters suggested further additions or revisions. Smith, Summerset & Associates pointed out that contractors rarely print out or electronically save copies of certified payrolls that they have entered into an electronic submission system, generally assuming that they will always be able

to obtain their certified payrolls from the system itself, but that certified payrolls are often archived when a project is complete and may therefore not be readily accessible to the contractor after that point. They therefore suggested adding language to the regulation to require any electronic certified payroll software provider to provide access to archived certified payrolls to the contractor, the contracting agency, and the Department upon request for at least 3 years after the work on the prime contract has been completed. The Department agrees that where a contracting agency encourages or requires contractors to submit their certified payroll through a particular electronic submission system, it is important that the contracting agency, the Department, and the contractors are easily able to access the certified payrolls in that system for the entire time period that such records must be maintained. The Department has therefore added language to § 5.5(a)(3)(ii)(A) of the final rule clarifying that where a contracting agency encourages or requires contractors to submit their certified payroll through a particular electronic submission system, the contracting agency must also ensure that the system allows the contractor, the contracting agency, and the Department to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed.

Smith, Summerset & Associates also recommended that the Department add language to the regulations specifically authorizing contracting agencies to provide copies of certified payrolls to other labor or tax enforcement agencies, noting that in their review of certified payrolls, contracting agencies may frequently find issues, such as violations of state or local wage and hour laws or misclassification of employees as independent contractors, that should be reported to the relevant enforcement agency. They indicated that including such language would encourage contracting agencies to provide certified payrolls to other enforcement agencies while putting contractors on notice that the agencies might choose to do so. The Department recognizes that contracting agencies may frequently be in a position to identify potential violations of laws enforced by other agencies as the result of their certified payroll reviews and agrees that reporting such potential violations to the appropriate enforcement agencies can positively impact enforcement in these other areas and enhance workers' welfare. As the

<sup>204</sup> The Department explained that it does not endorse or approve the use of any electronic submission system or monitoring tool(s). Although electronic monitoring tools can be a useful aid to compliance, successful submission of certified payrolls to an electronic submission system with such tools does not guarantee that a contractor is in compliance, particularly since not all violations can be detected through electronic monitoring tools. Contractors that use electronic submission systems remain responsible for ensuring compliance with Davis-Bacon labor standards provisions.

<sup>205</sup> <https://www.fhwa.dot.gov/construction/cqit/111204dol.cfm>.

certified payrolls are records submitted to and maintained by the contracting agencies, contracting agencies are free to provide certified payrolls to other enforcement agencies without the Department's authorization or permission, where the contracting agency has determined that such a submission is appropriate and is in accordance with all relevant legal obligations. Therefore, the Department does not believe that regulatory language expressly directing such submissions or providing a blanket authorization for such submissions is currently necessary. However, the Department strongly encourages contracting agencies to provide certified payrolls and other related information to other law enforcement agencies when they determine they can and should appropriately do so.

MnDOT stated that contractors should be required to include addresses and Social Security numbers on electronically submitted certified payrolls, as the electronic submissions would be very secure, protecting workers' personally identifiable information while still allowing workers to be more easily identified and traced. Two other commenters requested adding a requirement to include an identifying number or similar identifier on certified payrolls that would not need to be redacted when certified payrolls are requested and obtained by third parties, apparently unaware that the current regulations already contain a requirement (which this rulemaking does not alter) that the contractor include an individual identifying number for each worker on the certified payrolls. As the proposed language maintains the current requirement that contractors include an individually identifying number for each worker, the Department believes that this is sufficient to allow workers to be identified and tracked across multiple certified payrolls. Although the Department acknowledges that electronic certified payroll submission systems will generally use secure online portals, the Department's experience has shown that the potential risk of unauthorized disclosure of workers' personally identifiable information outweighs any additional benefit that might be incurred by requiring the addition of an address and full Social Security number, instead of the current requirement for an individual identifying number, on certified payrolls.

One commenter objected to the proposed language explicitly permitting contracting agencies to permit or require the submission of certified payrolls

through an electronic system, so long as the electronic system requires a legally valid signature, on the grounds that the Department prohibits submission of certified payrolls by email, even though having to use an electronic submission system is just as burdensome to small contractors as submitting certified payrolls by email. However, the Department does not in fact prohibit submission of certified payrolls by email. Contracting agencies may permit submission of certified payrolls by email so long as the certified payrolls submitted in such a manner have a legally valid electronic signature, as required for all forms of electronic submission. Certified payrolls that do not have an original or a legally valid electronic signature, but rather are unsigned or merely have a scan or copy of a signature, do not meet the requirements of the Copeland Act regardless of the method of submission. Many payroll software options provide a method of adding a valid electronic signature to payroll documents; even a widely used Portable Document Format (PDF) platform has a digital signature option that can meet this requirement. Accordingly, the Department declines to adopt this suggestion because the Department does not believe that the requirement to append a legally valid electronic signature to any certified payrolls submitted electronically will be burdensome to contractors, even where such signatures must be added to certified payrolls that are submitted by email.

COSCEA and NCSHA also indicated that the requirement to submit weekly certified payrolls imposes significant administrative costs on contractors, particularly as many contractors have to adjust their usual biweekly or bimonthly payroll to meet the weekly submission requirement. These commenters requested that the Department revise the regulations to permit greater flexibility in the frequency of certified payroll submissions. While the Department appreciates these commenters' concerns regarding the weekly payment of prevailing wages and weekly submission of certified payroll, both requirements are statutory, not regulatory. The DBA itself states that contracts must include stipulations requiring contractors and subcontractors to pay applicable prevailing wages "unconditionally and at least once per week." 40 U.S.C. 3142(c)(1) (emphasis added). The Copeland Act similarly states that the Department's implementing regulations "shall include a provision that each contractor and

subcontractor *each week* must furnish a statement on the wages paid to each employee during the prior week." 40 U.S.C. 3145(a) (emphasis added). Therefore, the Department cannot promulgate regulations allowing contractors to pay required prevailing wages or submit certified payrolls on any basis less frequent than weekly.

Smith, Summerset & Associates noted that the language at 29 CFR 5.5(a)(3)(ii)(A) stating that "[t]he prime contractor is responsible for the submission of copies of certified payrolls by all subcontractors" is unnecessarily confusing, as prime contractors are responsible for ensuring that subcontractors submit all required certified payrolls, and recommended that the words "copies of" be replaced with "all" to eliminate this confusion. They also noted a citation error in the proposed regulatory text. The Department agrees with these suggestions and has made these non-substantive changes in the final rule.

After consideration of these comments and for the reasons discussed above, the Department is adopting the changes to this paragraph as proposed, except that the Department is also adding language regarding access to electronic certified payroll submission systems and the minor non-substantive edits described above. In addition, the Department has added a new paragraph (a)(3)(ii)(G) to § 5.5 that expressly states that contractors and subcontractors must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed. This length-of-record-retention requirement, which is the same as for other required records in § 5.5(a)(3), was implicit in the proposed regulatory text and is explicit in the existing regulatory text, but the express inclusion in the regulation will provide clarity for the regulated community.

#### (3) 29 CFR 5.5(a)(3)(iii)–(iv)

The Department proposed to add paragraph (a)(3)(iii) to § 5.5 to require all contractors, subcontractors, and recipients of Federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed. The Department explained that these related documents include, without limitation, contractors' and subcontractors' bids and proposals, as well as amendments, modifications, and extensions to contracts, subcontracts, or agreements.

The proposal explained that WHD routinely requests these contract documents in its DBRA investigations.

In the Department's experience, contractors and subcontractors that comply with the Davis-Bacon labor standards requirements usually, as a good business practice, maintain these contracts and related documents. The Department noted that adding an express regulatory requirement that contractors and subcontractors maintain and provide these records to WHD would bolster enforcement of the labor standards provisions of the statutes referenced by § 5.1. This requirement would not relieve contractors or subcontractors from complying with any more stringent record retention requirements (*e.g.*, longer record retention periods) imposed by contracting agencies or other Federal, State, or local law or regulation.

The Department also indicated that this proposed revision could help ensure uniform compliance with Davis-Bacon labor standards and prevent non-compliant contractors from underbidding law-abiding contractors. Like the current recordkeeping requirements, non-compliance with this new proposed requirement may result in the suspension of any further payment, advance, or guarantee of funds and may also be grounds for debarment action pursuant to 29 CFR 5.12.

The Department proposed to renumber current § 5.5(a)(3)(iii) as § 5.5(a)(3)(iv). In addition, the Department proposed to revise this re-numbered paragraph to clarify the records contractors and subcontractors are required to make available to the Federal agency (or applicant, sponsor, owner, or other entity, as the case may be) or the Department upon request. Specifically, the proposed revisions to § 5.5(a)(3)(ii) and (iv), and the proposed new § 5.5(a)(3)(iii), expanded and clarified the records contractors and subcontractors are required to make available for inspection, copying, or transcription by authorized representatives specified in this section. The Department also proposed an additional requirement that contractors and subcontractors must make available any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1.

Current § 5.5(a)(3)(iii) requires contractors and subcontractors to make available the records set forth in § 5.5(a)(3)(i) (Payrolls and basic records). The proposed revisions to re-numbered § 5.5(a)(3)(iv) would ensure that contractors and subcontractors are aware that they are required to make available not only payrolls and basic records, but also the payrolls actually submitted to the contracting agency (or

applicant, sponsor, owner, or other entity, as the case may be) pursuant to § 5.5(a)(3)(ii), including the Statement of Compliance, as well as any contracts and related documents required by proposed § 5.5(a)(3)(iii). The Department explained that these records help WHD determine whether contractors are in compliance with the labor standards provisions of the statutes referenced by § 5.1, and what the appropriate back wages and other remedies, if any, should be. The Department believed that these clarifications would remove doubt or uncertainty as to whether contractors are required to make such records available to the Federal agency (or applicant, sponsor, owner, or other entity, as the case may be) or the Department upon request. The proposed revisions made explicit the Department's longstanding practice and did not impose any new or additional requirements upon a Federal agency (or applicant, sponsor, owner, or other entity, as the case may be).

The proposal stated that the new or additional recordkeeping requirements in the proposed revisions to § 5.5(a)(3) should not impose an undue burden on contractors or subcontractors, as they likely already maintain worker telephone numbers and email addresses and may already be required by contracting agencies to keep contracts and related documents. These proposed revisions also enhance the Department's ability to provide education, outreach, and compliance assistance to contractors and subcontractors awarded contracts subject to the Davis-Bacon labor standards provisions.

Finally, the Department proposed to add a sanction in re-numbered § 5.5(a)(3)(iv)(B) for contractors and other persons that fail to submit the required records in § 5.5(a)(3) or make those records available to WHD within the timeframe requested. Specifically, the Department proposed that contractors that fail to comply with WHD record requests would be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD despite WHD's request for such records. The Department proposed this sanction to enhance enforcement of recordkeeping requirements and encourage cooperation with its investigations and other compliance actions. The proposal provided that WHD would take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD would determine the

reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

In addition to the general support for the proposed recordkeeping changes mentioned above, III-FFC, LIUNA, and TAUC specifically mentioned the proposal to require the maintenance of Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed, noting that it would help ensure that contractors are acting responsibly and would improve and strengthen enforcement, particularly when workers or contractors have already completed their work on a project. In contrast, FTBA, ABC, and the group of U.S. Senators objected to those proposed changes. FTBA also argued that the proposed requirement that contractors and subcontractors must make available "any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1" was overly broad and would require contractors to comply with potentially burdensome, varied, and unreasonable requests. FTBA also stated that the Department did not provide justification or state a need for adding this requirement, and that the Department should instead have proposed specific additional records, which would have provided an opportunity to comment on each specific additional record. ABC and the group of U.S. Senators stated that the proposed requirement that all contractors, subcontractors, and recipients of Federal assistance maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed is unduly burdensome, further stating that the Department did not provide sufficient justification for the requirement. ABC also objected to the proposed language prohibiting contractors that fail to comply with record requests from later introducing the specified records during administrative proceedings as arbitrary, coercive, and likely to violate contractors' due process rights, particularly since contractors may have many legitimate reasons for being unable or unwilling to comply immediately with the Department's record requests.

The Department agrees with commenters' statements that requiring contractors, subcontractors, and funding recipients to maintain Davis-Bacon contracts, subcontracts, and related documents will help ensure that

contractors are aware of their obligations and will strengthen enforcement. While the Department appreciates some commenters' concerns that maintaining copies of Davis-Bacon contracts, subcontracts, and related documents might be burdensome, particularly to small or mid-sized contractors, this requirement is not likely to result in any significant administrative burden or costs to contractors that contractors are not already incurring. Contractors would only be required to maintain contracts that they have been awarded or that they in turn have awarded to others. As the Department indicated in the NPRM, contractors will already have many sound business reasons for maintaining these contracts. The contracts awarded to the contractor (and subcontracts awarded to subcontractors) typically set forth the work that the contractor is obligated to perform, the terms and procedures of payment, and information as to what would be considered a breach of any of their contract obligations, including the specific Davis-Bacon obligations contained in their contract clauses. The subcontracts similarly typically state the subcontractor's scope of work, the financial terms under which the work will be performed, and what remedies exist if a subcontractor fails to perform as contracted. With these and many other sensible business reasons for maintaining a record of Davis-Bacon contracts and subcontracts, it is not surprising that, in the Department's experience, most contractors already maintain records of these contracts and subcontracts. The proposed regulatory language merely requires such records to be maintained for the same period of time as other required records, and that such records must similarly be provided to the Department upon request, as there are also several reasons why such records are particularly useful for enforcement purposes. Not only does the Department's experience indicate that contractors who fail to maintain these records are more likely to disregard their obligations to workers and subcontractors, as noted in the NPRM, but these records are critical for enforcement of the prevailing wage requirements. The information provided by these records assists the Department to make accurate coverage determinations, establish the extent of the site(s) of work, determine whether the contract included the required clauses and all applicable wage determinations (particularly where there is a dispute between the contracting agency and the contractor as to what

was provided to the contractor), and verify whether the prime contractor and upper-tier contractors have met their obligations to lower-tier subcontractors and their workers. The advantages of ensuring that contractors maintain a record of the contracts that set out their Davis-Bacon obligations for a reasonable period of time and enabling the Department to more easily enforce those obligations clearly outweigh the minor additional recordkeeping burden, if any, that contractors may incur.

Similarly, the Department does not agree that the proposed requirement that contractors and subcontractors must make available "any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1" is overly broad, or that the Department instead should list all possible types of records that may be created during the course of a construction project and may be necessary to determine compliance. Davis-Bacon labor standards apply to a wide variety of projects, contractors, and worker classifications, resulting in a correspondingly wide variety of relevant records, such that it would not be possible to list every conceivable type of record that may be needed to verify hours worked, wages rates paid, and fringe benefits provided. Particularly where a contractor has not maintained an accurate or complete record of daily and weekly hours worked and wages paid as required, the Department may need to look at records ranging from daily construction reports or security sign-in sheets to drivers' trip tickets or petty cash logs to determine whether laborers and mechanics received the applicable prevailing wage rates for all hours worked. It would significantly hamper enforcement if the Department could not require contractors to provide existing—not create new—relevant records that would help determine compliance merely because it is not possible to list every conceivable form of relevant record. Moreover, to the extent that such records, or the failure to provide them, results in a determination that a contractor is not in compliance with the Davis-Bacon labor standards, the contractor will have the opportunity to raise the issue of the reasonableness of the Department's request for such records during the enforcement process, including any administrative proceedings, if the contractor wishes to do so.

For similar reasons, the Department does not believe that prohibiting contractors that fail to comply with record requests from later introducing

the specified records during administrative proceedings is arbitrary, coercive, or likely to violate contractors' due process rights. While contractors may have valid reasons for being unable or unwilling to comply immediately with the Department's request, it is difficult to discern why contractors would be unable to provide those reasons to the Department in a request for an extension of time to provide such records, as provided for in the proposed provision. In addition, if the contractor believes that the requested records are relevant evidence in administrative proceedings relating to violations, the records would presumably also be relevant to the Department's investigation of those potential violations. Moreover, if a contractor believes that the Department's request for the records was arbitrary or unreasonable despite the contractor's belief that the records should be admitted as evidence during administrative proceedings, the contractor will have the opportunity to raise that issue during the administrative proceedings themselves.

For these reasons, the Department adopts § 5.5(a)(3)(iii) and (a)(3)(iv) as proposed.

#### (C) 29 CFR 5.5(a)(4) Apprentices

The Department proposed to reorganize § 5.5(a)(4)(i) so that each of the four apprentice-related topics it addresses—rate of pay, fringe benefits, apprenticeship ratios, and reciprocity—are more clearly and distinctly addressed. These proposed revisions are not substantive. In addition, the Department proposed to revise the paragraph of § 5.5(a)(4)(i) regarding reciprocity to better align with the purpose of the DBA and the Department's ETA regulation at 29 CFR 29.13(b)(7) regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered.

Section 5.5(a)(4)(i) provides that apprentices may be paid less than the prevailing rate for the work they perform if they are employed pursuant to, and individually registered in, a bona fide apprenticeship program registered with ETA's Office of Apprenticeship (OA) or with a State Apprenticeship Agency (SAA) recognized by the OA. In other words, in order to employ apprentices on a Davis-Bacon project at lower rates than the prevailing wage rates applicable to journeyworkers, contractors must ensure that the apprentices are participants in a federally registered

apprenticeship program or a State apprenticeship program registered by a recognized SAA. Any worker listed on a payroll at an apprentice wage rate who is not employed pursuant to and individually registered in such a bona fide apprenticeship program must be paid the full prevailing wage listed on the applicable wage determination for the classification of work performed. Additionally, any apprentice performing work on the site of the work in excess of the ratio permitted under the registered program must be paid not less than the full wage rate listed on the applicable wage determination for the classification of work performed.

In its current form, § 5.5(a)(4)(i) further provides that when a contractor performs construction on a project in a locality other than the one in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) specified in the contractor's or subcontractor's registered program will be observed. Under this provision, the ratios and wage rates specified in a contractor's or subcontractor's registered program are "portable," such that they apply not only when the contractor performs work in the locality in which the program was originally registered (sometimes referred to as the contractor's "home State") but also when a contractor performs work on a project located in a different State (sometimes referred to as the "host State"). In contrast, as part of a 1979 NPRM, the Department proposed essentially the opposite approach, *i.e.*, that apprentice ratios and wage rates would not be portable and that, instead, when a contractor performs construction on a project in a locality other than the one in which its program was originally registered, "the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in plan(s) registered for that locality shall be observed."<sup>206</sup>

In a final rule revising 29 CFR part 5, issued in 1981, the Department noted that several commenters had objected to the 1979 NPRM's proposal to apply the apprentice ratios and wage rates in the location where construction is performed, rather than the ratios and wage rates applicable in the location in which the program is registered.<sup>207</sup> The Department explained that, in light of these comments, "[u]pon reconsideration, we decided that to impose different plans on contractors, many of which work in several locations where there could be differing

apprenticeship standards, would be adding needless burdens to their business activities."<sup>208</sup>

In 2008, ETA amended its apprenticeship regulations in a manner that is seemingly in tension with the approach to Davis-Bacon apprenticeship "portability" reflected in the 1981 final rule revising 29 CFR part 5. Specifically, in December 2007, ETA issued an NPRM to revise the agency's regulations governing labor standards for the registration of apprenticeship programs.<sup>209</sup> One of the NPRM proposals was to expand the provisions of then-existing 29 CFR 29.13(b)(8), which at that time provided that in order to be recognized by ETA, an SAA must grant reciprocal recognition to apprenticeship programs and standards registered in other States—except for apprenticeship programs in the building and construction trades.<sup>210</sup> ETA proposed to move the provision to 29 CFR 29.13(b)(7) and to remove the exception for the building and construction trades.<sup>211</sup> In the preamble to the final rule issued on October 29, 2008, ETA noted that several commenters had expressed concern that it was "unfair and economically disruptive to allow trades from one State to use the pay scale from their own State to bid on work in other States, particularly for apprentices employed on projects subject to the Davis-Bacon Act."<sup>212</sup> The preamble explained that ETA "agree[d] that the application of a home State's wage and hour and apprentice ratios in a host State could confer an unfair advantage to an out-of-state contractor bidding on a Federal public works project."<sup>213</sup> Further, the preamble noted that, for this reason, ETA's negotiations of memoranda of understanding with States to arrange for reciprocal approval of apprenticeship programs in the building and construction trades have consistently required application of the host State's wage and hour and apprenticeship ratio requirements. Accordingly, the final rule added a sentence to 29 CFR

29.13(b)(7) to clarify that the program sponsor seeking reciprocal approval must comply with the host State's apprentice wage rate and ratio standards.<sup>214</sup>

In order to better harmonize the Davis-Bacon regulations and ETA's apprenticeship regulations, the Department proposed in its NPRM to revise 29 CFR 5.5(a)(4)(i) to reflect that contractors employing apprentices to work on a DBRA project in a locality other than the one in which the apprenticeship program was originally registered must adhere to the apprentice wage rate and ratio standards of the project locality. As noted above, the general rule in § 5.5(a)(4)(i) 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 ETA or an OA-recognized SAA. Under ETA's regulation at 29 CFR 29.13(b)(7), if a contractor has an apprenticeship program registered in 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 to be employed pursuant to and individually registered in the program in the project State, and the terms of that reciprocal approval would apply for purposes of the DBRA. The Department's proposed revision requiring contractors to apply the ratio and wage rate requirements from the relevant apprenticeship program for the locality where the laborers and mechanics are working therefore better aligns with ETA's regulations on recognition of SAAs and is meant to eliminate potential confusion for Davis-Bacon contractors subject to both ETA and WHD rules regarding apprentices. The proposed revision also better comports with the DBA's statutory purpose to eliminate the unfair competitive advantage conferred on contractors from outside of a geographic area bidding on a Federal construction contract based on lower wage rates (and, in the case of apprentices, differing ratios of apprentices paid a percentage of the journeyworker rate for the work performed) than those that prevail in the location of the project.

The Department noted that multiple apprenticeship programs may be

<sup>208</sup> *Id.* The 1981 final rule revising 29 CFR part 5 was withdrawn, but the apprenticeship portability provision in § 5.5 was ultimately proposed and issued unchanged by a final rule issued in 1982. See Final Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 47 FR 23658, 23669 (May 28, 1982).

<sup>209</sup> See NPRM, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations Notice of Proposed Rulemaking, 72 FR 71019 (Dec. 13, 2007).

<sup>210</sup> *Id.* at 71026.

<sup>211</sup> *Id.* at 71029.

<sup>212</sup> Final Rule, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 73 FR 64402, 64419 (Oct. 29, 2008).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 64420. See 29 CFR 29.13(b)(7).

<sup>206</sup> 44 FR 77085.

<sup>207</sup> 46 FR 4383.

registered in the same State, and that such programs may cover different localities of that State and require different apprenticeship wage rates and ratios within those separate localities. If apprentices registered in a program covering one State locality will be doing apprentice work in a different locality of the same State, and different apprentice wage and ratio standards apply to the two different localities, the proposed rule would require compliance with the apprentice wage and ratio standards applicable to the locality where the work will be performed. The Department encouraged comments as to whether adoption of a consistent rule, applicable regardless of whether the project work is performed in the same State as the registered apprenticeship program, best aligns with the statutory purpose of the DBA and would be less confusing to apply.

Lastly, the Department proposed to remove the regulatory provisions regarding trainees currently set out in §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to remove the references to trainees and training programs throughout parts 1 and 5. Current § 5.5(a)(4)(ii) permits “trainees” to work at less than the predetermined rate for the work performed, and § 5.2(n)(2) defines a trainee as a person registered and receiving on-the-job training in a construction occupation under a program approved and certified in advance by ETA as meeting its standards for on-the-job training programs. Sections 5.2(n)(2) and 5.5(a)(4)(ii) were originally added to the regulations over 50 years ago.<sup>215</sup> However, ETA no longer reviews or approves on-the-job training programs and, relatedly, WHD has found that § 5.5(a)(4)(ii) is seldom if ever applicable to DBRA contracts. The Department therefore proposed to remove the language currently in §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to retitle § 5.5(a)(4) “Apprentices.” The Department also proposed a minor revision to § 5.5(a)(4)(ii) to align with the gender-neutral term of “journeyworker” used by ETA in its apprenticeship regulations. The Department also proposed to rescind and reserve §§ 5.16 and 5.17, as well as delete references to such trainees and training programs in §§ 1.7, 5.2, 5.5, 5.6, and 5.15. The Department encouraged comments on this proposal, including

any relevant information about the use of training programs in the construction industry.

The Department received no comments on its technical, non-substantive proposal to reorganize § 5.5(a)(4)(i) so that each of the four apprentice-related topics it addresses are more clearly and distinctly addressed. The final rule therefore adopts this change as proposed.

The Department received several comments on its proposal regarding reciprocity of ratios and wage rates where a contractor performs construction in a locality other than that in which its apprenticeship program is registered. The majority of the comments expressed support for the proposal. Several commenters, such as CEA, NECA, and SMACNA, supported the proposal, saying that requiring contractors to apply the apprenticeship ratio and wage rate standards of the locality where the project is being performed better aligns with ETA’s apprenticeship regulations and eliminates potential confusion. The UA and NCDCL also stated that the proposal would help prevent non-local contractors from gaining an unfair economic advantage over local contractors and that it comports with the purpose of the DBA.

MCAA commended the proposal as constructive and sought clarification on “where the apprentice must . . . be registered.” In response to the question raised, the Department notes that nothing in the existing regulation or proposal purports to define where apprentices should be registered. Section 5.5(a)(4)(i) only provides that in order for contractors to employ apprentices on a Davis-Bacon project at lower rates than the prevailing wage rates applicable to journeyworkers, the apprentices must be participants in a federally registered apprenticeship program, or a State apprenticeship program registered by a recognized SAA. The ETA regulation at 29 CFR 29.3 governs the “[e]ligibility and procedure for registration of an apprenticeship program” and § 29.3(c) addresses individual registration.

CC&M, while supporting the proposal, recommended an additional change to the regulation to clarify that contractors employing apprentices outside of the locality in which the apprenticeship program is registered should apply the wage rate and ratio of the locality of the project “or apply the wage rates and ratio of the actual program in which the apprentice is enrolled, whichever is higher and more restrictive.” The Department’s intent for the proposed revision, in part, was to harmonize the

Davis-Bacon regulations with ETA’s apprenticeship regulations requiring contractors to adhere to the host State’s apprentice wage and ratio standards when employing apprentices in a State different from where the apprenticeship program is registered. In its existing form, § 5.5(a)(4)(i) is in tension with ETA regulations because it explicitly allows contractors to apply the apprentice ratio and wage rates under their registered program even where a different apprentice ratio and/or wage rate may apply pursuant to ETA’s reciprocity rule. CC&M’s recommended approach of applying the more restrictive apprenticeship ratio and wage rate would not sufficiently alleviate this tension and could cause further confusion for contractors subject to both ETA and WHD rules regarding apprentices. Therefore, the Department declines to adopt CC&M’s recommendation.

On the other hand, IEC asserted that the proposed revision would impose an undue burden on apprenticeship programs by causing them “to register in additional localities in order for apprenticeship to journeyman ratios to be reliable” and by imposing “locality-specific rules.” While IEC did not elaborate on how the proposal would cause apprenticeship programs to register in additional localities, the Department does not agree that it would have that effect. Neither the proposal nor the existing regulations address where an apprenticeship program needs to be registered. Rather, the rules establish a framework for determining the applicable apprentice ratio and wage rate when a contractor seeks to employ apprentices in a locality different from that in which the program is registered. The Department also disagrees with the comment that the proposal would impose an undue burden on apprenticeship programs by imposing locality specific rules. Rather, the Department believes the proposal avoids confusion and creates a consistent framework for ETA registered apprenticeship programs by requiring, at a minimum, the application of local wage rates and ratios consistent with ETA’s apprenticeship regulations.

IEC further stated that the Department provided no guidance for situations where localities have no apprenticeship program and asked what should be done in those circumstances. In response, the Department recognized the need for clarification and made revisions to the final rule accordingly. Specifically, the Department revised § 5.5(a)(4)(i)(D) to clarify that the apprenticeship ratio and wage rates under the contractor’s registered program would apply in the

<sup>215</sup> See Final Rule, Labor Standards Applicable to Contracts Covering Federally Financed and Assisted Construction, 36 FR 19304 (Oct. 2, 1971) (defining trainees as individuals working under a training program certified by ETA’s predecessor agency, the Manpower Administration’s Bureau of Apprenticeship and Training).

event there is no program in the project locality establishing the applicable ratio and rates.

Finally, the Department received a few comments in response to its proposal to remove the reference to the regulatory provisions regarding trainees set out in existing §§ 5.2(n)(2) and 5.5(a)(4)(ii). See section III.B.3.ii (“29 CFR 5.2 Definitions”). Two commenters, CEA and SMACNA, supported the proposal, recognizing that ETA no longer reviews or approves on-the-job training programs. On the other hand, IAPA opposed the proposal and stated that “eliminating trainees from the Davis[-]Bacon Act may have unintended consequences.” IAPA contended that student trainees such as those receiving training under the Illinois Department of Transportation’s program with the USDOT’s FHWA may not be able to work on Davis-Bacon projects if the trainee language is removed.

IAPA’s comment perhaps reflects a misunderstanding of the proposal. The existing regulation under § 5.5(a)(4)(ii) stated that trainees must not be paid at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval from the ETA. Given that the ETA no longer reviews or approves on-the-job training programs, the allowance to pay trainees less than the predetermined rate under the existing § 5.5(a)(4)(ii) also no longer applied. The proposal to remove the regulatory provisions pertaining to trainees would not prohibit trainees from working on Davis-Bacon projects. Rather, the proposal makes it clear that the trainees should be paid the full prevailing wage listed on the applicable wage determination for the work performed.

Moreover, as discussed in section III.B.3.ii (“29 CFR 5.2 Definitions”), the proposed regulatory definition in § 5.2 retains the text currently found in § 5.2(n)(3), which provides an exception for trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c). Trainees under 23 U.S.C. 113(c) are subject to wage rates and conditions set by the USDOT pursuant to 23 CFR 230.111, and thus, may be paid less than the full prevailing wage for the work performed.

The Department received no specific comments on its proposal to rescind and reserve §§ 5.16 and 5.17, as well as delete references to such trainees and training programs in §§ 1.7, 5.2, 5.5, 5.6, and 5.15. The Department also received

no comments regarding its proposal to revise current § 5.5(a)(4)(ii) to align with the gender-neutral term of “journeyworker” used by ETA in its apprenticeship regulations.

For the foregoing reasons, the final rule adopts the proposal to remove the regulatory provisions regarding trainees set out in existing §§ 5.2(n)(2) and 5.5(a)(4)(ii), and to remove the references to trainees and training programs throughout parts 1 and 5 as proposed. The final rule also adopts the changes proposed regarding reciprocity under § 5.5(a)(4)(i)(D) with minor clarifications as discussed in this section.

#### (D) Flow-Down Requirements in § 5.5(a)(6) and (b)(4)

The Department proposed to add clarifying language to the DBRA- and CWHSSA-specific contract clause provisions at § 5.5(a)(6) and (b)(4), respectively. Currently, these contract clauses 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 clauses also explicitly state that prime contractors are “responsible for [the] compliance by any subcontractor or lower tier subcontractor.” 29 CFR 5.5(a)(6) and (b)(4). The Department proposed changes that would affect these contract clauses in several ways.

##### (1) Flow-Down of Wage Determinations

The Department proposed adding language to § 5.5(a)(6) to clarify that the flow-down requirement also requires the inclusion in such subcontracts of the appropriate wage determination(s).

##### (2) Application of the Definition of “Prime Contractor”

As noted in the discussion of § 5.2, the Department is codifying a definition of “prime contractor” in § 5.2 to include controlling shareholders or members, joint venturers or partners, and any contractor (e.g., a general contractor) that has been delegated all or substantially all of the construction anticipated by the prime contract. These entities, having notice of the definitions, these regulations, and the contract clauses, would therefore also be “responsible” under § 5.5(a)(6) and (b)(4) for the same violations as the legal entity that signed the prime contract. As the Department explained, the change is intended to ensure that contractors do not interpose single-purpose corporate entities as the nominal “prime contractor” to escape liability or responsibility for the contractors’ Davis-

Bacon labor standards compliance duties.

##### (3) Responsibility for the Payment of Unpaid Wages

The proposal included 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. This is consistent with the Department’s longstanding interpretation of this provision. See *M.A. Bongiovanni, Inc.*, WAB No. 91–08, 1991 WL 494751, at \*1 (Apr. 19, 1991); see also *All Phase Elec. Co.*, WAB No. 85–18, 1986 WL 193105, at \*1–2 (June 18, 1986) (withholding contract payments from the prime contractor for subcontractor employees even though the labor standards had not been flowed down into the subcontract).<sup>216</sup> Because such liability for prime contractors is contractual, it represents strict liability and does not require that the prime contractor knew of or should have known of the subcontractors’ violations. *Bongiovanni*, 1991 WL 494751, at \*1. As the WAB explained in *Bongiovanni*, this rule “serves two vital functions.” *Id.* First, “it requires the general contractor to monitor the performance of the subcontractor and thereby effectuates the Congressional intent embodied in the Davis-Bacon and Related Acts to an extent unattainable by Department of Labor compliance efforts.” *Id.* Second, “it requires the general contractor to exercise a high level of care in the initial selection of its business associates.” *Id.*

##### (4) Potential for Debarment for Disregard of Responsibility

The Department proposed new language to clarify that in certain circumstances, underpayments of a subcontractor’s workers may subject the prime contractor to debarment for violating the responsibility provision. Under the existing regulations, there is no reference in the § 5.5(a)(6) or (b)(4) responsibility clauses to a potential for debarment. However, the existing § 5.5(a)(7) currently explains that “[a] breach of the contract clauses in 29 CFR 5.5”—which thus includes the responsibility clause at § 5.5(a)(6)—“may be grounds . . . for debarment[.]” 29 CFR 5.5(a)(7). The new language provides more explicit notice (in § 5.5(a)(6) and (b)(4) themselves) that a prime contractor may be debarred where

<sup>216</sup> The new language also clarifies that, consistent with the language in § 5.10, such responsibility also extends to any interest assessed on back wages or other monetary relief.



there are violations on the contract (including violations perpetrated by a subcontractor) and the prime contractor has failed to take responsibility for compliance.

#### (5) Responsibility and Liability of Upper-Tier Subcontractors

The Department also proposed language in § 5.5(a)(6) and (b)(4) to eliminate confusion regarding the responsibility and liability of upper-tier subcontractors. The existing language in § 5.5(a)(6) and (b)(4) creates express contractual responsibility of upper-tier subcontractors to flow down the required contract clauses to bind their lower-tier subcontractors. *See* § 5.5(a)(6) (stating that the prime contractor “or subcontractor” must insert the required clauses in “any subcontracts”); § 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 Department has long recognized that with this responsibility comes the potential for sanctions against upper-tier subcontractors that fail to properly flow down the contract clauses. *See* AAM 69 (DB–51), at 2 (July 29, 1966).<sup>217</sup>

The current contract clauses in § 5.5(a)(6) and (b)(4) do not expressly identify further contractual responsibility or liability of upper-tier subcontractors for violations their lower-tier subcontractors commit. However, although the Department has not had written guidance to this effect, it has in many circumstances held upper-tier subcontractors responsible for the failure of their lower-tier subcontractors to pay required prevailing wages. *See, e.g., Ray Wilson Co.*, ARB No. 02–086, 2004 WL 384729, at \*6 (Feb. 27, 2004); *see also Norsaire Sys., Inc.*, WAB No. 94–06, 1995 WL 90009, at \*1 (Feb. 28, 1995).

In *Ray Wilson Co.*, for example, the ARB upheld the debarment of an upper-tier subcontractor because its lower-tier subcontractor misclassified its workers. As the ARB held, the upper-tier subcontractor had an “obligation[] to be aware of DBA requirements and to ensure that its lower-tier subcontractor . . . properly complied with the wage payment and record keeping requirements on the project.” 2004 WL 384729, at \*10. The Department sought debarment because the upper-tier

subcontractor discussed the misclassification scheme with the lower-tier subcontractor and thus “knowingly countenanced” the violations. *Id.* at \*8.

In the NPRM, the Department proposed to clarify that upper-tier subcontractors (in addition to prime contractors) may be responsible for the violations committed against the employees of lower-tier subcontractors. The Department’s proposal also clarified that this responsibility requires upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subjects upper-tier subcontractors to debarment in appropriate circumstances (*i.e.*, where the lower-tier subcontractor’s violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors). In the contract clauses at § 5.5(a)(6) and (b)(4), the Department proposed to include language adding that “any subcontractor[] responsible” for the violations is also liable for back wages and potentially subject to debarment. This language is intended to place liability not only on the lower-tier subcontractor that is directly employing the worker who did not receive required wages, but also on the upper-tier subcontractors that may have disregarded their obligations to be responsible for compliance.

A key principle in enacting regulatory requirements is that liability should, to the extent possible, be placed on the entity that can best control whether a violation occurs. *See Bongiovanni*, 1991 WL 494751, at \*1.<sup>218</sup> For this reason, the Department proposed language assigning liability to upper-tier subcontractors that can choose the lower-tier subcontractors they hire, notify lower-tier subcontractors of the prevailing wage requirements of the contract, and take action if they have any reason to believe there may be compliance issues. By clarifying that upper-tier subcontractors may be liable under appropriate circumstances—but are not strictly liable as are prime

contractors—the Department believes that it has struck an appropriate balance that is consistent with historical interpretation, the statutory language of the DBA, and the feasibility and efficiency of future enforcement.

The Department received many comments from unions, contractor associations, and worker advocacy groups supporting the proposed changes to § 5.5(a)(6) and (b)(4). These comments stated generally that greater clarity and stronger enforcement mechanisms are necessary to increase compliance by contractors and protect vulnerable workers who may otherwise have no recourse against unscrupulous practices such as wage theft. Several contractor associations, including SMACNA, NECA, and CEA, supported the changes as reasonable clarifications of existing interpretations.

Several commenters in support of the proposal stated that the new language would help to ensure workers have a recourse regardless of which entity is their direct employer. The LCCHR letter, for example, stated that “up-the-chain liability” for DBA violations is particularly important in the construction industry because large-scale construction is an inherently fissured operation, with multiple specialized subcontractors retained to complete discrete aspects of a project. Under these circumstances, strengthening and clarifying the longstanding principles of contractors’ liability throughout the contracting chain reinforces accountability in taxpayer-funded construction and helps ensure workers will receive the wages they have earned, consistent with the purpose of the DBA.<sup>219</sup>

Several commenters, including UBC and III–FFC, stated that appropriate liability is important to promote self-policing by contractors. These commenters stated that the clarification of responsibility and potential accountability will further incentivize prime contractors and upper-tier subcontractors to choose lower-tier subcontractors wisely and encourage them to police compliance. Several commenters supporting the proposal, including UA, III–FFC, MCAA, NECA, and CEA, noted that enhanced oversight, enforcement, and vulnerability to penalties would close

<sup>217</sup> In AAM 69, the Department noted that “the failure of the prime contractor or a subcontractor to incorporate the labor standards provisions in its subcontracts may, under certain circumstances, be a serious violation of the contract requirements which would warrant the imposition of sanctions under either the Davis-Bacon Act or our Regulations.”

<sup>218</sup> *Cf. Am. Soc’y of Mech. Eng’rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572–73 (1982) (“[A] rule that imposes liability on the standard-setting organization—which is best situated to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.”). The same principle supports the Department’s codification of the definition of “prime contractor.” Where the nominal prime contractor is a single-purpose entity with few actual workers, and it contracts with a general contractor for all relevant aspects of construction and monitoring of subcontractors, the most reasonable enforcement structure would place liability on both the nominal prime contractor and the general contractor that actually has the staffing, experience, and mandate to assure compliance on the job site.

<sup>219</sup> A number of commenters supporting the proposal cited to a publication summarizing the evidence of widespread unlawful labor practices in the residential construction industry in particular. *See* Ormiston et al., *supra* note 70, at 75–113. The authors of this meta-analysis noted that one of the most effective methods of ensuring compliance in such circumstances is the appropriate allocation of liability on upper-tier subcontractors. *Id.* at 100.

loopholes, deter bad actors, and ensure that contractors do not shirk their responsibilities through subcontracting arrangements. This would also remove competitive disadvantages for high-road contractors bidding on covered projects. Several dozen contractors and state-level contractor associations that are members of SMACNA wrote letters, as part of a campaign, that expressed general support of the revisions to § 5.5(a)(6) and (b)(4).

NECA and CEA, while supporting the proposal, urged that the contract clauses should 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 the workforce entitled to them.

The Department also received a few comments opposing the proposed changes. The SBA Office of Advocacy conveyed comments from small businesses that it would be especially difficult for subcontractors to keep track of their lower-tiered subcontractors and material suppliers because of the lack of clarity and vague definitions in the rulemaking. Three contractor associations, the OCA, SIBA, and IRTBA, commented that the current Davis-Bacon enforcement mechanisms are working and should not be changed. IEC stated that the Department's proposed language was "overly harsh" and would greatly increase the compliance costs of upper-tier contractors that would have to expend significant costs to audit subcontractors.

NAHB stated that subcontracting is ubiquitous in the residential construction industry, and in particular for multifamily residential building. NAHB likened the proposed language in this section and elsewhere in this rulemaking to a proposed expansion of joint employer liability. NAHB stated that construction sites are unique examples of multiemployer worksites and that many of the usual factors for establishing a joint employer relationship are not applicable in this setting. But NAHB also urged that WHD should clarify in the final rule that "joint employer" status will be governed by case law under the FLSA.

IEC stated that the cases the Department cited in support of its proposal "do not support a blanket liability provision." IEC specifically pointed to the ARB decision in *Ray Wilson Co.*, in which, according to IEC, the vice-president of "a prime [contractor], Aztec" had prepared the subcontract with a lower-tier subcontractor that had violated the

DBA, and the subcontract did not include DBA provisions.<sup>220</sup> IEC stated that in that instance it "may have been appropriate" to hold Aztec responsible, but that these "specific issues govern the case" and should be used to interpret the Board's finding that Aztec violated the requirement to ensure that its lower-tier subcontractor properly complied with the Act's requirements. ARB No. 02–086, 2004 WL 384729, at \*6. IEC also emphasized that the ARB in *Ray Wilson Co.* and WAB in *Norsaire Systems*, 1995 WL 90009, at \*1, did not cite any provision of the DBA or regulations to support the Department's actions.

IEC recommended that the Department follow the approach of other regulations applicable to government contractors by explicitly allowing upper-tier contractors to rely on the certifications of lower-tier subcontractors with respect to certain compliance obligations. IEC gave the example of the SBA, which allows upper-tier contractors to rely on the size certifications of small business with no duty to inquire unless there was a reason to believe the certification was inaccurate. Similarly, the ARTBA recommended that the DBA rule should include a "good faith" standard for prime contractors that would relieve the prime contractor of liability for a subcontractor's violation if the prime contractor has established a compliance program, the transgression was beyond their reasonable scope of knowledge, and they did not willfully participate in the violation.

The Department has considered the comments received on this proposal. Both the comments for and against the proposal emphasize that subcontracting is a critical aspect of the construction industry and that the allocation of liability between upper-tiered and lower-tiered subcontractors is an issue of particular interest to contractors, subcontractors, and workers. The Department generally agrees with the commenters that supported the proposal that the failure to appropriately allocate responsibility has consequences for the construction workers for whom the Act was enacted. See *Binghamton Constr. Co.*, 347 U.S. at 178. The LCCHR letter emphasized that one of the letter's signatory organizations represents a construction workforce in Texas and pointed to the crucial role "up-the-chain

liability" plays in enabling these workers to secure redress from prime and general contractors for wage theft committed by subcontractors. The Department agrees with the LCCHR letter that clarity in the allocation of "up-the-chain" responsibility is consistent with the purpose of the Act to protect prevailing wages for these and other local construction workers.

The Department agrees with NECA and CEA that the contract clause language in § 5.5(a)(6) would be strengthened through the inclusion of a requirement that any DBRA-related contract modifications must also be flowed down. The Department therefore has amended the § 5.5(a)(6) contract clause language in the final rule to cover, along with the enumerated contract clauses and applicable wage determination(s), such other clauses "or contract modifications" as the Federal agency may by appropriate instructions require. The Department does not believe it is necessary to impose a specific timetable for such incorporation in § 5.5(a)(6), as the Department or relevant Federal agency can specify the timetable in the modification with the prime contractor, and the prime contractor will already be liable for the effect of any modification on the prevailing wages of the employees of lower-tier subcontractors during any delay in the flowing down of the required modification.

The Department has considered, but declines to adopt, the suggestions from IEC and ARTBA regarding certifications and "good faith" defenses. As the NPRM explained, the Department has long interpreted the DBRA to place strict liability on prime contractors to account for all unpaid back wages. This is because prime contractors are entering into a contract with the government agency that requires that all workers on the project be paid the prevailing wage in compliance with the Act. As explained in the Restatement (Second) of Contracts, "[c]ontract liability is strict liability" and "[t]he obligor is therefore liable in damages for breach of contract even if he is without fault[.]" Restatement, ch. 11, intro. note (Am. Law Inst. 1981). Allocating liability in this manner is appropriate given the prime contractor's ability to choose which subcontractors to hire, provide adequate notice and instruction to subcontractors of their responsibilities, and inquire into their compliance or audit them as appropriate. Creating a good faith defense to basic back wage or other contractual liability in this context is not consistent with common law of

<sup>220</sup> This description misstates the role of the company Aztec in *Ray Wilson Co.* Aztec was an upper-tier subcontractor, not the prime contractor. A lower-tier subcontractor of Aztec misclassified its workers as "partners" allegedly exempt from the Act's wage requirements. ARB No. 02–086, 2004 WL 384729, at \*3, \*5.

contract or with the purpose of the statute.

For the same reason, the Department does not believe that NAHB's comparison to joint employer liability under the FLSA is helpful. The DBA and Related Acts, like other statutes and executive orders governing Federal contracting, are not general regulatory statutes. Rather, they seek to impose conditions solely on entities involved in contracts for construction with a Federal agency or construction contracts receiving Federal assistance. The relevant question is not whether the common law would consider one entity to be liable for the other under a vicarious liability theory, or whether other statutes like the FLSA might impose liability depending on the wording of those statutes. Rather, the question the Department seeks to address is how best to ensure that the congressional purpose of the DBRA—the protection of the prevailing wages of workers on covered contracts—is satisfied.

Notwithstanding the above, the Department emphasized in the proposal that it does not intend to place the same strict liability on upper-tier subcontractors for back wages recoverable by the Department as it does on prime contractors. The Department also emphasized that it did not intend for the proposed new language in § 5.5(a)(6) to impose a new strict liability standard for debarment for either prime contractors or upper-tier subcontractors for violations involving the workers of lower-tier contractors. Some of the critical comments that the Department received overlooked these points in the NPRM. For example, OCA, SIBA, and IRTBA characterized the proposal as “[e]ssentially . . . impos[ing] strict, vicarious liability on contractors, to the point of debarment.” They opposed this, saying that it would place an undue burden and risk on contractors and would discourage contractors from bidding on work covered by the DBA.

OCA, SIBA, and IRTBA's recitation of the proposed changes blurs the Department's distinction between prime contractors and upper-tier subcontractors and also suggests confusion regarding the applicable debarment standard. The strict liability for covering unpaid back wages only applies to prime contractors, for the reasons articulated above. The new contract language in § 5.5(a)(6) will only impose back wage liability on upper-tier subcontractors to the extent they are “responsible” for the violations of their lower-tier subcontractors. As the Department stated in the NPRM, this

language should not be read to place the same strict liability responsibility on all upper-tier subcontractors that the existing language already places on prime contractors. Rather, the new language clarifies that, in appropriate circumstances, such as in *Ray Wilson Co.*, upper-tier subcontractors may be held responsible for paying back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages. This standard is intended to provide the potential for back wage liability for an upper-tier subcontractor that, for example, repeatedly or in a grossly negligent manner fails to flow down the required contract clause, or has knowledge of violations by lower-tier subcontractors and does not seek to remedy them, or is otherwise purposefully inattentive to Davis-Bacon labor standards obligations of lower-tier subcontractors.

Regarding debarment, OCA, SIBA, and IRTBA's implication that there could be a strict liability standard requiring the Department to debar a prime contractor or any upper-tier subcontractor for the violations of a lower-tier subcontractor is misplaced. In proposing this additional notice of the potential for debarment, the Department stated that it did not intend to change the core standard for when a prime contractor or upper-tier subcontractor may be debarred for the violations of a lower-tier subcontractor. The potential for debarment for a violation of the responsibility requirement, unlike the responsibility for back wages, is not subject to a strict liability standard—even for prime contractors. Rather, in the cases in which prime contractors have been debarred for the underpayments of subcontractors' workers, they were found to have some level of intent that reflected a disregard of their own obligations. See, e.g., *H.P. Connor & Co.*, WAB No. 88–12, 1991 WL 494691, at \*2 (Feb. 26, 1991) (affirming ALJ's recommendation to debar prime contractor for “run[ning] afoul” of 29 CFR 5.5(a)(6) because of its “knowing or grossly negligent participation in the underpayment” of the workers of its subcontractors).<sup>221</sup>

<sup>221</sup> See also *Martell Constr. Co.*, ALJ No. 86–DBA–32, 1986 WL 193129, at \*9 (Aug. 7, 1986), *aff'd*, WAB No. 86–26, 1987 WL 247045 (July 10, 1987). In *Martell*, the prime contractor had failed to flow down the required contract clauses and investigate or question irregular payroll records submitted by subcontractors. The ALJ explained that the responsibility clause in § 5.5(a)(6) places a burden on the prime contractor “to act on or investigate irregular or suspicious situations as necessary to assure that its subcontractors are in compliance with the applicable sections of the regulations.” 1986 WL 193129, at \*9.

The Department does not intend to change this debarment standard.

The Department believes it has appropriately relied on the precedent reflected in *Ray Wilson Co.* and *Norsaire Systems* to explain these liability principles. The lesson of *Ray Wilson Co.*—as IEC points out—is not that an upper-tier subcontractor will be debarred in any case in which a lower-tier subcontractor violates the DBRA. Rather, it is an example of a set of factual circumstances in which debarment of an upper-tier subcontractor was appropriate because it disregarded its obligations to employees of its own lower-tier subcontractor.

Although the Department declines to adopt IEC's suggestion that contractors should be allowed to escape liability if they rely on certifications of compliance by lower-tier subcontractors, this decision is not intended to limit the ways in which prime contractors, upper-tier subcontractors, and lower-tier subcontractors may agree among themselves to allocate liability. For example, a small business prime contractor or upper-tier subcontractor may wish to limit its exposure to back wage liability by requiring lower-tier subcontractors to enter into indemnification agreements with them for any back wage liability for the workers of lower-tier subcontractors. The Department believes that these types of agreements can address some of the concerns conveyed by SBA's Office of Advocacy about the potential burdens on small business subcontractors.

In general, however, the Department believes that the proposed changes to § 5.5(a)(6) and (b)(4) are consistent with the governing case law and represent a balanced compromise by allocating strict contractual liability only on the prime contractor and not on upper-tier subcontractors. The Department adopts the changes as proposed, with the limited addition of the language requiring the flow down of DBRA-related contract modifications.

(E) 29 CFR 5.5(d)—Incorporation of Contract Clauses and Wage Determinations by Reference

New paragraph at § 5.5(d) clarifies that, notwithstanding the continued requirement at § 5.5(a) that agencies incorporate contract clauses and wage determinations “in full” into contracts not awarded under the FAR, the clauses and wage determinations are equally effective if they are incorporated by reference. This new paragraph is discussed further below in section III.B.3.xx (“Post-award determinations and operation-of-law”), together with

proposed changes to §§ 1.6(f), 3.11, 5.5(e), and 5.6.

(F) 29 CFR 5.5(e)—Operation of Law

In a new paragraph at § 5.5(e), the Department proposed language making effective by operation of law a contract clause or wage determination that was wrongly omitted from the contract. This paragraph is discussed below in section III.B.3.xx (“Post-award determinations and operation-of-law”), together with changes to §§ 1.6(f), 3.11, 5.5(d), and 5.6(a).

iv. Section 5.6 Enforcement

(A) 29 CFR 5.6(a)(1)

The Department proposed to revise § 5.6(a)(1) by renumbering the existing regulatory text § 5.6(a)(1)(i), and adding an additional paragraph, § 5.6(a)(1)(ii), to include a provision clarifying that where a contract is awarded without the incorporation of the required Davis-Bacon labor standards clauses required by § 5.5, the Federal agency must incorporate the clauses or require their incorporation. This paragraph is discussed further below in section III.B.3.xx (“Post-award determinations and operation-of-law”), together with changes to §§ 1.6(f), 3.11, 5.5(d), and 5.5(e).

(B) 29 CFR 5.6(a)(2)

The Department proposed to amend § 5.6(a)(2) to reflect the Department’s longstanding practice and interpretation that certified payrolls submitted by the contractor as required in § 5.5(a)(3)(ii) may be requested—and Federal agencies must produce such certified payrolls—regardless of whether the Department has initiated an investigation or other compliance action. The term “compliance action” includes, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations.<sup>222</sup> The Department further proposed revising this paragraph to clarify that, in those instances in which a Federal agency does not itself maintain such certified payrolls, it is the responsibility of the Federal agency to ensure that those records are provided to the Department upon request, either by obtaining and providing the certified payrolls to the Department, or by requiring the entity maintaining those certified payrolls to provide the records directly to the Department.

The Department also proposed to replace the phrase “payrolls and statements of compliance” with “certified payrolls” to continue to more clearly distinguish between certified

payrolls and regular payroll and other basic records and information that the contractor is also required to maintain under § 5.5(a)(3), as discussed above.

The proposed revisions were intended to clarify that an investigation or other compliance action is not a prerequisite to the Department’s ability to obtain from a Federal agency certified payrolls submitted pursuant to § 5.5(a)(3)(ii). The proposed revisions also were intended to remove any doubt or uncertainty that each Federal agency has an obligation to produce or ensure the production of such certified payrolls, including in those circumstances in which it may not be the entity maintaining the requested certified payrolls. As the Department noted in the NPRM, these proposed revisions will make explicit the Department’s longstanding practice and interpretation of this provision, and do not place any new or additional requirements or recordkeeping burdens on contracting agencies, as they are already required to maintain these certified payrolls and provide them to the Department upon request.

The Department believes that these revisions will enhance the Department’s ability to provide compliance assistance to various stakeholders, including Federal agencies, contractors, subcontractors, sponsors, applicants, owners, or other entities awarded contracts subject to the provisions of the DBRA. Specifically, these revisions are expected to facilitate the Department’s review of certified payrolls on covered contracts where the Department has not initiated any specific compliance action. Conducting such reviews promotes the proper administration of the DBRA because, in the Department’s experience, such reviews often enable the Department to identify compliance issues and circumstances in which additional outreach and education would be beneficial.

The Department received no specific comments on these proposed revisions. III–FFC generally supported clarifying and strengthening the recordkeeping requirements as a means of ensuring that contractors remain responsible and that workers are paid the correct prevailing wage, without specifically discussing § 5.6(a)(2). The final rule therefore adopts these changes as proposed.

(C) 29 CFR 5.6(a)(3)–(5), 5.6(b)

The Department proposed revisions to § 5.6(a) and (b), similar to the proposed changes to § 5.6(a)(2), to clarify that an investigation is only one method of assuring compliance with the labor standards clauses required by § 5.5 and the applicable statutes referenced in

§ 5.1. The Department proposed to supplement the term “investigation,” where appropriate, with the phrase “or other compliance actions.” The proposed revisions align with all the types of compliance actions currently used by the Department, as well as any additional types that the Department may use in the future. These proposed revisions made explicit the Department’s longstanding practice and interpretation of these provisions and did not impose any new or additional requirements upon a Federal agency.

Proposed revisions to § 5.6(a)(3) clarified the records and information that contracting agencies should include in their DBRA investigations. These proposed changes conformed to proposed changes in § 5.5(a)(3).

The Department also proposed renumbering current § 5.6(a)(5) as a stand-alone new § 5.6(c) and updating that paragraph to reflect its practice of redacting portions of confidential statements of workers or other informants that would tend to reveal those informants’ identities. This proposed change was made to emphasize—without making substantive changes—that this regulatory provision mandating protection of information that identifies or would tend to identify confidential sources, applies to both the Department’s and other agencies’ confidential statements and other related documents. The proposed revisions codify the Department’s longstanding position that this provision protects workers and other informants who provide information or documents to the Department or other agencies from having their identities disclosed.

The Department received few comments about these proposals. Two comments supported the proposed revisions. III–FFC generally supported clarifying and strengthening the recordkeeping requirements. The UA also supported the safeguards the Department proposed to make it possible for underpaid or misclassified workers to report violations, starting with the Department’s clear commitment in § 5.6(c) to expressly protect the identity of workers or other informants who provide information in connection with a complaint or investigation.

In addition, the Department received a comment from NFIB recommending two limiting changes to § 5.6(b)(2) and (c). First, NFIB requested that the Department revise § 5.6(b)(2) by inserting “consistent with applicable law,” after “cooperate.” NFIB requested this regulatory change based on its concern that the existing regulatory

<sup>222</sup> See 2020 GAO Report, note 14, *supra*, at 6 tbl.1, for descriptions of WHD compliance actions.

requirement that private entities or citizens cooperate with Department investigations creates a legal duty that potentially conflicts with the legal rights of private entities or citizens to invoke evidentiary privileges against document production and the privilege against self-incrimination, and a right to refrain from answering questions absent service of compulsory process.

Second, NFIB recommended that the Department revise § 5.6(c) by inserting “unless otherwise directed by a final and unappealable order of a federal court” after “without the prior consent of the informant” and by inserting “or by the terms of such final and unappealable order of the court” at the end of the paragraph. NFIB asserted that the Department’s privilege to withhold the identity of confidential sources in investigations or other compliance actions is a qualified, not absolute, privilege, and that the Department should not “make[] a promise of confidentiality to confidential sources that, in certain circumstances, the Department cannot keep.” In support of this recommendation, NFIB cited a seminal U.S. Supreme Court decision, *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957), that addresses the common law government informer’s privilege standard that applies to the FLSA, among other statutes.

After consideration, the Department declines to adopt NFIB’s proposed limiting changes. First, the Department did not propose any substantive changes to the language in § 5.6(b)(2) that NFIB recommended qualifying. Second, the Davis-Bacon regulations have required cooperation since 29 CFR part 5 was added in 1951. *See* 16 FR 4432. Specifically, the paragraph then numbered § 5.10(a) provided that “the Federal agencies, contractors, subcontractors, sponsors, applicants or owners, shall cooperate with any authorized representative of the Department of Labor in the inspection of records, interviews with workers, and in all other aspects of the investigation.” *Id.* (emphasis added). This duty to cooperate, which has been reflected in the DBRA’s implementing regulations for more than 70 years with only minor, technical changes to the operative language, has coexisted and will continue to coexist with other legal rights, such as the Fifth Amendment right against self-incrimination, and other privileges. The Department is not aware of any instances (and NFIB points to none) in which the regulatory language of § 5.6(b)(2) and its predecessor provisions have caused confusion or been interpreted as compelling contractors or other entities

to, in NFIB’s words, “forfeit their legal rights in case of an investigation as a condition of working on federal construction projects.” Particularly in the absence of any such evidence, and given that the Department did not propose any substantive changes to § 5.6(b)(2), the Department declines to adopt NFIB’s suggested regulatory change.

Similarly, the Department declines to add NFIB’s proposed qualification to the confidentiality protections codified in current § 5.6(a)(5) (renumbered as § 5.6(c)) in the case of “final and unappealable order[s] of the court” overriding these protections because that qualification is implicit and therefore unnecessary. The Department will continue to defend existing regulatory informant’s privilege provisions which are currently codified in 29 CFR 5.6(a)(5) and 6.5<sup>223</sup> and discussed further in the following paragraphs. The Department would, however, also abide by a higher court’s final and unappealable order to the contrary.

The Department has long taken the position that protecting the identities of confidential informants is essential for enforcement. As explained in sections II.A (“Statutory and regulatory history”) and III.B.3.xix (“Anti-Retaliation”), the Department has broad authority to enact regulations like this one, which enhance enforcement and administration of the Act’s worker protections. Decades ago, the Department exercised this authority by, among other measures, extending protections to confidential informants. The first iteration of current § 5.6(a)(5) was added in 1951 in the then new 29 CFR part 5. *See* 16 FR 4432 (“Complaints of alleged violations shall be given priority and statements, written or oral, made by an employee shall be treated as confidential and shall not be disclosed to his employer without the consent of the employee.”). The current regulations, 29 CFR 5.6(a)(5) and 6.5, prohibit disclosing, without the informer’s consent, the identities of such people who have provided information to the Department in confidence. Specifically, §§ 5.6(c) and 6.5 direct that when an informant

provides statements or information in confidence, in no event will the identity of such an informant, or any portions of their statements, or other information provided that would tend to reveal their identity, be ordered to be produced before the date of that person’s testimony. In the case of non-testifying informants, such information may not be disclosed at all, unless the person has consented to such disclosure. These DBRA regulatory informant’s provisions, currently codified in §§ 5.6(a)(5) and 6.5—unlike the common law government informer’s privilege discussed in *Roviaro*, which is derived from judicial decisions, not regulations—prohibit disclosure (absent consent) of information that would tend to identify non-testifying informants and, for testifying informants, does not permit such disclosure until the date of the informant’s testimony at trial.

Absent these controlling regulations, application of the common law government informant’s privilege alone, which, as NFIB asserts, is a qualified privilege, would be appropriate. But even if that common law government informant’s privilege alone were applicable, it would be unnecessary to codify. WHD’s current and longstanding practice is to let workers know that their identities will be kept confidential to the maximum extent possible under the law.

#### v. Section 5.10 Restitution, Criminal Action

To correspond with proposed new language in the contract clauses, the Department proposed to add references to monetary relief and interest to the description of restitution in § 5.10, as well as an explanation of the method of computation of interest applicable generally to any circumstance in which there has been an underpayment of wages under a covered contract.

The Department also proposed new anti-retaliation contract clauses at § 5.5(a)(11) and (b)(5), along with a new related section of the regulations at § 5.18. Those clauses and section provide for monetary relief that would include, but not be limited to, back wages. Reference to this relief in § 5.10 was proposed to correspond to those proposed new clauses and section. For further discussion of those proposals, see section III.B.3.xix (“Anti-Retaliation”).

The reference to interest in § 5.10 was similarly intended to correspond to proposed new language requiring the payment of interest on any underpayment of wages in the contract clauses at § 5.5(a)(1)(vi), (a)(2) and (6), and (b)(2) through (4), and on any other

<sup>223</sup> In 1984, the Department added the following sentence to § 6.5 (previously numbered § 6.33): “In no event shall a statement taken in confidence by the Department of Labor or other Federal agency be ordered to be produced prior to the date of testimony at trial of the person whose statement is at issue unless the consent of such person has been obtained.” 49 FR 10626, 10628 (Mar. 21, 1984) (final rule). The companion regulations in 29 CFR part 6, subparts A (general) and C (DBRA enforcement proceedings), are authorized by various sources, including the DBA and Reorganization Plan No. 14 of 1950.

monetary relief for violations of the proposed anti-retaliation clauses. The current Davis-Bacon regulations and contract clauses do not specifically provide for the payment of interest on back wages. The ARB and the Department's ALJs, 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 worker protection statutes enforced by the Department. *See, e.g., Lawn Restoration Serv. Corp.*, ALJ No. 2002–SCA–00006, slip op. at 74 (Dec. 2, 2003) (awarding prejudgment interest under the SCA).<sup>224</sup> Under the DBRA, as under the INA and SCA and other similar statutes, an assessment of interest on back wages and other monetary relief will ensure that the workers Congress intended to protect from substandard wages will receive the full compensation that they were owed under the contract.

The proposed language established that interest would 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, and would be compounded daily. Various Occupational Safety and Health Administration (OSHA) whistleblower regulations use the tax underpayment rate and daily compounding because that accounting best achieves the make-whole purpose of a back-pay award. *See Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule*, 80 FR 11865, 11872 (Mar. 5, 2015).

The Department received one comment in opposition to its proposal. ABC noted that contractors may be unaware of any wage underpayments until they are notified by the Department at or near the end of a construction project, and that—absent knowledge and/or willful underpayment—interest compounding should not begin to be accrue until after the Department notifies a contractor of an unremedied liability.

However, the majority of commenters on this topic supported the Department's proposal. The UA stated that the chances of underpaid or misclassified workers coming forward to report violations—and in turn, employers paying employees swiftly—

are improved by requiring employers to pay interest if they fail to pay required wages. PAAG and PADLI also supported the proposal to calculate interest from the date of the underpayment or loss, and to be compounded daily, which it noted would ensure that the workers whom Congress intended to protect from substandard wages would receive the full compensation that they were owed. UBC stated that such language will improve deterrence and compliance. CC&M also supported the Department's proposal, noting that misclassification of workers as independent contractors amounts to wage theft and that protocols for workers to receive restitution are needed in the regulations.

Although in some cases the requirement to pay interest may act as an additional deterrent, the reason why the Department believes the requirement is necessary is its function in providing make-whole relief to workers who have not timely received the full prevailing wages that they were due under the statute and the regulations. The requirement to pay interest is not intended as a penalty on contractors or subcontractors that are responsible for violations. Accordingly, the requirement to provide interest outweighs the expressed concern about whether contractors and subcontractors have acted knowingly or willfully. The final rule adopts this change as proposed.

#### vi. Section 5.11 Disputes Concerning Payment of Wages

The Department proposed minor revisions to § 5.11(b)(1) and (c)(1), to clarify that where there is a dispute of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification, the Administrator may notify the affected contractors and subcontractors, if any, of the investigation findings by means other than registered or certified mail, so long as those other means would normally assure delivery. Examples of such other means include, but are not limited to, email to the last known email address, delivery to the last known address by commercial courier and express delivery services, or by personal service to the last known address. The Department explained that while registered or certified mail may generally be a reliable means of delivery, other delivery methods may be just as reliable or even more successful at assuring delivery, as has been demonstrated during the COVID–19 pandemic. The proposed revisions would therefore allow the Department to choose methods to ensure that the

necessary notifications are delivered to the affected contractors and subcontractors.

In addition, the Department proposed similar changes to allow contractors and subcontractors to provide their response, if any, to the Administrator's notification of the investigative findings by any means that would normally assure delivery. The Department also proposed replacing the term “letter” with the term “notification” in this section, as the proposed changes would allow the notification of investigation findings to be delivered by letter or other means, such as email. Similarly, the Department proposed to replace the term “postmarked” with “sent” to reflect that various means may be used to confirm delivery depending upon the method of delivery, such as by the date stamp on an email or the delivery confirmation provided by a commercial delivery service.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

For additional discussion related to § 5.11, see section III.B.3.xxi (“Debarment”).

#### vii. Section 5.12 Debarment Proceedings

The Department proposed minor revisions to § 5.12(b)(1) and (d)(2)(iv) (renumbered as § 5.12(c)(2)(iv)(A)) to clarify that the Administrator may notify the affected contractors and subcontractors, if any, of the investigation findings by means other than registered or certified mail, so long as those other means would normally assure delivery. As discussed above in reference to identical changes proposed to § 5.11, these revisions would allow the Department to choose the most appropriate method to confirm that the necessary notifications reach their recipients. The Department proposed similar changes to allow the affected contractors or subcontractors to use any means that would normally assure delivery when making their response, if any, to the Administrator's notification.

The Department also proposed a slight change to § 5.12(b)(2), which stated that the Administrator's findings would be final if no hearing were requested within 30 days of the date the Administrator's notification is sent, as opposed to the current language, which states that the Administrator's findings shall be final if no hearing is requested within 30 days of receipt of the Administrator's notification. This proposed change would align the time period available for requesting a hearing in § 5.12(b)(2) with similar requirements

<sup>224</sup> *See also Greater Mo. Med. Pro-care Providers, Inc.*, ARB No. 12–015, 2014 WL 469269, at \*18 (Jan. 29, 2014) (approving of pre-judgment and post-judgment interest on back pay award for H–1B visa cases under the Immigration and Nationality Act (INA)), *aff'd sub nom. Greater Mo. Med. Pro-care Providers, Inc. v. Perez*, No. 3:14–CV–05028, 2014 WL 5438293 (W.D. Mo. Oct. 24, 2014), *rev'd on other grounds*, 812 F.3d 1132 (8th Cir. 2015).

in § 5.11 and other paragraphs in § 5.12, which state that such requests must be made within 30 days of the date of the Administrator's notification.

For additional discussion related to § 5.12, see section III.B.3.xxi ("Debarment").

The Department received no comments on this proposal. The final rule therefore adopts these changes as proposed.

viii. Section 5.16 Training Plans Approved or recognized by the Department of Labor Prior to August 20, 1975

As noted (*see* III.B.3.ii.(E) "29 CFR 5.5(a)(4) Apprentices."), the Department proposed to rescind and reserve § 5.16. Originally published along with § 5.5(a)(4)(ii) in a 1975 final rule, § 5.16 is essentially a grandfather clause permitting contractors, in connection with certain training programs established prior to August 20, 1975, to continue using trainees on Federal and federally assisted construction projects without seeking additional approval from the Department pursuant to § 5.5(a)(4)(ii). *See* 40 FR 30480. Since § 5.16 appears to be obsolete more than four decades after its issuance, the Department proposed to rescind and reserve the section. The Department also proposed several technical edits to § 5.5(a)(4)(ii) to remove references to § 5.16.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

ix. Section 5.17 Withdrawal of Approval of a Training Program

As already discussed, the Department proposed to remove references to trainees and training programs throughout parts 1 and 5 (*see* III.B.3.ii.(E) "29 CFR 5.5(a)(4) Apprentices.") as well as rescind and reserve § 5.16 (*see* III.B.3.viii "Section 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.").

Accordingly, the Department also proposed to rescind and reserve § 5.17.

The Department received no comments on the proposal to rescind and reserve § 5.17. The final rule therefore adopts this change as proposed.

x. Section 5.20 Scope and Significance of This Subpart

The Department proposed two technical corrections to § 5.20. First, the Department proposed to correct a typographical error in the citation to the Portal-to-Portal Act of 1947 to reflect

that the relevant section of the Portal-to-Portal Act is codified at 29 U.S.C. 259, not 29 U.S.C. 359. Second, the last sentence of § 5.20 currently states, "Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.12." However, the regulatory provision titled "Rulings and Interpretations," which this section is meant to reference, is currently located at § 5.13. The Department therefore proposed to replace the incorrect reference to § 5.12 with the correct reference to § 5.13.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed, with minor technical edits to improve readability, none of which are intended to reflect a change in the substance of this section.

xi. Section 5.23 The Statutory Provisions

The Department proposed to make technical, non-substantive changes to § 5.23. The existing text of § 5.23 primarily consists of a lengthy quotation of a particular fringe benefit provision of the 1964 amendments to the DBA. The Department proposed to replace this text with a summary of the statutory provision at issue for two reasons. First, due to a statutory amendment, the quotation set forth in existing § 5.23 no longer accurately reflects the statutory language. Specifically, on August 21, 2002, Congress enacted legislation which made several non-substantive revisions to the relevant 1964 DBA amendment provisions and recodified those provisions from 40 U.S.C. 276a(b) to 40 U.S.C. 3141.<sup>225</sup> The Department proposed to update § 5.23 to include a citation to 40 U.S.C. 3141(2). Second, the Office of the Federal Register disfavors lengthy block quotations of statutory text.<sup>226</sup> In light of this drafting convention, and because the existing quotation in § 5.23 no longer accurately reflects the statutory language, the Department proposed to revise § 5.23 so that it paraphrases the statutory language set forth at 40 U.S.C. 3141(2).

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

<sup>225</sup> *See* Revision of Title 40, U.S.C., "Public Buildings, Property, and Works," Public Law 107–217, sec. 3141, 116 Stat. 1062, 1150 (Aug. 21, 2002).

<sup>226</sup> *See* Off. of the FR, "Document Drafting Handbook" section 3.6 (Aug. 2018 ed., rev. Mar. 24, 2021), <https://www.archives.gov/files/Federal-register/write/handbook/ddh.pdf>.

xii. Section 5.25 Rate of Contribution or Cost for Fringe Benefits

The Department proposed to add new paragraph (c) to existing § 5.25 to codify 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 perform work on both DBRA-covered projects (referred to as "DBRA-covered" work or projects) and projects that are not subject to DBRA requirements (referred to as "private" work or projects) in a particular year or other shorter time period. While existing guidance generally requires the use of annualization to compute the hourly equivalent of fringe benefits, annualization is not currently addressed in the regulations. The Department's proposal provided for annualization of fringe benefits unless a contractor obtained an exception with respect to a particular fringe benefit plan and also addressed how to properly annualize fringe benefits. The proposal also set forth an administrative process for obtaining approval by the Administrator for an exception from the annualization requirement.

Consistent with the Secretary's authority to set the prevailing wage, WHD has long concluded that a contractor generally may not take Davis-Bacon credit for all its contributions to a fringe benefit plan based solely upon the workers' hours on a DBRA-covered project when the workers also work on private projects for the contractor in that same time period. *See, e.g., Miree Constr. Corp. v. Dole*, 930 F.2d 1536, 1545–46 (11th Cir. 1991) (adopting the Administrator's contention that "[i]f an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work"); *see also, e.g., Indep. Roofing Contractors v. Chao*, 300 Fed. Appx. 518, 521 (9th Cir. 2008) (noting the Department's "long history of applying annualization," including when an "employer provides a year-long benefit" so as to "ensure 'that a disproportionate amount of that fringe benefit is not paid out of wages earned on . . . Davis-Bacon work'" (citation omitted); *In re Cody-Zeigler*, ARB Nos. 01–014, 01–015, 2003 WL 23114278, at \*13 (Dec. 19, 2003); WHD Opinion Letter DBRA–72 (June 5, 1978); WHD Opinion Letter DBRA–134 (June 6, 1985); WHD Opinion Letter DBRA–68 (May 22, 1984); FOH 15f11(b). Contributions made to a fringe benefit



plan for DBRA-covered work generally may not be used to fund the plan for periods of private work. A contractor therefore typically must convert its total annual contributions to the fringe benefit plan to an hourly cash equivalent by dividing the cost of the fringe benefit by the total number of hours worked (DBRA-covered and private work) to determine the amount creditable towards meeting its obligation to pay the prevailing wage under the DBRA. *See* FOH 15f11(b) (“Normally, contributions made to a fringe benefit plan for government work generally may not be used to fund the plan for periods of non-government work.”); *see also* FOH 15f12(b).

This principle, which is referred to as “annualization,” effectively prohibits contractors from using fringe benefit plan contributions attributable to work on private projects to meet their prevailing wage obligation for DBRA-covered work. *See, e.g., Miree Constr.*, 930 F.2d at 1545 (annualization ensures receipt of the prevailing wage by “prevent[ing] employers from receiving Davis-Bacon credit for fringe benefits actually paid to employees during non-Davis-Bacon work”). Annualization is intended to prevent the use of DBRA-covered work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and that constitute compensation for all the worker’s work, both DBRA-covered and private.

For many years, WHD has required contractors to annualize contributions for most types of fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans, and sick leave plans. *See, e.g., Rembrandt, Inc.*, WAB No. 89–16, 1991 WL 494712, at \*1 (Apr. 30, 1991) (noting WHD Deputy Administrator’s position that “fringe benefit contributions creditable for Davis-Bacon purposes may not be used to fund a fringe benefit plan for periods of non-government work”); PWRB, sec. 9, p. 21 (noting that the Administrator originally applied annualization to health insurance plans in the 1970s). WHD’s rationale for requiring annualization is that such contributions finance benefits that are continuous in nature and reflect compensation for all of the work performed by a laborer or mechanic, including work on both DBRA-covered and private projects. One exception to this general rule compelling the annualization of fringe benefit plan contributions has been that annualization is not required for defined contribution pension plans (DCPPs) that provide for immediate participation and essentially immediate vesting (*e.g.*, 100

percent vesting after a worker works 500 or fewer hours). *See* WHD Opinion Letter DBRA–134 (June 6, 1985); *see also* FOH 15f14(f)(1). However, WHD does not currently have public guidance explaining the extent to which other plans may also warrant an exception from the annualization principle.

To clarify when an exception to the general annualization principle may be appropriate, the Department proposed language stating that contributions to a fringe benefit plan may only qualify for such an exception when three requirements 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. In accordance with the Department’s longstanding guidance, under the proposal, a plan would generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours. These proposed criteria were not necessarily limited to DCPPs. However, to ensure that the criteria were applied correctly and that workers’ Davis-Bacon wages were not disproportionately used to fund benefits during periods of private work, the Department proposed that such an exception could only apply when the plan in question had been submitted to the Department for review and approval. As proposed, such requests could be submitted by plan administrators, contractors, or their representatives. However, to avoid any disruption to the provision of worker benefits, the Department also proposed that any plan that is not subject to annualization under the Department’s existing guidance could continue to use such an exception until the plan had either requested and received a review of its exception status under the proposed process, or until 18 months had passed from the effective date of this rule, whichever came first.

The Department noted that by requiring annualization, the proposal furthered the policy goal of protecting the fringe benefit component of workers’ Davis-Bacon prevailing wage compensation from dilution by preventing contractors from taking credit for fringe benefits attributable to work on private projects against their fringe obligations on DBRA-covered work. The proposed exception also provided the flexibility for certain fringe benefit plan contributions to be excepted from the annualization requirement if they met the proposed criteria.

The Department received a wide variety of comments on the Department’s proposal to codify the annualization principle. All of the commenters appeared to recognize that the Department has long required most fringe benefits to be annualized. They also appeared to accept that annualization of fringe benefits is at least typically warranted and that codification of the annualization principle in regulations would be appropriate. However, some commenters that were generally supportive of annualization advocated that the Department modify the proposal to more broadly require annualization, whereas others (including through comments submitted as part of an organized ABC member campaign) opposed the proposed exception approval process, questioned or opposed the criterion that annualization apply to any fringe benefit that is continuous in nature, and/or proposed that contributions to specific types of fringe benefit plans such as DCPPs and supplemental unemployment benefit (SUB)<sup>227</sup> plans be excepted from annualization.

Many commenters, including III–FFC, Alaska District Council of Laborers, LIUNA Laborers’ Local 341, PAAG and PADLI, NABTU, and an individual commenter, expressed general support for the Department’s proposal to codify the Davis-Bacon annualization principle. These commenters agreed that annualization prevents the use of DBRA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and that constitute compensation for all the worker’s work, both DBRA-covered and private. Commenters such as PAAG and PADLI also supported the Department’s explanation of the method for annualizing fringe benefit contributions, commenting that codifying and explaining annualization would assist

<sup>227</sup> Under SUB plans, contractors typically make payments to worker-specific supplemental unemployment insurance accounts. The terms and conditions of SUB plans vary, but contractors often contribute an amount equal to the difference between the fringe benefit amount listed on an applicable Davis-Bacon wage determination and the fringe benefit amount that the contractor would have provided in the absence of DBRA requirements. Participating contractors generally are not required to make contributions to SUB plans for hours worked on private projects, but plan benefits may be available to workers when they experience “involuntary work interruptions” on both DBRA-covered and private projects. Under some SUB plans, for example, work interruptions such as layoffs, inclement weather, illness, or equipment down time can all render a participant eligible to receive benefits. Under other SUB plans, a participant may be eligible to receive payouts if the worker qualifies to receive state unemployment benefits.

contractors in complying with the Davis-Bacon annualization and fringe benefit requirements.

Although NABTU, the III-FFC, and the IUOE expressed strong support for the annualization principle, they commented that the Department should revise the proposed regulation to strengthen the annualization requirement. In particular, NABTU and the III-FFC recommended adopting an express presumption in favor of annualization, claiming that without such an express presumption and the other revisions they proposed, contractors would be free to front-load benefit costs on DBRA projects instead of spreading them out across DBRA-covered and private work, thereby effectively paying for fringe benefits used by workers during periods of private work with Davis-Bacon contributions. NABTU, the III-FFC, and the IUOE also recommended that the phrase “essentially immediate vesting” in the Department’s third proposed criterion for an exception from annualization be changed to “immediate vesting.” In longstanding subregulatory guidance, as well as in its proposed rule, the Department has interpreted “essentially immediate vesting” to refer to 100 percent vesting after a worker works 500 or fewer hours. *See, e.g.,* FOH 15f14(f)(1). An exception from annualization therefore is available when a worker becomes 100 percent vested in their DCP benefit after working 500 or fewer hours, if all other criteria<sup>228</sup> for the exception are satisfied. Under these commenters’ recommended approach, by contrast, the exception from annualization would not be available unless a worker’s fringe benefit vested beginning with their first hour of work.<sup>229</sup>

NABTU, the III-FFC, and the IUOE, along with an individual commenter, further contended that an exception from annualization should not be available for plan types other than DCPs, and that the final rule should expressly state that the narrow exception to annualization only applies to DCPs. The III-FFC and the IUOE explained that no type of fringe benefit

plan besides DCPs satisfies each of the exception criteria that the Department set forth in proposed § 5.25, since, for example, health and welfare fringe benefit plans are continuous in nature and cover individuals when working on DBRA-covered and private projects. Similarly, NABTU urged the Department to emphasize in the final rule that the criterion that a fringe benefit not be continuous in nature is a stringent requirement that very few benefit plans would satisfy. Specifically, NABTU asserted that a year-round SUB plan that is available to protect against loss of both private work and DBRA-covered work should be considered continuous in nature, as the plan is available throughout the year to meet a contingent event, such as the involuntary loss of employment due to seasonal or similar conditions prevalent in the construction industry. NABTU similarly stated that, unlike DCPs, SUB plans are made available during an employee’s active career, not at retirement, and therefore are “continuous in nature” for this reason as well. By limiting the annualization exception to certain DCPs, NABTU contended (as did the III-FFC and the IUOE) that prevailing wage standards will be preserved, as contractors will be unable to use DBRA-covered work to pay for fringe benefits used by employees during periods of private work.

Other commenters, including Fringe Benefit Group, Inc. (FBG), CC&M, IEC, the Law Office of Martha Hutzelman (Hutzelman), and ABC, objected to the treatment of particular types of fringe benefits under the proposed rule and, more generally, the administrative exception process set forth in the proposed rule. FBG expressed support for the principles underlying proposed § 5.25(c) “on a macro level” but recommended that, with respect to DCPs, the Department reconsider requiring all fringe benefit plans seeking an exception from the annualization requirement to submit a written request for approval to WHD. FBG explained that, with respect to DCPs, such a requirement would place a significant burden on contractors, plan administrators, and WHD in connection with plans that “on their face” qualify for the exception. FBG added that this additional administrative complexity could discourage small businesses or new entrants from pursuing work on DBRA-covered projects without any offsetting benefits given that “the vast number of contractors adopt DCPs that are already consistent with the long-held annualization exception.” Other

commenters, including ABC, expressed similar concerns and opposition to the proposed administrative exception process.<sup>230</sup> In light of these stated concerns, and particularly given their view that the Department has long successfully applied the exception from annualization to DCPs that provide for immediate participation and essentially immediate vesting, FBG, along with CC&M, proposed amending the proposal to create a safe-harbor provision that would automatically apply the annualization exception to DCPs that meet the proposed requirements without requiring them to apply for approval.

Hutzelman similarly objected to the creation of a new administrative exception process applicable to all types of fringe benefit plans and instead called for the Department to clearly define and describe the criteria for exception from the annualization requirement in the final rule. Specifically, Hutzelman recommended that the Department not adopt its administrative exception process or that, in the alternative, the proposal be revised to provide for an exception from the annualization process for all DCPs and SUB plans that provide for immediate participation and essentially immediate vesting (as historically defined by the Department) where the benefit provided is not continuous in nature.<sup>231</sup> Hutzelman then proposed that the term “continuous in nature” be defined in the regulations as “a benefit that requires minimum periodic deposits or payments or that has a stated annual cost associated with the benefit,” such that a benefit that is “continuous in nature” “is not a benefit that is continuously available, but rather is a benefit that is continuously funded.” Hutzelman contended that “essentially cash equivalent benefits” such as DCPs and SUB plans are not “continuous in nature” under this proposed definition and should be excepted from the annualization requirement.<sup>232</sup> REBOUND and an individual

<sup>228</sup> In this final rule the Department has made a non-substantive change by referring to the requirements for the annualization exception as “criteria” instead of “factors.” The NPRM sometimes referred to these requirements as factors, but criteria is a more appropriate term.

<sup>229</sup> IEC appeared to interpret the Department’s proposal as already contemplating the type of “immediate vesting” that NABTU, the III-FFC, and the IUOE proposed, thereby prompting IEC to comment, incorrectly, that the Department’s proposal of “immediate participation and immediate vesting” would “eliminate[] fringe 401k plans from DBA creditability.”

<sup>230</sup> IEC opposed the administrative exception process for similar reasons, and III-FFC similarly commented that a general “preclearance process” would be unnecessary, particularly if exceptions to annualization are limited to certain DCPs, and that the proposed process also raised practical concerns about staff and resources.

<sup>231</sup> Hutzelman’s proposed formulation did not include the long-established criterion that, in order to be excepted from annualization, contributions to a fringe benefit plan must not provide compensation for both DBRA-covered and private work.

<sup>232</sup> ABC also address the “continuous in nature” criterion, contending that the criterion does not appear in the FOH or other guidance materials and therefore appeared to reflect “a significant, but unacknowledged, policy change.”

commenter expressed support for the annualization of fringe benefits and for the specific exception criteria proposed by the Department.” However, they further commented that there has been an increase in the number of companies that offer contractors the ability to purchase medical and other types of insurance for their employees during the hours that they are employed on public works projects in order to comply with prevailing wage requirements, but that the contractors do not have to participate in the plans when they work on private projects. The commenters opposed annualization of such contributions, as long as the policies provided immediate vesting and coverage of each individual employee, and further stated that these policies allow contractors to meet the requirements of prevailing wage laws while still maintaining their regular operations. These comments thus appear similar to Hutzelman’s to the extent they suggest that whether an exception to the annualization requirement is warranted should be determined based on when the contribution is made (*i.e.*, whether contributions are made solely in connection with DBRA-covered work) rather than when benefits are available.

In considering the comments received, the Department notes at the threshold that annualization is not a new principle; rather, as reflected in the directly applicable Federal court and administrative precedent cited in this section, DBRA contractors have been required to annualize fringe benefit contributions for decades. As various commenters stated, including annualization in the regulations will help ensure that contractors are aware of how to comply with fringe benefit requirements and are informed about how to properly credit plan contributions against their fringe benefit obligations.

The Department believes that addressing annualization in the final rule will increase compliance with Davis-Bacon prevailing wage obligations by codifying subregulatory guidance and case law about the requirement to annualize contributions to fringe benefit plans. Codifying the annualization principle in regulations rather than continuing to address annualization at the subregulatory level does not increase costs or make compliance more difficult for experienced contractors, small contractors, or contractors that are new to DBRA-covered projects. Rather, codifying the annualization principle will aid contractors in understanding and fulfilling their obligations when working on Davis-Bacon projects. By

doing so, the regulations will help contractors that may otherwise have overlooked or misunderstood the requirements of annualization to correctly satisfy their fringe benefit obligations under the DBRA and to account for the annualization of fringe benefits when formulating bids for DBRA-covered projects.

While annualization is not a new requirement, the addition of a regulatory administrative process requiring approval of all plans for the exception to annualization would have been new. The Department appreciates the comments and recommendations regarding this proposed administrative process to approve plans for exception from annualization.

Upon review and consideration of the comments, in this final rule the Department adopts § 5.25(c) as proposed, with two substantive exceptions and related revisions. First, the formal administrative process for requesting exceptions from the annualization requirement will not apply to contributions to DCPs as long as the DCP meets each of the exception criteria. This approach aligns with various commenters’ objections to applying the proposed administrative exception process to DCPs and the related requests for a safe harbor for DCPs that satisfy the exception criteria. The final rule, therefore, consistent with existing subregulatory requirements, generally only requires that administrative approval of an exception to the annualization requirement be obtained in connection with contributions to fringe benefit plans other than DCPs. In accordance with this change from the proposed provision, a sentence has been added to § 5.25(c)(2) excepting contributions to DCPs provided that each of the requirements of new § 5.25(c)(3) is satisfied, and that the DCP provides for immediate participation and essentially immediate vesting (*i.e.*, the benefit vests within the first 500 hours worked). In the final rule, proposed § 5.25(c)(3) was replaced with a portion of proposed § 5.25(c)(2) that was revised as explained in this section.

The Department made this change to the proposed rule because it agrees with commenters, including ABC and FBG, that contributions to DCPs have a long history of being excepted from the annualization requirement. The Department believes that excepting contributions to DCPs that meet the criteria for exception from the annualization requirement in the final rule addresses the concern of commenters that the administrative process could be burdensome on plan

administrators, contractors, and the Department. Not applying the formal administrative exception process to DCPs will likely dramatically reduce the number of requests for an exception from the annualization requirement. The Department also agrees with commenters that DCPs will typically if not invariably satisfy the enumerated exception criteria. To the extent questions arise regarding whether the exception to annualization may apply to contributions to a particular DCP, an exception request should be submitted in accordance with § 5.25(c)(2).

In further response to the comments about the proposal’s perceived administrative burdens, the Department reiterates that, as revised, § 5.25 provides that only contributions to non-DCP fringe benefit plans that wish to be excepted from the annualization requirement need to be approved through the administrative process. Thus, as revised, § 5.25 mirrors existing subregulatory practice, under which contributions to DCPs do not need to be annualized if the applicable criteria are satisfied, and fringe benefit contributions to all other types of plans must be annualized absent requesting and receiving an exception from the annualization requirement from WHD. Thus, the administrative burden for plan administrators, contractors, and the Department is limited to non-DCP plans that want to be approved for the exception to annualization and DCPs for which there is uncertainty as to whether they meet all the requirements of the exception. Based on its extensive experience, the Department believes the number of fringe benefit plans that fall in this category will be manageable for all affected parties. The final rule does not impose an unduly burdensome administrative requirement for the remaining plans that choose to apply for the exception because exception requests will predominantly be based on readily available documents such as plan descriptions. Requiring approval for the exception for non-DCP fringe benefit plans will help ensure workers receive their required Davis-Bacon fringe benefits.

The Department declines to adopt suggestions that the exception from annualization perhaps should be eliminated altogether, or that it should apply exclusively to DCPs. While the Department acknowledges these commenters’ concerns that workers receive all the fringe benefits they are due under the DBRA, it also recognizes the long-standing practice of allowing DCPs to forego annualization if they meet the enumerated criteria. Moreover, by allowing contributions to bona fide

fringe benefit plans other than DCPs to be excepted from the annualization requirement, the final rule codifies existing practice and implements a process that allows a broader range of plans to potentially be excepted from the annualization requirement to the extent appropriate, but only if they too meet the enumerated criteria for the exception.

The Department believes that the test for obtaining an exception from annualization is sufficient to address NABTU's and III-FFC's concerns about DBRA benefit contributions—particularly SUB plan benefits—subsidizing benefits that are available throughout the year on DBRA-covered and private projects. If WHD has not approved an exception from annualization with respect to a specific non-DCPP plan, such as a particular SUB plan, then contributions to the plan must be annualized. Moreover, with respect to such plans, exceptions to annualization will be approved only when each of the criteria have been satisfied. This framework reflects an implicit presumption in favor of annualization. Therefore, the Department declines to add an express presumption in favor of annualization.

The second change in the final rule from the proposed rule is a more fulsome recitation in § 5.25(c)(3) of the criteria for an exception to the annualization requirement. Some commenters, including NABTU and III-FFC, recommended the regulations include a definition of “continuous in nature” and eliminate the use of the word “essentially” when discussing immediate vesting, specifically recommending elimination of the use of the 500-hour criterion and opting for immediate vesting. The Department agrees that the regulations should include an explanation of when a fringe benefit is not “continuous in nature” to provide further guidance to the regulated community and other interested parties. As a result, § 5.25(c)(3)(i) of the final rule includes a new explanation of benefits that are “not continuous in nature” as benefits that are not available to a participant without penalty throughout the year or other relevant time period to which the cost of the benefit is attributable.

The Department declines to accept Hutzelman's proposed definition of “continuous in nature” as a benefit that requires minimum periodic deposits or payments or that has a stated annual cost associated with the benefit. This proposed definition would appear to undermine the purpose of annualization, which is to prevent contractors from paying for benefits that

cover hours worked on private projects with compensation due for hours worked on DBRA-covered projects. Moreover, the continuous in nature criterion focuses on the circumstances under which the fringe benefit is available, not the timing of the contractor's contributions toward the benefit. Under a contrary approach that focused on the timing of the contractor's contributions to the benefit, a contractor could annualize contributions to a fringe benefit plan that were made only in connection with DBRA-covered work, even though benefits were available to the worker during periods of private work. Such an approach would contravene the basic premise of the annualization requirement. *See, e.g., Indep. Roofing Contractors*, 300 Fed. Appx. at 521 (noting the Department's “long history of applying annualization” so as to “ensure ‘that a disproportionate amount of that fringe benefit is not paid out of wages earned on . . . Davis-Bacon work’”) (citation omitted). For this reason, to the extent that REBOUND and an individual commenter suggested that whether an exception to the annualization requirement is warranted should be determined based on when the contribution is made (*i.e.*, whether contributions are made solely in connection with DBRA-covered work) rather than when benefits are available, such a suggestion reflects a misunderstanding of the annualization principle, as in such a scenario, contributions during periods of DBRA-covered work would be used to subsidize benefits provided during periods of private work, thereby presenting a classic case in which annualization is required.

The Department also disagrees with ABC's contention that the “continuous in nature” criterion appears to reflect “a significant, but unacknowledged, policy change” because it does not appear in the FOH or other guidance materials. This criterion simply expressly reflects the bedrock principle that where benefits are available on a continuing basis, and are not, for example, restricted to Davis-Bacon work, annualization will be warranted. As such, this criterion reflects the Department's longstanding position, as reflected in *Miree Construction* and *Independent Roofing Contractors*, that it is proper to annualize benefits that are continuous in nature and constitute compensation for all of an employee's work. *See Miree Constr.*, 930 F.2d at 1546 (“If an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit,

the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work”); *Indep. Roofing Contractors*, 300 Fed. Appx. at 521 (concluding that the ARB had a reasonable basis for requiring annualization of apprentice training program benefits where “apprentice training continued year-round but [the contractor] contributed to the [apprenticeship training fund] only for DBA projects”).

The Department did not receive comments specifically on the second criterion that requires a benefit plan to not compensate both DBRA-covered and private work. However, considering the comments requesting clarification or recommending changes to the other two criteria, the Department has clarified in § 5.25(c)(3)(ii) of the final rule that the second criterion means that a benefit does not compensate both private and DBRA-covered work if any benefits provided during periods of private work are wholly paid for by compensation for private work. Benefits provided during periods of private work that are paid for, in whole or in part, by compensation earned during hours worked on DBRA-covered work do not meet this criterion.

While the Department appreciates some commenters' request to require immediate vesting, the Department declines to adopt this recommendation. The Department has used the 500-hour criteria for “essentially immediate vesting” for decades, and it is the current standard for DCPs that are excepted from the annualization requirement. Moreover, any request to change vesting requirements (as opposed to identifying a vesting threshold that satisfies the annualization principle) is beyond the scope of this rule. The Department has, however, revised the regulatory text to reflect that, as a matter of historical practice, the requirement of immediate participation and essentially immediate vesting has been a criterion generally applied to DCPs. To the extent that benefit plans or contractors have concerns regarding the application of this criterion or wish to seek exception approval whether or not they satisfy the criterion, they may direct questions or requests for specific exception to the Department pursuant to § 5.25(c)(3). The Department also notes that to the extent that IEC interpreted the Department's proposal as requiring “immediate vesting” in a manner that would “eliminate[] fringe 401k plans from DBA creditability,” the commenter misunderstood the nature of the proposal, which, through its requirement of “essentially immediate

vesting,” reflected that annualization of contributions to DCPs will be permissible (assuming other criteria are satisfied) where the pension benefit vests within the first 500 hours worked, which is a criterion that has not interfered with the availability of an exception from annualization for DCPs.

In addition to the two substantive changes discussed in this section, the final rule includes several clarifying changes. In § 5.25(c), the Department has added a one-sentence summary of the annualization principle as well as language to further clarify that annualization requirements apply to unfunded as well as funded plans. The Department also has clarified that, except as provided in § 5.25(c), contractors must annualize all contributions to fringe benefit plans, not all fringe benefit contributions. As proposed, this paragraph could have been construed to incorrectly imply that cash payments in lieu of fringe benefits must be annualized. Similarly, the beginning of § 5.25(c)(3) in the final rule has been revised to clarify that the annualization principle, and exceptions to that principle, apply to contributions to fringe benefit plans, not to the plans themselves. This concept was clear in the NPRM and was understood by the regulated community and other stakeholders that submitted comments on this proposal. The Department has made these changes in the final rule to be more precise.

xiii. Section 5.26 “\* \* \* Contribution Irrevocably Made \* \* \* to a Trustee or to a Third Person”

The Department proposed several non-substantive technical corrections to § 5.26 to improve clarity and readability. The Department received no comments on most of the proposed changes to § 5.26 and therefore adopts those changes as proposed. The Department, however, received two comments contending that one of the proposed changes would be substantive and opposing the change. Specifically, FBG and ABC asserted that the proposed change from current language stating, “The trustee [of fringe benefits contributions] must assume the usual fiduciary responsibilities imposed upon trustees by applicable law” to revised language stating, “the trustee or third person must adhere to any fiduciary responsibilities applicable under law” appeared to impose, for the first time, fiduciary responsibilities on non-trustee third parties that administer fringe benefits, and that the scope of such fiduciary responsibilities was unclear.

As an initial matter, as noted in the proposed rule, this change was not intended to be substantive. Neither the existing language nor the proposed language imposes any fiduciary responsibilities; rather, both simply state that the recipient of fringe benefits contributions must adhere to whatever fiduciary responsibilities already apply by virtue of any “applicable law.” Thus, whether a non-trustee third party is considered a fiduciary and subject to fiduciary responsibilities is determined not by the Davis-Bacon regulations but by other laws. The proposed rule would not have effected any change in this regard.

The Department nonetheless recognizes that, as these commenters noted, the current regulation only includes trustees, not non-trustee “third persons,” when referring to applicable fiduciary responsibilities, whereas the proposed rule included both. Given the commenters’ concerns that this could be construed as a substantive change, the Department modifies the language in the final rule to state instead that “a trustee must adhere to any fiduciary responsibilities applicable under law.” The Department notes, however, that whether the recipient of fringe benefit contributions is a trustee or a third person, to the extent that the party is deemed a fiduciary under applicable law, if the party is found to have materially violated its fiduciary responsibilities with respect to the fringe benefit contributions, it is likely that such contributions will not be creditable under the DBRA. The final rule makes this change and otherwise adopts the language as proposed.

xiv. Section 5.28 Unfunded Plans

Section 5.28 discusses “unfunded plans,” *i.e.*, plans in which the contractor does not make irrevocable contributions to a trustee or third person pursuant to a fund, plan, or program, but instead provides fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, and receives fringe benefit credit for the rate of costs which may be reasonably anticipated in providing benefits under such a commitment. In the NPRM, the Department proposed a technical correction to the citation to the DBA to reflect the codification of the relevant provision at 40 U.S.C. 3141(2)(B)(ii), as well as a number of other non-substantive revisions. The Department received no comments on these proposals. The final rule therefore adopts these changes as proposed.

Additionally, the Department proposed adding a new paragraph (b)(5)

to § 5.28, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and to replace the text in current paragraph (c) with language explaining the process contractors and subcontractors must use to request such approval. To accommodate these changes, the Department proposed to add a new paragraph (d) that contains the text currently located in paragraph (c) with non-substantive edits for clarity and readability.

As the Department noted in the proposed rule, other regulatory sections—including the Davis-Bacon contract clause itself in § 5.5—make clear that if a contractor provides its workers with fringe benefits through an unfunded plan, the contractor may only take credit for any costs reasonably anticipated in providing such fringe benefits if it has submitted a request in writing to the Department and the Secretary has determined that the applicable standards of the DBA have been met. *See* 29 CFR 5.5(a)(1)(iv), 5.29(e). However, § 5.28 does not mention this approval requirement or the process for requesting approval, even though § 5.28 is the section that most specifically discusses requirements for unfunded plans. Accordingly, to improve regulatory clarity and consistency, the Department proposed to revise § 5.28 to clarify that, for payments under an unfunded plan or program to be credited as fringe benefits, contractors and subcontractors must submit a written request for the Secretary to consider in determining whether the plan or program, and the benefits proposed to be provided thereunder, are “bona fide,” meet the factors set forth in § 5.28(b)(1)–(4), and are otherwise consistent with the Act. The Department also proposed to add language to explain that such requests must be submitted by mail to WHD’s Division of Government Contracts Enforcement, via email to *unfunded@dol.gov* or any successor address, or via any other means directed by the Administrator.

The Department received one comment in support of the proposed revisions to § 5.28. PAAG and PADLI commented that while “unfunded plans may provide workers with meaningful benefits, prevailing wage violators often . . . claim fringe benefit credits for unfunded plans that do not meet the standards currently outlined in 29 CFR 5.28.” As an example, PAAG and PADLI cited a case in which a contractor claimed credit for an unfunded paid time off plan under which all but 3 of the workers’ unused vacation days were

forfeited every year and the workers were not compensated for the forfeited vacation time. PAAG and PADLI explained that contracting agencies—especially small, local agencies—often lack the information and expertise to determine whether or not an unfunded plan is creditable under the DBRA and therefore need to refer questionable cases for investigation, whereas the proposed language would ensure that unfunded plans would be evaluated and preapproved up front. PAAG and PADLI therefore supported the proposed revisions to § 5.28 explicitly requiring preapproval of unfunded plans as a means of ensuring that workers actually receive the money they earn and increasing regulatory clarity.

The Department also received comments in opposition to these revisions. CC&M commented that requiring the Department's approval of unfunded plans, especially vacation and holiday plans, is unduly burdensome to contractors and would disadvantage nonunion contractors by discounting legitimate holiday and vacation benefits. Similarly, IUOE commented that over 60 percent of construction workers receive health care from self-funded plans. They expressed concern that contractors might not possess the documentation necessary to substantiate more "informal" self-funded benefits such as vacation, holiday, and sick leave. IUOE also expressed concern that a preapproval process would be unnecessarily burdensome on WHD and that WHD's authority to approve benefit plans could conflict with the authority of the Department's Employee Benefits Security Administration (EBSA) under the Employment Retirement Income Security Act (ERISA). The IUOE instead recommended that the final rule establish clear rules for determining the hourly fringe benefit credit in lieu of cash wages for unfunded plans, recommending four specific additions to the rule.<sup>233</sup> III-FFC expressed concerns and made recommendations similar to those of IUOE. ABC suggested that the Department address any inconsistency in the regulations by eliminating the advance approval requirement from

both §§ 5.28 and 5.29, stating that such advance approvals should be voluntary on the part of contractors. Finally, IAPA expressed concern that under the proposed revisions, underfunded multiemployer pension plans may be considered unfunded, and contractors would be prohibited from paying cash in lieu of fringe benefits or using other fringe benefit plans that are regulated by the Internal Revenue Service (IRS).

Many of the comments in opposition appear to be premised on a misconception that the revisions impose new substantive requirements with respect to unfunded plans. Nothing in these revisions alters the four substantive conditions for unfunded plans set out in § 5.28(b)(1)–(4) or the overall requirements that an unfunded plan must be "bona fide" and able to "withstand a test . . . of actuarial soundness." For example, the existing regulations already provide the Secretary with discretion to require sufficient funds be set aside to meet the obligations of an unfunded plan, and nothing in the existing or revised regulations prohibits a contractor from making contributions to bona fide fringe benefit plans or from paying cash in lieu of fringe benefits, as appropriate. Nor do the revisions have any effect on whether a multiemployer pension plan would be considered "underfunded." Consistent with §§ 5.5(a)(1)(iv) and 5.29(e), the Department has long required written approval if a contractor seeks credit for the reasonably anticipated costs of an unfunded benefit plan towards its Davis-Bacon prevailing wage obligations, including with respect to vacation and holiday plans. The revisions to § 5.28 merely clarify this preexisting requirement and detail the process through which contractors may request such approval from the Department. Moreover, this existing process is consistent with ERISA; while EBSA is charged with evaluating a plan's compliance with ERISA, WHD is responsible for determining whether an employer has complied with the fringe benefit requirements of the DBRA.

The Department disagrees that the revised regulations will disadvantage non-union contractors. To the extent any contractor—union or non-union—wishes to take credit towards its prevailing wage obligations for the reasonably anticipated costs of unfunded benefit plans, the contractor must ensure that such plan has been approved by the Department. The approval process benefits contractors by helping them avoid potential violations by correcting any issues noted during the approval process. The approval process also benefits workers by

ensuring that they will receive the full prevailing wage to which they are entitled when working on Davis-Bacon covered contracts. Only contractors who wish to claim credit for the reasonably anticipated costs of an unfunded plan will incur the minimal burden of submitting a request for approval.

While the Department appreciates the suggestions by IUOE and III-FFC for specific standards for unfunded plans, the Department believes that the current regulatory requirements provide greater flexibility to contractors in fulfilling their prevailing wage obligations on Davis-Bacon covered contracts. Section 5.28 outlines the process and requirements for obtaining approval regarding an unfunded benefit plan; it does not purport to describe the methodology by which contractors may calculate the appropriate credit for the reasonably anticipated cost of such plans. Adding the language that IUOE and III-FFC proposed would significantly alter the purpose and scope of this section and would be beyond the scope of the proposed rule.

Finally, the proposal provided that a request for approval of an unfunded plan must include sufficient documentation for the Department to evaluate whether the plan satisfies the regulatory criteria. To provide flexibility for contractors, the final rule, like the proposed rule, does not specify the documentation that must be submitted with the request. Rather, new paragraph (d) of this section (which, as noted above, contains the language of former paragraph (c) with non-substantive edits for clarity and readability) explains that the words "reasonably anticipated" contemplate a plan that can "withstand a test" of "actuarial soundness." While WHD's determination whether an unfunded plan meets the statutory and regulatory requirements will be based on the totality of the circumstances, the type of information WHD will require from contractors or subcontractors in order to make such a determination will typically include identification of the benefit(s) to be provided; an explanation of the funding/contribution formula; an explanation of the financial analysis methodology used to estimate the costs of the plan or program benefits and how the contractor has budgeted for those costs; a specification of how frequently the contractor either sets aside funds in accordance with the cost calculations to meet claims as they arise, or otherwise budgets, allocates, or tracks such funds to ensure that they will be available to meet claims; an explanation of whether employer contribution amounts are different for Davis-Bacon and non-prevailing wage work; identification of

<sup>233</sup> Specifically, IUOE suggested that (1) all "rate of cost" plans must use a yearly period for their fringe benefit credit calculations; (2) "rate of cost" health care plans must use the IRS COBRA rules for determining the premium costs used for any fringe benefit credit calculations; (3) all "rate of contribution" plans must use the existing annual or monthly time period for annualizing fringe credit calculation; shorter periods are not allowed; and (4) the regulations should state that annualization rule should apply to all types of plans, including Health Savings Accounts and Health Reimbursement Accounts; except for Defined Contribution Pension Plans.

the administrator of the plan or program and the source of the funds the administrator uses to pay the benefits provided by the plan or program; specification of the ERISA status of the plan or program; and an explanation of how the plan or program is communicated to laborers or mechanics.

The final rule accordingly adopts these revisions as proposed.

xv. Section 5.29 Specific Fringe Benefits

In the NPRM, the Department proposed to revise § 5.29 to add a new paragraph (g) that addresses the circumstances under which a contractor may take a fringe benefit credit for the costs of an apprenticeship program. While § 5.29(a) provides that the defrayment of the costs of apprenticeship programs is a recognized fringe benefit that Congress considered common in the construction industry, the regulations do not presently address when a contractor may take credit for such contributions or how to properly credit such contributions against a contractor's fringe benefit obligations.

In the NPRM, the Department proposed that for a contractor or subcontractor to take credit for the costs of an apprenticeship program, the program, in addition to meeting all other requirements for fringe benefits, must be registered with OA, or an SAA recognized by the OA). Additionally, the Department proposed to permit contractors to take credit for the actual costs of the apprenticeship program, such as tuition, books, and materials, but not for additional contributions that are beyond the costs actually incurred for the apprenticeship program. The proposed rule also reiterated the Department's position that the contractor may only claim credit towards its prevailing wage obligations for the workers employed in the classification of laborer or mechanic that is the subject of the apprenticeship program. For example, if a contractor has apprentices registered in a bona fide apprenticeship program for carpenters, the contractor could claim a credit for the costs of the apprenticeship program towards the prevailing wages due to the carpenters on a Davis-Bacon project, but could not apply that credit towards the prevailing wages due to other classifications, such as electricians or laborers, on the project. Furthermore, the proposed paragraph explained that, when applying the annualization principle pursuant to the proposed revisions to § 5.25, the workers whose total working hours are used to calculate the hourly contribution amount are limited to those workers in the same

classification as the apprentice, and that this hourly amount may only be applied toward the wage obligations for such workers. The Department explained that the proposed changes were consistent with its historical practice and interpretation and relevant case law. See WHD Opinion Letters DBRA-116 (May 17, 1978), DBRA-18 (Sept. 7, 1983), DBRA-16 (July 28, 1987), DBRA-160 (Mar. 10, 1990); FOH 15f17; *Miree Constr. Corp.*, 930 F.2d at 1544-45; *Miree Constr. Corp. v. Dole*, 730 F. Supp. 385 (N.D. Ala. 1990); *Miree Constr. Corp.*, WAB No. 87-13, 1989 WL 407466 (Feb. 17, 1989). The Department also proposed a minor technical revision to paragraph (e) to include a citation to § 5.28, which provides additional guidance on unfunded plans.

The comments the Department received regarding these proposals were generally supportive. The Alliance agreed that limiting creditable contributions to registered apprenticeship programs will help ensure that apprentices receive quality instruction and may help prevent unscrupulous employers from paying a lower wage while providing sub-standard apprenticeship programs. SMACNA stated that the guidance will assist contractors to properly compute fringe benefit credit against their fringe benefit obligation. CEA also expressed support for these proposals. LIUNA, while generally supportive, suggested that § 5.29(g)(2) be revised so that permissible contributions include, in addition to actual costs incurred by an apprenticeship program, contributions negotiated as part of a collectively bargained agreement. LIUNA expressed concern that the proposed language might not necessarily encompass such programs.

After reviewing the comments received, the Department has largely retained the language as proposed but has modified § 5.29(g)(2) to allow for greater flexibility in determining whether contributions to apprenticeship plans are creditable. Specifically, the final rule requires that a contractor's apprenticeship contributions must bear a "reasonable relationship" to the cost of apprenticeship benefits provided to the contractor's employees. This standard more accurately reflects the Department's position noted and upheld in *Miree* and subsequent decisions. See *Indep. Roofing Contractors*, 300 F. App'x at 521; *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900, 903 (D.C. Cir. 1995); *Miree Constr. Corp.*, 930 F.2d at 1543. The final rule further explains that in the absence of evidence to the contrary, the Department will presume that amounts the employer is required

to contribute by a CBA or by a bona fide apprenticeship plan (whether or not the plan is collectively bargained) satisfy this standard, but reaffirms that voluntary contributions beyond that which is reasonably related to apprenticeship benefits are not creditable.

While the Department declines to adopt LIUNA's suggestion to categorically deem collectively bargained contributions creditable, under this presumption, required contributions to apprenticeship plans under CBAs will typically be creditable. See *Miree Constr. Corp.*, 930 F.2d at 1543-45 (noting that the Department "gives full credit for the amounts required to be contributed under a [collectively bargained] plan, based on the assumption that there exists a reasonable relationship between the amount of contributions on the one hand and the cost of providing training and administering the plan on the other hand," and agreeing that such an assumption is reasonable) (quoting Letter of Administrator of Feb. 20, 1987).

xvi. Section 5.30 Types of Wage Determinations

The Department proposed several non-substantive revisions to § 5.30. In particular, the Department proposed to update the examples in § 5.30(c) to more closely resemble the current format of wage determinations issued under the DBA. The current illustrations in § 5.30(c) list separate rates for various categories of fringe benefits, including "Health and welfare," "Pensions," "Vacations," "Apprenticeship program," and "Others." However, current Davis-Bacon wage determinations typically contain a single combined fringe benefit rate per classification, rather than separately listing rates for different categories of fringe benefits. To avoid confusion, the Department proposed to update the illustrations to reflect the way in which fringe benefits are typically listed on wage determinations. The Department also proposed several non-substantive revisions to § 5.30(a) and (b), including revisions pertaining to the updated illustrations in § 5.30(c).

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

xvii. Section 5.31 Meeting Wage Determination Obligations

The Department proposed to update the examples in § 5.30(c) to more closely resemble the current format of wage determinations under the DBA. The



Department therefore proposed to make technical, non-substantive changes to § 5.31 to reflect the updated illustration in § 5.30(c).

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed.

#### xviii. Section 5.33 Administrative Expenses of a Contractor or Subcontractor

The Department proposed to add a new § 5.33 to codify existing WHD policy under which a contractor or subcontractor may not take Davis-Bacon credit for its own administrative expenses incurred in connection with fringe benefit plans. 87 FR 15745 (citing WHD Opinion Letter DBRA-72 (June 5, 1978); FOH 15f18). This policy is consistent with Department case law under the DBA, under which such costs are viewed as “part of [an employer’s] general overhead expenses of doing business and should not serve to decrease the direct benefit going to the employee.” *Collinson Constr. Co.*, WAB No. 76-09, 1977 WL 24826, at \*2 (also noting that the DBA’s inclusion of “costs” in the provision currently codified at 40 U.S.C. 3141(2)(B)(ii) refers to “the costs of benefits under an unfunded plan”); see also *Cody-Zeigler, Inc.*, ARB Nos. 01-014, 01-015, 2003 WL 23114278, at \*20 (applying *Collinson* and concluding that a contractor improperly claimed its administrative costs for “bank fees, payments to clerical workers for preparing paperwork and dealing with insurance companies” as a fringe benefit). This policy is also consistent with the Department’s regulations and guidance under the SCA. See 29 CFR 4.172; FOH 14j00(a)(1).

The Department also sought public comment regarding whether it should clarify this principle further with respect to administrative functions performed by third parties. 87 FR 15745. Under both the DBA and SCA, fringe benefits include items like health insurance, which necessarily involves both the payment of medical benefits and administration of those benefits through activities such as evaluating benefit claims, deciding whether they should be paid, and approving referrals to specialists. 40 U.S.C. 3141(2)(B); 41 U.S.C. 6703(2). Accordingly, reasonable costs incurred by a third-party fiduciary in its administration and delivery of fringe benefits to employees are creditable under the SCA. See WHD Opinion Letter SCA-93 (Jan. 27, 1994) (noting that an SCA contractor could take credit for its contribution to a pension plan on behalf of its employees,

including the portion of its contribution that was used by the pension plan for “administrative costs” “incurred” by “the plan itself”); FOH 14j00(a)(2). WHD applies a similar standard under the DBA.

However, as explained in the NPRM, WHD has received a number of inquiries in recent years regarding the extent to which contractors may take credit for fees charged by third parties for performing such administrative tasks as tracking the amount of the contractor’s fringe benefit contributions; making sure those contributions cover the fringe benefit credit claimed by the contractor; tracking and paying invoices from third-party plan administrators; and sending lists of new hires to the plan administrators. Since a contractor’s own administrative costs incurred in connection with the provision of fringe benefits are non-creditable business expenses, see *Collinson*, 1977 WL 24826, at \*2; cf. 29 CFR 4.172, WHD has advised that if a third party is merely performing these types of administrative functions on the contractor’s behalf, the contractor’s payments to the third party are not creditable.

While not proposing specific regulatory text, the Department sought comment on whether and how to address this issue in a final rule. The Department sought comment on whether it should incorporate the above-described policies, or other policies regarding third-party entities, into its regulations. In addition, the Department sought comment on examples of the administrative duties performed by third parties that do not themselves pay benefits or administer benefit claims. The Department also sought comment on the extent to which third-party entities both (1) perform administrative functions associated with providing fringe benefits to employees, such as tracking a contractor’s fringe benefit contributions, and (2) actually administer and deliver benefits, such as evaluating and paying out medical claims, and on how the Department should treat payments to any such entities. The Department asked for comments on whether, for instance, it should consider the cost of the administrative functions in the first category to be non-creditable business expenses, and the cost of actual benefits administration and payment in the second category to be creditable as fringe benefit contributions. It also asked whether the creditability of payments to such an entity depends on the third-party entity’s primary function or whether the third-party entity is an employee welfare plan within the meaning of ERISA, 29 U.S.C. 1002(1).

The Department received several comments in response to proposed § 5.33 and its request for comments regarding administrative functions performed by third parties.

Commenters either generally agreed with or did not specifically address the Department’s proposal to codify the longstanding principle that a contractor or subcontractor may not take credit for its own administrative expenses which it incurs directly, like the cost of an office employee who fills out medical insurance claim forms for submission to an insurance carrier.<sup>234</sup> For example, Duane Morris noted that the statement that “a contractor may not take DBRA credit for its own administrative expenses incurred in connection with the administration of a fringe benefit plan” expresses a longstanding principle, reflected in *Collinson*, WAB No. 76-09, 1977 WL 24826, and *Cody-Zeigler*, ARB Nos. 01-014, 015, 2003 WL 23114278, that, in Duane Morris’s words, “a contractor may not take fringe credit for expenses it pays directly for delivering DBRA-required fringe benefits.” FBG similarly stated that the language of FOH 15f18 regarding a contractor’s own administrative expenses, which the Department proposed to codify in § 5.33, “directly aligns” with its preferred approach to the issue of administrative costs generally.

However, a number of commenters expressed concerns in response to the Department’s request for comments regarding the potential creditability of administrative expenses paid by third parties. While they generally agreed, as noted above, that contractors should not receive credit against DBRA fringe benefits for their own direct costs, they expressed concern that the Department appeared to be considering classifying as non-creditable any expenses incurred by a third party other than those associated with claims payment or benefits administration. These commenters, including ABC, Duane Morris, and FBG, advocated that the Department instead permit any reasonable fees paid by a contractor to a third party that are directly related to the provision of fringe benefits to be creditable, and suggested that the standard for such an inquiry be that a third-party expense should be creditable as long as it would not have been incurred “but for” the provision of the fringe benefit. Duane Morris and FBG argued that such a standard would be

<sup>234</sup> East Coast Wall Systems stated they would find it beneficial to use fringe benefit contributions to pay for the cost of providing fringe benefits but did not specifically explain this statement or how it related to the proposed revisions.

consistent with their own interpretation of ERISA's standard for the permissible use of plan assets, with Duane Morris contending that a separate DBRA creditability standard would make the distinction between creditable and noncreditable expenses ambiguous and would unnecessarily complicate compliance.<sup>235</sup> These commenters argued that necessary expenses associated with plan administration go beyond mere claims administration, that administrative functions and the delivery of benefits are inherently interrelated, and therefore that the costs of both should be creditable toward DBRA obligations.<sup>236</sup>

Some of these commenters also argued that the Department's proposal would also unfairly advantage contractors that make direct payments to insurers as opposed to contractors who either self-insure, participate in multiemployer plans, or pay third parties to administer their Davis-Bacon fringe benefit obligations. Duane Morris, for example, stated that the Department had "conflate[d]" "employers and their plans when the plans are funded in trust" and inappropriately contemplated "regulat[ing] the internal operations of

the plan."<sup>237</sup> Similarly, FBG said that the distinction between creditable expenses incurred by a third party for administration of a plan versus noncreditable expenses that substitute for a contractor's own administrative costs is impracticable because third parties usually bundle their services and fees together. It also commented that making certain third-party administrative costs noncreditable would make it more expensive for contractors to use "third-party benefit administrators," thereby incentivizing contractors to, for instance, "spend[] less on administrative services" or "bring[] administration 'in-house' to be performed by individuals who lack . . . specialized knowledge[.]" ABC likewise argued that contractors should be permitted to take credit for any reasonable fees paid to third parties, whether related to the administration and delivery of benefits or to the administrative costs relating to the provision of fringe benefits to employees, as contractors "use qualified third parties to assist with the administration of benefits" because they "ensure that the highest quality benefits are provided in an efficient manner to covered employees." Clark Pacific commented that the rule would prohibit taking credit for administrative costs entirely and, as a result, reduce the number of contractors willing to provide fringe benefits.

III—FFC and IUOE recommended that the Department continue to analyze when contributions are creditable against fringe benefits on a case-by-case basis, particularly relating to fees charged by plan administrators and other plan service providers. IUOE stated that it would be difficult to determine whether a plan administrative expense is "reasonable" because there are too many factors to be considered, such as "the size of the plan, the nature of the benefits provided by the plan, the nature of the administrative services provided to the plan, the availability of the administrative services in the marketplace, the precise scope of the

administrative services provided, the qualifications, expertise and reputation of the service provider, differences in regional costs, and so forth." After reviewing the comments received, the Department has adopted § 5.33 with several revisions to clarify the Department's intent and address commenter concerns.

As an initial matter, the Department did not propose to make all third-party expenses, or even all expenses except for the direct expense of evaluating and paying out benefit claims, noncreditable; nor did the Department propose to incentivize any particular method by which contractors provide bona fide fringe benefits. As multiple commenters noted, third-party administrators may fulfill a vital role in the provision of fringe benefits. As WHD has expressly noted in guidance under the analogous fringe benefit requirements under the SCA, contractors may take credit for third-party expenses which are directly related to the administration and delivery of fringe benefits to their workers under a bona fide plan. See FOH 14j00(a)(2). The Department agrees that credit for such expenses is appropriate whether the entity performing such activities is an insurance carrier, a third-party trust fund, or a third-party administrator under a contractor's bona fide unfunded plan.

To clarify this, the Department has added paragraph (a) to § 5.33, which explicitly states that a contractor may take credit for costs incurred by a contractor's insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe benefits to the contractor's laborers and mechanics. Section 5.33(a) includes illustrative examples of creditable expenses directly related to the administration and delivery of benefits, stating that a contractor may take credit for payments to an insurance carrier or trust fund that are used to pay for both benefits and the administration and delivery of benefits, such as evaluating benefit claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the plan. Additional examples of such creditable expenses include the reasonable costs of administering the plan, such as the cost of recordkeeping related to benefit processing and payment in the case of a healthcare plan, or expenses associated with managing plan investments in the case of a 401(k) plan. Additionally, to clarify that these expenses are also creditable

<sup>235</sup> Under ERISA, plan fiduciaries must act prudently and solely in the interest of the plan's participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. While ERISA section 406(a) prohibits the provision of services between plans and service providers and plan payments to service providers, ERISA section 408(b)(2) sets forth an exemption from section 406(a) which permits a plan fiduciary to contract or make reasonable arrangements for services necessary for the establishment or operation of the plan if no more than reasonable compensation is paid therefore, among other requirements. See 29 U.S.C. secs. 1106(a), 1108(b)(2); see also 29 CFR 2550.408b-2. However, the exemption under section 408(b)(2) does not provide relief for transactions described in section 406(b) of ERISA, including fiduciary self-dealing, conflicts of interest, and kickbacks in connection with transactions involving plan assets.

<sup>236</sup> Duane Morris also submitted a set of proposals "to improve the scheme for benefiting contractor employees" subject to a fixed-cost contract, under which, among other elements, a contractor apparently would be required to request competitive bids for fringe benefits at least every 3 years in order to satisfy a requirement, for purposes of receiving fringe benefit credit, to evaluate whether the value of the benefit "is market competitive with comparable alternatives available to the contractor." Under these proposals, contributions to a trust that "can be expected to provide" "market competitive" benefits would be presumptively creditable, "without regard to the specific application of plan assets to the trust." Although the Department has reviewed and appreciates the proposals, it considers them to be outside the scope of this rulemaking. To the extent Duane Morris is proposing that, under certain conditions, a contractor should be permitted to take credit for payments to a third party to perform the contractor's own administrative tasks, the Department disagrees, for the reasons discussed below.

<sup>237</sup> Duane Morris claimed that multiemployer plans maintained through CBAs often use plan assets to hire third-party administrators to perform tasks which the Department "propose[d] to make non-creditable," such as "reconcil[ing] covered hours [and] employer contributions[.]" The Department did not receive any comments from unions indicating that its proposal would make noncreditable the cost of tasks regularly performed by plans maintained under CBAs between unions and contractors. In WHD's enforcement experience, such plans do not perform administrative tasks on behalf of the contractor such as keeping track of whether a particular contractor's contributions were sufficient to cover its fringe benefit credit on its various projects.

in the case of an unfunded plan, § 5.33(a) states that a contractor may take credit for the fees paid to a third-party administrator to perform similar tasks directly related to the administration and delivery of benefits, including under an unfunded plan.

As noted above, commenters did not oppose the Department's proposal to codify its policy that a contractor may not take credit for its own administrative costs where it incurs them directly, and accordingly, in new § 5.33(b), the final rule adopts that proposal. In addition, section 5.33(b) of the final rule states that a contractor may not take credit for its own administrative expenses even when the contractor pays a third party to perform its administrative tasks rather than incurring the expenses internally. The final rule includes illustrative examples of such noncreditable administrative expenses, including the cost of filling out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor's personnel records when laborers or mechanics are hired or separate from employment, sending lists of new hires to insurance carriers or plan administrators, or sending out tax documents to the contractor's laborers or mechanics. The Department is hopeful that these examples will be helpful in identifying expenses that would be considered employer expenses not directly related to the administration and delivery of bona fide fringe benefits. The Department agrees with the commenters who contended that its regulations should not incentivize any particular benefit model, and as such, the final rule clarifies that these types of costs are non-creditable regardless of whether the employer performs them itself or pays a third party a fee to perform them. Section 5.33(b) also clarifies that recordkeeping costs associated with ensuring the contractor's compliance with the Davis-Bacon fringe benefit requirements, such as the cost associated with tracking the amount of its fringe benefit contributions or making sure contributions cover the fringe benefit credit claimed, are considered a contractor's own administrative expenses and therefore are not creditable whether the contractor performs those tasks itself or whether it pays a third party a fee to perform those tasks.

Section 5.33(b) is in accordance with the analogous SCA regulations, which preclude SCA contractors from taking credit for any costs that are "primarily

for the benefit or convenience of the contractor." 29 CFR 4.171(e); *see also* 29 CFR 4.172. Under the FLSA—upon which the SCA prohibition against taking credit for contractor business expenses is based, *see* 48 FR 49757—an expense is primarily for the benefit of the employer if, among other reasons, it is "imposed on the employer by law." *See* Br. of the Sec'y of Labor, 2010 WL 5622173, at \*10–11, *Ramos-Barrientos v. Bland Farms*, No. 10–13412–C (11th Cir. 2011), ECF No. 47 (citing 29 CFR 531.3(d)(2), 531.32(c), 531.38). Given that contractors may satisfy their DBRA prevailing wage obligations by making contributions to or incurring reasonably anticipated costs in providing bona fide fringe benefits under a plan or program, *see* 29 CFR 5.5(a)(1)(i), and given that contractors are required to keep records of the hours worked by their laborers and mechanics and any contributions made or costs reasonably incurred under a bona fide fringe benefit plan, *id.* at (3)(i), it would be anomalous to permit a contractor to take credit towards its prevailing wage obligation for the cost of, for instance, tracking the hours worked by its laborers and mechanics on DBRA-covered projects costs, tracking the contractor's fringe benefit contributions on behalf of these workers, and reconciling workers' hours worked with the contractor's contributions.

This rationale applies equally to a contractor that uses its own employees to perform such tasks as to a contractor that pays a third party to perform such tasks. If a contractor were permitted to claim a credit for these expenses, it could effectively outsource its own administrative and compliance costs to third parties and have the cost paid for from the prevailing wages due to its workers. Similarly, if it is not permissible for a contractor to take credit for the cost of an office employee who submits claim forms to an insurance carrier—which none of the commenters specifically disputed—then it should not be permissible for a contractor to take credit for payments it makes to a third party to perform similar tasks on its behalf.

The Department declines the recommendation from some commenters to adopt a standard under which third-party expenses are considered directly related to the administration and delivery of fringe benefits, and therefore creditable, as long as they would not have been incurred but for the provision of the fringe benefit. The Department acknowledges those comments that claimed that such a "but for" standard would be consistent with what they

assert are ERISA standards governing the permissible use of plan assets. Regardless of the accuracy of those claims, the DBRA requires a different analysis for whether a contractor may take credit against the payment of prevailing wages for such expenses. Under the DBRA, the question is not whether a plan's assets may be used for a particular expense, but whether a contribution or cost may be considered a part of a worker's wage. A contractor's own administrative costs, even if related in some fashion to the fringe benefits provided to workers, are not part of its workers' wages since, as explained above, such costs primarily benefit the contractor. It is therefore not sufficient, for purposes of DBRA credit, that an administrative cost would not have been incurred "but for" the fringe benefit plan(s).

The Department has observed an increase in the number of third-party businesses that promise to reduce contractors' costs if contractors hire them to perform the contractors' own administrative tasks and then claim a fringe benefit credit for the costs of those outsourced tasks. Existing regulations have not been sufficient to curtail this practice, and for the reasons discussed above, the payments of fees to third parties to perform such tasks is inconsistent with the requirements of the DBRA. Thus, the final rule adopts an approach, consistent with the guidance the Department has previously provided, that distinguishes more precisely between creditable and noncreditable expenses based on whether the expenses are properly viewed as business expenses of the contractor. The Department believes that codifying this standard in the regulations will help the contracting community and third-party administrators understand which types of expenses are creditable and which types are not.

By making creditability depend on the type and purpose of the expense, rather than on whether it is paid by the contractor directly or through a third party, the Department believes that the final rule addresses commenters' concerns that the proposed rule might have discouraged the use of bona fide third-party plan administrators or provided an advantage to contractors that make payments directly to insurers and other benefit providers. The final rule does not preclude contractors from taking credit for reasonable costs incurred or charged by these entities to administer bona fide fringe benefit plans. Rather, § 5.33(b) merely precludes contractors from taking credit for their own administrative costs

associated with providing fringe benefit plans and which are properly considered business expenses of the contractor, whether the contractor incurs such costs directly or in the form of payments to a third party.

While the Department appreciates some commenters' recommendation to continue to analyze administrative expenses on a case-by-case basis, given that, as discussed above, the Department has observed an increase in business models under which contractors may be taking credit for noncreditable expenses, the Department believes that it is necessarily to codify these basic principles to help contractors and plan administrators recognize and comply with the requirements and their obligations under the DBRA. The Department recognizes that there will, of course, be close cases, and will continue to conduct fact-specific analyses in individual cases when questions of creditability arise. To that end, the Department has added § 5.33(c) to clarify that if contractors, plan administrators, or others have questions as to whether certain expenses are creditable, such questions should be submitted to the Department for review.

Finally, the Department disagrees with FBG's comment that third parties' practice of bundling creditable and noncreditable expenses together will make it difficult to comply with the proposed rule. In its investigations under the DBRA and SCA, WHD has found that when third parties both perform plan administration and help contractors fulfill their own administrative obligations, they frequently impose separate charges for the different types of services. Even in instances where such services are so intertwined that it is not possible to determine whether payments to a third party are for creditable plan administration or noncreditable administrative activities, WHD will consider the facts to determine whether the third party is primarily performing creditable services. Finally, if questions arise, § 5.33(c) will allow contractors to receive input from the Department as to the creditability of any questionable expenses, whether bundled or not.

#### xix. Anti-Retaliation

The Department proposed to add anti-retaliation provisions to enhance enforcement of the DBRA and their implementing regulations in 29 CFR parts 1, 3, and 5. The proposed anti-retaliation provisions were intended to discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices

that may chill worker participation in WHD investigations or other compliance actions and enable prevailing wage violations to go undetected. The proposed anti-retaliation provisions were also intended to provide make-whole relief for any worker who has been discriminated against in any manner for taking, or being perceived to have taken, certain actions concerning the labor standards provisions of the DBA, CWHSSA, and other Related Acts, and the regulations in parts 1, 3, and 5.

In most WHD DBRA investigations or other compliance actions, effective enforcement requires worker cooperation. Information from workers about their actual hours worked, wages paid, and work performed is often essential to uncover violations such as falsification of certified payrolls or wage underpayments, including underpayments due to craft misclassification, by contractors or subcontractors that fail to keep pay or time records or have inaccurate or incomplete records. Workers are often reluctant to come forward with information about potential violations of the laws WHD enforces because they fear losing their jobs or suffering other adverse consequences. Workers are similarly reluctant to raise these issues with their supervisors. Such reluctance to inquire or complain internally may result in lost opportunities for early correction of violations by contractors.

The current Davis-Bacon regulations protect the identity of confidential worker-informants in large part to prevent retribution by the contractors for whom they work. See 29 CFR 5.6(a)(5); see also 29 CFR 6.5. This protection helps combat the “possibility of reprisals” by “vindictive employers” against workers who speak out about wage and hour violations, but does not eliminate it. *Cosmic Constr. Co.*, WAB No. 79–19, 1980 WL 95656, at \*5 (Sept. 2, 1980).

When contractors retaliate against workers who cooperate or are suspected of cooperating with WHD or who make internal complaints or otherwise assert rights under the DBRA, neither worker confidentiality nor the DBRA remedial measures of back wages or debarment can make workers whole. The Department's proposed anti-retaliation provisions aimed to remedy such situations by providing make-whole relief to workers who are retaliated against, as well as by deterring or correcting interference with DBRA worker protections.

The Department's authority to promulgate the anti-retaliation provisions stems from 40 U.S.C. 3145 and Reorganization Plan No. 14 of 1950.

In transmitting the Reorganization Plan to Congress, President Truman noted that “the principal objective of the plan is more effective enforcement of labor standards,” and that the plan “will provide more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.” *Special Message to the Congress Transmitting Reorganization Plan No. 14 of 1950*, reprinted in 5 U.S.C. app. 1 (Mar. 13, 1950) (1950 Special Message to Congress).

It is well settled that the Department has regulatory authority to debar Related Act contractors even though Related Acts do not expressly provide for debarment. See *Janik Paving & Constr., Inc. v. Brock*, 828 F.2d 84, 90, 91 (2d Cir. 1987) (upholding debarment for CWHSSA violations even though that statute “specifically provided civil and criminal sanctions for violations of overtime work requirements but failed to mention debarment”). In 1951, the Department added a new part 5 to the DBRA regulations, including the Related Act debarment regulation. See 16 FR 4430. The Department explained that it was doing so in compliance with the directive of Reorganization Plan No. 14 of 1950 to “assure coordination of administration and consistency of enforcement of the labor standards provisions” of the DBRA. *Id.* Just as regulatory debarment is a permissible exercise of the Department's “implied powers of administrative enforcement,” *Janik Paving & Constr.*, 828 F.2d at 91, so, too, are the proposed anti-retaliation provisions and the revised Related Act debarment provisions discussed in section III.B.3.xxi (“Debarment”). The Department stated its position that it would be both efficient and consistent with the remedial purpose of the DBRA to investigate and adjudicate complaints of retaliation as part of WHD's enforcement of the DBRA. These measures will help achieve more effective enforcement of the Davis-Bacon labor standards.

Currently, debarment is the primary mechanism under the DBRA 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. Such unscrupulous behavior may be both a disregard of obligations to workers under the DBA and “aggravated or willful” violations under the current Related Act regulations that warrant debarment. See 40 U.S.C. 3144(b)(1); 29 CFR 5.12(a)(1), (a)(2), (b)(1).

Both the ARB and ALJs have debarred contractors in part because of their retaliatory conduct or interference with WHD investigations. *See, e.g., Pythagoras Gen. Contracting Corp.*, ARB Nos. 08–107, 09–007, 2011 WL 1247207, at \*13 (affirming debarment of contractor and its principal in a DBRA case in part because of the “attempt [by principal and other officials of the contractor] at witness coercion or intimidation” when they visited former employees to talk about their upcoming hearing testimony); *R.J. Sanders, Inc.*, WAB No. 90–25, 1991 WL 494734, at \*1–2 (Jan. 31, 1991) (affirming ALJ’s finding that employer’s retaliatory firing of an employee who reported to a Navy inspector being paid less than the prevailing wage was “persuasive evidence of a willful violation of the [DBA]”); *Early & Sons, Inc.*, ALJ No. 85–DBA–140, 1986 WL 193128, at \*8 (Aug. 5, 1986) (willful and aggravated DBRA violations evidenced in part where worker who “insisted on [receiving the mandated wage] . . . was told, in effect, to be quiet or risk losing his job”), *rev’d on other grounds*, WAB No. 86–25, 1987 WL 247044, at \*2 (Jan. 29, 1987); *Enviro & Demo Masters, Inc.*, ALJ No. 2011–DBA–00002, Decision and Order, slip op. at 9–10, 15, 59, 62–64 (Apr. 23, 2014) (*Enviro D&O*) (debarring subcontractor, its owner, and a supervisor because of “aggravated and willful avoidance of paying the required prevailing wages,” which included firing an employee who refused to sign a declaration repudiating his DBRA rights, and instructing workers to lie about their pay and underreport their hours if questioned by investigators).

There are also criminal sanctions for certain coercive conduct by DBRA contractors. The Copeland Anti-Kickback Act makes it a crime to induce DBRA-covered construction workers to give up any part of compensation due “by force, intimidation, or threat of procuring dismissal from employment, or by any other manner whatsoever.” 18 U.S.C. 874; *cf.* 29 CFR 5.10(b) (discussing criminal referrals for DBRA violations). Such prevailing wage kickback schemes are also willful or aggravated violations of the civil Copeland Act (a Related Act) that warrant debarment. *See* 40 U.S.C. 3145; *see, e.g., Killeen Elec. Co.*, WAB No. 87–49, 1991 WL 494685, at \*5 (Mar. 21, 1991).

Interference with WHD investigations or other compliance actions may also warrant criminal prosecution. For example, in addition to owing 37 workers \$656,646 in back wages in the DBRA civil administrative proceeding, *see Enviro D&O* at 66, both the owner

of *Enviro & Demo Masters* and his father, the supervisor, were convicted of Federal crimes including witness tampering and conspiracy to commit witness tampering. These company officials instructed workers at the jobsite to hide from and “lie to investigators about their working hours and wages,” and they fired workers who spoke to investigators or refused to sign false documents. *Naranjo v. United States*, No. 17–CV–9573, 2021 WL 1063442, at \*1–2 (S.D.N.Y. Feb. 26, 2021), *report and recommendation adopted by* 2021 WL 1317232 (S.D.N.Y. Apr. 8, 2021); *see also Naranjo, Sr. v. United States*, No. 16 Civ. 7386, 2019 WL 7568186, at \*1 (S.D.N.Y. Dec. 16, 2019), *report and recommendation adopted by* 2020 WL 174072, at \*1 (S.D.N.Y. Jan. 13, 2020).

Contractors, subcontractors, and their responsible officers may be debarred and even criminally prosecuted for retaliatory conduct. Laborers and mechanics who have been discriminated against for speaking up, or for having been perceived as speaking up, however, currently have no redress under the Department’s regulations implementing the DBA or Related Acts to the extent that back wages do not make them whole or that such discriminatory conduct is not prohibited under a separate anti-retaliation provision such as the FLSA, 29 U.S.C. 215(a)(3).<sup>238</sup> For example, the Department currently may not order reinstatement of workers fired for their cooperation with investigators or as a result of an internal complaint to their supervisor. Nor may the Department award compensation for the period after a worker is fired. Similarly, the Department cannot require contractors to compensate workers for the difference in pay resulting from retaliatory demotions or reductions in hours. The addition of anti-retaliation provisions is a logical extension of the DBA and Related Acts debarment remedial measure. It would supplement debarment as an enforcement tool to more effectively prevent retaliation, interference, or any other such discriminatory behavior. An anti-retaliation mechanism would also build on existing back-wage remedies by extending compensation to a fuller range of harms.

The Department therefore proposed to add two new regulatory provisions concerning anti-retaliation, as well as to update several other regulations, to

reflect the new anti-retaliation provisions.

(A) Proposed New § 5.5(a)(11) and (b)(5)

The Department proposed to implement anti-retaliation in part by adding a new anti-retaliation provision to all contracts subject to the DBA or Related Acts. The proposed contract clauses provided for in § 5.5(a)(11) and (b)(5) stated 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. The proposed protected activities included notifying any contractor of any conduct which the worker reasonably believes constitutes a violation; filing any complaints, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert any right or protection; cooperating in an investigation or other compliance action, or testifying in any proceeding; or informing any other person about their rights under the DBA, Related Acts, or the regulations in 29 CFR parts 1, 3, or 5, for proposed § 5.5(a)(11), or the CWHSSA or its implementing regulations in 29 CFR part 5, for proposed § 5.5(b)(5).

The scope of these anti-retaliation provisions was intended to be broad to better effectuate the remedial purpose of the DBRA, to protect workers, and to ensure that they are not paid substandard wages. Workers must feel free to speak openly—with contractors for whom they work and contractors’ responsible officers and agents, with the Department, with co-workers, and others—about conduct that they reasonably believe to be a violation of the prevailing wage requirements or other DBRA labor standards requirements. The proposed anti-retaliation provisions recognized that worker cooperation is critical to enforcement of the DBRA. They would also incentivize compliance and seek to eliminate any competitive disadvantage borne by government contractors and subcontractors that follow the rules.

In line with those remedial goals, the Department intended the proposed anti-retaliation provisions to protect workers who make internal complaints to supervisors or who otherwise assert or seek to assert Davis-Bacon or CWHSSA labor standards protections set forth in § 5.5(a)(11) and (b)(5), as well as to remedy interference with Davis-Bacon worker protections or WHD investigations that may not have a direct adverse monetary impact on the affected workers. Similarly, the Department

<sup>238</sup> One exception is ARRA, a Related Act, that included a whistleblower protection provision which provided that complaints were to be investigated by agency inspectors general, not WHD. *See* section 1553, Public Law 111–5, 123 Stat 115 (Feb. 17, 2009).

intended the anti-retaliation provisions to also apply in situations where there is no current work or employment relationship between the parties. For example, it would prohibit retaliation by a prospective or former employer or contractor (or both). Finally, the Department's proposed rule sought to protect workers who make oral as well as written complaints, notifications, or other assertions of their rights protected under § 5.5(a)(11) and (b)(5).

#### (B) Proposed New § 5.18

The Department proposed remedies to assist in enforcement of the DBRA labor standards provisions. Section 5.18 set forth the proposed remedies for violations of the new anti-retaliation provisions. This proposed section also included the process for notifying contractors and other persons found to have violated the anti-retaliation provisions of the Administrator's investigative findings, as well as for Administrator directives to remedy such violations and provide make-whole relief.

Make-whole relief and remedial actions under this proposed provision were intended to restore the worker subjected to the 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. Proposed available remedies included, but were not limited to, any back pay and benefits denied or lost by reason of the violation; other actual monetary losses or compensatory damages sustained as a result of the violation; interest on back pay or other monetary relief from the date of the loss; and appropriate equitable or other relief such as reinstatement or promotion; expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and posting of notices that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements.

In addition, proposed § 5.18 specified that when contractors, subcontractors, responsible officers, or other persons dispute findings of violations of § 5.5(a)(11) or (b)(5), the procedures in 29 CFR 5.11 or 5.12 would apply.

Conforming revisions were proposed to the withholding provisions at §§ 5.5(a)(2) and (b)(3) and 5.9 to indicate that withholding includes monetary relief for violations of the anti-retaliation provisions at § 5.5(a)(11) and (b)(5), in addition to withholding of back wages for DBRA prevailing wage

violations and CWHSSA overtime violations.

Similarly, conforming changes were proposed to §§ 5.6(a)(4) and 5.10(a). Computations of monetary relief for violations of the anti-retaliation provisions were added to the limited investigatory material that may be disclosed without the permission and views of the Department under § 5.6(a)(4). In proposed § 5.10(a), monetary compensation for violations of anti-retaliation provisions were added as a type of restitution.

As explained, contractors, subcontractors, and their responsible officers have long been subject to debarment for their retaliatory actions. The NPRM proposed to update DBRA enforcement mechanisms by attempting to ensure that workers can cooperate with WHD or complain internally about perceived prevailing wage violations without fear of reprisal. The proposal reflected a reasonable extension of the Department's broad regulatory authority to enforce and administer the DBRA. Further, the Department stated its belief that adding anti-retaliation provisions would amplify existing back wage and debarment remedies by making workers whole who suffer the effects of retaliatory firings, demotions, and other actions that reduce their earnings. The Department explained that this important new tool would help carry out the DBRA's remedial purposes by bolstering WHD's enforcement.

The Department received many comments about this proposal. All but a few of the comments expressed support for the anti-retaliation proposal. Most of the supporting comments were from individuals, including as part of an organized LIUNA member campaign. The remaining supporting comments were from many non-profit and workers' rights organizations, unions, labor-management groups, contractors (including an organized SMACNA member campaign), and various appointed and elected government officials. Most of the commenters expressed general support for this proposal in its entirety and a few commenters recommended measures to strengthen the proposal. The comments opposing the proposal were submitted by the group of U.S. Senators and several contractor organizations, all of whom opposed the proposal in its entirety.

Commenters that supported the proposed anti-retaliation provisions in their entirety overwhelmingly agreed that the proposed provisions would both strengthen enforcement of the Davis-Bacon and Related Acts and better protect workers who speak out about

potential DBRA violations. *See, e.g.,* LCCHR, several members of the U.S. House of Representatives from Illinois, International Union of Operating Engineers Local 77 (IUOE Local 77), and individual commenters. UBC noted that the proposed anti-retaliation provisions—both the contract clauses and remedies—would also assist in deterring retaliatory conduct. NABTU emphasized that the anti-retaliation proposal is consistent with the Department's broad enforcement authority under Reorganization Plan No. 14 of 1950, which Congress has consistently affirmed throughout the years.

Various commenters provided empirical support for the need to strengthen worker protections, including through the proposed anti-retaliation provisions. WA BCTC and LIUNA, for example, pointed to the Department's recent data showing that the construction industry is consistently one of the top two low-wage, high violation industries.<sup>239</sup> LCCHR highlighted various reports and articles documenting the widespread problem of wage theft, workers' fear of retaliation which leads workers to not report serious workplace problems, and retaliation against workers who did so report. Similarly, EPI referred to reports that underscored the particular importance of strengthening anti-retaliation protections for low-wage and immigrant workers who are disproportionately affected by wage theft in the construction industry, where many wage payment violations go unreported due to workers' well-founded fears of retaliation.

A number of commenters provided anecdotal support for the proposed anti-retaliation provisions as an effective mechanism to enhance enforcement through worker cooperation. PAAG and PADLI stated that they have received feedback from many workers that fear of retaliation stopped them from coming forward and reporting prevailing wage violations. FFC noted their experience with "how reluctant workers can be to report misconduct," explaining the disincentive to come forward to report violations when there is no possibility that the workers will be made whole if they are retaliated against. Affiliated Construction Trades Foundation of Ohio (ACT Ohio) and NCDCL commented that they have witnessed workers' reluctance to report misconduct for fear of losing their jobs, thereby compromising their ability to support themselves and their families

<sup>239</sup> See <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries>.

financially. LCCHR explained that the risk of retaliation tends to be greater for workers who are already in relatively vulnerable positions and who are least likely to be able to withstand the consequences of retaliation, which can quickly escalate as lost pay leads to serious financial, emotional, and legal issues.

A number of commenters, including several members of the U.S. House of Representatives from Illinois, lauded this proposal, as well as the timing of the Department's proposed rulemaking, which they asserted would help maximize the economic benefits of the bipartisan IJA for workers, their families, and their communities. SMACNA members who supported the proposed anti-retaliation protections, among other proposals in the NPRM, also supported providing substantial resources to WHD. *See, e.g.,* Mechanical & Sheet Metal Contractors of Kansas.

A few commenters recommended additional provisions to strengthen the anti-retaliation proposal. PAAG and PADLI recommended adding a requirement to add the anti-retaliation contract provisions to existing DBRA mandatory postings. LCCHR described the Department's proposed make-whole relief as a "good start," but recommended going further to account for financial losses that are more difficult to quantify, such as fees and penalties for missed payments due to loss of income, and non-financial harms such as harassment. An individual commenter asserted that the proposed uniform and less stringent debarment standard could also have a chilling effect on workers' willingness to report violations since their hours could be cut if the contractor for whom they work is less profitable as a result of being debarred. They noted that whether the threat of a reduction in wages and harm to career prospects comes from retaliation or from the employer's loss of Federal contracting opportunities, the fact that the economic consequence was a result of speaking up remains the same. This commenter, therefore, recommended adding "predicted lost pay" as an additional quasi-anti-retaliation remedy to compensate workers for reduced hours resulting from possible debarment. UBC suggested that the Department also require notice posting in the first step of the proposed administrative process in § 5.18(a), include interest on lost wages, and include information in WHD case-handling manuals about how investigators can assist immigrant workers in obtaining deferred action from the Department of Homeland

Security (DHS), as well as applications for T and U visas.

None of the commenters that opposed the proposal rejected the proposed anti-retaliation provisions squarely on their merits. Rather, in opposing the proposal, IEC claimed that it was duplicative of another whistleblower protection law for Federal contractor employees, 41 U.S.C. 4712, as well as various anti-retaliation provisions issued under other statutes or regulatory schemes, Executive Orders, and a trade agreement. APCA claimed that the anti-retaliation provisions, combined with other proposals, would subject many—particularly small—firms to significant cost increases. And the group of U.S. Senators and ABC claimed that the proposed anti-retaliation provisions were overbroad remedial measures that exceeded the Department's statutory authority and should be withdrawn. The group of U.S. Senators argued that forcing private actors to reinstate workers or pay them back wages implicated unspecified constitutional rights and, therefore, the broad whistleblower enforcement scheme envisioned by the Department "is reserved for Congress to impose as subject matter experts and elected representatives."

After considering the comments, the Department adopts the anti-retaliation provisions as proposed, with one minor addition to the anti-retaliation contract clauses and one minor addition to the remedies in § 5.18. The vast majority of commenters expressed strong support for this proposal in its entirety. The Department echoes the support of the many commenters that emphasized the importance of worker cooperation to effective enforcement of the DBRA and reiterates the reasons for adding these provisions that the Department enumerated in the NPRM preamble—primarily that the Department anticipates that the anti-retaliation provisions will significantly enhance enforcement, compliance, and deterrence, while making workers whole who suffer reprisals in violation of these provisions. In § 5.5(a)(11)(ii) and (b)(5)(ii) the Department added protection for otherwise asserting "or seeking to assert" the enumerated DBRA or CWHSSA labor standards protections. This provision would prohibit a contractor's retaliation after, for example, learning that a worker has consulted with a third party about the possibility of asserting such rights or protections. In § 5.18, the Department added to the illustrative list of remedies front pay in lieu of reinstatement. This type of relief is appropriate in situations where either the contractor or worker

does not want reinstatement and front pay is provided instead.

While the Department appreciates the recommendations of several commenters to strengthen the anti-retaliation provisions in particular respects, the Department believes that the anti-retaliation provisions as proposed contain appropriate and sufficient safeguards against retaliation. The Department agrees, however, that PAAG and PADLI's recommendation to require posting of the new anti-retaliation contract provisions would further enhance DBRA enforcement and compliance as well as worker protections. Therefore, the Department will add anti-retaliation information to the Davis-Bacon poster<sup>240</sup> (WH-1321) that is currently required by § 5.5(a)(1)(i).

Concerning anti-retaliation remedies, the Department agrees with LCCHR that it is important to account for financial losses that are difficult to quantify, like fees and penalties for missed payments due to loss of income, as well as non-financial harms such as harassment. Nevertheless, the Department believes that the regulatory remedies in the final rule adequately encompass such relief. If a worker or job applicant provides sufficient justification of financial and non-financial harms resulting from a violation of § 5.5(a)(11) or (b)(5), such as those that LCCHR identified, § 5.18(b) as adopted contemplates relief for those types of harms to remedy the violation. Moreover, the examples in § 5.18(c) are illustrative, not exclusive.

The Department also appreciates an individual commenter's concern that speaking up could lead to debarment with attendant adverse financial and/or career impacts similar to those that workers may experience as a result of retaliation. But the Department declines to adopt this commenter's accompanying recommendation for predicted lost pay resulting from debarment for several reasons. The final rule's anti-retaliation provisions are intended to encourage more workers to report potential DBRA violations and to provide make-whole relief for workers who have suffered specific incidents of reprisals or interference as a result of such reporting. In contrast, the individual commenter's proposal seeks highly speculative damages based on a possible future event—debarment—that may not occur and, even if it did, might not happen for years if the contractor disputes the underlying violations and/or debarment remedy through an

<sup>240</sup> See <https://www.dol.gov/agencies/whd/posters/dbra> and <https://www.dol.gov/agencies/whd/posters/dbra/espanol>.



administrative hearing and any subsequent administrative or Federal court appeals. This commenter's proposed predicted lost pay remedy is far-reaching: it goes beyond financial make-whole relief for the particular workers who spoke up and could extend to the whole workforce if they were adversely impacted by the debarment. The Department's anti-retaliation provisions are more narrowly tailored to address specific harms. For example, if a worker were given a bad reference by a debarred DBRA contractor for whom they had worked, or if a contractor refused to hire a worker who had spoken up about DBRA violations and was then "blacklisted," that worker could seek relief under the final rule's anti-retaliation provisions.

While the Department also appreciates UBC's recommendation to require the posting of a notice to workers that the contractor or subcontractor agrees to comply with the DBRA anti-retaliation requirements in the first step of the proposed administrative process in § 5.18(a), the Department declines to adopt this recommendation because at that stage of proceedings, the contractor or subcontractor would still be able to dispute the findings in an administrative hearing. The Department notes that the examples of make-whole relief listed in § 5.18(c)—an illustrative, not exhaustive list—include notice posting as well as back pay and interest among other types of make-whole relief. Similarly, UBC's suggestion to include interest on lost wages is encompassed in the final rule's remedies under § 5.18. Finally, the Department appreciates UBC's recommendation to include information in WHD case-handling manuals about assisting immigrant workers in obtaining deferred action from DHS, as well as applications for T and U visas, and notes that WHD currently has publicly available guidance about these topics.<sup>241</sup>

The Department disagrees with IEC that the proposed anti-retaliation provisions are duplicative of other whistleblower protections for contractor employees and could unnecessarily

expand the number of claims against contractors. There are Federal laws, including one that IEC identified, that provide protections from reprisal for employees of Federal contractors and grantees who disclose, among other things, "information that [they] reasonably believe[] is a . . . violation of law, rule, or regulation related to a Federal contract." 41 U.S.C. 4712 (covering certain civilian contracts); *see* 10 U.S.C. 4701(a)(1) (covering certain defense contracts).<sup>242</sup> But these statutory whistleblower protections are not duplicative because they may not apply to the same subsets of workers, and they are not as specifically tailored to protected activities under the DBRA. Nor are they mutually exclusive.

In addition, enforcement under these existing statutory whistleblower protections appears to have been uncommon. Specifically, the Department is not aware of any Federal courts deciding cases on the merits in which DBRA or SCA workers have availed themselves of section 4712, and the Department is only aware of one such case under 10 U.S.C. 2409. *See Rogers v. U.S. Army*, 2007 WL 1217964, at \*3, \*6–8 (S.D. Tex. Apr. 23, 2007) (dismissing, among other claims, employee's claim under 10 U.S.C. 2409).<sup>243</sup>

The new DBRA anti-retaliation provisions will coexist with these other whistleblower statutory protections and supplement them with additional worker protections to further effectuate the DBRA statutory and regulatory scheme. For example, the final rule's anti-retaliation provisions cover disclosures to a wider range of people than in the above-mentioned two whistleblower-protection laws. The final rule protects worker disclosure of information not only to law enforcement entities, courts, and contractors, but also to any other person (*e.g.*, co-workers or advocates for workers' rights) about their Davis-Bacon rights and assertions of any right or protection under the DBRA.

<sup>242</sup> Formerly cited as 10 U.S.C. 2409(a)(1).

<sup>243</sup> Similarly, the Department is aware of only one Federal court decision about ARRA's whistleblower protection provisions in which the underlying protected activity related to alleged prevailing wage violations. *See Business Commc'ns, Inc. v. U.S. Dept. of Educ.*, 739 F.3d 374, 376, 383 (8th Cir. 2013) (worker filed complaint with the Department of Education's OIG alleging that cable installation contractor had terminated his employment after he complained about not being paid prevailing wages as required by ARRA). In any event, most ARRA funding has been spent by now or is no longer available due to sunset provisions, so the protections that flowed from that funding no longer apply and ARRA's anti-retaliation provisions will soon be, if they are not already, inapplicable to any existing or future DBRA-covered projects.

The Department believes that it is both efficient and consistent with the remedial purpose of the DBRA as well as the directive in Reorganization Plan No. 14 of 1950 "to assure coordination of administration and consistency of enforcement" for WHD—not only contracting agency inspectors general—to investigate and adjudicate complaints of retaliation or interference as part of the Department's Davis-Bacon labor standards enforcement, particularly given WHD's expertise in interpreting and enforcing DBRA labor standards requirements. Potential retaliation and interference with DBRA worker protections are relevant to WHD's investigations of whether debarment is warranted. Under the final rule, WHD's investigations will encompass the new anti-retaliation remedies provisions as part of the Department's overarching enforcement authority.

Finally, the Department declines to withdraw its proposed anti-retaliation provisions because, contrary to assertions of ABC and the group of U.S. Senators that this proposal exceeds the Department's statutory authority,<sup>244</sup> the proposed provisions fit within the Department's broad enforcement authority under the DBA and Reorganization Plan No. 14 of 1950. *See* 5 U.S.C. app. 1. The comments submitted by the group of U.S. Senators and ABC overlook the fact that Reorganization Plan No. 14 of 1950 was a Congressional delegation of rulemaking authority to the Department. The Plan was prepared by President Truman and submitted to Congress in March 1950 pursuant to the Reorganization Act of 1949, Public Law 81–109, 63 Stat. 203 (1949). The Reorganization Act, as passed in 1949, provided that a plan submitted by the President would become effective after 60 days unless disapproved by Congress. *See* 63 Stat. at 205. Although not required, the Senate Committee on Expenditures in the Executive Department reviewed the Reorganization Plan and reported favorably before the Plan became

<sup>241</sup> *See, e.g.*, U and T Visa Certifications, Wage & Hour Div., Dep't of Lab., <https://www.dol.gov/agencies/whd/immigration/u-t-visa>; Dep't of Lab., "FAQ: Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes" (2022), <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf>; Department of Labor U and T Visa Process & Protocols Question—Answer, Wage & Hour Div., Dep't of Lab., <https://www.dol.gov/agencies/whd/immigration/u-t-visa/faq>.

<sup>244</sup> The group of U.S. Senators' apparent suggestion that DBRA remedial purpose and remedies are limited to those Congress expressly provided for in the 1935 amendment to the DBA (withholding, debarment, and affording laborers a private right of action against a contractor) is inconsistent with subsequent legislative, regulatory, and judicial actions discussed in this section. Furthermore, these commenters' suggestion that DBRA is not remedial as that term is defined overlooks another meaning of "remedial statute," which is "[one] that is designed to . . . introduce regulations conducive to the public good." *Remedial statute*, Black's Law Dictionary Deluxe 4th Ed. (1951) & 6th Ed. (1990).

effective on May 24, 1950. *See* 95 Cong. Rep. 6792 (daily ed. May 10, 1950).

Since that time, as NABTU noted, Congress has repeatedly recognized the Secretary's authority and functions under Reorganization Plan No. 14 of 1950 with respect to the DBA's prevailing wage provisions in subsequent legislation. *See, e.g.*, 42 U.S.C. 18851(b), 42 U.S.C. 1440(g), 42 U.S.C. 3212, 20 U.S.C. 954(n), 42 U.S.C. 300j-9(e), 42 U.S.C. 5046. Additionally, in 1984, Congress ratified and affirmed as law each reorganization plan that was implemented pursuant to the provision of a prior reorganization act. Public Law 98-532, 98 Stat. 2705 (1984). The 1984 ratification went on to declare that "[a]ny actions taken prior to the date of enactment of this Act pursuant to a reorganization plan ratified [herein] shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress." *Id.* (emphasis added). Such prior actions include the Department's various rulemakings for 29 CFR parts 1, 3, and 5. For example, the 1964 final rule amending part 5 in turn had extended the Department's regulatory enforcement and administration authority to future Related Acts that the Department anticipated Congress would continue to enact from time to time. *See* 29 FR 95, 99 (Jan. 4, 1964) (adding the following italicized language to § 5.1(a), "The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon him under Reorganization Plan No. 14 of 1950."). That regulation implemented by another Department final rule in 1983 added to the statutory sources of the Department's authority to promulgate such regulations to include the Copeland Act as well as Reorganization Plan No. 14 of 1950. *See* 48 FR 19540-41 (implementing provisions of final rule that had not been enjoined by a Federal district court and on appeal by the Department).

Federal courts, the ARB, and the ARB's predecessor tribunals have all explained that Reorganization Plan No. 14 of 1950 authorizes the Department "to issue regulations designed to 'assure coordination of administration and consistency of enforcement' of the Davis-Bacon Act and all Davis-Bacon related statutes." *Vulcan Arbor Hill Corp. v. Reich*, No. 87-3540, 1995 WL

774603, at \*2 (D.D.C. Mar. 31, 1995) (emphasis added), *aff'd*, 81 F.3d 1110, 1112 (D.C. Cir. 1996) ("[The Reorganization Plan No. 14 of 1950] confers on the Department of Labor the authority and responsibility to coordinate the enforcement not only of the Davis-Bacon Act itself, but also Davis-Bacon related statutes."); *see also Coutu*, 450 U.S. at 759 ("Pursuant to Reorganization Plan No. 14 of 1950 the Secretary of Labor . . . issued regulations designed to 'assure coordination of administration and consistency of enforcement' of the Act and some 60 related statutes." (internal citations omitted)); *Quincy Hous. Auth. LaClair Corp.*, WAB No. 87-32, 1989 WL 407468, at \*2 (Feb. 17, 1989) ("Pursuant to [the] mandate [of Reorganization Plan No. 14], the Secretary has promulgated regulations to enforce the labor standards provisions of the Davis-Bacon Act and the related acts."); *cf. Coleman Constr. Co.*, ARB No. 15-002, 2016 WL 4238468, at \*2, \*9-11 (June 8, 2016) (stating that "the National Housing Act and CWHSSA, the two Davis-Bacon Related Acts under which this case is being brought, do not include a debarment provision," but that "it is the Department of Labor regulations, duly promulgated pursuant to Reorganization Plan No. 14 of 1950 that provide for debarment for violations of a Related Act").

The Department reiterates that like regulatory debarment, the anti-retaliation provisions adopted in the final rule—as well as the revised Related Act debarment provisions discussed in section III.B.3.xxi ("Debarment")—are all permissible exercises of the Department's "implied powers of administrative enforcement." *Janik Paving & Constr.*, 828 F.2d at 91. Like the revised debarment provisions, the anti-retaliation provisions will also help achieve more effective enforcement of DBRA labor standards requirements.

The Department does not agree with ABC or the group of U.S. Senators that Congress's omission of express statutory anti-retaliation provisions or authority in the DBA and most Related Acts prohibits the Secretary from regulating such behavior. The new anti-retaliation regulations are consistent with and a permissible extension of current remedies for retaliatory conduct. Courts have recognized the Department's broad regulatory authority to enforce and administer the DBRA, including the appropriateness of measures such as debarment under the Related Acts, which was initially implemented without explicit statutory authority. *See Janik Paving & Constr.*, 828 F.2d at 92

(holding that Congressional silence on debarment when it enacted the CWHSSA did not preclude the Department from enforcing its regulatory debarment provision under that statute and noting "[t]hat a later Congress seeks to grant expressly a power which an earlier Congress has granted by implication does not negate the existence of the power prior to the express grant" (internal quotations omitted)); *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 372-73 (D.C. Cir. 1961) (holding that Reorganization Plan No. 14 of 1950 authorized debarment under a Related Act as "a means for securing compliance with the wage and hour standards and . . . obtaining responsible bidding," notwithstanding that the Related Act was silent on debarment but provided for other sanctions and that Congress had expressly authorized debarment in similar statutes, like the DBA.).

The anti-retaliation provisions will further Reorganization Plan No. 14 of 1950's mandate by helping to ensure workers are paid the prevailing wages they are owed and to coordinate effective administration of Davis-Bacon labor standards on Federal and federally assisted construction projects. As with debarment, anti-retaliation is "integral to the Secretary's effective enforcement of labor standards provisions." *Janik Paving & Constr.*, 828 F.2d at 93. Prohibiting retaliation against workers for asserting their rights under the DBRA and requiring contractors to remedy such retaliation gives DOL and contracting agencies a tool to help ensure effective administration and enforcement of the DBRA and to protect the prevailing wage statutory scheme "from those who would abuse it." *Jacquet v. Westerfield*, 569 F.2d 1339, 1345 (5th Cir. 1978). The final rule's anti-retaliation provisions will further the DBA's purposes of protecting workers and preventing substandard wages on Federal construction projects. By further shielding workers who speak out about violations that might not be discovered otherwise, this final rule will enhance the incentive to comply with the law, foster construction worker cooperation with the Department's (and contracting agencies') enforcement efforts, and improve the ability of WHD investigators to respond to and discover violations.

The final rule's regulatory anti-retaliation provisions are not novel. The Department has promulgated anti-retaliation regulations with make-whole remedies to aid enforcement and worker protection in other program areas where the underlying statutes do not expressly

provide for anti-retaliation. For example, both the Department's H-2A and H-2B regulations include anti-retaliation provisions. *See* 29 CFR 501.4 (H-2A); 29 CFR 503.20(a) (H-2B); Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 FR 24042, 24069 (Apr. 29, 2015) (Interim final rule; request for comments) ("Worker rights cannot be secured unless there is protection from all forms of intimidation or discrimination resulting from any person's attempt to report or correct perceived violations of the H-2B provisions."). In addition, OSHA added an anti-retaliation regulation to provide an enforcement tool for the long-standing injury and illness recordkeeping regulations despite also having a statutory anti-retaliation provision, section 11(c), 29 U.S.C. 660(c)—both of which had been in place for over 40 years. *See* 29 CFR 1904.35(b)(1)(iv); Improve Tracking of Workplace Injuries and Illnesses, 81 FR 29624, 29627 (May 12, 2016) (Final rule) ("Where retaliation threatens to undermine a program that Congress required the Secretary to adopt, the Secretary may proscribe that retaliation through a regulatory provision unrelated to section 11(c)."); *cf.* 57 FR 7533, 7535 (Mar. 3, 1992) (Final Rule) (stating that the DOE's regulatory anti-retaliation DOE Contractor Employee Protection Program found at 10 CFR part 708 was "issued pursuant to the broad authority granted [DOE]" by various statutes "to prescribe such rules and regulations as necessary or appropriate to protect health, life, and property and the otherwise administer and manage the responsibilities and functions of the agency"). The Department's adoption of anti-retaliation provisions in the final rule similarly implements this additional enforcement tool.

#### xx. Post-Award Determinations and Operation-of-Law

The Department proposed several revisions in parts 1, 3, and 5 to update and codify the administrative procedure for enforcing Davis-Bacon labor standards requirements when the contract clauses and/or appropriate wage determination(s) have been wrongly omitted from a covered contract.

#### (A) Current Regulations

The current regulations require the insertion of the relevant contract clauses and wage determination(s) in covered contracts. 29 CFR 5.5. Section 5.5(a) requires the appropriate contract clauses to be inserted "in full" into any covered contracts, though the FAR only requires

the DBA contract clauses to be incorporated by reference in FAR-covered contracts. The contract clause language at § 5.5(a)(1) currently states that applicable wage determinations are "attached" to the contract.

The existing regulations at § 1.6(f) provide instruction for how the Department and contracting agencies must act when a wage determination has been wrongly omitted from a contract. Those regulations provide a procedure through which the Administrator makes a finding that a wage determination should have been included in the contract. After the finding by the Administrator, the contracting agency must either terminate and resolicit the contract with the valid wage determination or incorporate the wage determination retroactively by supplemental agreement or change order. The same procedure applies where the Administrator finds that the wrong wage determination was incorporated into the contract. The existing regulations at § 1.6(f) specify that the contractor must be compensated for any increases in wages resulting from any supplemental agreement or change order issued in accordance with the procedure.

As the Department explained in the NPRM, WHD has faced multiple longstanding enforcement challenges under the current regulations. First, the language of § 1.6(f) explicitly refers only to omitted wage determinations and does not expressly address the situation where a contracting agency has mistakenly omitted the contract clauses from the contract. Although WHD has historically relied on § 1.6(f) to address this situation, the ambiguity in the regulations has caused confusion in communications between WHD and contracting agencies and delay in resolving conflicts. *See, e.g.,* WHD Opinion Letters DBRA-167 (Aug. 29, 1990); DBRA-131 (Apr. 18, 1985).

Second, under the existing regulations, affected workers have suffered from significant delays while contracting agencies determine the appropriate course of action. At a minimum, such delays cause problems for workers who must endure long waits to receive their back wages. At worst, the delay can result in no back wages recovered at all where witnesses become unavailable or there are no longer any contract payments to withhold when a contract is finally modified or terminated. In all cases, the identification of the appropriate mechanism for contract termination or modification can be difficult and burdensome on Federal agencies—in

particular during later stages of a contract or after a contract has ended.

The process provided in the current § 1.6(f) is particularly problematic where a contracting agency has questions about whether an existing contract can be modified without violating another non-DBRA statute or regulation. This problem has arisen in particular in the context of MAS contracts, BPAs, and other similar schedule contracts negotiated by GSA.<sup>245</sup> Contracting agencies that have issued task orders under GSA schedule contracts have been reluctant to modify those task orders to include labor standards provisions where the governing Federal schedule contract does not contain the provisions. Under those circumstances, contracting agencies have argued that such a modification could render that task order "out of scope" and therefore arguably unlawful.

Although the Department believes it is incorrect that a contract modification to incorporate required labor standards clauses or wage determinations could render a contract or task order out of scope,<sup>246</sup> concerns about this issue have interfered with the Department's enforcement of the labor standards. If a contracting agency believes it cannot modify a contract consistent with applicable procurement law, it may instead decide to terminate the contract without retroactively including the required clauses or wage determinations. In those circumstances, the regulations currently provide no express mechanism that explains how the Department or contracting agencies should seek to recover the back wages that the workers should have been paid on the terminated contract. While in many cases, the authority does exist, the

<sup>245</sup> Sales on the GSA MAS, for example, have increased dramatically in recent decades—from \$4 billion in 1992 to \$36.6 billion in 2020. Gov't Accountability Office, "High Risk Series: An Update," GAO-05-207 (Jan. 2005), at 25 (Figure 1) (noting these types of contracting vehicles "contribute to a much more complex environment in which accountability has not always been clearly established"), available at: <https://www.gao.gov/assets/gao-05-207.pdf>; Gen. Servs. Admin., "GSA FY 2020 Annual Performance Report," at 11, available at: <https://www.gsa.gov/cdnstatic/GSA%20FY%202020%20Annual%20Performance%20Report%20v2.pdf>.

<sup>246</sup> This argument tends to conflate the change associated with incorporating a missing contract clause or wage determination with any unexpected changes by the contracting agency to the actual work to be performed under the task order or contract. As a general matter, a Competition in Contracting Act challenge based solely on the incorporation of missing labor standards clauses or appropriate wage determinations would be without merit. *See* Booz Allen Hamilton Eng'g Servs., LLC, B-411065 (May 1, 2015), available at: <https://www.gao.gov/products/b-411065>.

lack of an express mechanism can lead to unnecessary delay and confusion.

The Department also engages in various compliance assistance efforts to decrease the risk that contract clauses will be omitted from covered contracts in the first place. The Department routinely conducts trainings for contracting agencies and other stakeholders about Davis-Bacon coverage principles, issues and maintains guidance documents (such as the PWRB and FOH), and responds to requests for advice and rulings about coverage matters. In tandem with this rulemaking, the Department intends to continue these efforts to reduce the likelihood of erroneous omission of contract clauses and wage determinations. However, after decades of experience with this problem, the Department has determined that additional measures are necessary.

To address these longstanding enforcement challenges, the Department proposed to exercise its authority under Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145 to adopt several changes to §§ 1.6, 5.5, and 5.6.

#### (B) Proposed Regulatory Revisions

In the NPRM, the Department proposed to include language in a new paragraph at § 5.5(e) to provide that the labor standards contract clauses and appropriate wage determinations will be effective “by operation of law” in circumstances where they have been wrongly omitted from a covered contract. The Department explained that the purpose of the proposal was to 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. The proposal would also ensure that workers receive the correct prevailing wages in circumstances where the correct wage determination has not been attached to the original contract or has not been incorporated during the exercise of an option.

Under the proposal, erroneously omitted contract clauses and appropriate wage determinations would be effective by operation of law and therefore enforceable retroactive to the beginning of the contract or construction. The proposed language provided that all of the contract clauses set forth in § 5.5—the contract clauses at § 5.5(a) and the CWHSSA contract clauses at § 5.5(b)—are considered to be a part of every covered contract, whether or not they are physically

incorporated into the contract. This includes the contract clauses requiring the payment of prevailing wages and overtime at § 5.5(a)(1) and (b)(1), respectively; the withholding clauses at § 5.5(a)(2) and (b)(3); and the labor standards disputes clause at § 5.5(a)(9).

In the NPRM, the Department explained that the operation-of-law provision is intended to complement the existing requirements in § 1.6(f) and would not entirely replace them. Thus, the contracting agency will still be required to take action as appropriate to terminate or modify the contract. Under the new proposed procedure, however, WHD would not need to await a contract modification to assess back wages and seek withholding, because the wage requirements and withholding clauses would be read into the contract as a matter of law.<sup>247</sup> The application of the clauses and the correct wage determination as a matter of law would also provide WHD with an important tool to enforce the labor standards on a contract that a contracting agency decides it must terminate instead of modify.

The proposal included two important provisions to protect both contractors and contracting agencies. First, the proposal included a provision requiring that contracting agencies compensate prime contractors for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law under § 5.5(e). This proposed language was modeled after similar language that has been included in § 1.6(f) since 1983.<sup>248</sup> Under the proposal, when the contract clause or wage determination is incorporated into the prime contract by operation of law, the prime contractor would be responsible for the payment of applicable prevailing wages to all workers under the contract—including the workers of its subcontractors—retroactive to the contract award or beginning of construction, whichever occurs first. This is consistent with the current Davis-Bacon regulations and case law. *See* 29 CFR 5.5(a)(6); *All Phase Elec. Co.*, WAB No. 85–18 (June 18, 1986) (withholding contract payments from the prime for subcontractor employees even though the labor standards had not been flowed down into the subcontract). This

responsibility, however, would be offset by the compensation provision in § 5.5(e), which would require that the prime contractor be compensated for any increases in wages resulting from any post-award incorporation by operation of law.

The second important provision in the proposed operation-of-law paragraph was language that provides protection for contracting agencies by continuing to allow requests that the Administrator grant a variance, tolerance, or exemption from application of the regulations. As noted in the NPRM, this includes an exemption from retroactive enforcement of wage determinations and contract clauses (or, where permissible, an exemption from prospective application) under the same conditions currently applicable to post-award determinations. *See* 29 CFR 1.6(f); 29 CFR 5.14; *City of Ellsworth*, ARB No. 14–042, 2016 WL 4238460, at \*6–8 (June 6, 2016).<sup>249</sup> In addition, as the Department noted in the NPRM, contracting agencies avoid difficulties associated with post-award incorporations by proactively incorporating the Davis-Bacon labor standards clauses and applicable wage determinations into contracts or using the existing process for requesting a coverage ruling or interpretation from the Administrator prior to contract award. *See* 29 CFR 5.13.<sup>250</sup>

The operation-of-law provision in proposed § 5.5(e) is similar to the Department’s existing regulations enacting Executive Order 11246—Equal Employment Opportunity. *See* 41 CFR 60–1.4(e); *United States v. Miss. Power & Light Co.*, 638 F.2d 899, 905–06 (5th Cir. 1981) (finding 41 CFR 60–1.4(e) to be valid and have force of law). The operation-of-law provision at 41 CFR 60–1.4(e), like the proposed language in

<sup>249</sup> Factors that the Administrator considers in making a determination regarding retroactive application are discussed in the ARB’s ruling in *City of Ellsworth*, ARB No. 14–042, 2016 WL 4238460, at \*6–10. Among the non-exclusive list of potential factors are “the reasonableness or good faith of the contracting agency’s coverage decision” and “the status of the procurement (*i.e.*, to what extent the construction work has been completed).” *Id.* at \*10. In considering the status of the procurement, the Administrator will consider the status of construction at the time that the coverage or correction issue is first raised with the Administrator.

<sup>250</sup> Contracting agencies can also contest a determination by the Administrator that a contract is covered (either an initial determination or a post-award determination) or the Administrator’s denial of a tolerance, variance, or exemption, by seeking review of the determination with the ARB. 29 CFR 7.1, 7.9. A decision of the ARB on a coverage question is a final agency action that in turn may be reviewable under the APA in Federal district court. *See* 5 U.S.C. 702, 704.

<sup>247</sup> The Department proposed parallel language in 29 CFR 5.9 (Suspension of funds) to clarify that funds may be withheld under the contract clauses and appropriate wage determinations whether they have been incorporated into the contract physically, by reference, or by operation of law.

<sup>248</sup> *See* 46 FR 4306, 4313 (Jan. 16, 1981); 47 FR 23644, 23654 (May 28, 1982) (implemented by 48 FR 19532 (Apr. 29, 1983)).

§ 5.5(e), operates in addition to and complements the other provisions in the Executive Order's regulations that require the equal opportunity contract clause to be included in the contract. See 41 CFR 60–1.4(a).

Unlike 41 CFR 60–1.4(e), the Department's proposed language in the new § 5.5(e) would apply the "operation of law" provision only to prime contracts and not to subcontracts. The reason for this difference is that, as noted above, the Davis-Bacon regulations and case law provide that the prime contractor is responsible for the payment of applicable wages on all subcontracts. If the prime contract contains the labor standards as a matter of law, then the prime contractor is required to ensure that all employees on the contract—including subcontractors' employees—receive all applicable prevailing wages. Accordingly, as the Department explained in the NPRM, extending the operation-of-law provision itself to subcontracts is not necessary to enforce the Congressional mandate that all covered workers under the contract are paid the applicable prevailing wages.

The proposed operation-of-law provision at § 5.5(e) is also similar in many, but not all, respects to the judicially-developed *Christian* doctrine, named for the 1963 Court of Claims decision *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl.), *reh'g denied*, 320 F.2d 345 (Ct. Cl. 1963). Under the doctrine, courts and administrative tribunals have held that required contractual provisions may be effective by operation of law in Federal government contracts, even if they were not in fact included in the contract. The doctrine applies even when there is no specific "operation of law" regulation as proposed here.

The *Christian* doctrine flows from the basic concept in all contract law that "the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law." 11 Williston on Contracts § 30:19 (4th ed. 2021); see *Ogden v. Saunders*, 25 U.S. 213, 231 (1827). Thus, those who contract with the government are charged with having "knowledge of published regulations." *PCA Health Plans of Texas, Inc. v. LaChance*, 191 F.3d 1353, 1356 (Fed. Cir. 1999) (citation omitted).

Under the *Christian* doctrine, a court can find a contract clause effective by operation of law if that clause "is required under applicable [F]ederal administrative regulations" and "it expresses a significant or deeply ingrained strand of public procurement policy." *K-Con, Inc. v. Sec'y of Army*,

908 F.3d 719, 724 (Fed. Cir. 2018). Where these prerequisites are satisfied, it does not matter if the contract clause at issue was wrongly omitted from a contract. A court will find that a Federal contractor had constructive knowledge of the regulation and that the required contract clause applies regardless of whether it was included in the contract.

The recent decision of the Federal Circuit in *K-Con* is helpful to understanding why it is appropriate to provide that the DBA labor standards clauses are effective by operation of law. In *K-Con*, the Federal Circuit held that the *Christian* doctrine applies to the 1935 Miller Act. 908 F.3d at 724–26. The Miller Act contains mandatory coverage provisions that are similar to those in the DBA, though with different threshold contract amounts. The Miller Act requires that contractors furnish payment and performance bonds before a contract is awarded for "the construction, alteration, or repair of any public building or public work." 40 U.S.C. 3131(b). The DBA, as amended, requires that the prevailing wage stipulations be included in bid specifications "for construction, alteration, or repair, including painting and decorating, of public buildings and public works." 40 U.S.C. 3142(a).

Like the Miller Act, the 90-year-old Davis-Bacon Act also expresses a significant and deeply ingrained strand of public procurement policy. The Miller Act and the Davis-Bacon Act are of similar vintage. The DBA was enacted in 1931. The DBA amendments were enacted in 1935, almost simultaneously with the Miller Act. Through both statutes, Congress aimed to protect participants on government contracts from nonpayment by prime contractors and subcontractors. Thus, the same factors that the Federal Circuit found sufficient to apply the *Christian* doctrine to the Miller Act also apply to the DBA and suggest that the proposed operation-of-law regulation would be appropriate.<sup>251</sup>

The Department's proposal, however, offers more consideration for contractor equities than the *Christian* doctrine in two critical respects. First, as noted above, the proposed language at § 5.5(e) would be paired with a contractor compensation provision similar to the existing provision in § 1.6(f). The

<sup>251</sup> The Federal Circuit has also noted that the *Christian* doctrine applies to in the context of the SCA, which has a similar purpose as the DBA and dates only to 1965. See *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1351 & n.1 (Fed. Cir. 2017). Because the DBA and SCA are similar statutes with the same basic purpose, the Department has long noted that court decisions relating to one of these acts may have a direct bearing on the other. See WHD Opinion Letter SCA–3 (Dec. 7, 1973).

*Christian* doctrine does not incorporate such protection for contractors, and as a result, can have the effect of shifting cost burdens from the government to the contractor. In *K-Con*, for example, the doctrine supported the government's defense against a claim for equitable adjustment by the contractor. 908 F.3d at 724–28.

Second, the *Christian* doctrine is effectively self-executing and renders contract clauses applicable by operation of law solely on the basis of the underlying requirement that they be inserted into covered contracts. The doctrine contains no specific mechanism through which the government can limit its application to avoid any unexpected or unjust results—other than simply deciding not to raise it as a defense or affirmative argument in litigation. The proposed provision here at § 5.5(e), on the other hand, would pair the enactment of the operation-of-law language with the traditional authority of the Administrator to waive retroactive enforcement or grant a variance, tolerance, or exemption from the regulatory requirement under 29 CFR 1.6(f) and 5.14, which the Department believes will foster a more orderly and predictable process and reduce the likelihood of any unintended consequences.

In the NPRM, the Department also discussed whether it was necessary or advisable to create a different procedure in which the operation-of-law rule would only become effective after a determination by the Administrator or a contracting agency that a contract was in fact covered. While the Department stated that it did not believe that such an approach was necessary, it nonetheless sought comment regarding this potential alternative.

## (C) Discussion of Comments

### (1) § 5.5(e) and Operation of Law

Many commenters expressed support for the operation-of-law proposal at § 5.5(e) on the basis that it would be protective of workers. The LCCHR and other civil rights and employee advocacy organizations supported the proposal, stating that under the status quo, workers on covered projects too often do not receive DBRA-required prevailing wages "on time or at all." Several unions strongly supported the proposal because it would ensure that, as UBC commented, the burden of "intentional or mistaken omissions" would not be placed "on the backs of construction workers." The FFC and the NCDCL wrote that technicalities or accidental omissions should not prevent

workers from “receiving the protection of the DBRA and being paid the prevailing wage.”

Various commenters emphasized other positive aspects of the proposal. The III–FFC stated that the approach will streamline enforcement. SMACNA noted that the compensation provision allows a contractor to rely on an initial determination that the DBA does not apply or a wage determination with lower rates applies. Similarly, LCCHR noted that the provision is more favorable to contractors than traditional operation-of-law doctrine because it provides reimbursement to prime contractors for any increase of wages that results from its invocation. Furthermore, LCCHR added that the provision’s application only to prime contracts, and not subcontracts, reflects a targeted approach. This is appropriate, they stated, because prime contractors “are frequently repeat recipients of federal funds, engage directly with the contracting agency, and may reasonably be expected to be aware of generally applicable legal requirements, such as the DBRA.”

Several commenters, including AFP–I4AW, ABC, CC&M, IEC, the SBA Office of Advocacy, and the group of U.S. Senators, opposed the operation-of-law proposal, arguing that it does not give contractors sufficient notice of the applicability of DBA requirements. IEC and the group of U.S. Senators asserted that a lack of notice is not consistent with basic contract and procedural due process principles. AFP–I4AW claimed that “without direct contractual notice to contractors, the risk of unknowing violations will abound,” and stressed the “risk of inadvertent and completely avoidable noncompliance.” And CC&M asserted that sometimes a local agency does not inform a contractor that Federal funds are being used on a particular project.

Some commenters expressed concern that the operation-of-law provision would increase costs to contractors, and that those costs in turn could be passed on to the government. IEC, for example, asserted that the provision would lead to higher costs through two routes: first, uncertainty could result in contractors opting out of DBA-covered work, resulting in less competition and thus, higher prices; and second, through contractors “hedging” about DBA coverage by “submitting bids that account for the DBA, when it is in fact not covered, but still placing these added costs onto the taxpayer.” IEC also contended that “contractors would have to track all the different regulatory changes (wage rates) from location,” which would increase their cost of

compliance. AFP–I4AW and two partners from the law firm Wiley Rein LLP expressed concern that the proposal could lead to increased litigation, with associated costs for contractors.<sup>252</sup> ABC and the SBA Office of Advocacy expressed concern about costs and burdens on subcontractors.

The Wiley Rein partners and the group of U.S. Senators expressed concern that the provision requiring compensation for contractors would not work as proposed. The Wiley Rein partners stated that contracting officers might simply refuse to provide an equitable adjustment, notwithstanding the express requirement in § 5.5(e). The result could be unreimbursed cost increases “and related adverse effects.” The Senators suggested that agencies might “use the threat of refusing to award contract bids in the future” in order to pressure contractors not to seek compensation. CC&M stated that it is unfair for a contracting agency to transfer liability to a contractor when it is the agency that failed to meet its obligations.

A few commenters expressed concern that the Department lacks the authority to implement the proposed rule. The FTBA noted that the text of the DBA explicitly requires contracting agencies to insert the contract clauses in covered contracts. Given this statutory language, the comment asserted, “it is within the sole power and domain of the federal courts, not the DOL as a regulatory agency, to make any determination that the DBA requirements are applicable by operation of law.” AFP–I4AW argued that there is no “legal justification” for the proposal because the statute requires the government to include the proper clauses in the contract. The comment from the group of U.S. Senators stated that the statute meant to place the burden on procuring agencies, not contractors.

Commenters disagreed about the effect of the Supreme Court’s decision in *University Research Ass’n v. Coutu*, 450 U.S. 754 (1981), and the state of the law on the *Christian* doctrine. The Wiley Rein partners noted the Court’s statement in the *Coutu* decision that the DBA is “not self-executing.” See also *id.* at 784 n.38. Accordingly, the partners expressed doubt that the Department can “give away” its interpretive authority by allowing arbitrators, courts, or other administrative agencies to make determinations about whether the DBA

should be found to be incorporated by operation of law in a given contract.

The FTBA and the Wiley Rein partners argued that the Department had read too much into Federal Circuit decisions discussing the *Christian* doctrine. The Wiley Rein partners suggested that *Coutu* and *Bellsouth Communications Systems*, ASBCA No. 45955, 94–3 BCA ¶ 27231, a subsequent decision issued by the Armed Services Board of Contract Appeals, undermine the significance of the Federal Circuit’s decision about the Miller Act in *K-Con*, 908 F.3d at 724–26. In addition, both the FTBA and the Wiley Rein partners stated the Department had overread the Federal Circuit’s decision in *Call Henry*, 855 F.3d at 1351 n.1, because, among other reasons, that decision involved a situation in which the core SCA clauses had in fact been incorporated into the contract.

On the other hand, the LCCHR and other civil rights and worker advocacy groups noted that multiple decisions after *Coutu* have stated that the DBA contract clauses may be effective by operation of law. See, e.g., *United States ex rel. D.L.I. Inc. v. Allegheny Jefferson Millwork, LLC*, 540 F. Supp. 2d 165, 176 (D.D.C. 2008) (“When such provisions are omitted from a *prime* contract, they do become part of the contract by operation of law, and the prime contractor is charged with constructive knowledge of Davis–Bacon’s requirements.”); *BUI Constr. Co. & Bldg. Supply*, ASBCA No. 28707, 84–1 B.C.A. ¶ 17183 (citing *G.L. Christian*, 312 F.2d at 418). LCCHR noted that these decisions were issued after *Coutu*, which suggests that *Coutu* imposes no bar to the proposed rule.

The Wiley Rein partners made several recommendations in their comment. They recommended that instead of the Department’s current proposal, the Department should adapt the SCA regulation codified at 29 CFR 4.5(c) for use in the DBRA rule. Section 4.5(c) instructs contracting agencies to add omitted SCA requirements to contracts after award by modification but does not make them effective by operation of law. The partners stated that this approach would reduce the risk that contractors would not be made whole for increased costs, while still addressing the Department’s enforcement concerns. They suggested that the SCA post-award modification provision has been time-tested because it was implemented many years ago. See 48 FR 49736, 49766 (Oct. 27, 1983).

The Wiley Rein partners also made two suggestions in the alternative. First, if their recommendation to adapt the SCA regulation is declined, the

<sup>252</sup> The Wiley Rein partners also expressed concern about how the operation-of-law provision would function in contracts that may be jointly covered by both the DBA and the SCA.

Department should instead finalize the alternative option discussed in the NPRM to require that the operation-of-law provision at § 5.5(e) be effective only after a determination by the contracting agency or the Department that the DBRA applies to the contract at issue. The partners stated that this option is consistent with the *Christian* doctrine, “comports with existing caselaw,” and offers certain practical benefits as well.<sup>253</sup> The Wiley Rein partners also suggested that the Department should defer the effective date for the operation-of-law provision until the FAR is updated to expressly require equitable adjustments in these circumstances.

A few other commenters requested clarifications or made suggestions. AGC stated that the Department “has always maintained that the DBA clauses required by the regulation are applicable by operation of law.” They asserted, however, that this has never been “official,” and they noted that the Department’s practice is to require retroactive incorporation of contract clauses and appropriate wage determinations into a contract before enforcement. AGC acknowledged the language in the proposal that would require compensation for contractors where the operation-of-law provision is invoked but asked for “further clarifications” because “[i]t is absolutely necessary that prime contractors be compensated for any increased costs caused by a contracting agency failure.” The COSCDA similarly agreed that the Department should take actions to secure adequate compensation for workers in a timely manner, but it stated that proposals to do so should not impose additional costs on contractors or program administrators. CC&M suggested that when compensation is provided under the proposal, agencies should be required to pay the contractor “150% of the delta between what the contractor paid and the amount that should have been paid,” to penalize the agency for its error, and that withholding or cross-withholding for violations based on operation of law should not be permitted unless such a rule is implemented.

Lastly, a number of union and contractor association commenters expressed general support for the provision ensuring that DBA provisions are incorporated by “operation of law.” Those commenters included the Alaska

District Council of Laborers, Bricklayers & Allied Craftworkers Local #1, LIUNA, LIUNA Local 341, LIUNA Local 942, the Massachusetts Building Trades Unions, NABTU, the Southern Nevada Building Trades Unions (SNBTU), the WA BCTC, SMACNA, and CEA.

The Department considered the comments submitted regarding the operation-of-law provision at § 5.5(e) and agrees with those commenters that supported the implementation of the provision as proposed in the NPRM. Commenters noted that failures by contracting agencies to properly incorporate the DBRA contract clauses and wage determinations have significant consequences for the workers that the DBA and Related Acts were enacted to protect. For example, the comment from LCCHR and other civil rights and worker advocacy organizations cited a news article that discussed similar problems occurring during the implementation of the 2009 Recovery Act. See Ben Penn, “Labor’s Infrastructure Wins Depend on Avoiding Problems of 2009,” *Bloomberg L.* (Nov. 9, 2021).<sup>254</sup> According to the article, during the implementation of the Recovery Act, the Department “struggled to secure commitments on worker pay standards from government agencies that awarded contracts,” problems “fueled interagency breakdowns and debates over whether prevailing wage standards were applicable on particular projects,” and “[u]ltimately, workers paid the price when Davis-Bacon wasn’t applied, lowering their pay.” *Id.* As the Department noted in the NPRM, it is not appropriate for staff at an executive agency to effectively nullify Congress’s intent that Davis-Bacon standards apply to certain categories of contracts.

While the operation-of-law provision addressed an important subset of enforcement problems, as a practical matter it should not represent a broad expansion of application of the DBRA. As COSCDA noted in their comment, the proposal is an “extension of the retroactive modification procedures” that have been in effect in § 1.6 of the regulations since the 1981–1982 rulemaking. While the § 1.6(f) procedure in the existing regulations references only wage determinations, the Department has long interpreted the procedure to also require the retroactive modification of contracts to include missing contract clauses themselves. The operation-of-law provision has the effect of extending the current status

quo only to those situations in which a contract has not been timely modified through the retroactive modification procedures in § 1.6(f).

MBI, BCCI, PCCA, and several others asserted the proposal would function by “essentially eliminating the requirement to publish specific Davis-Bacon wage determinations in project bid and contract documents.” However, this characterization is not accurate. Under the current procedures, contracting agencies’ responsibility to insert contract clauses and wage determinations has long co-existed with a post-award modification procedure that allows the government to remedy any circumstances when those clauses have been omitted. Since the 1981–1982 rulemaking, § 5.5(a) has required a contracting agency head to “cause or require the contracting officer to insert” the required contract clauses into any covered contracts. 29 CFR 5.5(a). Likewise, § 5.6(a)(1)(i) has stated that the Federal agency is responsible for “ascertain[ing] whether the clauses required by § 5.5 and the appropriate wage determination(s) have been incorporated” into covered contracts. *Id.* § 5.6.

The proposed operation-of-law proposal is not significantly different in this respect from the current incorporation and enforcement procedures. Contrary to the concerns of MBI and other commenters, § 5.5(a) in the final rule continues to require contracting agencies to insert the contract clauses in full into covered contracts, although the Department has also added language to § 5.5(a) and (b) to clarify that the FAR permits incorporation by reference. The contract clause at § 5.5(a)(1) continues to contemplate that, for non-FAR contracts, the applicable wage determinations “will be attached hereto and made a part thereof.” These requirements are reinforced by practical consequences. The new provision at § 5.5(e) requires that contracting agencies compensate contractors for any resulting increases in wages when the agency fails to incorporate the contract clauses and wage determinations and those clauses or wage determinations are subsequently incorporated into the contract through the operation-of-law provision. It is therefore not the case, as the commenters contended, that this rule eliminates contracting agencies’ obligations to include wage determinations in covered contracts.

Given current enforcement procedures already require agencies to incorporate omitted contract clauses and require compensation from contracting agencies in those

<sup>253</sup> Conversely, two other commenters, UBC and the III-FFC, stated that the Department’s proposed rule as written was superior to the alternative option in which the DBA provisions would only be added by operation of law after a determination by the Administrator.

<sup>254</sup> Available at: <https://news.bloomberglaw.com/daily-labor-report/labors-infrastructure-wins-depend-on-avoiding-problems-of-2009>.



circumstances, it is unlikely that the operation-of-law provision will materially increase overall costs to contractors or the government. In the individual cases in which the provision ultimately must be invoked, the costs will be borne by the government, and not the contractor, because the operation-of-law provision at § 5.5(e) requires agencies to compensate a prime contractor for any increases in wages. However, in such cases, the operation-of-law provision should increase efficiency and reduce administrative costs for both contracting agencies and the Department. It will reduce the need for extended negotiations about retroactive modification. It also may in some circumstances reduce litigation costs by reducing or eliminating disputes about the method and timing of modification. The existence of the compensation provision significantly reduces the potential that CC&M identified of contractors being required to pay the price for errors by contracting agencies.

The Department also is not persuaded by comments from IEC and others that the operation-of-law provision will increase contractors' general compliance costs because contractors will have to newly track coverage provisions or may prophylactically apply Davis-Bacon wages even where they do not apply. The Department already interprets the DBRA to require employers to take affirmative steps to ensure that they are in compliance. *See, e.g., Coleman Construction Co.*, ARB No. 15-002, 2016 WL 4238468, at \*6 (holding that "[t]he law is clear that, if a contract subject to Davis-Bacon lacks the wage determination, it is the employer's obligation . . . to get it"). And, the Department's current application of § 1.6(f) provides similar incentives and consequences as will the operation-of-law provision. As the comment from LCCHR and other civil rights and employee advocacy organizations noted, trade publications already advise contractors to be proactive in determining whether a project is covered.<sup>255</sup> Because prime contractors are already monitoring DBRA coverage, the Department believes any increased compliance burdens due to this change will be minimal and are outweighed by the Department's goal of streamlining coverage determinations, ensuring effective enforcement, and reducing

economic hardship to workers caused by delays in receiving backpay.

The Department has also considered specific concerns raised by ABC and the SBA Office of Advocacy about the effects on subcontractors of the operation-of-law provision. ABC stated that the result of the operation-of-law provision would be to hold subcontractors (as well as prime contractors) responsible for DBRA violations without notice. The SBA Office of Advocacy stated that small subcontractors are less equipped to absorb withholding on a contract. As the Department explained in the NPRM, however, § 5.5(e) limits the reach of the operation-of-law provision to prime contractors only, rather than including subcontractors. Accordingly, if neither a prime contract nor a subcontract thereunder references the DBA, the Department would not hold a subcontractor liable for unpaid back wages under § 5.5(e). The Department recognizes that there may still be residual effects on a subcontractor where the operation-of-law provision is invoked and funds are withheld from a prime contractor to ensure that workers of a subcontractor are paid the required prevailing wages. In such a situation, it is possible the prime contractor might in turn delay in paying its subcontractor in full as a result. However, this circumstance is not materially different than any other enforcement action that involves withholding, except that there is a provision requiring compensation that should make the effects of any withholding temporary. Moreover, because the operation-of-law provision is likely to be invoked in only a small portion of overall enforcement actions, the Department believes that the additional impact of such actions on subcontractors will be minimal. The Department thus has concluded that the final rule's limited effects on subcontractors are outweighed by the Department's goal of streamlining and ensuring the effectiveness of enforcement.

The Department also disagrees with those commenters that argued that the proposal does not give contractors sufficient notice of the applicability of DBA requirements. As noted in the NPRM, those that contract with the government are charged with having "knowledge of published regulations." *PCA Health Plans of Texas*, 191 F.3d at 1356 (citing *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947)). "[T]he appearance of rules and regulations in the **Federal Register** gives legal notice of their contents." *Merrill*, 332 U.S. at 384–385. Under the Department's final rule, contractors will

be put on notice, through the language of § 5.5(e), that the DBRA requirements are effective by operation of law, regardless of whether they have been wrongly omitted from a contract. Section 1.6(b)(2) also provides notice that a contractor has an "affirmative obligation to ensure that its pay practices are in compliance with the Davis-Bacon Act labor standards." Further, any contractor can seek guidance from the Department prior to contract award regarding whether the DBA provisions should apply to a contract. *See* 29 CFR 5.13. These regulations provide notice to prime contractors of the potential that DBRA contract clauses may be effective by operation of law. For similar reasons, the Department disagrees with the comments from IEC and the group of U.S. Senators that the proposal does not comport with procedural due process.<sup>256</sup>

In the NPRM, the Department provided a review of legal considerations regarding the application of the operation-of-law provision. The commenters suggesting that the statute does not permit the provision, or, as the AFP-I4AW argued, that the Department lacked a "legal justification," largely did not engage with that reasoning in the NPRM. The group of U.S. Senators, for example, stated that the statute meant to place the burden on procuring agencies, not contractors. This comment, however, did not acknowledge that the compensation provision in the operation-of-law proposal does in practice place the ultimate responsibility on the contracting agency rather than contractors.

The commenters raising legal questions about the operation-of-law proposal based their arguments largely on the DBA's express requirement that contracting agencies incorporate the contract clauses into covered contracts. The commenters suggested that this language prevents the Department from enforcing the Act where the clause is not included. The mandatory nature of this statutory requirement, however, is itself the basis for the operation-of-law provision. *See K-Con*, 908 F.3d at 724. Where Congress has expressly stated that a contract clause must be included in certain types of contracts, that is precisely where it is not appropriate to allow a contracting agency to effectively nullify the statutory command by failing

<sup>255</sup> *See* Kim Slowey, "The Dotted Line: Beefing up Davis-Bacon compliance," *Construction Dive* (Mar. 30, 2021), <https://www.constructiondive.com/news/the-dotted-line-beefing-up-davis-bacon-compliance/597398>.

<sup>256</sup> In addition to the notice provided by the regulation itself, contractors are provided due process through the administrative procedures that allow contractors to challenge a ruling by the Department that a contract is covered by the DBRA or that back wages are owed. *See generally* 29 CFR 5.11.

to act. *See S.J. Amoroso Const. Co. v. United States*, 12 F.3d 1072, 1075 (Fed. Cir. 1993) (discussing *G.L. Christian & Assocs.*, 312 F.2d at 426).<sup>257</sup> As the Court of Federal Claims explained in denying rehearing on the original decision in *G.L. Christian & Assocs.*, the animating principle is that “[o]bligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against ad hoc encroachment or dispensation by the executive.” *G.L. Christian & Assocs. v. United States*, 320 F.2d 345, 350–51 (Ct. Cl. 1963) (denying reconsideration). Therefore, the Department does not interpret the Davis-Bacon Act’s requirement that agencies include a mandatory contract clause in covered contracts to preclude the proposed operation-of-law provision as designed.<sup>258</sup>

The Department also disagrees with FTBA and the Wiley Rein partners that the NPRM read too much into *Call Henry, Inc. v. United States*, 855 F.3d 1348, 1351 n.1 (Fed. Cir. 2017). The FTBA stated that the *Call Henry* decision only discussed operation of law with regard to section 4(c) of the SCA, under which a predecessor contractor’s CBA is recognized by operation of law as the contract wage determination. That observation is not accurate. While the opinion also

discusses section 4(c), the Department’s citation was to the opinion’s separate discussion of the SCA price adjustment clauses. *See Call Henry*, 855 F.3d at 1351 n.1 (Fed. Cir. 2017). There, the Federal Circuit noted that the appropriate SCA price adjustment clause at 48 CFR 52.222–43 had not been included in the contract at issue in that case, but explained that “[p]ursuant to the Christian doctrine, the mandatory SCA clauses applicable to this contract are incorporated by reference, as those clauses reflect congressionally enacted, deeply ingrained procurement policy.” *Id.* (citing *G.L. Christian & Assocs.*, 312 F.2d at 426). That the Federal Circuit found the SCA price adjustment clauses satisfy those elements of the *Christian* doctrine is certainly relevant to whether it is justifiable to require the DBRA clauses to be effective by operation of law as well.

The Wiley Rein partners also questioned whether the Supreme Court’s decision in *Coutu* casts doubt on the Department’s reference to *K-Con* and the *Christian* doctrine. As noted in the NPRM, before proposing this new regulatory provision, the Department considered the implications of the Supreme Court’s decision in *Coutu*. In that case, the Court held that there was no implied private right of action for workers to sue under the Davis-Bacon Act—at least when the contract clauses were not included in the contract. *Coutu*, 450 U.S. at 768–69 & nn.17, 19. Although not the focus of the decision, the Court also stated in dicta that the workers in that case could not rely on the *Christian* doctrine to read the missing DBA contract clause into the contract. *Id.* at 784 & n.38.<sup>259</sup> For the reasons discussed in the NPRM and below, however, the Department has concluded that the operation-of-law provision in the final rule is consistent with *Coutu* and that the distinctions between the final rule and the *Christian* doctrine address the concerns that animated the *Coutu* Court in that case.

One of the Court’s fundamental concerns in *Coutu* was that an implied private right of action could allow parties to evade the Department’s review of whether a contract should be covered by the Act. The Court noted that there was at the time “no administrative procedure that expressly provides review of a coverage determination after the contract has been let.” 450 U.S. at 761 n.9.<sup>260</sup> If an

implied private right of action existed under those circumstances, private parties could effectively avoid raising any questions about coverage with the Department or with the contracting agency—and instead bring them directly to a Federal court to second-guess the administrative determinations. *Id.* at 783–84.

Another of the Court’s concerns was that such an implied private right of action would undermine Federal contractors’ reliance on the wage determinations that the Federal government had (or had not) incorporated into bid specifications. The Supreme Court noted that one of the purposes of the 1935 amendments to the DBA was to ensure that contractors could rely on the predetermination of wage rates that apply to each contract. 450 U.S. at 776. If, after a contract had already been awarded, a court could find that a higher prevailing wage applied to that contract than had been previously determined, the contractor could lose money because of its mistaken reliance on the prior rates—all of which would undermine Congress’s intent. *Id.* at 776–77.

The operation-of-law procedure in this final rule alleviates both of these concerns. As noted, the procedure differs from the *Christian* doctrine because—like under the existing regulation at § 1.6(f)—contractors will be compensated for any increase in costs caused by the government’s failure to properly incorporate the clauses or wage determinations. The proposed procedure therefore 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.<sup>261</sup> In light of the clear rule

<sup>257</sup> Like the *K-Con* decision, the *S.J. Amoroso Construction Co.* matter also involved the application of statutory coverage language which mirrors the text of the DBA. *Compare* 41 U.S.C. 8303(a) (formerly cited as 41 U.S.C. 10b) (requiring, under the 1933 Buy America Act, that “[e]very contract for the construction, alteration, or repair of any public building or public work in the United States . . . shall contain” certain contract provisions) with 40 U.S.C. 3142(a) (requiring, under the DBA, that “[e]very contract . . . for construction, alteration, or repair . . . of public building or public works . . . shall contain a provision” setting prevailing wages).

<sup>258</sup> The Department disagrees with the FTBA that this statutory language gives Federal courts “sole power and domain” to determine whether any DBA requirements are applicable by operation of law. While the *Christian* doctrine is a judicially-made rule, the concept of “operation of law” is not limited to judge-made rules. *See Operation of Law*, Black’s Law Dictionary (11th ed. 2019) (defining the concept as “[t]he means by which a right or a liability is created for a party regardless of the party’s actual intent”). Likewise, the potential for such a judicially imposed outcome does not bar administrative agencies from identifying specific circumstances where a rule will be effective by operation of law. *See, e.g.*, 19 CFR 111.45(b) (prescribing that if a customs broker fails to pay user fee, permit is revoked by operation of law); 29 CFR 38.25 (prescribing that a grant applicant’s nondiscrimination assurance is considered incorporated by operation of law into grants and other instruments under the Workforce Innovation and Opportunity Act); 49 CFR 29.207 (prescribing that if a Tribe submits a final offer to the Department of Transportation to resolve a dispute and the Department takes no action with the 45-day review period, the offer is accepted by operation of law).

<sup>259</sup> *See* 48 FR 19532. Moreover, although the Department has used § 1.6(f) to address post-award coverage determinations, as noted here, the language of that paragraph references wage determinations and does not explicitly address the omission of required contract clauses. The Department now seeks to remedy that ambiguity in § 1.6(f) by adding similar language to § 5.6, as discussed below, in addition to the proposed operation-of-law language at § 5.5(e).

<sup>260</sup> For the same reason, the *BellSouth* case cited by the Wiley Rein partners does not undermine the Department’s logic. In that case, after the government unilaterally modified a contract pursuant to 29 CFR 1.6(f), the government denied part of a request for compensation, and attempted to use the *Christian* doctrine to circumvent the requirement for compensation in § 1.6(f) and the applicable FAR provisions. ASBCA No. 45955, Sept. 27, 1994, 94–3 BCA ¶ 27231. Under the proposed operation-of-law provision in § 5.5(e), to the contrary, the Department is specifying that when the contract clauses are effective by operation of law, contractors will be compensated “for any resulting increase in wages in accordance with applicable law.”

<sup>259</sup> *See* Steven Feldman, 1 Government Contract Awards: Negotiation and Sealed Bidding § 1:7 n.16 (rev. Oct. 2022) (describing the discussion in *Coutu* as “infrequently recognized dictum”).

<sup>260</sup> Section 1.6(f) did not go into effect until Apr. 29, 1983, nearly 2 years after the *Coutu* decision.

requiring compensation, the Department is not persuaded by the concerns raised by commenters that contracting agencies might simply ignore the compensation requirement.<sup>262</sup>

Nor does the operation-of-law rule risk creating an end-run around the administrative procedures set up by contracting agencies and the Department pursuant to Reorganization Plan No. 14. Instead, the provision will function as part of an administrative structure implemented by the Administrator and subject to the Administrator's decision to grant a variance, tolerance, or exemption. Its enactment should not affect one way or another whether any implied private right of action exists under the statute. Executive Order 11246 provides a helpful comparator. In 1968, the Department promulgated the regulation clarifying that the Executive Order's equal opportunity contract clause would be effective by "operation of the Order" regardless of whether it is physically incorporated into the contract. 41 CFR 60-1.4(e). That regulation was upheld, and the *Christian* doctrine was also found to apply to the required equal opportunity contract clause. *See Miss. Power & Light*, 638 F.2d at 905-06. Nonetheless, courts have widely held that E.O. 11246 does not convey an implied private right of action. *See, e.g., Utley v. Varian Assocs., Inc.*, 811 F.2d 1279, 1288 (9th Cir. 1987).

The Department has also considered whether the operation-of-law provision will lead to an increase in bid protest litigation or expand the authority of the Court of Federal Claims or other contracting appeal tribunals to develop their own case law on the application of the DBRA without the input of the Department. In exploring this question, the Department considered proposing an alternative procedure in which the operation-of-law rule would only become effective after a determination by the Administrator or a contracting agency that a contract was in fact covered. The Department, however, does not believe that such an approach is necessary because both the GAO and the Federal Circuit maintain strict waiver rules that prohibit post-award bid protests based on errors or ambiguities in the solicitation. *See NCS/EML JV, LLC*, B-412277, 2016 WL

335854, at \*8 n.10 (Comp. Gen. Jan. 14, 2016) (collecting GAO decisions); *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312-13 (Fed. Cir. 2007).<sup>263</sup>

The operation-of-law provision as enacted in this final rule also will not affect the well-settled case law in the Court of Federal Claims—developed after the *Coutu* decision—that only the Department of Labor has jurisdiction to resolve disputes arising out of the labor standards provisions of the contract. As part of the post-*Coutu* 1982 final rule, the Department enacted a provision at 29 CFR 5.5(a)(9) that requires a disputes clause with that jurisdictional limitation to be included in all DBRA-covered contracts. *See* 47 FR 23660-61 (final rule addressing comments received on the proposal). The labor standards disputes clause creates an exception to the Contract Disputes Act of 1974 and effectively bars the Court of Federal Claims from deciding substantive matters related to the Davis-Bacon Act and Related Acts. *See, e.g., Emerald Maint., Inc. v. United States*, 925 F.2d 1425, 1428-29 (Fed. Cir. 1991). Under the operation-of-law provision, the disputes clause at § 5.5(a)(9) will continue to be effective even when it has been omitted from a contract because the language of the operation-of-law provision applies the principle to all of the required contract clauses in § 5.5(a)—including § 5.5(a)(9). As a result, under the operation-of-law provision, disputes regarding DBRA coverage or other related matters arising under § 5.5(a)(9) should continue to be heard only through the Department's administrative process instead of or prior to any judicial review in the Court of Federal Claims, and there is no reason to believe that the implementation of the operation-of-law provision would lead to a parallel body of case law in that venue.

The Department has also considered the Wiley Rein partners' concern that the operation-of-law provision could result in litigation pursuant to the False Claims Act (FCA). *See* 31 U.S.C. 3729 *et seq.* The FCA, which applies to claims submitted by contractors for payment under the DBRA, provides an important avenue for private whistleblowers to assist the government in recovering funds that have been paid out as a result

of false or fraudulent claims. *See, e.g., United States ex rel. Int'l Bhd. of Elec. Workers Loc. 98 v. Farfield Co.*, 5 F.4th 315, 343 (3d Cir. 2021). To be actionable, the FCA requires false claims to be "material" to the Government's decision to make payments in response to the claims. *Id.* at 342 (citing 31 U.S.C. 3729(a)(1)(B)). Where a DBA contractor fails to comply with the DBRA contract clauses, the regulations require contracting agencies to suspend payments to the contractor. *See* 29 CFR 5.9 (stating in the event of a contractor's compliance failure, the government "shall" take action if necessary to suspend payments). And where a contractor knowingly misrepresents information on the certified payroll it must submit, it subjects itself to potential criminal penalties for false statements (which are referenced on the certified payroll forms themselves) and debarment.<sup>264</sup>

The circumstances may be different, however, where no certified payroll has been submitted because the contract clause has been omitted entirely from the contract by the contracting agency. As noted in the NPRM, debarment requires some degree of intent, so it would generally not be appropriate to debar a contractor for violations where the contracting agency omitted the contract clause and the clause was subsequently incorporated retroactively or found to be effective by operation of law. The FCA also has a scienter requirement that, like the DBRA debarment standard, requires a level of culpability beyond negligence. *See United States v. Comstor Corp.*, 308 F. Supp. 3d 56, 88 (D.D.C. 2018). Whether the FCA scienter requirement can be satisfied will depend on the facts and circumstances of any individual case. For example, where a contracting agency omits the contract clauses based on case law or guidance from the Department that is public or shared with the contractor, a relator would be unlikely to be able to satisfy the FCA's scienter requirement for the same reasons that debarment would generally not be appropriate. For these reasons, there is no certainty that the operation-of-law provision will lead to a

<sup>262</sup> The Department is not persuaded by the speculation from the group of U.S. Senators that contracting agencies might "use the threat of refusing to award contracts in the future" in order to pressure contractors not to seek compensation. The Department is not aware of any basis on which a contracting agency would be permitted to deny future awards because a contractor sought reimbursement under that regulation that expressly provides for such compensation.

<sup>263</sup> In *Blue & Gold*, the National Park Service failed to include the SCA contract clauses in a contract that the Department of Labor later concluded was covered by the Act. The Federal Circuit denied the bid protest from a losing bidder because "a party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of the bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims." 492 F.3d at 1313.

<sup>264</sup> The Department pursues recovery (and suspension or withholding as necessary) regardless of the amount of unpaid wages. Davis-Bacon enforcement efforts at the Department in the last decade have resulted in the recovery of more than \$229 million in back wages for over 76,000 workers. *see* 2020 GAO Report, at 39, *supra* note 14. This recovery occurred across 14,639 compliance determinations, meaning that the average recovery in a compliance investigation was under \$16,000.

significant expansion of FCA disputes.<sup>265</sup>

Finally, the Wiley Rein partners' concern about arbitrators potentially deciding Davis-Bacon coverage issues does not warrant a different approach. The Department believes it is unlikely that arbitrators will be asked to consider Davis-Bacon questions with any frequency. When a dispute turns on Davis-Bacon determinations that implicate the Department's technical expertise, arbitration is not appropriate. See *IBEW Local 113 v. T&H Services*, 8 F.4th 950, 962–63 (10th Cir. 2021). Moreover, mandatory pre-dispute arbitration agreements neither prevent workers from alerting agencies to potential violations of the law nor limit agencies' authority to pursue appropriate enforcement measures in response to worker complaints. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287 (2002). To the extent that any arbitrator considers a Davis-Bacon coverage question, however, it would not run the risk of creating a separate body of law because arbitration decisions are generally sealed and non-precedential.

Given all of these continued safeguards and considerations, the Department believes it is not necessary to expressly limit the proposed operation-of-law provision to be effective only after the Department or a contracting agency determines that contract clauses or wage determinations were erroneously omitted, as the Wiley Rein partners advocated.

The Department also considered the Wiley Rein partners' suggestion to replace the operation-of-law provision with post-award procedures similar to the SCA regulation at 29 CFR 4.5(c). The SCA regulation at § 4.5(c) is similar to the existing DBRA regulation at § 1.6(f). It covers situations where the Department discovers that a contracting agency made an erroneous determination that the SCA did not apply to a particular contract and/or failed to include an appropriate wage determination in the contract. *Id.* § 4.5(c). In those situations, the SCA regulation states that the contracting agency has 30 days from the notification by the Department to incorporate the missing clauses or wage determinations through the exercise of any all authority that may be needed, including through

its authority to pay any additional costs. *Id.* It also states that the Department can require retroactive application. *Id.* The Wiley Rein partners wrote that a primary benefit of this proposal would be to avert FCA litigation or other disputes. For the reasons discussed above, the Department is not persuaded that the final rule will lead to a significant increase in FCA or other litigation.

This language from § 4.5(c), moreover, does not fully address the underlying problems that the Department is seeking to address with the operation-of-law provision. Section 4.5(c) still leaves the Department's enforcement efforts dependent on the willingness or ability of contracting agencies to pursue modification of a contract at the Department's direction, and the speed with which they accomplish the necessary modification. While many agencies timely act in response to the Department's requests under § 4.5(c), the Department has also experienced many of the same challenges enforcing the SCA under § 4.5(c) as it has experienced enforcing the DBRA under § 1.6(f). Thus, modeling the updated DBRA post-award modification regulations based on § 4.5(c) would be an improvement over the current status quo, but such a rule would not resolve the contract-modification issues that have motivated the operation-of-law proposal.

While the Department declines to replace the operation-of-law provision with a § 4.5(c)-type provision, some of the Wiley Rein partners' animating concerns are nonetheless addressed in the related aspects of the final rule. For example, for contracts covered by both the DBA and SCA, the partners stated that their proposal would simplify contract administration by allowing contracting agencies to be able to make both DBA and SCA contract modifications in the same contract modification. Using similar contract-modification procedures for each Act would allow this. However, the existence of an operation-of-law provision in the DBRA regulations is not an obstacle to this sort of coordination. As described in the NPRM, the operation-of-law provision is intended to work in tandem with the existing wage-determination modification procedure at § 1.6(f), as well as the new contract-modification procedure in § 5.6(a)(1)(ii). Thus, notwithstanding an operation-of-law provision, the Department could still issue a direction to a contracting agency to incorporate new terms for application of both the SCA and DBRA in the same contract.

Similarly, the final rule addresses the Wiley Rein partners' concern about the need for a clear date marking the dividing line between prospective and retroactive applicability. The language in § 5.5(e) specifically subjects such a determination to the Administrator's authority to grant a variance, tolerance, or exemption. As noted in the NPRM, this includes the authority to limit retroactive enforcement traditionally exercised under 29 CFR 1.6(f). Thus, when the Administrator issues a coverage determination pursuant to the operation-of-law provision, the Administrator will be authorized to make a decision about the date back to which the retroactive application will be enforced and the date from which prospective application is required. *Cf. FlightSafety Def. Corp.*, ARB No. 2022–0001, slip op. at 16–19 (Feb. 28, 2022) (affirming the Administrator's determination, in an SCA matter, that under the circumstances of that case the prospective application of a missing contract clause should begin at the start of the subsequent Contract Line Item Number period). This authority should sufficiently allay the Wiley Rein partners' concerns.

The Department has considered AGC's request for further clarification regarding the manner in which the compensation requirement would work. The language of § 5.5(e) requires that compensation should be made "in accordance with applicable law." As a general matter, the FAR will provide the applicable law for direct Federal procurement contracts. The FAR currently includes price adjustment clauses applicable to different types of Davis-Bacon contracts. See, e.g., 48 CFR 52.222–30, 52.222–31 and 52.222–32. Because the FAR and its price-adjustment contract clauses provide applicable law, the Department does not believe it is appropriate to adopt CC&M's suggestion to mandate that contractors be reimbursed 150 percent of the difference between current and required wage rates. The Department also does not believe that it is necessary to penalize contracting agencies when the compensation provision alone already provides sufficient incentive to agencies to ensure that contract clauses and applicable wage determinations are correctly incorporated into covered contracts.

Finally, the Wiley Rein partners suggested that the Department should defer the effective date for the operation-of-law provision until the FAR is updated to expressly require equitable adjustments in these circumstances. In the **DATES** section of this final rule, the Department discusses

<sup>265</sup> AFP–I4AW also expressed a generalized concern about increased litigation from the operation-of-law provision. As there is no certainty that the provision will increase bid protests, claims in the Court of Federal Claims, or FCA litigation, the Department does not agree that such generalized concern is a persuasive reason to decline to adopt the proposal.

the applicability date of the rule. *See also infra* section III.C (“Applicability Date”). The provisions of parts 3 and 5 of the final rule (including the operation-of-law provisions at §§ 3.11(e) and 5.5(e)) are generally applicable only to contracts entered into after the effective date of the final rule.

Once the operation-of-law provision at § 5.5(e) is effective and applicable to a contract, it will require the incorporation as a matter of law of any omitted contract clauses and wage determinations that would have been appropriate and necessary to include in the contract at the time the contract was entered into. Because § 5.5(e) will generally only apply to contracts newly entered into after the applicability date, the Department would not interpret § 5.5(e) to require the contract clause provisions as amended in this final rule to be incorporated by operation of law to replace the contract clauses that have already been physically incorporated into contracts entered into before the applicability date. Similarly, § 5.5(e) would not incorporate the contract clauses into any contract from which the clauses have been wrongly omitted, unless that contract has been entered into after the effective date of the final rule. For any contracts entered into prior to the effective date of the final rule that are missing required contract clauses or wage determinations, the Department will seek to address any omissions solely through the modification provisions in the existing regulation at § 1.6(f).

The Department declines to defer the effective date of the operation-of-law provision at § 5.5(e) for contracts governed by the FAR, but has amended § 5.5(e) to clarify how the provision interacts with the FAR. The final rule clarifies that for contracts governed by the FAR, the contract clauses that are made effective by operation of law are the Davis-Bacon contract clauses in the FAR itself. Accordingly, for any contracts that are entered into after the effective date of the final rule but before the effective date of any amendment to the FAR (including an amendment to the required FAR DBRA contract clauses), § 5.5(e) would incorporate by operation-of-law the FAR contract clauses that are mandatory under the FAR regulation in effect at the time the FAR contract was entered into. As a result, it is not necessary to defer the effective date of § 5.5(e).

The final rule thus adopts the regulatory text of § 5.5(e) as proposed, with the limited modification discussed above.

### (2) § 3.11 Application of Copeland Act Regulations

The Department also proposed a revision to § 3.11 to conform to the “operation of law” provision in § 5.5(e). Section 3.11 currently requires all covered contracts to “expressly bind the contractor or subcontractor to comply” with the applicable regulations from part 3. 29 CFR 3.11. The existing regulations then reference § 5.5(a)’s longstanding requirement that agency heads require contracting officers to insert appropriate contract clauses into all covered contracts. *See id.* The contract clause at § 5.5(a)(3)(ii) contains the certified payroll requirements that are derived from and mirror the requirements in part 3. *See* section III.B.3.iii.(B).

The proposed new operation-of-law paragraph in § 5.5(e) makes all of the contract clauses required by § 5.5(a) effective by operation of law even when they have been wrongly omitted from a covered contract. Thus, in accordance with § 5.5(e), the recordkeeping requirements in the contract clause at § 5.5(a)(3)(ii) are made effective by operation of law where necessary. The Department proposed the amendment to § 3.11 as a conforming change to provide notice to contractors that the applicable part 3 regulations, required to be included in every contract by that provision, are effective by operation of law where necessary.

UBC expressed support for the proposed change to § 3.11, writing that it would improve application and enforcement of the DBRA standards. AFPF–I4AW opposed the operation-of-law addition to § 3.11, arguing that the change will lead to greater litigation and wasted resources. The Department has considered these comments, which parallel the comments received on § 5.5(e). The Department believes that the proposed language in § 3.11 provides appropriate additional notice that the regulations in part 3 govern DBRA-covered contracts whether or not their requirements have been physically included through a contract clause or otherwise. For the same reasons articulated above with regard to § 5.5(e), the Department does not believe that the operation-of-law provision will significantly increase litigation or otherwise waste resources. By making required contract clauses effective by operation of law, the Department will avoid the enforcement challenges that have arisen in the application of the current contract-modification provision at § 1.6(f). The final rule therefore adopts the language of § 3.11 as proposed.

### (3) § 5.5(d) Incorporation of Contract Clauses and Wage Determinations by Reference

The Department proposed a new provision at § 5.5(d) to clarify that the clauses and wage determinations are equally effective if they are incorporated by reference, notwithstanding the requirement in § 5.5(a) that contracting agencies insert contract clauses “in full” into non-FAR contracts and the language of the contract clause at § 5.5(a)(1)(i) that specifies that the applicable wage determination “is attached” to such contracts. As the Department noted in the NPRM, this follows from the FAR and the common law of contract. Under the FAR, a contract that contains a provision expressly incorporating the clauses and the applicable wage determination by reference may be tantamount to insertion in full. *See* 48 CFR 52.107, 52.252–2. And, as a general matter, the terms of a document appropriately incorporated by reference into a contract effectively bind the parties to that contract. *See* 11 Williston on Contracts section 30:25 (4th ed.) (“Interpretation of several connected writings”).

Only one commenter, CC&M, referenced this proposed language. In the comment, CC&M stated general opposition to the idea that incorporation by reference can be just as effective as inserting the full Davis-Bacon contract section. The comment did not address the common use of incorporation by reference in the FAR or in the common law. The Department agrees with CC&M that it is preferable for contracting agencies to insert contract clauses and wage determinations in full into covered contracts. That is why the Department maintained instructions to contracting agencies in § 5.5(a) that they continue to be required to insert the contract clauses “in full” into non-FAR-covered contracts.<sup>266</sup> The Department does not agree, however, that the failure by a contracting agency to do so should result in a disregard of the statutory command that a contract should be covered and the workers on the contract paid a prevailing wage. This is particularly true where the contract includes express language making compliance with the DBRA a term of the agreement. In such a situation, it generally would be sufficient under the common law to find the missing contract clauses and wage determinations to be effective through incorporation by reference. The same

<sup>266</sup> The Department, however, has revised its instructions in § 5.5(a) to reflect that it is FAR convention to incorporate clauses by reference, as opposed to in full text.

should be true under a statute that has the recognized purpose of protecting workers and ensuring that they are paid prevailing wages. *See Binghamton Constr. Co.*, 347 U.S. at 178.

As the Department explained in the NPRM, these various proposed parallel regulatory provisions are consistent and work together. They require the best practice of physical insertion or modification of contract documents (or, where warranted, incorporation by reference), so as to provide effective notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives. At the same time, they create a safety net to ensure that where any mistakes are made in initial determinations, the prevailing wage required by statute will still be paid to the laborers and mechanics on covered projects.

Accordingly, the final rule adopts the language of § 5.5(d) as proposed.

#### (4) § 1.6(f) Post-Award Correction of Wage Determinations

In addition to the operation-of-law language at § 5.5(e), the Department proposed to make several changes to the regulation at § 1.6(f) that contains the current post-award procedure requiring contracting agencies to incorporate an omitted wage determination. First, as discussed above in section III.B.1.vi. (§ 1.6 Use and effectiveness of wage determinations), the Department proposed adding titles to § 1.6(a)–(g) in order to improve readability of the section as a whole. The proposed title for § 1.6(f) was “Post-award determinations and procedures.” The Department also proposed dividing § 1.6(f) into multiple paragraphs to improve the organization and readability of the important rules it articulates.

At the beginning of the section, the Department proposed a new § 1.6(f)(1), which explains generally that if a contract subject to the labor standards provisions of the Acts referenced by § 5.1 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 Department proposed to add language to § 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 current version of § 1.6(f) explicitly provides only for a determination by the Administrator that a correction must be made. Some contracting agencies had interpreted the existing language as

precluding an action by a contracting agency alone—without action by the Administrator—to modify an existing contract to incorporate a correct wage determination. The Department proposed the new language to clarify that the contracting agency can take such action alone. Where a contracting agency does intend to take such an action, proposed language at § 1.6(f)(3)(iii) would require it to notify the Administrator of the proposed action.

In the proposed reorganization of § 1.6(f), the Department located the discussion of the Administrator’s determination that a correction is necessary in a new § 1.6(f)(2). The only proposed change to the language of that paragraph was not substantive. The current text of § 1.6(f) refers to the action that the Administrator may take as an action to “issue a wage determination.” However, in the majority of cases, where a wage determination is not included in the contract, the proper action by the Administrator will not be to issue a new or updated wage determination, as that term is used in § 1.6(c), but to identify the appropriate existing wage determination that applies to the contract. Thus, to eliminate any confusion, the Department proposed to amend the language in this paragraph to describe the Administrator’s action as “requir[ing] the agency to incorporate” the appropriate wage determination. To the extent that, in an exceptional case, the Department would need to “issue” a new project wage determination to be incorporated into the contract, the proposed new language would require the contracting agency to incorporate or require the incorporation of that newly issued wage determination.

The Department also proposed to amend the language in § 1.6(f) that describes the potential corrective actions that an agency may take. In a non-substantive change, the Department proposed to refer to the wage determinations that must be newly incorporated as “correct” wage determinations instead of “valid” wage determinations. This is because the major problem addressed in § 1.6(f)—in addition to the failure to include any wage determination at all—is the use of the wrong wage determinations. Even while wrong for one contract, a wage determination may be valid if used on a different contract to which it properly applies. It is therefore more precise to describe a misused wage determination as incorrect rather than invalid. The proposed amendment would also add to the reference in the current regulation at § 1.6(f) to “supplemental agreements” or

“change orders” as the methods for modifying contracts post-award to incorporate valid wage determinations. The Department proposed, in a new § 1.6(f)(3), to instruct that agencies make such modifications additionally through the exercise of “any other authority that may be needed.” This language parallels the Department’s regulation at 29 CFR 4.5 for similar circumstances under the SCA.

The Department also proposed to make several changes to § 1.6(f) to clarify that the requirements apply equally to projects carried out with Federal financial assistance as they do to DBA projects. The proposed initial paragraph at § 1.6(f)(1) contains new language that states expressly that where an agency is providing Federal financial assistance, “the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the correct wage determination(s) into its contracts.” Similarly, the reference to agencies’ responsibilities in proposed new § 1.6(f)(3) requires an agency to terminate and resolicit the contract or to “ensure” the incorporation (in the alternative to “incorporating” the correct wage determination itself)—in recognition that this language applies equally to direct procurement where the agency is a party to a DBA-covered contract and Related Acts where the agency must ensure that the relevant State or local agency incorporates the corrected wage determination into the covered contract. Finally, the Department also proposed to amend the requirement that the incorporation should be “in accordance with applicable procurement law” to instead reference “applicable law.” This change is intended to recognize that the requirements in § 1.6 apply also to projects executed with Federal financial assistance under the Related Acts, for which the Federal or State agency’s authority may not be subject to Federal procurement law. None of these proposed changes represent substantive changes, as the Department has historically applied § 1.6(f) equally to both DBA and Related Act projects. *See, e.g., City of Ellsworth*, ARB No. 14–042, 2016 WL 4238460, at \*6–8.

In the new § 1.6(f)(3)(iv), the Department proposed to include the requirements from the existing regulations that contractors must be compensated for any change and that the incorporation must be retroactive to the beginning of the construction. That retroactivity requirement, however, is amended to include the qualification that the Administrator may direct otherwise. As noted above, the

Administrator may make determinations of non-retroactivity on a case-by-case basis. In addition, consistent with the SCA regulation on post-award incorporation of wage determinations at 29 CFR 4.5(c), the Department proposed including language in a new § 1.6(f)(3)(ii) to require that incorporation of the correct wage determination be accomplished within 30 days of the Administrator's request, unless the agency has obtained an extension.

The Department also proposed to include new language at § 1.6(f)(3)(v), applying to Related Acts, instructing that the agency must suspend further payments or guarantees if the recipient refuses to incorporate the specified wage determination and that the agency must promptly refer the dispute to the Administrator for further proceedings under § 5.13. This language is a clarification and restatement of the existing enforcement regulation at § 5.6(a)(1), which provides that no such payment or guarantee shall be made "unless [the agency] ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts."

In proposed new language at § 1.6(f)(3)(vi), the Department included additional safeguards for the circumstances in which an agency does not retroactively incorporate the missing clauses or wage determinations and instead seeks to terminate the contract. The proposed language provided that before termination, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism. This language is consistent with the existing FAR provision at 48 CFR 49.112–2(c) that requires contracting officers to ascertain whether there are any outstanding labor violations and withhold sufficient funds if possible before forwarding the final payment voucher. It is also consistent with the language of the template termination settlement agreements at 48 CFR 49.602–1 and 49.603–3 that seek to ensure that any termination settlement agreement does not undermine the government's ability to fully satisfy any outstanding contractor liabilities under the DBRA or other labor clauses.

Finally, the Department included a proposed provision at § 1.6(f)(4) to clarify that the specific requirements of § 1.6(f) to physically incorporate the correct wage determination operate in addition to the proposed requirement in § 5.5(e) that makes the correct wage determination applicable by operation

of law. As discussed above, such amendment and physical incorporation (including incorporation by reference) is helpful in order to provide notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives.

Two contractor associations, CEA and SMACNA, generally expressed support for the Department's proposed amendments to § 1.6(f). They noted in particular that the proposed amendments would allow contracting agencies to incorporate correct wage determinations upon their own initiative as well as at the request of the Administrator. These two commenters, along with the UBC, supported the proposed language at § 1.6(f)(4) that states the operation-of-law provision at § 5.5(e) would operate in tandem with the requirement that contracting agencies insert wage determinations into contracts where they have been omitted.

In contrast, ABC opposed the proposed changes to § 1.6(f), stating that the proposal would allow contracting agencies to make a change "without a determination from WHD of special circumstances justifying such incorporation" as required by current rules. ABC argued that this "threatens contractors with improper changes to their government contracts post-award." ABC also stated that the proposed new language at § 1.6(f)(3)(vi) that requires withholding before contract termination "imposes new withholding and cross-withholding requirements that violate longstanding understandings of the contract-based scope of the DBA and FAR contract requirements."

AGC stated that the proposed language needs additional clarification. As AGC noted, the proposed rule stated at § 1.6(f)(3)(i) that "[u]nless the Administrator directs otherwise, the incorporation of the clauses required by § 5.5 must be retroactive." AGC requested clarification about whether the Administrator's authority to "direct[]" otherwise "applies only to the retroactive incorporation or also to the requirement that contractors must be compensated for any increased costs as a result. AGC also asked two other questions regarding compensation: first, whether the proposal would allow the Administrator to deny compensation to contractors when a wage determination is retroactively included; and second, what would happen if a missing wage determination were not retroactively included in a contract. AGC stated that it is absolutely necessary that prime contractors be compensated for increased costs that result from a contracting agency failure.

The Department considered the comments received regarding the proposed revisions to § 1.6(f) and agrees with the commenters supporting the amendments to this section. Allowing contracting agencies to take action to correct missing or incorrect wage determinations will streamline compliance and enforcement. Earlier action to remedy such problems will be more protective of workers, who otherwise may need to wait a longer time to receive the prevailing wages they are due. In response to ABC's comment about "improper changes," the Department notes that proposed § 1.6(f)(3)(iii) requires agencies to provide notice to the Administrator of their proposed action before they require incorporation on their own initiative. This requirement provides the Department with the opportunity to help ensure that the contracting agency's proposed action is appropriate. The Department also considered ABC's comments about withholding, but those comments appear to be directed toward the Department's cross-withholding proposals. The Department has addressed comments regarding these proposals in section III.B.3.xxiii ("Withholding").

The proposed language at § 1.6(f)(3)(i) addressed the Administrator's authority to direct that a newly incorporated wage determination should not be enforced retroactively to the beginning of the contract. The Administrator does not have separate authority to "direct[]" otherwise" with regard to contractor compensation. Rather, the proposed language of § 1.6(f)(3)(iv) states that the contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination, and the language at proposed § 1.6(f)(3) states that the method of adjustment in contract prices "should be in accordance with applicable law." For direct Federal procurement contracts, the extent to which compensation is due, if any, is governed by the FAR and any price adjustment clauses applicable to different types of Davis-Bacon contracts. *See, e.g.*, 48 CFR 52.222–30, 52.222–31 and 52.222–32.

The provisions regarding compensation in § 1.6(f) apply where the contracting agency incorporates the correct wage determination into a contract post-award. They do not apply in the hypothetical AGC provides, in which the contractor believes that a wage determination is missing and the missing wage determination is not retroactively included in the contract. While it is important for enforcement purposes that the Department and



contracting agencies have the ability to modify an award to correct errors (with appropriate compensation), the Department has generally found it to be inappropriate for a contractor to seek to modify wage determinations post-award to attempt to receive compensation for wage rates it has been paying already. See *Joe E. Woods, Inc.*, ARB No. 96-127, 1996 WL 678774 (Nov. 19, 1996).

The Department proposed several of the changes to § 1.6(f) in order to borrow language from the similar SCA provision at 29 CFR 4.5(c). That provision, as noted in the comment by the Wiley Rein partners, has been time-tested in the many years it has been in effect to address post-award modifications under the SCA. The changes proposed to § 1.6(f) are common-sense changes that provide clarity and consistency to the process of addressing circumstances where no wage determination, or the wrong wage determination, was attached to a covered contract. The changes will benefit construction workers by ensuring that they receive back wages owed to them in a timely manner.

The final rule therefore adopts the revisions to § 1.6(f) as proposed.

#### (6) § 5.6(a)(1) Post-Award Incorporation of Contract Clauses

The Department proposed to revise § 5.6(a)(1) to include language expressly providing a procedure for determining that the required contract clauses were wrongly omitted from a contract. As noted above, the Department has historically sought the retroactive incorporation of missing contract clauses by reference to the language regarding wage determinations in § 1.6(f). In the NPRM, the Department proposed to eliminate any confusion by creating a separate procedure at § 5.6(a)(1)(ii) that will apply specifically to missing contract clauses in a similar manner as § 1.6(f) continues to apply to missing or incorrect wage determinations.

The Department proposed to revise § 5.6(a)(1) by renumbering the existing regulatory text as § 5.6(a)(1)(i), and adding an additional paragraph, (a)(1)(ii), to include the provision clarifying that where a contract is awarded without the incorporation of the Davis-Bacon labor standards clauses required by § 5.5, the agency must incorporate the clauses or require their incorporation. This includes circumstances where the agency does not award a contract directly but instead provides funding assistance for such a contract. In such instances, the Federal agency, or other agency where appropriate, must ensure that the

recipient or subrecipient of the Federal assistance incorporates the required labor standards clauses retroactive to the date of contract award, or the start of construction if there is no award.

The proposed paragraph at § 5.6(a)(1)(ii) contained a similar set of provisions as § 1.6(f), as modified by the amendments to that paragraph proposed in the NPRM. These included that the incorporation must be retroactive unless the Administrator directs otherwise; that retroactive incorporation may be required by the request of the Administrator or upon the agency's own initiative; that incorporation must take place within 30 days of a request by the Administrator, unless an extension is granted; that the agency must withhold or otherwise obligate sufficient funds to satisfy back wages before any contract termination; and that the contractor should be compensated for any increase in costs resulting from any change required by the paragraph.

The Department also proposed to clarify the application of the current regulation at § 5.6(a)(1), which states that no payment, advance, grant, loan, or guarantee of funds will be approved unless the Federal agency ensures that the funding recipient or sub-recipient has incorporated the required clauses into any contract receiving the funding. Similar to the proposed provision in § 1.6(f)(3)(v), a new proposed provision at § 5.6(a)(1)(ii)(C) explains that such a required suspension also applies if the funding recipient refuses to retroactively incorporate the required clauses. In such circumstances, the issue must be referred promptly to the Administrator for resolution.

Similar to the proposed provision at § 1.6(f)(4), the Department also proposed a provision at § 5.6(a)(1)(ii)(E) that explains that the physical-incorporation requirements of § 5.6(a)(1)(ii) would operate in tandem with the proposed language at § 5.5(e), making the contract clauses and wage determinations effective by operation of law.

The proposed changes clarify that the requirement to incorporate the Davis-Bacon labor standards clauses is an ongoing responsibility that does not end upon contract award, and the changes expressly state the Department's longstanding practice of requiring the relevant agency to retroactively incorporate, or ensure retroactive incorporation of, the required clauses in such circumstances. As discussed above, such clarification is warranted because agencies occasionally have expressed confusion about—and even questioned whether they possess—the authority to incorporate, or ensure the incorporation of, the required contract

clauses after a contract has been awarded or construction has started.

The proposed changes similarly make clear that while agencies must retroactively incorporate the required clauses upon the request of the Administrator, agencies also have the authority to make such changes on their own initiative when they discover that an error has been made. The proposed changes also eliminate any confusion of the recipients of Federal funding as to the extent of the Federal funding agency's authority to require such retroactive incorporation in federally funded contracts subject to the Davis-Bacon labor standards. Finally, the proposed changes do not alter the provisions of 29 CFR 1.6(g), including its provisos.

The Department received only one comment, from ABC, regarding the proposed revisions to § 5.6(a). ABC referenced its concerns about the § 5.5(e) operation-of-law provision and stated that the proposal at § 5.6(a) “again holds contractors responsible without notice of DBA requirements.” The comment added that “[u]ntil now, contractors have not been held responsible for DBA compliance” in these circumstances and continued that “[c]hanging contract requirement after award is forbidden unless specific requirements of the FAR are satisfied.” ABC also stated that the NPRM is “unclear or else fails to justify the apparent expansion in the scope of the DBA's coverage.”

The Department disagrees with ABC. As explained above, these revisions merely codify the Department's practice of requiring contracting agencies to take the necessary steps to correct contracts which omit required clauses and does not represent an expansion in “the scope of the DBA's coverage.” Although § 1.6(f) expressly references only the authority of the Department to direct the incorporation of missing wage determinations, the Department has consistently interpreted that language as including by necessity the authority to request the incorporation of erroneously omitted contract clauses. See, e.g., DBRA-131 (Apr. 18, 1985) (requesting the contracting agency take action “in accordance with section 1.6(f) of Regulations, 29 CFR part 1, to include the Davis-Bacon provisions and an applicable wage decision” in a contract from which the contract clauses were erroneously omitted). Accordingly, the rule neither imposes new DBA responsibilities on contractors nor provides agencies with new authority to amend contracts which they could not have amended previously.

Finally, this proposed revision to § 5.6(a)(ii) does not “hold[] contractors responsible without notice of DBA requirements,” as ABC states, for the same reason that the new operation-of-law provision at § 5.5(e) does not. Like the operation-of-law provision, and like the existing regulation at § 1.6(f), the revision to § 5.6(a)(ii) contains a compensation provision that states that the contractor must be compensated for any increases in wages resulting the incorporation of a missing contract clause. Contractors will also receive sufficient notice through publication of the final rule. *See Merrill*, 332 U.S. at 384–85.

Retroactive incorporation of the required contract clauses ensures that agencies take every available step to ensure that workers on covered contracts are paid the prevailing wages that Congress intended. The final rule therefore adopts the language in § 5.6(a)(ii) as proposed.

#### xxi. Debarment

In accordance with the Department’s goal of updating and modernizing the DBA and Related Act regulations, as well as enhancing the implementation of Reorganization Plan No. 14 of 1950, the Department proposed a number of revisions to the debarment regulations that were intended both to promote consistent enforcement of the Davis-Bacon labor standards provisions and to clarify the debarment standards and procedures for the regulated community, adjudicators, investigators, and other stakeholders.

The regulations implementing the DBA and the Related Acts currently reflect different standards for debarment. Since 1935, the DBA has mandated 3-year debarment “of persons . . . found to have *disregarded their obligations to employees and subcontractors*.” 40 U.S.C. 3144(b) (emphasis added); *see also* 29 CFR 5.12(a)(2) (setting forth the DBA’s “disregard of obligations” standard). Although the Related Acts themselves do not contain debarment provisions, since 1951, their implementing regulations have imposed a heightened standard for debarment for violations under the Related Acts, providing that “any contractor or subcontractor . . . found . . . to be in *aggravated or willful violation of the labor standards provisions*” of any Related Act will be debarred “for a period not to exceed 3 years.” 29 CFR 5.12(a)(1) (emphasis added). The Department proposed to harmonize the DBA and the Related Act debarment-related regulations by applying the longstanding DBA debarment standard and related

provisions to the Related Acts as well. Specifically, in order to create a uniform set of substantive and procedural requirements for debarment under the DBA and the Related Acts, the Department proposed five changes to the Related Act debarment regulations so that they mirror the provisions governing DBA debarment.

First, the Department proposed to adopt the DBA statutory debarment standard—disregard of obligations to employees or subcontractors—for all debarment cases and to eliminate the Related Acts’ regulatory “aggravated or willful” debarment standard. Second, the Department proposed to adopt the DBA’s mandatory 3-year debarment period for Related Act cases and to eliminate the process under the Related Acts regulations for early removal from the ineligible list (also known as the debarment list).<sup>267</sup> Third, the Department proposed to expressly permit debarment of “responsible officers” under the Related Acts. Fourth, the Department proposed to clarify that under the Related Acts as under the DBA, entities in which debarred entities or individuals have an “interest” may be debarred. Related Acts regulations currently require a “substantial interest.” Finally, the Department proposed to make the regulatory scope of debarment language under the Related Acts consistent with the scope of debarment under the DBA by providing, in accordance with the current scope of debarment under the DBA, that Related Acts debarred persons and firms may not receive “any contract or subcontract of the United States or the District of Columbia,” as well as “any contract or subcontract subject to the labor standards provisions” of the DBA. *See* 29 CFR 5.12(a)(2).

#### (A) Relevant Legal Authority

The 1935 amendments to the DBA gave the Secretary authority to enforce—not just set—prevailing wages, including through the remedy of debarment. *See Coutu*, 450 U.S. at 758 n.3, 759 n.5, 776–77; *see also* S. Rep. No. 74–332, pt. 3, at 11, 14–15 (1935). Since then, the DBA has required 3-year debarment of persons or firms that have been found to “have disregarded their obligations to employees and subcontractors.” 40 U.S.C. 3144(b) (formerly 40 U.S.C. 276a-2 and known as section 3(a) of the DBA). The DBA also mandates debarment of entities in

which debarred persons or firms have an “interest.” 40 U.S.C. 3144(b)(2).

Approximately 15 years later, the Truman Administration developed, and Congress accepted, Reorganization Plan No. 14 of 1950, a comprehensive plan to improve Davis-Bacon enforcement and administration. The Reorganization Plan provided that “[i]n order to assure coordination of administration and consistency of enforcement” of the DBA by the agencies who are responsible for administering them, the Secretary of Labor was empowered to “prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies.” Reorganization Plan No. 14 of 1950, 15 FR 3176. In transmitting the Reorganization Plan to Congress, President Truman observed that “the principal objective of the plan is more effective enforcement of labor standards” with “more uniform and more adequate protection for workers through the expenditures made for the enforcement of the existing legislation.” 1950 Special Message to Congress.

Shortly after Reorganization Plan No. 14 of 1950 was adopted, the Department promulgated regulations adding “a new Part 5,” effective July 1, 1951. 16 FR 4430. These regulations added the “aggravated or willful” debarment standard for the Related Acts. *Id.* at 4431. The preamble to that final rule explained that adding the new part 5 was to comply with Reorganization Plan No. 14 of 1950’s directive to prescribe standards, regulations, and procedures “to assure coordination of administration and consistency of enforcement.” *Id.* at 4430. Since then, the two debarment standards—disregard of obligations in DBA cases and willful or aggravated violations in Related Acts cases—have co-existed, but with challenges along the way that the Department seeks to resolve through this rulemaking.

#### (B) Proposed Regulatory Revisions

##### (1) Debarment Standard

##### a. Proposed Change to Debarment Standard

As noted previously, the DBA generally requires the payment of prevailing wages to laborers and mechanics working on contracts with the Federal Government or the District of Columbia for the construction of public buildings and public works. 40 U.S.C. 3142(a). In addition, Congress has included DBA prevailing wage provisions in numerous Related Acts under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other

<sup>267</sup> There are several terms referring to the same list (e.g., ineligible list, debarment list, debarred bidders list) and the terms for this list may continue to change over time.

methods. The same contract clauses are incorporated into DBA- and Related Act- covered contracts, and the laws apply the same labor standards protections (including the obligation to pay prevailing wages) to laborers and mechanics without regard to whether they are performing work on a project subject to the DBA or one of the Related Acts. Not only are some projects subject to the requirements of both the DBA and one of the Related Acts due to the nature and source of Federal funding, but also the great majority of DBA-covered projects are also subject to CWHSSA, one of the Related Acts.

Against this backdrop, there is no apparent need for a different level of culpability for Related Acts debarment than for DBA debarment. The sanction for failing to compensate covered workers in accordance with applicable prevailing wage requirements should not turn on the source or form of Federal funding. Nor is there any principled reason that it should be easier for prime contractors, subcontractors, and their responsible officials to avoid debarment in Related Acts cases. Accordingly, the Department proposed to revise the governing regulations so that conduct that warrants debarment on DBA construction projects would also warrant debarment on Related Act projects. This proposal fits within the Department's well-established authority to adopt regulations governing debarment of Related Act contractors. *See, e.g., Janik Paving & Constr.*, 828 F.2d at 91; *Copper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368, 372–73 (D.C. Cir. 1961).

The Department noted in the NPRM that the potential benefits of adopting a single, uniform debarment standard outweigh any benefits of retaining the existing dual-standard framework. Other than debarment, contractors who violate the DBA and Related Acts run the risk only of having to pay back wages, often long after violations occurred. Even if these violations are discovered or disclosed through an investigation or other compliance action, contractors that violate the DBA or Related Acts can benefit in the short-term from the use of workers' wages, an advantage that can enable such contractors to underbid their more law-abiding competitors. If the violations never come to light, such non-compliant contractors pocket wages that belong to workers. Strengthening the debarment remedy encourages unprincipled contractors to comply with Davis-Bacon prevailing wage requirements by expanding the reach of this remedy when they do not.

*Lab.*, 987 F.2d 206, 214 (3d Cir. 1993) (observing that debarment “may in fact ‘be the only realistic means of deterring contractors from engaging in willful [labor] violations based on a cold weighing of the costs and benefits of non-compliance’” (quoting *Janik Paving & Constr.*, 828 F.2d at 91)).

In proposing a unitary debarment standard, the Department intended that well-established case law applying the DBA “disregard of obligations” debarment standard would now also apply to Related Act debarment determinations. Under this standard, as a 2016 ARB decision explained, “DBA violations do not, by themselves, constitute a disregard of an employer’s obligations,” and, to support debarment, “evidence must establish a level of culpability beyond negligence” and involve some degree of intent. *Interstate Rock Prods., Inc.*, ARB No. 15–024, 2016 WL 5868562, at \*4 (Sept. 27, 2016) (footnotes omitted). For example, the underpayment of prevailing wages, coupled with the falsification of certified payrolls, constitute a disregard of a contractor’s obligations that establish the requisite level of “intent” under the DBA debarment provisions. *See id.* Bad faith and gross negligence regarding compliance have also been found to constitute a disregard of DBA obligations. *See id.* The Department’s proposal to apply the DBA “disregard of obligations” standard as the sole debarment standard would maintain safeguards for law-abiding contractors and responsible officers by retaining the bedrock principle that DBA violations, by themselves, generally do not constitute a sufficient predicate for debarment. Moreover, the determination of whether debarment is warranted would continue to be based on a consideration of the particular facts found in each investigation and to include the same procedures and review process that are currently in place to determine whether debarment is to be pursued.

For these reasons and those discussed in more detail in this section below, the Department’s proposal to harmonize debarment standards included a reorganization of § 5.12. Proposed paragraph (a)(1) set forth the “disregard of obligations” debarment standard, which would apply to both DBA and Related Acts violations. The proposed changes accordingly removed the “willful or aggravated” language from § 5.12, with proposed conforming changes in 29 CFR 5.6(b) (included in renumbered 5.6(b)(4)) and 5.7(a). Proposed paragraph (a)(2) combined the parts of current § 5.12(a)(1) and (a)(2) concerning the different procedures for

effectuating debarment under the DBA and Related Acts.

#### b. Impacts of Proposed Debarment Standard Change

Because behavior that is willful or aggravated is also a disregard of obligations, in many instances the proposed harmonization of the debarment standards would apply to conduct that under the current regulations is already debarable under both the DBA and Related Acts. For example, falsification of certified payrolls to simulate compliance with Davis-Bacon labor standards has long warranted debarment under both the DBA and Related Acts. *See, e.g., R.J. Sanders, Inc.*, WAB No. 90–25, 1991 WL 494734, at \*1–2 (Jan. 31, 1991) (DBA); *Coleman Constr. Co.*, ARB No. 15–002, 2016 WL 4238468, at \*11 (Related Acts). Kickbacks also warrant debarment under the DBA and Related Acts. *See, e.g., Killeen Elec. Co., Inc.*, WAB No. 87–49, 1991 WL 494685, at \*5–6 (DBA and Related Act). In fact, any violation that meets the “willful or aggravated” standard would necessarily also be a disregard of obligations.

Under the proposed revisions, a subset of violations that would have been debarable only under the DBA “disregard of obligations” standard now would be potentially subject to debarment under both the DBA and Related Acts. The ARB recently discussed one example of this type of violation, stating that intentional disregard of obligations “may . . . include acts that are not willful attempts to avoid the requirements of the DBA” since contractors may not avoid debarment “by asserting that they did not intentionally violate the DBA because they were unaware of the Act’s requirements.” *Interstate Rock Prods.*, ARB No. 15–024, 2016 WL 5868562, at \*4. Similarly, “failures to set up adequate procedures to ensure that their employees’ labor was properly classified,” which might not have been found to be willful or aggravated Related Act violations, were debarable under the DBA “disregard of obligations” standard. *Id.* at \*8. Under the Department’s proposed revisions to § 5.12, these types of violations could now result in debarment in Related Acts as well as DBA cases. Additionally, under the “disregard of obligations” standard, prime contractors and upper-tier subcontractors may be debarred if they fail to flow down the required contract clauses into their lower-tier subcontracts as required by § 5.5(a)(6), or if they otherwise fail to ensure that their subcontractors are in compliance with the Davis-Bacon labor standards

provisions. *See* 29 CFR 5.5(a)(6), (7); *Ray Wilson Co.*, ARB No. 02–086, 2004 WL 384729, at \*10 (affirming debarment under DBA of upper-tier subcontractor and its principals because of subcontractor’s “abdication from—and, thus, its disregard of—its obligations to employees of . . . its own lower-tier subcontractor”). Such failures alone, which might not have been found to be a willful or aggravated violation depending on the totality of the circumstances, would under the proposed harmonized standard be more likely to satisfy the requirements for debarment whether the failure had occurred on a DBA or Related Act project.

#### c. Benefits of Proposed Debarment Standard Change

##### i. Improved Compliance and Enforcement

In the NPRM, the Department stated its position that applying the DBA’s “disregard of obligations” debarment standard in a uniform, consistent manner would advance the purpose of the DBA, “a minimum wage law designed for the benefit of construction workers.” *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1055 (D.C. Cir. 2007) (quoting *Binghamton Constr. Co.*, 347 U.S. at 178). Both the DBA statutory and the Related Acts regulatory debarment provisions are “intended to foster compliance with labor standards.” *Howell Constr., Inc.*, WAB No. 93–12, 1994 WL 269361, at \*7 (May 31, 1994); *see also Interstate Rock Prods.*, ARB No. 15–024, 2016 WL 5868562, at \*8 (“Debarment has consistently been found to be a remedial rather than punitive measure so as to encourage compliance and discourage employers from adopting business practices designed to maximize profits by underpaying employees in violation of the Act.”).

The Department explained that using the “disregard of obligations” debarment standard for all DBA and Related Act work would enhance enforcement of and compliance with Davis-Bacon labor standards in multiple ways. First, it would better enlist the regulated community in Davis-Bacon enforcement by increasing contractors’ incentive to comply with the Davis-Bacon labor standards. *See, e.g., Facchiano Constr.*, 987 F.2d at 214 (“Both § 5.12(a)(1) and § 5.12(a)(2) are designed to ensure the cooperation of the employer, largely through self-enforcement.”); *Brite Maint. Corp.*, WAB No. 87–07, 1989 WL 407462, at \*2 (May 12, 1989) (debarment is a “preventive tool to discourage violation[s]”).

Second, applying the “disregard of obligations” standard to Related Act cases would serve the important public policy of holding contractors’ responsible officials accountable for noncompliance in a more consistent manner, regardless of whether they are performing on a Federal or federally funded project. Responsible officials currently may be debarred under both the DBA and the Related Acts. *See, e.g., P.B.M.C., Inc.*, WAB No. 87–57, 1991 WL 494688, at \*7 (Feb. 8, 1991) (stating that “Board precedent does not permit a responsible official to avoid debarment by claiming that the labor standards violations were committed by agents or employees of the firm” in Related Act case); *P.J. Stella Constr. Corp.*, WAB No. 80–13, 1984 WL 161738, at \*3 (Mar. 1, 1984) (affirming DBA debarment recommendation because “an employer cannot take cover behind actions of his inexperienced agents or representatives or the employer’s own inexperience in fulfilling the requirements of government construction contracts”); *see also Howell Constr., Inc.*, WAB No. 93–12, 1994 WL 269361, at \*7 (DBA case) (debarment could not foster compliance if “corporate officials . . . are permitted to delegate . . . responsibilities . . . [and] to delegate away any and all accountability for any wrong doing”). Applying a unitary debarment standard would further incentivize compliance by all contractors and responsible officers.

##### ii. Greater Consistency and Clarity

The Department also stated its view that applying the DBA debarment and debarment-related standards to all Related Act prevailing wage cases would eliminate the confusion and attendant litigation that have resulted from erroneous and inconsistent application of the two different standards. The incorrect debarment standard has been applied in various cases over the years, continuing to the present, notwithstanding the ARB’s repeated clarification. *See, e.g., J.D. Eckman, Inc.*, ARB No. 2017–0023, 2019 WL 3780904, at \*3 (July 9, 2019) (remanding for consideration of debarment under the correct standard as a result of ALJ’s legal error of using inapplicable “disregard of obligations” standard rather than applicable “aggravated or willful” standard); *Coleman Constr. Co.*, ARB No. 15–002, 2016 WL 4238468, at \*9–11 (noting that the ALJ had applied the wrong debarment standard but concluding that the ALJ’s “confl[ation of the] two different legal standards” was harmless error under the circumstances). Most

recently, the ARB vacated and remanded an ALJ’s decision to debar a subcontractor and its principal under the DBA, noting that, even though the Administrator had not argued that the DBA applied, the ALJ had applied the incorrect standard because “the contract was for a construction project of a non-[F]ederal building that was funded by the U.S. Government but did not include the United States as a party.” *Jamek Eng’g Servs., Inc.*, ARB No. 2020–0043, 2021 WL 2935807, at \*8 (June 23, 2021); *see also Jamek Eng’g Servs., Inc. (Jamek II)*, ARB No. 2022–0039, 2022 WL 6732171, at \*8–9 (Sept. 22, 2022) (affirming ALJ’s decision on remand, including 3-year debarment for aggravated or willful Related Acts violations), *appeal docketed, Jamek Eng’g Servs., Inc. v. U.S. Dep’t of Lab.*, No. 22–cv–2656 (D. Minn. Oct. 21, 2022).

Additionally, the “aggravated or willful” Related Acts standard has been interpreted inconsistently over the past decades. In some cases, the ARB has required actual knowledge or awareness of violations, while in others it has applied (or at least recited with approval) a less stringent standard that encompasses intentional disregard or plain indifference to the statutory requirements but does not require actual knowledge of violations. *Compare J.D. Eckman, Inc.*, ARB No. 2017–0023, 2019 WL 3780904, at \*3 (requiring actual knowledge or awareness of the violation) and *A. Vento Constr.*, WAB No. 87–51, 1990 WL 484312, at \*3 (Oct. 17, 1990) (aggravated or willful violations are “intentional, deliberate, knowing violations of the [Related Acts’] labor standards provisions”) with *Fontaine Bros., Inc.*, ARB No. 96–162, 1997 WL 578333, at \*3 (Sept. 16, 1997) (stating in Related Act case that “mere inadvertent or negligent conduct would not warrant debarment, [but] conduct which evidences an intent to evade or a purposeful lack of attention to, a statutory responsibility does” and that “[b]lissful ignorance is no defense to debarment” (quotation omitted)); *see also Pythagoras Gen. Contracting Corp.*, ARB Nos. 08–107, 09–007, 2011 WL 1247207, at \*12 (“[A] ‘willful’ violation encompasses intentional disregard or plain indifference to the statutory requirements.”).

The Department stated its belief that a single debarment standard would provide consistency for the regulated community. Under the proposed single “disregard of obligations” debarment standard, purposeful inattention, and gross negligence with regard to Davis-Bacon labor standards obligations—as well as actual knowledge of or

participation in violations—could warrant debarment. The Department explained that it would continue to carefully consider all of the facts involved in determining whether a particular contractor's actions meet the proposed single standard.

## (2) Length of Debarment Period

The Department also proposed to revise § 5.12(a)(1) and (2) to make 3-year debarment mandatory under both the DBA and Related Acts and to eliminate the regulatory provision permitting early removal from the debarment list under the Related Acts.

As noted above, since 1935, the DBA has mandated a 3-year debarment of contractors whose conduct has met the relevant standard. In 1964, the Department added two regulatory provisions that permit Related Acts debarment for less than 3 years as well as early removal from the debarment list. According to the 1964 final rule preamble, the Department added these provisions “to improve the debarment provisions under Reorganization Plan No. 14 of 1950 by providing for a flexible period of debarment up to three years and by providing for removal from the debarred bidders list upon a demonstration of current responsibility.” 29 FR 95.

The Department explained in the proposal that its experience over the nearly 60 years since then has shown that those Related Act regulatory provisions that differ from the DBA standard have not improved the debarment process (*i.e.*, have not assured consistency of enforcement) for any of its participants. Rather, they have added another element of confusion and inconsistency to the administration and enforcement of the DBA and Related Acts. For example, contractors and subcontractors have been confused about which provision applies. *See, e.g., Bob's Constr. Co., Inc.*, WAB No. 87–25, 1989 WL 407467, at \*1 (May 11, 1989) (stating that “[t]he [DBA] does not provide for less than a 3-year debarment” in response to contractor's argument that “if the Board cannot reverse the [ALJ's] DBA debarment order, it should consider reducing the 3-year debarment”).

Requiring a uniform 3-year debarment period would reduce confusion and increase consistency. Although the regulations currently provide for an exception to 3-year debarment, debarment in Related Acts cases is usually, but not always, for 3 years. In some cases, the WAB treated a 3-year debarment period as effectively presumptive and therefore has reversed ALJ decisions imposing debarment for

fewer than 3 years. *See, e.g., Brite Maint. Corp.*, WAB No. 87–07, 1989 WL 407462, at \*1, \*3 (imposing a 3-year debarment instead of the 2-year debarment ordered by the ALJ); *Early & Sons, Inc.*, WAB No. 86–25, 1987 WL 247044, at \*1–2 (Jan. 29, 1987) (same); *Warren E. Manter Co., Inc.*, WAB No. 84–20, 1985 WL 167228, at \*2–3 (June 21, 1985) (same). Under current case law, “aggravated or willful” violations of the Related Acts labor standards provisions warrant a 3-year debarment period “absent extraordinary circumstances.” *A. Vento Constr.*, WAB No. 87–51, 1990 WL 484312, at \*6. ALJs have grappled with determining the appropriate length of debarment in Related Acts cases. *Id.* In the NPRM, Department noted its belief that setting a uniform 3-year debarment period would provide clarity and promote consistency.

Further, the Department remarked that it had concluded that in instances—usually decades ago—when debarment for a period of less than 3 years had been found to be warranted, it had not improved the debarment process or compliance. *See, e.g., Rust Constr. Co., Inc.*, WAB No. 87–15, 1987 WL 247054, at \*2 (Oct. 2, 1987) (1-year debarment), *aff'd sub nom. Rust Constr. Co., Inc. v. Martin*, 779 F. Supp. 1030, 1032 (E.D. Mo. 1992) (affirming WAB's imposition of 1-year debarment instead of no debarment, noting “plaintiffs could have easily been debarred for three years”); *Progressive Design & Build Inc.*, WAB No. 87–31, 1990 WL 484308, at \*3 (Feb. 21, 1990) (18-month debarment); *Morris Excavating Co., Inc.*, WAB No. 86–27, 1987 WL 247046, at \*1 (Feb. 4, 1987) (6-month, instead of no, debarment).

For the above reasons, the Department proposed to modify the period of Related Acts debarment to mirror the DBA's mandatory 3-year debarment when contractors are found to have disregarded their obligations to workers or subcontractors.

The Department also proposed to eliminate the provision at 29 CFR 5.12(c) that allows for the possibility of early removal from the debarment list for Related Acts contractors and subcontractors. The Department stated that in its experience, the possibility of early removal from the debarment list has not improved the debarment process. Just as Related Acts debarment for fewer than 3 years has rarely been permitted, early removal from the debarment list has seldom been requested, and it has been granted even less often.

Similarly, the ARB and WAB do not appear to have addressed early removal

for decades. When they have, the ARB and WAB affirmed denials of early removal requests. *See Atl. Elec. Servs., Inc.*, ARB No. 96–191, 1997 WL 303981, at \*1–2 (May 28, 1997); *Fred A. Nemann*, WAB No. 94–08, 1994 WL 574114, at \*1, \*3 (June 27, 1994). Around the same time, early removal was affirmed on the merits in only one case. *See IBEW Loc. No. 103*, ARB No. 96–123, 1996 WL 663205, at \*4–6 (Nov. 12, 1996). Additionally, the early-removal provision has caused confusion among judges and the regulated community concerning the proper debarment standard. For example, an ALJ erroneously relied on the regulation for early relief from Related Acts debarment in recommending that a contractor not be debarred under the DBA. *See Jen-Beck Assocs., Inc.*, WAB No. 87–02, 1987 WL 247051, at \*1–2 (July 20, 1987) (remanding case to ALJ for a decision “in accordance with the proper standard for debarment for violations of the [DBA]”). Accordingly, the Department proposed to amend § 5.12 by deleting paragraph (c) and renumbering the remaining paragraph to accommodate that revision.

## (3) Debarment of Responsible Officers

The Department also proposed to revise 29 CFR 5.12 to expressly state that responsible officers of both DBA and Related Acts contractors and subcontractors may be debarred if they disregard obligations to workers or subcontractors. The purpose of debarring individuals along with the entities in which they are, for example, owners, officers, or managers is to close a loophole where such individuals could otherwise continue to receive Davis-Bacon contracts by forming or controlling another entity that was not debarred. The current regulations mention debarment of responsible officers only in the paragraph addressing the DBA debarment standard. *See* 29 CFR 5.12(a)(2). But it is well-settled that they can be debarred under both the DBA and Related Acts. *See Facchiano Constr.*, 987 F.2d at 213–14 (noting that debarment of responsible officers is “reasonable in furthering the remedial goals of the Davis-Bacon Act and Related Acts” and observing that there is “no rational reason for including debarment of responsible officers in one regulation, but not the other”); *Hugo Reforestation, Inc.*, ARB No. 99–003, 2001 WL 487727, at \*12 (Apr. 30, 2001) (CWHSSA; citing Related Acts cases); *see also Coleman Constr. Co.*, ARB No. 15–002, 2016 WL 4238468, at \*12 (“Although the regulations do not explicitly grant authority to debar individual corporate

officers in Related Act cases, the regulations have been interpreted to grant such authority for decades.”). Thus, by expressly stating that responsible officers may be debarred under both the DBA and Related Acts, this proposed revision merely codifies current law. The Department explained that it intended that Related Acts debarment of individuals would continue to be interpreted in the same way as debarment of DBA responsible officers has been interpreted.

#### (4) Debarment of Other Entities

The Department proposed another revision so that the Related Acts regulations mirror the DBA regulations not only in practice, but also in letter. Specifically, the Department proposed to revise 29 CFR 5.12(a)(1) (with conforming changes in § 5.12 and elsewhere in part 5) to state that “any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer has an interest” must be debarred under the Related Acts, as well as the DBA. The DBA states that “No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest.” 40 U.S.C. 3144(b)(2) (emphasis added); see 29 CFR 5.12(a)(2). In contrast, the current regulations for Related Acts require debarment of “any firm, corporation, partnership, or association in which such contractor or subcontractor has a *substantial interest*.” 29 CFR 5.12(a)(1) (emphasis added); see 29 CFR 5.12(b)(1), (d).

The 1982 final rule preamble for these provisions indicated that the determination of “interest” (DBA) and “substantial interest” (Related Acts) was intended to be the same: “In both cases, the intent is to prohibit debarred persons or firms from evading the ineligibility sanctions by using another legal entity to obtain Government contracts.” 47 FR 23658, 23661 (May 28, 1982), *implemented by* 48 FR 19540 (Apr. 29, 1983). It is “not intended to prohibit bidding by a potential contractor where a debarred person or firm holds only a nominal interest in the potential contractor’s firm,” and “[d]ecisions as to whether ‘an interest’ exists will be made on a case-by-case basis considering all relevant factors.” *Id.* In the NPRM, the Department proposed to eliminate any confusion by requiring the DBA “interest” standard to be the standard for both DBA and Related Acts debarment.

#### (5) Debarment Scope

The Department proposed to revise the regulatory language specifying the

scope of Related Acts debarment so that it mirrors the language specifying the scope of DBA debarment set forth in current 29 CFR 5.12(a)(2). Currently, under the corresponding Related Acts regulation, § 5.12(a)(1), contractors are not generally debarred from being awarded all contracts or subcontracts of the United States or the District of Columbia, but rather are only barred from being awarded contracts or subcontracts subject to Davis-Bacon and/or CWHSSA labor standards provisions, *i.e.*, “subject to any of the statutes listed in § 5.1.” As proposed in revised § 5.12(a)(1), in Related Acts as well as DBA cases, any debarred contractor, subcontractor, or responsible officer would be barred for 3 years from “[being] awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.”

The Department’s belief is that there is no reasoned basis to prohibit debarred contractors or subcontractors whose violations have warranted debarment for Related Acts violations from receiving DBA contracts or subcontracts, but to permit them to continue to be awarded other, non-DBA-covered contracts or subcontracts with the United States or the District of Columbia that parties debarred under the DBA are statutorily prohibited from receiving during their debarment period. The proposed changes to § 5.12(a)(1) would eliminate this anomalous situation, and apply debarment consistently to contractors, subcontractors, and their responsible officers who have disregarded their obligations to workers or subcontractors, regardless of the nature of the Federal contract or subcontract for the work.

#### (C) Discussion

The Department received many comments about its proposed debarment provisions. Most of the comments, including organized IUOE and SMACNA member campaign comments, expressed general support for the debarment proposals in their entirety. A few organizations, including a group of civil rights and workers’ rights organizations, unions, and labor-management organizations, specified the detailed reasons for their support. Several commenters opposed the proposals entirely, giving reasons for their opposition.

As an overarching matter, commenters that supported the debarment proposals did so because the proposal would promote consistent enforcement of the DBA labor standards provisions. Supporting

commenters generally agreed that the proposed uniform debarment standards and procedures (*e.g.*, mandatory 3-year debarment, no option for early removal, responsible officer, and/or interest proposals) would provide clarity for, among others, the regulated community and, thus, enhance compliance with the DBA labor standards provisions. *See, e.g.*, Balance America, Inc., CEA, LCCHR, Fair Contracting Foundation of Minnesota, UBC, LIUNA.

Commenters like FFC noted that having one debarment standard would be easier to understand for both workers and contractors. UBC supported the single debarment standard because it would eliminate confusion for adjudicators and the regulated community and improve efficiency for the Department. LCCHR also supported the uniform 3-year debarment period without early removal to promote clarity as to regulatory obligations and compliance.

Among supporters, many comments praised the proposal’s impact on worker protection. For example, III-FFC and LCCHR supported the uniform “disregard of obligation” debarment standard because it would reach contractor behavior that is essential for compliance with Davis-Bacon and CWHSSA labor standards, but that may not have been deemed to rise to the level of aggravated or willful behavior under the existing Related Act debarment standard. LCCHR gave as examples of such behavior a contractor’s failure to establish appropriate procedures to classify laborers or mechanics correctly and to ensure that lower-tier subcontractors are in compliance with DBA labor standards requirements. These and other commenters applauded the proposed harmonized debarment standards because they would strengthen worker protections, in part by reducing disincentives to underpay workers—in some cases repeatedly—as well as by enhancing enforcement. *See, e.g.*, FFC, IUOE Local 77, LIUNA.

Several commenters emphasized the importance of uniform, clear debarment standards to further protect workers and DBA-compliant contractors by deterring contractors that treat violations as part of their business model due in part to the unlikelihood of being debarred. The Fair Contracting Foundation of Minnesota explained that in their experience, contractors that show a disregard for labor standards obligations on one project without significant consequences often go on to demonstrate a similar disregard on future projects. They, therefore, supported the single debarment

standard as well as the mandatory 3-year debarment and interest provisions to further protect workers and DBRA-compliant contractors, incentivize compliance, and promote consistent enforcement of labor standards requirements. ACT Ohio asserted that violators of the DBRA rarely face debarment from Federal contracts, no matter how egregious the violation. And LCCHR highlighted watchdog group findings that the Federal government has awarded contracts to contractors that have repeatedly violated Federal laws like the DBA, such as a report asserting that in fiscal year 2017 Federal agencies spent over \$425 million on contractors that had been found to have violated the DBA in 2016. UBC noted that applying the lower debarment threshold to Related Act violations would increase deterrence.

A number of commenters similarly supported the harmonized debarment standard as a way to hold repeat contractors accountable. *See, e.g.,* ACT Ohio, Foundation for Fair Contracting of Connecticut, Inc. (FFC-CT). They noted that the different debarment standards could allow violators to remain out of compliance without facing real consequences beyond just paying back wages. FFC-CT explained that debarment is a real consequence that sends a message to government contractors that “we expect them to be responsible stewards of public monies.”

Those commenters that supported the proposed changes also affirmed the importance of the Department’s proposal to codify existing law regarding debarment of responsible officers. The UA emphasized the need to debar individuals so that they cannot “avoid accountability by setting up shop as another entity.” LCCHR noted their support for the responsible officers proposal, which is consistent with existing law.

Some supporting commenters went further and claimed that the current two debarment standards are inconsistent, *see, e.g.,* FFC, or even arbitrary and capricious, *see, e.g.,* NABTU. NCDCL claimed that the heightened Related Act standard “arbitrarily makes it more difficult to debar contractors for violations of the DBRA.” LCCHR asserted that there is no principled reason for employing two different debarment standards for contractors that are otherwise subject to the same contractual requirements. NABTU cited *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996) and *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) in support of its claim that the different DBA and Related Act debarment standards “are

arbitrary and capricious because they treat identical situations differently without a reasonable basis.” LCCHR also objected to the inconsistent consequences for similar behavior under the current DBRA debarment framework.

Among commenters who opposed the Department’s debarment proposals in their entirety, several challenged the Department’s authority to change the debarment standard for Related Acts. ABC and IEC questioned the Department’s authority to implement a uniform standard for DBA and Related Act debarments. ABC argued that since Congress had not adopted the DBA standard for Related Act debarments, the Department could not “unilaterally impose a unitary debarment test.” ABC claimed that if in the 70 years since the Department established by regulation in 1951 Congress had wanted to impose the DBA’s “inflexible and easier to prove” “disregard of obligations” debarment standard, it could easily have done so, and that the Department had provided no specific justification for this “radical change.” IEC objected to applying the DBA debarment standard to Related Acts, stating without further explanation that this broadening would likely exceed “the statutory authority of several if not all of the ‘Related Acts.’”

Next, unlike commenters that noted that a uniform debarment standard would lead to more consistent enforcement, a few commenters contended that the Department’s proposed changes would not achieve these results or were too burdensome. The group of U.S. Senators claimed that the fact-specific nature of the DBA “disregard of obligations” standard is “ambiguous” and would lead to “the same supposed ‘inconsistencies’” the Department sought to address in the proposed rule. They also claimed that in the NPRM, the Department failed to explain the “disregard of obligations” standard, which would pose a greater obstacle to small firms bidding on “federal contracts covered by the DBRA [that are] in essence nearly the entirety of federal procurement.” In addition, the group of U.S. Senators questioned the Department’s claim that the willful or aggravated standard has been interpreted inconsistently over the decades, alleging that this claim is “dubious” because of “the volatile manner in which DOL calculates prevailing wage rates.”

Unlike commenters who lauded the proposal’s enhanced enforcement and worker protection and clarity for the regulated community and other stakeholders, FTBA and the group of U.S. Senators asserted that the proposed

harmonized debarment provisions would have a negative impact on contractors, especially small and mid-size contractors. FTBA asserted that compliance with certain aspects of DBA requirements like the classification of work and coverage issues such as the site-of-the-work limitation can be “extraordinarily difficult even for contractors with robust compliance processes.” FTBA and ABC faulted the Department for not proposing changes such as greater transparency about proper classification of workers on wage determinations, instead of relying on “unpublished union scope of work claims” or “unpublished union work rules” that make it challenging for non-union contractors to properly determine job classifications.<sup>268</sup> The group of U.S. Senators asserted that small and mid-size contractors are at greater vulnerability of “unintentionally violating incomprehensible prevailing wage requirements.”

To support its claim that the Department’s debarment and other proposals would be an “impermissible burden on the private sector,” the group of U.S. Senators alleged that the Department’s proposal to eliminate the aggravated or willful debarment standard would “lower[] the burden of persuasion to a ‘disregard of obligations’ [and] ensnare many small contractors into debarment proceedings.” According to the group of U.S. Senators, given the “non-transparent and wasteful manner in which prevailing wages are calculated” and “less than consistent” survey methods, small and mid-size contractors who “lack administrative resources to keep abreast of DOL’s nightmarishly bureaucratic administration of DBRA” would be vulnerable to “an ocean of legal liability as a result of the new debarment standard.” FTBA asserted that there was no compelling reason for the Department to choose the “more rigid threshold and longer debarment period” given that debarment is a remedial, not punitive measure.

ABC also objected to the Department’s proposals to revise § 5.12(a)(2) to

<sup>268</sup> The Department did not include the publication of “union work rules” in the proposed rule, and therefore, such an initiative is outside the scope of this rulemaking. However, the Department recognizes that it is important that contractors be able to understand wage determinations and comply with their obligations to pay laborers and mechanics prevailing wages based on the appropriate labor classifications in the applicable wage determination. Therefore, the Department will continue to address the clarity of wage determinations at the subregulatory level. The Department believes that the modifications to the enforcement procedures in part 5 of this rulemaking should be implemented along with continued efforts to improve compliance.



expressly include responsible officers and entities in which they have a “substantial [sic] interest” for debarment purposes, claiming that the NPRM offered little guidance as to how responsible officers would be determined or what constitutes a substantial interest in a debarred company. ABC requested additional guidance about these provisions.

The Department considered all the comments it received about its proposals to harmonize the DBA and Related Act debarment standards by adopting the DBA’s debarment provisions for all DBRA debarments. As explained below, the Department adopts the debarment provisions as proposed.

As many of the supporting commenters underscored, a primary benefit of the harmonized debarment provisions, most notably the change to a single “disregard of obligations” debarment standard, will be to improve consistency of—and, thus, effectiveness of—enforcement and coordination of administration of the DBRA, as Reorganization Plan No. 14 of 1950 directs the Department to do. The unitary debarment standard will also advance Reorganization Plan No. 14 of 1950’s related objective of “more uniform and adequate protection for workers.” 1950 Special Message to Congress.

Although the Related Act debarment standard adopted in 1951 was also implemented to try to accomplish Reorganization Plan No. 14 of 1950’s directive, it has become evident that more change is needed to achieve this objective. As explained in the NPRM, the dual debarment standard and related provisions have not achieved the goals the Department intended that they would, and, in some instances, have led to counterproductive results from inconsistent or erroneous application of the applicable standard(s), as well as from confusion about which standard applies. For example, in one case, a subcontractor and its principal claimed that they should not be debarred under the DBA because their violations were not “willful or fraudulent,” an apparent misunderstanding of the “disregard of obligation” standard. *NCC Elec. Servs., Inc.*, ARB No. 13–097, 2015 WL 5781073, at \*6 n.25 (Sept. 30, 2015).<sup>269</sup>

<sup>269</sup> While misunderstanding the applicable debarment standard has led to counterproductive results, contrary to the assertion of the group of U.S. Senators, for debarment purposes, it is irrelevant if contractors do not understand how WHD calculated or periodically adjusted applicable prevailing wages and fringe benefits. Although contractors are free to challenge the wage rates on a wage determination prior to contract award, if they do not challenge the rates prior to that date and instead agree to incorporation of the wage determination into their

As some commenters that supported this change asserted, the current dual debarment standard could be viewed as arbitrary or inconsistent to the extent that it treats contractors, subcontractors, and their responsible officers—who are subject to the same DBRA labor standards requirements and doing the same types of work—differently based solely on the source of Federal funding or assistance. The Department, however, does not agree with NABTU that the current dual debarment standards are impermissibly arbitrary or capricious. The Department also disagrees with FTBA that it did not explain why there were different debarment standards. As explained in the NPRM, the Department adopted a new part 5 in 1951 to comply with Reorganization Plan No. 14 of 1950’s directive and made changes to Related Act debarment in 1964 in an effort to improve debarment provisions under that Reorganization Plan. The Department posits that the willful or aggravated Related Act standard may have been chosen in 1951 to lessen the effect on the regulated community of the expansion of debarment to Related Act violations by limiting debarment to more egregious violations, in an acknowledgement of the relative novelty of Related Act work at that time. This heightened standard may have been intended to accommodate the regulated community’s relative inexperience with Related Act work, as well as the new part 5 provisions, most of which were new (other than Copeland Act requirements, which had existed since the mid-1930s).

The Department’s 1964 changes to the Related Act 3-year debarment period may have corresponded with growing criticism in the early 1960s of Federal agency use of debarment and suspension without sufficient due process safeguards. *See, e.g.*, Robert F. Meunier & Trevor B. A. Nelson, “Is It Time for a Single Federal Suspension and Debarment Rule?,” 46 Pub. Cont. L.J. 553, 558–59, 559 n.29 (2017) (discussing judicial “due process and fundamental fairness requirements” developments in debarment and suspension beginning in the 1960s and extending through the 1990s); *see also*

contract without modification, they have thereby accepted the wage rates as a part of their contract and have agreed to comply with those wage rates. In this context, given their commitment to pay no less than the wage rates listed in the wage determination that they have accepted as contractually binding, contractors do not need to understand how prevailing wage rates are determined to comply, but merely need to be able to look at the applicable wage determination and pay required rates listed on that wage determination, a task well within the capacity of even small firms.

*Copper Plumbing & Heating Co.*, 290 F.2d at 371–73 (affirming the Department’s regulatory authority to debar contractors for willful or aggravated violations of Related Acts such as the Eight Hour Laws, and in dicta mentioning that “upon a proper showing [of responsibility] it appears” the contractor’s petition for removal from the Comptroller General’s ineligible list “would have been granted”).

There are now more than 70 Related Acts, and federally assisted construction work is prevalent. Since the same Davis-Bacon contractual obligations apply on Related Act projects as on DBA projects, with a few exceptions mandated by statute,<sup>270</sup> the regulated community’s familiarity with their labor standards obligations on Related Acts has also increased over this time. Due process safeguards include that the DBRA regulations require notification of violation findings and an opportunity to request a hearing when WHD finds reasonable cause to believe that debarment is warranted.

Moreover, in the decades since the Related Act debarment provisions went into effect, as explained in the NPRM, it has become clear that having two debarment standards has not always improved consistency of enforcement and administration and, at times, has had the opposite effect. It has become evident that the flexibility of a possible shorter debarment period of under 3 years and the possibility of early removal from the debarment list, aside from rarely being used over the past 2 or 3 decades, have not improved the effectiveness of debarment, and at times, have impaired it. The Department agrees with commenters that the unitary debarment standard and concomitant related provisions (mandatory 3-year debarment period with no early removal, interest, responsible officers, and scope of debarment) will be easier to understand for the regulated community and adjudicators, and more consistent in application and result.

The final rule thus adopts a uniform debarment framework comprised of the longstanding DBA provisions. The DBA debarment provisions will enhance worker protection by eliminating the heightened Related Act standards, and the DBA standards are well-known to the regulated community. The

<sup>270</sup> Such exceptions include the “site of the work” provision, which applies to DBA and most Related Act work, with the exception of CWHSSA and certain HUD projects under “development statutes.” Another difference is that under the DBA, the Department recommends debarment to the GAO for implementation, while under the Related Acts, the Department effectuates debarment.

Department emphasizes that the “disregard of obligations” standard is not “new,” as the group of U.S. Senators asserted. The Department also disagrees with ABC that this rule is a “radical change.” Rather, it takes the original, longstanding “disregard of obligations” debarment standard and applies it to all debarments, not only DBA debarments. Since 1935, the DBA has required debarment of “persons or firms” who have “disregarded their obligations to employees and subcontractors” as well as debarment of firms and other entities in which such debarred persons or firms have an “interest.” 40 U.S.C. 3144(b). Since willful or aggravated violations are, by definition, also a disregard of a contractor’s obligations to workers or subcontractors, debarment for such violations will continue.

The Department disagrees with the allegation from the group of U.S. Senators that the fact-specific nature of the “disregard of obligations” standard is “ambiguous” and will lead to inconsistencies the Department is trying to address. First, aggravated or willful Related Act violations are also determined on a case-specific basis. Second, such totality of the circumstances analyses are common legal approaches, even in criminal law where a person’s liberty is at stake. *See, e.g., Florida v. Harris*, 568 U.S. 237, 244 (2013) (describing the “fluid concept” of probable cause under the Fourth Amendment as a “common-sensical standard” that should be evaluated by looking at the “totality of the circumstances . . . a more flexible, all-things-considered approach” and “reject[ing] rigid rules, bright-line tests, and mechanistic inquiries” for determining probable cause in case involving police search of a vehicle during a traffic stop); *see also Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) (holding that a child’s “habitual residence” for purposes of the Hague Convention “depends on the totality of the circumstances specific to the case”); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553–54 (2014) (holding that courts may consider the totality of the circumstances when determining whether a case is “exceptional” under Federal Patent Act provision concerning the award of attorney’s fees to prevailing parties). The Department is confident that its case-by-case approach in the DBRA debarment context will continue to be fairly administered and readily understood by the regulated community.

Contractors on DBRA projects are charged with knowing the law, including the Davis-Bacon and

CWHSSA labor standards requirements and the consequences, such as debarment, for violating them. *See, e.g., NCC Elec. Servs., Inc.*, ARB No. 13–097, 2015 WL 5781073, at \*7 (“[T]here has to be a presumption that the employer who has the savvy to understand government bid documents and to bid on a Davis-Bacon Act job knows what wages the company is paying its employees and what the company and its competitors must pay when it contracts with the federal government” (quotation marks omitted)); *cf. Abhe & Svoboda, Inc.*, 508 F.3d at 1059–60 (“Existing administrative and judicial decisions and the [DBA] itself put the Company on fair notice of what was required” regarding classification of employees despite contractor’s claim that “general wage determinations did not indicate the proper method of classifying employees.”).

Being a government contractor carries with it attendant responsibilities, not least of which is complying with DBRA labor standards requirements. These obligations apply to all DBRA contractors, subcontractors, and responsible officers. Government contractors may be subject to debarment regardless of size and even if their disregard of obligations occurs on their first DBRA contract, or if WHD has not previously found violations. *See, e.g., Stop Fire, Inc.*, WAB No. 86–17, 1987 WL 247040, at \*2 (June 18, 1987) (“The contention that this was a company’s first Davis-Bacon Act job is not sufficient to relieve it from being placed on the ineligible list, absent other additional justification.”); *Morris Excavating Co., Inc.*, WAB No. 86–27, 1987 WL 247046, at \*1 (rejecting “principle that each contractor” violating the DBRA “gets one free shot at underpaying laborers and mechanics on a Davis-Bacon project until the time of enforcement” and finding that 6-month debarment of a small contractor on relatively small contract doing “localized specialty work” was warranted despite workers’ “agree[ment] that [the firm] would pay them their regular wages now and the additional Davis-Bacon amount later”).

The Department believes that existing mechanisms are sufficient to address FTBA’s concern about debarment in light of what they allege to be a lack of “transparency” about applicable classifications. If there is any uncertainty about which classifications apply to particular work, contractors may request clarification and information on local area practice, including from the contracting agency or WHD. If that further guidance indicates that the work in question is

not performed by a classification listed on the wage determination, the issue may be resolved through the conformance process. Further, “[c]ontractors who seek to perform work on a federal construction project subject to the Davis-Bacon Act have an obligation ‘to familiarize themselves with the applicable wage standards contained in the wage determination incorporated into the contract solicitation documents.’” *Am. Bldg. Automation, Inc.*, ARB No. 00–067, 2001 WL 328123, at \*3–4 (Mar. 30, 2001) (citation omitted) (denying subcontractor’s appeal of denial of conformance request in which subcontractor claimed it had no reason to believe that building automation and controls work fell within plumber classification). Firms of any size may also consult the extensive subregulatory materials that are available on WHD’s website (including FOH chapters and the PWRB), request informal compliance assistance from WHD, or seek guidance in accordance with 29 CFR 5.13. More formally, contractors may request ruling letters from the Administrator.

The Department disagrees with the group of U.S. Senators that the NPRM did not adequately explain the “disregard of obligations” standard such that small firms could understand it. Not only did the NPRM contain an explanation of the standard, but also the Department has resources available on its website for those who desire more information about debarment criteria. Nevertheless, the Department takes this opportunity to expand upon the explanation in the NPRM about the types of actions and inactions that could constitute a debarable disregard of obligations to workers or subcontractors under the rule. The additional examples of debarable actions or omissions in this section are illustrative, not exhaustive.

As the Department highlighted in the NPRM, it is well settled that contractors, subcontractors, and responsible officers will be debarred for certain egregious or deliberate and knowing violations under both the disregard of obligations and aggravated or willful standards. For example, falsification of certified payroll combined with underpayment or misclassification—thus simulating compliance with Davis-Bacon or CWHSSA obligations—constitute aggravated and willful violations and, necessarily, a disregard of obligations to workers too. Falsification of certified payrolls can take various forms including, but not limited to, overreporting prevailing wages and/or fringe benefits paid; underreporting

hours worked; misclassifying workers who performed skilled trade work as laborers; omitting workers (often because they are paid less than required wages) from the payroll; and listing managers or principals who did not perform manual labor as laborers and mechanics.

Making workers “kick back” or return any portion of the prevailing wages is another DBA violation that has warranted debarment under both the willful or aggravated and the “disregard of obligations” standards for decades. *See, e.g., Killeen Elec. Co.*, WAB No. 87–49, 1991 WL 494685, at \*5. Such kickbacks have been illegal since 1934, when the Copeland “Anti-Kickback” Act was passed and can even result in criminal prosecution. *See* 48 Stat. 948 (June 13, 1934); *see also* section III.B.3.xix (“Anti-Retaliation”). When the DBA was amended in 1935, Congress not only added the debarment sanction, but also “the provision that each contract shall contain a stipulation requiring unconditional weekly payments without subsequent deductions or rebates” to try to eliminate the “illegal practices of exacting rebates or kick-backs.” H. Rep. No. 74–1756, at 3 (1935); S. Rep. No. 74–1155, at 3 (1935); 40 U.S.C. 3142(c)(1). Regulations implementing the Copeland Act’s requirement that contractors and subcontractors submit weekly statements about wages paid each worker—with some variation and changes over the years—have been in place since 1935, except for a “three-year hiatus from 1948 to 1951.” *Donovan*, 712 F.2d at 630; *see also* 6 FR 1210, 1210–1211 (Mar. 1, 1941) (requiring contractors and subcontractors to provide weekly sworn affidavits regarding wages paid during preceding pay roll period); 7 FR 686, 687–88 (Feb. 4, 1942).

Other categories of willful or aggravated actions that necessarily warrant debarment under the lower “disregard of obligations” standard include, but are not limited to, contractor efforts to require or coerce workers to lie to the Department or contracting agencies about their wages paid and hours worked, or to refuse to cooperate with such enforcement efforts at all by instructing workers to leave the job site when investigators are conducting worker interviews. These actions are akin to falsification of payroll or destruction of records to the extent that such actions are intended to simulate compliance or, at least, hide noncompliance.

While disregard of obligations “need not be the equivalent of intentional falsification,” DBA violations alone do

not constitute a disregard of obligations warranting debarment. *See NCC Elec. Servs., Inc.*, ARB No. 13–097, 2015 WL 5781073, at \*6, \*10; *Structural Concepts, Inc.*, WAB No. 95–02, 1995 WL 732671, at \*3 (Nov. 30, 1995) (the strict liability standard for holding prime contractors liable for back wages owed to workers has not been extended to debarment under the DBA). For example, in *Structural Concepts*, the Board reversed an ALJ’s debarment order because the Board could not conclude from the evidence presented that the prime contractor’s principal knew or should have known of the subcontractor’s falsified certified payrolls, and when the principal did find out about the subcontractor’s DBA violations, they took reasonable action by cancelling the subcontract. *Id.*

The Department reiterates, as it explained in the NPRM, that contractors’ bad faith or grossly negligent actions or inactions can be a disregard of their DBA obligations warranting 3-year debarment. While merely inadvertent or negligent conduct or innocuous mistakes would not warrant debarment, conduct evidencing an intent to evade, or a purposeful lack of attention to, statutory or regulatory obligations warrant debarment. “Blissful ignorance is no[t]” and will continue not to be a “defense to debarment.” *Fontaine Bros., Inc.*, ARB No. 96–162, 1997 WL 578333, at \*3.

Debarment under the “disregard of obligations” standard requires some element of intent or culpability beyond mere negligence. *P&N, Inc./Thermodyn Mech. Contractors, Inc.*, ARB No. 96–116, 1996 WL 697838, at \*4, \*7 (Oct. 25, 1996); *NCC Elec. Servs., Inc.*, ARB No. 13–097, 2015 WL 5781073, at \*6. The Department, thus, disagrees with the claim from the group of U.S. Senators that small and mid-size contractors are at greater vulnerability of debarment for “unintentionally violating” prevailing wage requirements. Truly unintentional violations that are merely negligent would not merit debarment as a disregard of obligations.

The Board has explained the difference between violations that constitute a disregard of obligations to workers or subcontractors and those that are willful or aggravated violations. For example, an “intentional failure to look at what the law requires” may not rise to a deliberate, knowing, and intentional action that constitutes a willful or aggravated violation of the Related Acts. *Interstate Rock Prods., Inc.*, ARB No. 15–024, 2016 WL 5868562, at \*4 (“Intentional disregard of obligations may therefore include acts that are not willful attempts to avoid the

requirements of the DBA.”). The Board went on to explain that “contractors and subcontractors [may not] ignore the rules and regulations applicable to DBA contracts, pay their employees less than prevailing wages, and avoid debarment by asserting that they did not intentionally violate the DBA because they were unaware of the Act’s requirements.” *Id.* Similarly, gross negligence and bad faith can constitute a disregard of obligations. *NCC Elec. Servs., Inc.*, ARB No. 13–097, 2015 WL 5781073, at \*6 & n.22.

For example, a contractor or subcontractor’s failure to “look to [their] obligations under DBA,” a failure to read DBA provisions on a contract, a failure “to keep proper records tracking the actual work performed,” and failing to flow down Davis-Bacon labor standards provisions to lower-tier subcontractors would be a disregard of obligations because government contractors are expected to know the law. *Id.* at \*7. A subcontractor’s failure to read DBA provisions the prime contractor included in its subcontract and its failure to include the DBA provision in its own subcontract with a lower-tier contractor also has been held to constitute a disregard of the debarred subcontractor’s obligations to be aware of the DBA requirements and to ensure its lower-tier subcontractor complied with wage payment and record keeping requirements. *See Ray Wilson Co.*, ARB No. 02–086, 2004 WL 384729, at \*10.

Recordkeeping violations short of falsification have led to debarment in various Related Act cases. *See, e.g., Fontaine Bros., Inc.*, ARB No. 96–162, 1997 WL 578333, at \*3 (affirming debarment of a contractor that failed to keep records of any payroll deductions or to keep any records for workers paid in cash); *P.B.M.C., Inc.*, WAB No. 87–57, 1991 WL 494688, at \*7 (debarment appropriate where contractor failed to record workers’ piecework production and hours worked). The regulations notify contractors that “failure to submit the required records upon request or to make such records available may be grounds for debarment.” 29 CFR 5.5(a)(3)(iii) (current). Under the final rule, such required records now also include contracts and related documents. *See* 29 CFR 5.5(a)(3)(iii). In one case, a contractor’s failure to submit certified payrolls on a timely basis—it waited 9 weeks before submitting the first nine certified payrolls—also constituted a disregard of its obligations warranting debarment. *Sealtite Corp.*, WAB No. 87–06, 1988 WL 384962, at \*4 (Oct. 4 1988).

A disregard of contractors’ compliance and oversight

responsibilities could also result in debarment under the DBA standard. “[F]ailure to properly instruct [subordinates] in the preparation of the payrolls” could result in debarment under the DBA. *C.M. Bone*, WAB No. 78–04, 1978 WL 22712, at \*1 (Sept. 13, 1978); see also *Ray Wilson Co.*, ARB No. 02–086, 2004 WL 384729, at \*10. Another example of actions or omissions that could result in debarment under the unitary standard includes a failure to flow down the applicable wage determination and Davis-Bacon and/or CWHSSA labor standards provisions to lower-tier subcontractors.

While there will be a subset of violations that would only have been debarable under the DBA “disregard of obligations” standard but now will be potentially subject to debarment under both the DBA and Related Acts, the Department does not anticipate that this subset of violations will be particularly large or the violations novel. First, as explained in the NPRM and reiterated in this section above, many of the same types of violations have long been debarable under both the DBA and Related Acts (e.g., falsification of certified payrolls coupled with underpayment or misclassification, kickbacks). Second, in some cases involving projects subject to both DBA and Related Acts, the Board previously has decided debarment based on the laxer DBA “disregard of obligations” standard. See, e.g., *Interstate Rock Prods.*, ARB No. 15–024, 2016 WL 5868562, at \*8 n.36 (affirming debarment for misclassification under the DBA “laxer standard” which “render[ed] debarment under the [Related Acts] redundant and moot”); *P&N, Inc./Thermodyn Mech. Contractors, Inc.*, ARB No. 96–116, 1996 WL 697838, at \*2 & n.7 (distinguishing between the DBA and Related Act standards and applying the less strict DBA standard because case involved violations of both DBA and CWHSSA).

The Department expects the change to a single debarment standard—the current “disregard of obligations” standard instead of the heightened aggravated or willful standard—will further the remedial goals of the DBRA by more effectively enlisting the regulated community in compliance with the Davis-Bacon and CWHSSA labor standards requirements. The Department’s decision to change to a single debarment standard rests in part on its belief that extending the current “disregard of obligations” standard to all DBA and Related Act debarments will promote “the cooperation of the employer, largely through self-

enforcement,” in complying with the DBRA requirements. *Facchiano Constr.*, 987 F.2d at 214. As echoed by various commenters, this change makes particular sense since DBA and Related Act construction work is otherwise generally subject to the same Davis-Bacon labor standards.

The Department agrees with the many commenters who emphasized the importance of preventing repeat violations by contractors who may not be debarred the first time they are found to have violated the DBA or Related Acts. The Department echoes the importance of incentivizing compliance by contractors and their responsible officers on every project, particularly in light of limited enforcement resources vis-a-vis the number of potentially affected workers on DBRA-covered projects. To the extent some unscrupulous contractors’ business models even rely on the likelihood of their violations going undetected, as some commenters asserted, strengthening the debarment remedy takes on an even greater importance for repeat, or potential repeat, violators.

Similar concerns animated the 1935 amendments to the DBA, which until then had no enforcement provisions. The legislative history indicates that Congress added debarment, one such enforcement power, in part to address the problem of repeat violators getting new Davis-Bacon contracts. See, e.g., S. Rep. No. 74–332, pt. 3, at 11 (1935) (noting the need to “speedily remed[y]” the situation in which the requirement to award contracts to the lowest responsible bidder resulted in “the anomaly . . . where violators of prevailing wage scales and even contractors who have actually been guilty of dishonest practices, such as defrauding their workmen . . . were granted additional contracts by the Government”). Congress in 1935, thus, implemented a “[s]ystem of coordination between various Government Departments to assure that the Government will not be in the position of continuing to contract with a contractor who disregards his obligations to his employees and subcontractors.” H. Rep. No. 74–1756, at 2 (1935); S. Rep. No. 74–1155, at 2 (1935). The debarment provision “further penalizes offending contractors and subcontractors by disqualifying them for 3 years from their privilege of bidding for Government contracts”—a measure to arm the Department and contracting agencies with another tool for departments not to have to “continue to deal” with “bidders [who] had been notorious violators of the Davis-Bacon Act in the past.” H. Rep.

No. 74–1756, at 3; S. Rep. No. 74–1155, at 3.

As commenters asserted, it is not uncommon for contractors and their responsible officers found to have engaged in debarable conduct under the DBRA to have committed similar violations on other projects. The Department expects that adopting the “disregard of obligations” debarment standard for Related Act violations may reduce repeat violations by contractors, subcontractors, and their responsible officers, since they will face the possibility of debarment on Related Act-only projects for a broader range of actions and inactions than under the current dual debarment framework.

The Department is authorized to harmonize the DBRA debarment standards by substituting the DBA standard for that of the Related Acts. Contrary to commenters who asserted the Department does not have the authority to do so, and as discussed in more detail in section III.B.3.xix (“Anti-Retaliation”), since 1950, Congress has repeatedly recognized the Secretary’s authority and functions under Reorganization Plan No. 14 of 1950—as recently as November 2021. See IJJA 41101, 42 U.S.C. 18851(b). And in 1984 Congress ratified and affirmed Reorganization Plan No. 14 of 1950 as law. Reorganization Plan No. 14 of 1950 expressly authorizes the Department to adopt regulations that promote consistent enforcement and more efficient administration of the DBRA. The Department anticipates that having one debarment standard instead of two will do just that. Just as the Department was authorized to implement regulatory debarment under the willful or aggravated standard under the Related Acts in 1951, so too may it now adjust that standard to the “disregard of obligations” standard in order to more effectively promote the remedial goals of the DBRA.

The Department, therefore, disagrees with commenters that claimed that it lacks authority to adopt the “disregard of obligations” standard for debarment under the Related Acts. IEC, for example, did not cite any specific statutory provision or other law to support their contention that this rule exceeds the Department’s authority under “several if not all” of the Related Acts. Reorganization Plan No. 14 of 1950 has consistently been applied to Related Acts even where it is not specifically referenced in the Related Act.

Regulatory debarment outside the DBRA context as a “means for accomplishing [a] congressional purpose,” *Gonzalez v. Freeman*, 334

F.2d 570, 577 (D.C. Cir. 1964), or to support “the integrity and effectiveness of federally funded activities,” Meunier & Nelson, *supra*, at 556–57, is not uncommon. In the 1980s, debarment and suspension from Federal procurement and nonprocurement transactions was promulgated in the FAR and the Non-procurement Common Rule, respectively. See FAR Subpart 9.4, 48 CFR 9.400–409 (procurement debarment, suspension, and ineligibility); 2 CFR part 180 (OMB guidelines to agencies on governmentwide debarment and suspension (nonprocurement, *e.g.*, Federal grants, loans, and other forms of assistance)); see also 48 FR 42102, 42148 (Sept. 19, 1983) (establishing the FAR); 53 FR 19161 (May 26, 1988) (memorandum about publication of final government-wide nonprocurement common rule); Meunier & Nelson, *supra*, at 554–57. As such, the regulated community is or should be familiar with the general concept of debarment or suspension being a consequence for misuse of Federal funding or assistance.<sup>271</sup>

In addition to the decisions upholding regulatory debarment for Related Act willful or aggravated violations discussed in the NPRM, courts have upheld regulatory debarment and suspension measures absent express Congressional authority for such provisions, provided there are certain minimum fairness safeguards. See, *e.g.*, *Gonzalez*, 334 F.2d at 576–77 (finding statute that made no explicit provision for debarment of contractors doing business with the agency authorized debarment of “irresponsible, defaulting or dishonest” bidders and contractors, a power “inherent and necessarily incidental to the effective administration of the statutory scheme”); *cf. Jacquet*, 569 F.2d at 1345 (upholding regulation temporarily disqualifying households that fraudulently acquired food stamps, which was “appropriate for the effective and efficient administration of the program” and “[gave] the administrative authorities a tool with which to protect the program from those who would abuse it” and was authorized despite the Food Stamp Act’s silence about such

disqualification). Such administrative debarment power comes with “an obligation to deal with uniform minimum fairness as to all.” *Gonzalez*, 334 F.2d at 577. Specifically, “[c]onsiderations of basic fairness require administrative regulations establishing standards for debarment and procedures which will include notice of specific charges, opportunity to present evidence and to cross-examine adverse witnesses, all culminating in administrative findings and conclusions based upon the record so made.” *Id.* at 578. Although the Department’s rule eliminates the provisions providing for the possibility of debarment for fewer than 3 years and early removal from the debarment list, as mentioned above, the Department’s debarment procedures accord contractors and responsible officers extensive due process protections to challenge their debarment in the first instance.<sup>272</sup>

The Department also disagrees with FTBA that it should (or could) make the unitary debarment standard the heightened Related Act standard with the possibility of a shorter period and early removal. The Department cannot change the DBA disregard of obligation standard, the mandatory 3-year period, or the extension of debarment to entities in which a debarred person or firm has an interest because those provisions are statutory, not regulatory. The Department may, however, under its statutory and implied powers of enforcement, bring Related Act debarments within the DBA debarment framework of a lower standard, mandatory 3-year period, and no possibility of early removal. The Department has long had procedures in place that provide contractors, “responsible officers,” and other affected parties ample notice of the findings against them, an opportunity to request a hearing in which they could contest those findings, and the ability to appeal adverse decisions. See 29 CFR 5.11, 5.12, pts. 6, 7, 18. These robust procedures include safeguards for the regulated community if they choose to challenge—as they have been able to do for decades—3-year debarment for disregarding their obligations, albeit in all DBRA cases under the final rule, not just DBA cases. The rule’s harmonized debarment provisions will further the DBRA’s remedial goals of protecting

workers, with all the attendant procedural safeguards for the regulated community.

As part of the revisions to harmonize debarment provisions, the Department is codifying both existing case law about debarment of “responsible officers” in Related Act cases and the Department’s position about debarment of entities in which debarred parties have an “interest.” The Department agrees with the UA that absent debarment of such individuals and entities, debarred parties could avoid debarment sanctions by setting up shop as a new entity to obtain government contracts. In response to ABC’s request for more guidance about how responsible officers would be determined or what constitutes a substantial interest in a debarred company, the Department reiterates that these changes do not effect a substantive change in the law or how it is applied, as noted in the NPRM (and restated above). These determinations—both in the current regulations and final rule—are made on a case-by-case basis considering all relevant facts, and in the relatively rare circumstances in which there are issues regarding who qualifies as a responsible officer or what constitutes an interest in a debarred company, information regarding those issues is available through various public Departmental resources. See *e.g.*, 47 FR 23661 (1982 final rule).

In determining whether an individual responsible officer’s debarment is warranted, the Department evaluates factors such as involvement in and responsibility for running the company; status as an officer and/or principal of the entity (although status alone is not determinative); actual or constructive knowledge of or gross negligence with respect to DBRA obligations (*e.g.*, failure to ensure present or future compliance with applicable labor standards, failure to correct ongoing violations, etc.); and/or violations (*e.g.*, underpayments, misclassification, incomplete, inaccurate, or falsified payroll and timekeeping, etc.). See, *e.g.*, *Facchiano Constr.*, 987 F.2d at 213–15; *Pythagoras Gen. Contracting Corp.*, ARB Nos. 08–107, 09–007, 2011 WL 1247207, at \*13–14, \*13 n.94. Responsible company officials cannot “avoid debarment by claiming that the labor standards violations were committed by employees of the firm.” *Superior Masonry, Inc.*, WAB No. 94–19, 1995 WL 256782, at \*5 (Apr. 28, 1995). The Department notes much of the same analysis to determine whether a firm has disregarded its obligations and should be debarred will apply to determine whether an individual is a

<sup>271</sup> As with debarment under the DBA and Related Acts, the policy for debarment, suspension, and ineligibility under the FAR underscores that “[t]he serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government’s protection and not for purposes of punishment.” 48 CFR 9.402(b); see also *Gonzalez*, 334 F.2d at 576–77 (“Notwithstanding its severe impact upon a contractor, debarment is not intended to punish but is a necessary ‘means for accomplishing the congressional purpose’” at issue in that case).

<sup>272</sup> The Department notes that contrary to the comment from the group of U.S. Senators, the regulations do not change any of the existing evidentiary burdens (*e.g.*, “burden of persuasion”). WHD will continue to have to prove violations in administrative proceedings by a preponderance of the evidence.

responsible officer of the firm whose debarment is warranted.

To determine whether a debarred firm or person has an “interest” in another entity that should also be debarred, the Department will consider such factors as the debarred party’s ownership interest, extent of control of the related entity’s operations, whether the related entity was formed by a person previously affiliated with or a relative of the debarred party, and whether there is common management. *See, e.g., R.C. Foss & Son, Inc.*, WAB No. 87–46, 1990 WL 484311, at \*2, \*4 (Dec. 31, 1990) (affirming Related Act debarment of entity owned by wife of debarred subcontractor’s principal owner and for which debarred owner was performing same functions as he had performed for debarred subcontractor); *see generally Charles Randall*, LBSA No. 87–SCA–32, 1991 WL 733572 (Dec. 9, 1991) (SCA and CWHSSA). Entities in which a debarred person or firm holds only a “nominal interest” will not be debarred. 47 FR 23661.

Finally, because the Department received no comments specifically about the scope of the debarment proposal, the final rule therefore adopts the change as proposed.

For the foregoing reasons, the final rule adopts the harmonized debarment standards so that—regardless of the source or type of Federal funding—all DBRA contractors, subcontractors, and responsible officers (as well as firms in which they have an interest) that disregard their obligations to workers or subcontractors are subject to a 3-year debarment during which they may not receive any contract or subcontract of the United States or the District of Columbia, as well as any contract or subcontract subject to the labor standards provisions of the laws referenced in § 5.1. Specifically, the Department adopts with no modification the proposed changes to § 5.12 as well as the proposed conforming changes to § 5.6(b) (included in renumbered §§ 5.6(b)(4) and 5.7(a)). In addition, the Department adopts the changes to § 5.5(a)(10) as proposed, except that an inadvertent error in the proposed regulatory text has been corrected. That section referred to ineligibility “by virtue of 40 U.S.C. 3144(b) or § 5.12(a) or (b),” but it should only have referred to—and this correction has been made in the final rule—ineligibility “by virtue of 40 U.S.C. 3144(b) or § 5.12(a)” to conform to the harmonized debarment provisions in revised § 5.12. Paragraph 5.12(a)(2) has been revised to specify that debarment actions are reflected on the SAM website.

## xxii. Employment Relationship Not Required

The Department proposed a few changes throughout parts 1, 3, and 5 to reinforce the well-established principle that Davis-Bacon labor standards requirements apply even when there is no employment relationship between a contractor and worker.

In relevant part, the DBA states that “the contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work, unconditionally and at least once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and the laborers and mechanics.” 40 U.S.C. 3142(c)(1). The Department has interpreted this language to cover “[a]ll laborers and mechanics employed or working upon the site of the work,” § 5.5(a)(1)(i), and the definitions of “employed” in parts 3 and 5 of the existing regulations similarly reflect that the term includes all workers on the project and extends beyond the traditional common-law employment relationship. *See* § 3.2(e) (“Every person paid by a contractor or subcontractor in any manner for his labor . . . is *employed* and receiving wages, regardless of any contractual relationship alleged to exist between him and the real employer.”); § 5.2(o) (“Every person performing the duties of a laborer or mechanic [on DBRA work] is *employed* regardless of any contractual relationship alleged to exist between the contractor and such person.”); *cf.* 41 U.S.C. 6701(3)(B) (defining “service employee” under the SCA to “include[] an individual without regard to any contractual relationship alleged to exist between the individual and a contractor or subcontractor”); 29 CFR 4.155 (providing that whether a person is a “service employee” does not depend on any alleged contractual relationship).

The ARB and its predecessors have similarly recognized that the DBRA apply to workers even in the absence of an employment relationship. *See Star Brite Constr. Co., Inc.*, ARB No. 98–113, 2000 WL 960260, at \*5 (June 30, 2000) (“[T]he fact that the workers [of a subcontractor] were engaged in construction of the . . . project triggered their coverage under the prevailing wage provisions of the [DBA]; lack of a traditional employee/employer relationship between [the prime

contractor] and these workers did not absolve [the prime contractor] from the responsibility to insure that they were compensated in accordance with the requirements of the [DBA].”); *Labor Servs., Inc.*, WAB No. 90–14, 1991 WL 494728, at \*2 (May 24, 1991) (stating that the predecessor to section 3142(c) “applies a functional rather than a formalistic test to determine coverage: if someone works on a project covered by the Act and performs tasks contemplated by the Act, that person is covered by the Act, regardless of any label or lack thereof,” and requiring a contractor to pay DBA prevailing wages to workers labeled as “subcontractors”). This broad scope of covered workers also extends to CWHSSA, the Copeland Act, and other Related Acts. *See* 40 U.S.C. 3703(e) (providing that Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145 apply to CWHSSA); 29 CFR 3.2(e); *see also, e.g., Ray Wilson Co.*, ARB No. 02–086, 2004 WL 384729, at \*6 (finding that workers met the DBA’s “functional [rather than formalistic] test of employment” and affirming an ALJ’s order of prevailing wages and overtime pay due to workers of a second-tier subcontractor); *Joseph Morton Co.*, WAB No. 80–15, 1984 WL 161739, at \*2–3 (July 23, 1984) (rejecting a contractor’s argument that workers were subcontractors not subject to DBA requirements and affirming an ALJ finding that the contractor owed the workers prevailing wage and overtime back wages for work performed on a contract subject to DBA and CWHSSA); *cf. Charles Igwe*, ARB No. 07–120, 2009 WL 4324725, at \*3–5 (Nov. 25, 2009) (rejecting contractors’ claim that workers were independent contractors not subject to SCA wage requirements, and affirming an ALJ finding that contractors “violated both the SCA and the CWHSSA by failing to pay required wages, overtime, fringe benefits, and holiday pay, and failing to keep proper records”).

The Department proposed a few specific changes to the regulations in recognition of this principle. First, the Department proposed to amend § 1.2 to add a definition of “employed” that is substantively identical to the definition in § 5.2 and to amend § 3.2 to clarify the definition of “employed” in part 3. These changes clarify that the DBA’s expansive coverage of workers even in the absence of an employment relationship is also relevant to wage surveys and wage determinations under part 1 and certified payrolls under part 3. Second, the Department proposed to change references to employment (*e.g.*, “employee,” “employed,” “employing,”

etc.) in § 5.5(a)(3) and (c), as well as elsewhere in the regulations, to refer instead to “workers,” “laborers and mechanics,” or “work.”

Notwithstanding the broad scope of worker coverage reflected in the existing definitions and in case law, the Department explained that the additional language proposed, particularly in the DBRA contract clauses, would further clarify the scope of worker coverage and eliminate any ambiguity that laborers and mechanics are covered by the DBRA even in the absence of an employment relationship. Consistent with the above, however, the words “employee,” “employed,” or “employment” when used in this preamble or in the regulations (including the existing regulations), should be interpreted expansively and do not limit coverage to workers in an employment relationship. Finally, the Department proposed to clarify in the definition of “employed” in parts 1, 3, and 5 that the broad understanding of that term applies equally in the context of “public building[s] or public work[s]” and in the context of “building[s] or work[s] financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise.”

The Department received several dozen comments on this proposal, most of which supported the proposed changes. Many of these comments contended that this proposal would help address the widespread misclassification of employees as independent contractors in the construction industry by reducing or eliminating the perceived incentives to misclassify employees as independent contractors. Several comments cited to numerous misclassification studies substantiating widespread misclassification of employees as independent contractors. For example, the National Employment Law Project (NELP) cited to a 2007 study of New York’s unemployment insurance audits which concluded that the misclassification rate in the construction industry is almost 50 percent higher than the overall misclassification rate in the private sector. LCCHR cited to a study finding 23 percent of Minnesota’s, 20 percent of Illinois’, and 10 percent of Wisconsin’s construction workers were misclassified or paid off-the-books. LCCHR further noted that, according to the study, such misclassification or off-the-books payments cost the three states a combined \$360 million in lost tax revenues per year. LCCHR also cited to an estimate that U.S. construction

workers were denied over \$811 million in overtime premium in 2017 due to misclassification and off-the-books payments.

NELP also stated that the NPRM’s proposals to clarify coverage of laborers and mechanics regardless of their employment status would increase accountability and improve work standards in multitiered contracting relationships. TAUC expressed their support for the NPRM’s proposed changes because the misclassification of employees as independent contractors gives an unfair competitive advantage to contractors and subcontractors who misclassify and underpay their workers.

The Department appreciates the commenters’ concerns about misclassification in the construction industry and expects the NPRM’s proposed changes, which are adopted in this final rule, to further emphasize that the DBRA’s labor standards requirements apply to workers even in the absence of an employment relationship. The changes may also help to reduce misclassification in the construction industry by eliminating any misperception that DBRA requirements can be avoided by classifying workers as independent contractors or by otherwise denying the existence of an employment relationship.

Smith, Summerset & Associates also supported the proposed changes, but commented that the “irrelevancy” of employee status should be further amplified by the specific mention of irrelevancy in the regulations or at least in the preamble. Smith, Summerset & Associates stated that DBRA contractors are overburdened with contracting agency requests for additional documentation that workers are self-employed when workers are listed on certified payrolls without payroll taxes withheld. However, the Department believes that the proposed changes adequately explain that employee status is not relevant to worker coverage under the DBRA, but agencies may still have other relevant purposes for requesting such documentation. As stated in section III.B.3.iii.(B) of this preamble, contracting agencies are free to provide certified payrolls to other enforcement agencies without the Department’s authorization or permission where the contracting agency has determined that such a submission is appropriate and is in accordance with relevant legal obligations. In other words, even though employee status is not relevant to worker coverage under the DBRA, there may be other legitimate reasons to request documentation regarding whether a worker has been properly

identified as “self-employed” or as an independent contractor, and the revisions discussed in this section are not intended to discourage such requests.

CC&M expressed concern over the cost shifting of payroll taxes to workers when they are misclassified as independent contractors. CC&M also noted that even when contractors pay the correct prevailing wages to workers who are misclassified as independent contractors, such workers are excluded from unemployment insurance and other State or Federal employment benefits. Though the Department acknowledges the issues raised by CC&M, these concerns are outside the scope of this rulemaking. The DBA does not address issues related to payroll taxes, unemployment insurance or Federal, State, or local benefit programs that are outside the scope of the wage determinations. Contractors on DBRA-covered projects are required to comply with other applicable laws. Payroll tax laws and other employment benefit programs often have statutory definitions of employment that are properly interpreted and applied by the government agencies with appropriate enforcement and/or regulatory authority over such laws. The Department may, however, refer its findings of misclassification of employees as independent contractors to other tax agencies for further action under their respective authority and discretion.

On the other hand, NAHB opposed the NPRM’s proposed changes to employment terms in parts 1, 3, and 5, asserting that such changes would “seemingly remove[] the defining line between general contractor and subcontractor liability by implying [an employment] relationship ‘regardless of any contractual relationship alleged to exist between the contractor and such person.’” NAHB further asserted that the Department’s proposals would constitute an expansion of joint employer liability, and thus, in NAHB’s view, would place nearly all the burden for subcontractor compliance on the prime contractor. Consequently, NAHB requested that the Department clarify in the final rule that “joint employer” status will be governed by FLSA case law.

The Department believes that NAHB’s concerns about changes to employment terms in the existing regulations are misplaced. As explained in the NPRM, the Department seeks to reinforce the well-established principle that, as already reflected in the statute and existing regulations, Davis-Bacon labor standards requirements apply even when there is no employment



relationship between a contractor and worker. The existing regulations at 29 CFR part 3 and part 5 have long stated that workers are considered to be “employed” for the purposes of prevailing wage and certified payroll requirements, regardless of any contractual relationship which may be alleged to exist. The definitional changes adopted in this final rule simply emphasize this fact. Similarly, defining “employed” in part 1 clarifies that, just as workers are entitled to prevailing wage rates even where there is no employment relationship, it is appropriate to include wage data for independent contractors and others who are not “employed” by a contractor or subcontractor within the meaning of the FLSA in determining prevailing wages under the Davis-Bacon wage survey program. Thus, this final rule does not change the standard for joint employer liability for contractors on Davis-Bacon contracts, as the concept of an employment relationship is simply not relevant to the application of prevailing wage requirements to workers. The Department specifically rejects NAHB’s suggestion to incorporate or cross-reference the FLSA standard for joint employer liability in parts 1, 3, and 5, because contractor obligations under the DBA may exist even in the absence of an employment relationship with covered laborers and mechanics. Despite NAHB’s assertion that the proposal was contrary to legal precedent, the ARB has repeatedly affirmed that DBRA requirements apply even in the absence of an employment relationship as discussed above in this section.

NAHB’s concerns with respect to the proposed changes in § 5.5(a)(6) are more fully discussed in that section of the preamble. However, the Department notes here that a prime contractor’s liability for subcontractor violations is based primarily on statutory language of the DBRA and the contract provisions that flow from that language, rather than based on any concept of joint employment between the prime contractor and the workers of its subcontractors.

For the foregoing reasons, the final rule adopts the described changes to reinforce the well-established principle that Davis-Bacon labor standards apply even when there is no employment relationship between a contractor and worker in parts 1, 3, and 5 as proposed.

#### xxiii. Withholding

The DBA, CWHSSA, and the regulations at 29 CFR part 5 authorize withholding from the contractor accrued payments or advances equal to the

amount of unpaid wages due laborers and mechanics under the DBRA. *See* 40 U.S.C. 3142(c)(3), 3144(a)(1) (DBA withholding), 3702(d), 3703(b)(2) (CWHSSA withholding); 29 CFR 5.5(a)(2) and (b)(3) and 5.9. Withholding helps to realize the goal of protecting workers by ensuring that money is available to pay them for the work they performed but for which they were undercompensated. Withholding plays an important role in the statutory schemes to ensure payment of prevailing wages and overtime to laborers and mechanics on Federal and federally assisted construction projects. The regulations currently require, among other things, that upon a request from the Department, contracting agencies must withhold so much of the contract funds as may be considered necessary to pay the full amount of wages required by the contract, and in the case of CWHSSA, liquidated damages. *See* 29 CFR 5.5(a)(2) and (b)(3) and 5.9. The Department proposed a number of regulatory revisions to reinforce the current withholding provisions.

#### (A) Cross-Withholding

Cross-withholding is a procedure through which agencies withhold contract monies due a contractor from contracts other than those on which the alleged violations occurred. Prior to the 1981–1982 rulemaking, Federal agencies generally refrained from cross-withholding for DBRA liabilities because neither the DBA nor the CWHSSA regulations specifically provided for it. In 1982, however, the Department amended the contract clauses to expressly provide for cross-withholding. *See* 47 FR 23659–60<sup>273</sup> (cross-withholding permitted as stated in § 5.5(a)(2) and (b)(3)); *Grp. Dir., Claims Grp./GGD*, B–225091, 1987 WL 101454, at \*2 (Comp. Gen. Feb. 20, 1987) (the Department’s 1983 Davis-Bacon regulatory revisions, *e.g.*, § 5.5(a)(2), “now provide that the contractor must consent to cross-withholding by an explicit clause in the contract”).

In the NPRM, the Department proposed additional amendments to the cross-withholding contract clause language at § 5.5(a)(2) and (b)(3) to clarify and strengthen the Department’s ability to cross-withhold when contractors use single-purpose entities, joint ventures or partnerships, or other similar vehicles to bid on and enter into DBRA-covered contracts. As noted in

the earlier discussion of the definition of prime contractor in section III.B.3.ii.(D), the interposition of another entity between the contracting agency and the general contractor is not a new phenomenon. However, the use of single-purpose LLC entities and similar joint ventures and teaming agreements in government contracting generally has been increasing in recent decades. *See, e.g.*, John W. Chierichella & Anne Bluth Perry, “Teaming Agreements and Advanced Subcontracting Issues,” Fed. Publ’ns LLC, TAASI GLASS–CLE A, at \*1–6 (2007); A. Paul Ingrao, “Joint Ventures: Their Use in Federal Government Contracting,” 20 Pub. Cont. L.J. 399 (1991).

The Department explained in the NPRM that in response to this increase in the use of such single-purpose legal entities or arrangements, Federal agencies have often required special provisions to assure that liability among joint venturers will be joint and several. *See, e.g.*, Ingrao, *supra*, at 402–03 (“Joint and several liability special provisions vary with each procuring agency and range from a single statement to complex provisions regarding joint and several liability to the government or third parties.”). While the corporate form may be a way for joint venturers to attempt to insulate themselves from liability, commentators have noted that this “advantage will rarely be available in a Government contracts context, because the Government will customarily demand financial and performance guarantees from the parent companies as a condition of its ‘responsibility’ determination.” Chierichella & Perry, *supra*, at \*15–16.

Under the existing regulations, however, the Government is not able to obtain similar guarantees to secure performance of Davis-Bacon labor standards and CWHSSA requirements. It is necessary for the cross-withholding regulations to be amended to ensure that the core DBRA remedy of cross-withholding is available when single-purpose LLCs and similar contracting vehicles are used to contract with the Federal Government. This enforcement gap exists because, as a general matter, cross-withholding (referred to as “offset” under the common law) is not available unless there is a “mutuality of debts” in that the creditor and debtor involved are exactly the same person or legal entity. *See R.P. Newsom*, 39 Comp. Gen. 438, 439 (1959). That general rule, however, can be waived by agreement of the parties. *See Lila Hannebrink*, 48 Comp. Gen. 365, 365 (1968) (allowing cross-withholding against a joint venture for debt of an individual joint

<sup>273</sup> The May 28, 1982, final rule was implemented in part, including § 5.5(a)(2) and (b)(3), in 1983. 48 FR 19540, 19540, 19545–47 (Apr. 29, 1983).

venturer on a prior contract, where all parties agreed).

The structure of the Davis-Bacon Act, with its implementation in part through the mechanism of contract clauses, provides both the opportunity and the responsibility of the Government to ensure—by contract—that the use of the corporate form does not interfere with Congress's mandate that workers be paid the required prevailing wage and that withholding ensures the availability of funds to pay any back wages and other monetary relief owed. It is a cardinal rule of law that “the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement.” *Anderson v. Abbott*, 321 U.S. 349, 363 (1944). This principle is generally applied to allow, in appropriate circumstances, for corporate forms to be disregarded by “piercing the corporate veil.”<sup>274</sup> However, where a policy is effectuated through contract terms, it can be inefficient and unduly limiting to rely on post hoc veil-piercing to implement that policy. The Government may instead, by contract, make sure that the use of single-purpose entities, subsidiaries, or joint ventures interposed as nominal “prime contractors” does not frustrate the Congressional mandate to ensure back wages are available through withholding.<sup>275</sup>

Accordingly, the Department proposed to amend the withholding contract clauses at § 5.5(a)(2) and § 5.5(b)(3), as well as to amend § 5.9, to ensure that any entity that directly enters into a contract covered by Davis-Bacon labor standards must agree to cross-withholding against it to cover liabilities for any DBRA violations on not just that contract, but also on other

covered contracts entered into by the entity that directly entered into the contract or by specified affiliates. The covered affiliates were those entities included within the proposed definition of prime contractor in § 5.2, including controlling shareholders or members and joint venturers or partners. Thus, for example, if a general contractor secures two prime contracts for two Related Act-covered housing projects through separate single-purpose entities that it controls, the proposed cross-withholding language would allow the Department to seek cross-withholding against either contract even though the contracts are nominally with separate legal entities.

The Department also proposed to add language to § 5.5(a)(2) and (b)(3) to clarify that the Government may pursue cross-withholding regardless of whether the contract on which withholding is sought was awarded by, or received Federal assistance from, the same agency that awarded or assisted the prime contract on which the violations necessitating the withholding occurred. This revision is in accordance with the Department's longstanding policy, the current language of the withholding clauses, and case law on the use of setoff procedures in other contexts dating to 1946. *See, e.g., United States v. Maxwell*, 157 F.3d 1099, 1102 (7th Cir. 1998) (“[T]he federal government is considered to be a single-entity that is entitled to set off one agency's debt to a party against that party's debt to another agency.”); *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946) (same). However, because the current Davis-Bacon regulatory language does not explicitly state that funds may be withheld from contracts awarded or assisted by other Federal agencies, some agencies have questioned whether cross-withholding is appropriate in such circumstances. This proposed addition would expressly dispel any such uncertainty or confusion. Conforming edits were also proposed to § 5.9.

The Department also proposed certain non-substantive changes to streamline the withholding clauses. The Department proposed to include in the withholding clause at § 5.5(a)(2)(i) similar language as in the CWHSSA withholding clause at § 5.5(b)(3) authorizing withholding necessary “to satisfy the liabilities . . . for the full amount of wages . . . and monetary relief” of the contractor or subcontractor under the contract without reference to the specific, and duplicative, language currently in § 5.5(a)(2) that re-states the lists of the types of covered workers already listed in § 5.5(a)(1)(i). The Department also proposed using the

same phrase “so much of the accrued payments or advances” in both § 5.5(a)(2) and (b)(3), instead of simply “sums” as currently written in § 5.5(b)(3). Finally, the Department proposed to adopt in § 5.5(b)(3) the use of the term “considered,” as used in § 5.5(a)(2), instead of “determined” as currently used in § 5.5(b)(3), to refer to the determination of the amount of funds to withhold, as this mechanism applies in the same manner under both clauses.

Conforming edits for each of the above changes to the withholding clauses at § 5.5(a)(2) and (b)(3) were also proposed for § 5.9. In addition, the Department proposed clarifying in a new paragraph (c) of § 5.9 that cross-withholding from a contract held by a different legal entity is not appropriate unless the withholding provisions in that different legal entity's contract were incorporated in full or by reference. Absent exceptional circumstances, cross-withholding would not be permitted from a contract held by a different legal entity where Davis-Bacon labor standards were incorporated only by operation of law into that contract.

The Department received multiple comments in support of the proposed revisions to the regulatory language for cross-withholding. Several commenters noted that as the construction industry has evolved over the years to include an increased use of contracting entities that are closely related, particularly single-purpose contracting entities, the Department's regulations must similarly change to ensure that the use of such contracting vehicles does not undercut the remedial purpose of the DBA. These commenters noted that the proposed revisions are necessary both to ensure that workers receive the prevailing wages that they are entitled to for their work and to prevent law-abiding contractors from being undercut by contractors taking advantage of these contracting entities to underpay their workers. They also pointed out that the provisions would make it more difficult for entities to move from contract to contract without making their workers whole for any wage underpayment. *See, e.g.,* ACT Ohio, FFC, III-FFC, LIUNA, NCDCL, REBOUND, SMACNA, UBC. The Department agrees with such commenters that it is necessary for the Davis-Bacon regulations to take modern contracting processes into account, to safeguard the payment of applicable prevailing wages to workers, and to ensure uniform compliance across the industry.

ABC and IEC opposed the proposal and stated that cross-withholding in any circumstances is not authorized by the

<sup>274</sup> The Department has long applied corporate veil-piercing principles under the DBRA. *See, e.g., Thomas J. Clements, Inc.*, ALJ No. 82-DBA-27, 1984 WL 161753, at \*9 (June 14, 1984) (recognizing, in the context of a Davis-Bacon Act enforcement action, that a court may “pierce the corporation veil where failure to do so will produce an unjust result”), *aff'd*, WAB No. 84-12, 1985 WL 167223, at \*1 (Jan. 25, 1985) (adopting ALJ's decision as the WAB's own decision); *Griffin v. Sec'y of Lab.*, ARB Nos. 00-032, 00-033, 2003 WL 21269140, at \*8, n.2 (May 30, 2003) (various contractors and their common owner, who “made all decisions regarding operations of all of the companies,” were one another's “alter egos” in a DBRA debarment action), *aff'd sub nom Phoenix-Griffin Grp. II, Ltd. v. Chao*, 376 F. Supp. 2d 234, 247 (D.R.I. 2005).

<sup>275</sup> *Cf. Robert W. Hamilton, The Corporate Entity*, 49 Tex. L. Rev. 979, 984 (1971) (noting the difference in application of “piercing the veil” concepts in contract law because “the creditor more or less assumed the risk of loss when he dealt with a ‘shell’; if he was concerned, he should have insisted that some solvent third person guarantee the performance by the corporation”).

Davis-Bacon Act. They asserted the DBA limits withholding to the contract on which the violations occurred. A comment from Practus, LLP claimed that legislative action was required for the “ambiguous” cross-withholding policy. An individual commenter argued that the Davis-Bacon Act does not expressly provide for cross-withholding, and that cross-withholding could result in violations of the “Purpose Statute” and the Anti-Deficiency Act when the cross-withholding is effectuated by a contracting agency other than the agency with the contract on which DBA violations had been found. This commenter requested that language be added to the regulation to clarify that cross-withholding is “subject to availability of funds in accordance with law.” IEC also claimed that the Department’s explanation for the proposed language acknowledged that there is no “mutuality of debts” between a contractor and the government when a contractor owes a worker wages that would justify a cross-withholding. FTBA did not object to cross-withholding as a whole, but objected to cross-withholding on contracts held by separate legal entities that merely have some form of common ownership or control, on the ground that cross-withholding in such circumstances ignores the separate legal status (for contract award, tax, payroll, and myriad other purposes) of such contracting entities.

FTBA and ABC also stated that there is no indication that cross-withholding is necessary to ensure that workers receive back pay for prevailing wage violations. ABC suggested that the Department has ample resources available to enforce findings of violations on a particular DBA-covered contract without the use of cross-withholding. IEC and the group of U.S. Senators also expressed general concern that the cross-withholding process would not provide sufficient due process for contractors, and IEC proposed that the regulations should prohibit funds from being withheld until the ARB had reviewed and approved the proposed withholding. Practus similarly emphasized the need for specific due process safeguards especially when “underlying claims involving a subcontractor are not yet liquidated or ripe for adjudication.” Finally, APCA stated that the changes (among others) would have negative effects on contractors’ costs, compliance responsibilities, enforcement exposure, and penalties.

The Department does not agree with comments that suggest the DBA does

not permit the use of cross-withholding. The DBA provides that “there may be withheld from the contractor so much of accrued payments as the contracting officer considers necessary to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by the laborers and mechanics and not refunded to the contractor or subcontractors or their agents.” 40 U.S.C. 3142(c)(3). The statute does not specify from which contract the funds should be withheld or state that the funds should be only withheld from the contract on which the violations occurred or from payments due for work on that specific contract.<sup>276</sup> The Department rejects IEC’s claim that the use of the term “the work” in section 3142(c)(3) limits the contracts from which accrued payments may be withheld to the contract on which “the work” occurred for which workers were not properly paid, and that this statutory provision therefore does not authorize withholding of funds from a DBA contract on which no violations were found. The term “on the work” in section 3142(c)(3) specifies which workers are to benefit from the withholding—those on the DBA-covered work on which the violations occurred; “on the work” does not limit the accrued payments from which monies can be withheld. Rather, the statute directs that funds may be “withheld from the contractor” in an amount considered necessary to pay the difference between the rates required and the rates paid to laborers and mechanics on the work.<sup>277</sup> The regulations have expressly provided for cross-withholding for the past 40 years, as previously explained. And, contrary to commenters’ assertions that cross-withholding is unnecessary to make workers whole, the Department has

<sup>276</sup> Similarly, CWHSSA does not specify the contract from which funds should be withheld for the payment of unpaid wages, as it states that “the governmental agency . . . may withhold, or have withheld, from money payable because of work performed by a contractor or subcontractor, amounts administratively determined to be necessary to satisfy the liabilities of the contractor or subcontractor for unpaid wages and liquidated damages as provided in this section.” 40 U.S.C. 3702(d).

<sup>277</sup> One commenter indicated that by stating that withholding should be for the difference between wages paid and the prevailing wage due to laborers or mechanics on the work, Congress intended to say that funds could only be withheld from the contract on which the violations occurred. However, this language merely addresses the amount of funds that may be withheld, and hence does not identify or limit the contracts from which such withholding may occur.

repeatedly used the cross-withholding process to obtain back wages for workers where there would otherwise be insufficient contract funds available to ensure that workers are paid the applicable prevailing wages. *Cf. Silverton Constr. Co., Inc.*, WAB No. 92–09, 1992 WL 515939, at \*2–3 (Sept. 29, 1992) (reversing ALJ’s decision that prime contractor was not liable for its subcontractor’s underpayments because no money had been withheld under the contract on which violations were found because this decision was inconsistent with the Department’s regulations in effect since 1983 that permit cross-withholding if necessary to satisfy Davis-Bacon and CWHSSA obligations).

Moreover, as noted in this section above, cross-withholding is related to the common-law right of “offset.” It is well settled that no statutory authority at all is necessary for the Federal government to assert the right of offset. “Like private creditors, the federal government has long possessed the right of offset at common law.” *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 817 (D.C. Cir. 1997) (citing, among other cases, *Gratiot v. United States*, 40 U.S. 336, 370 (1841)).<sup>278</sup> To accept the commenters’ assertion that the DBA does not permit cross-withholding would mean that, by enacting the withholding provisions in the Act, Congress had limited—and not expanded—the government’s authority. There is no basis for such a conclusion. To the contrary, the legislative history of the 1935 amendments to the Act reflects Congress’s intent that withholding operate to ensure that workers would be made whole. *See Liberty Mut. Ins. Co.*, ARB No. 00–018, 2003 WL 21499861, at \*6 (citing S. Rep. No. 74–1155 (1935)). As the ARB noted in the *Liberty Mutual* decision, “neither the DBA’s terms nor the legislative history indicate Congress’s intention to limit the Administrator’s withholding authority to the detriment of the laborers and mechanics that are the intended beneficiaries of the Act.” *Id.*

The Department also disagrees with the individual commenter that cross-withholding contravenes the Anti-Deficiency Act, the Purpose Statute, or other statutes governing the use of appropriated funds, and declines to revise the regulatory text as they

<sup>278</sup> In *Gratiot*, the Supreme Court explained that “[t]he United States possess[es] the general right to apply all sums due for such pay and emoluments, to the extinguishment of any balances due to them by the defendant, on any other account, whether owed by him as a private individual, or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.” *Gratiot*, 40 U.S. at 370.

requested. The Anti-Deficiency Act prohibits, in relevant part, an officer or employee of the United States from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.” 31 U.S.C. 1341(a)(1)(A). The commenter appears to have conflated the Anti-Deficiency Act with another general prohibition on unauthorized transfers of funds between appropriations accounts. See U.S. Gov’t Accountability Off., 1 Principles of Federal Appropriations Law ch. 2, at 2–38–39 (3d ed. 2015) (GAO Red Book). Specifically, 31 U.S.C. 1532 provides that “[a]n amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.” An unauthorized transfer could lead to a violation of the Anti-Deficiency Act or Purpose Statute if the transfer “led to overobligating the receiving appropriation” or “the use of appropriations for other than their intended purpose,” respectively. GAO Red Book ch. 2 at 38–40. The commenter also apparently relies on “a general rule that an agency may not augment its appropriations from outside sources without specific statutory authority.” NRC Authority to Collect Annual Charges From Federal Agencies, 15 Op. O.L.C. 74, 78 (1991) (referring to the “anti-augmentation principle”). The commenter’s concerns are misplaced because cross-withholding does not involve any impermissible transfer or augmentation, and because cross-withholding and disbursement of cross-withheld funds are authorized by law.

Contrary to this individual commenter’s concerns, cross-withholding does not involve an impermissible augmentation of any agency’s appropriation. Nor, relatedly, is the cross-withholding agency making payments on the other agency’s contract (i.e., augmenting that agency’s appropriation) as the individual commenter also appeared to suggest. First, when funds are cross-withheld, they remain in the account of the contracting agency from whose contract the funds are being withheld, typically before being disbursed to workers by the Department, as discussed below. The contracting agency implementing an inter-agency cross-withholding does not actually or effectively transfer the cross-withheld funds to the contracting agency on whose contract DBRA violations occurred. The contracting agency on whose contract DBRA violations were found has no remaining payment obligations to the contractor,

thereby creating the need for cross-withholding in the first place, which underscores why cross-withholding does not implicate the purpose of, or impermissibly augment, that agency’s appropriation. Second, in the context of inter-agency cross-withholding, contracting agencies neither make payments on another agency’s contract nor could be required to do so, as the DBA imposes liability for paying back wages on contractors, not contracting agencies. See 40 U.S.C. 3142(c)(1) (“[T]he contractor or subcontractor shall pay all mechanics and laborers employed directly on the site of the work . . . the full amounts accrued at time of payment.” (emphasis added)); see also 40 U.S.C. 3702(b)(2) (“[T]he contractor and any subcontractor responsible for the [CWHSSA overtime] violation are liable”). Rather, the cross-withholding agency is ensuring, at the Department’s request, that the contractor is not overpaid given the contractor’s (or its subcontractor’s) failure to satisfy their statutory and contractual obligation to workers. As such, inter-agency cross-withholding functions as a mechanism to satisfy the contractor’s DBRA underpayment liability. The cross-withholding contracting agency thus is not augmenting (by transfer or otherwise) appropriated funds of the contracting agency on whose contract the DBRA violations occurred.

Consistent with the DBA’s directive that the Department pay withheld monies “directly to laborers and mechanics,” 40 U.S.C. 3144(a), see also 40 U.S.C. 3703(b)(3), the cross-withholding contracting agency may eventually transfer the cross-withheld funds to WHD—in its capacity as enforcement agency—for distribution directly to workers to whom the contractor owes DBRA back wages. WHD in turn may only distribute cross-withheld funds to such workers after any challenge to the finding of violations has been resolved. Until then, the withheld funds are effectively held in trust for the benefit of the underpaid workers and cannot be used by DOL for purposes other than disbursement to workers. Cf. *In re Quinta Contractors, Inc.*, 34 B.R. 129, 131 (Bankr. M.D. Pa. 1983) (invoking statutory trust principles in concluding that funds withheld under the DBA were not property of an estate in bankruptcy except to the extent that the amount withheld exceeded the amount of the debtor’s liability under the DBA).<sup>279</sup> If

<sup>279</sup> Similarly, when an SCA-covered contractor fails to pay required prevailing wages and fringe benefits, the underpaid funds are “impressed with

there are any unclaimed funds after 3 years, WHD is required to send such funds to the U.S. Treasury.”<sup>280</sup> Cf. B–256568 (Comp. Gen. Mar. 18, 1994) (finding that, under predecessor provision of DBA under which Comptroller General, not the Department, disbursed withheld funds to workers, 3 years was a suitable period of time for GAO to wait before transferring unclaimed withheld funds to the Treasury). The Department’s cross-withholding and distribution process is thus an enforcement mechanism authorized by statute under which WHD acts as an intermediary to return funds to the workers to whom they are owed. Cf. *Grp. Dir., Claims Grp./GGD*, B–225091, 1987 WL 101454, at \*2 (stating that under CWHSSA, disbursement of withheld funds is “purely ministerial”); *Glaude d/b/a Nationwide Indus. Svcs.*, ARB No. 98–081, 1999 WL 1257839, at \*1–2, \*4 (Nov. 24, 1999) (affirming pre-hearing withholding and cross-withholding from contractor under contracts with two Federal agencies for SCA back wages ALJ found due to contractor’s workers on one of those contracts); *Nissi Corp.*, BSCA No. SCA–1233, 1990 WL 656138 (Sept. 25, 1990) (finding it was proper to cross-withhold funds on a contract with one agency for SCA underpayments that an ALJ had found due on another agency’s contract with the same contractor).

In any event, the Anti-Deficiency Act permits transfers, expenditures, and obligations where “specified in . . . any other provision of law.” 31 U.S.C. 1341(a)(1). The “other provision of law” exception applies here because the DBA and CWHSSA authorize contracting agencies to withhold accrued payments needed to pay back wages, see 40 U.S.C. secs. 3142(c)(3) & 3702(d), respectively, and require the Department to distribute back wages to underpaid workers, see 40 U.S.C. 3144(a)(1) (“The Secretary of Labor shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found due to laborers and mechanics under this subchapter.”); 40 U.S.C. 3703(b)(3) (“The Secretary of Labor shall pay the amount administratively determined to be due directly to the laborers and mechanics from amounts withheld on account of

a trust, either constructive or statutory, for the benefit of the undercompensated employees.” *Brock v. Career Consultants, Inc.* (In re *Career Consultants, Inc.*), 84 B.R. 419, 424 (Bankr. E.D. Va. 1988); see also, e.g., *In re Frank Mossa Trucking, Inc.*, 65 B.R. 715, 718 (Bankr. D. Mass. 1985).

<sup>280</sup> See, e.g., “Workers Owed Wages,” Wage & Hour Div., Dep’t of Lab., <https://www.dol.gov/agencies/whd/wow>.

underpayments of wages if the amount withheld is adequate. If the amount withheld is not adequate, the Secretary of Labor shall pay an equitable proportion of the amount due.”). Thus, these statutes expressly contemplate that the funds withheld will be transferred to the custody of the Department of Labor so that it can distribute those withheld funds to remedy violations of the DBRA. The Department’s authority to disburse withheld funds to underpaid workers would be meaningless if contracting agencies could not transfer cross-withheld (and withheld) funds to DOL—or withhold accrued payments to begin with.

For similar reasons, cross-withholding does not violate the Purpose Statute. The Purpose Statute states that appropriations “shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” See 31 U.S.C. 1301(a). As with the Anti-Deficiency Act, the DBA and CWHSSA satisfy the “otherwise provided by law” element. Specifically, contrary to the individual commenter’s assertion, both the DBA and CWHSSA authorize contracting agencies to withhold accrued payments needed to pay back wages and expressly authorize the Department to pay such funds directly to underpaid workers. To the extent such withholding and payments could be construed as outside “the objects for which” the appropriation underlying the withheld funds was made, the withholding and payment nonetheless are consistent with the Purpose Statute because Congress expressly authorized such actions through the DBA and CWHSSA.

The fact that Congress in the SCA expressly stated that withholding may be from “the contract or any other contract between the same contractor and the Federal government,” as this individual commenter noted, does not mean that Congress did not authorize the same practice in the DBA or any Related Acts. As noted above, the DBA authorizes the withholding of funds “from the contractor,” without limiting such withholding to the contract on which Davis-Bacon violations occurred. That the SCA and DBA contain differently worded withholding provisions does not establish that cross-withholding is not also authorized under the DBA, or that the DBA should be interpreted as prohibiting cross-withholding. Indeed, Congressional hearings shortly before the SCA’s enactment reflect Congressional awareness that both the SCA and DBA provided for withholding, without suggesting that withholding under the

SCA was broader than under the DBA. *Service Contract Act of 1965: Hearing before the Subcomm. on Lab. of the S. Comm. on Lab. & Pub. Welfare*, 89th Cong. 11, 15–16 (1965). Moreover, as detailed further in sections II.A (“Statutory and regulatory history”) and III.B.3.xix (“Anti-Retaliation”), in 1984, Congress ratified and affirmed as law Reorganization Plan No. 14 of 1950 and declared that previous actions taken pursuant to such reorganization plans were considered to have been taken pursuant to a reorganization expressly approved by Congress. The 1983 cross-withholding regulation is one such prior action.

It is also not accurate to state that the Department’s explanation of the proposed language in the NPRM acknowledged that there is no “mutuality of debts” between a contractor and the government when a contractor owes back wages that would justify a cross-withholding. As explained above, under the common law, cross-withholding is *generally* not available unless there is a “mutuality of debts” in that the creditor and debtor involved are exactly the same person or legal entity. Under the DBA, however, Congress specifically implemented a withholding provision with the goal of ensuring that workers receive the prevailing wages they are owed, and the provision contemplated that the withholding would be made effective through the use of a contract clause. As the Department noted in the NPRM, any question about mutuality of debts does not prohibit offset or withholding where the parties have expressly contracted to provide for such withholding. For these same reasons, the Department does not agree that the proposed language ignores the separate legal status of such contracting entities for a variety of other purposes; it merely recognizes that while this separate legal status may be valid in other situations, it should not be permitted to undermine one of the DBA’s key enforcement mechanisms.

The Department appreciates commenters’ suggestion that the Department should be able to obtain back wages for workers in all instances where there has been a finding of violations even without the use of cross-withholding. In WHD’s experience in Davis-Bacon enforcement, withholding is the remedy of first resort when Davis-Bacon violations are identified and funds remain to be paid on the contract. However, cross-withholding is necessary and appropriate to satisfy the contractor’s potential DBRA liability when there are insufficient funds remaining to be paid under the contract on which violations have been found. In

some instances, the Department does not learn of, and does not have the opportunity to fully investigate, potential violations until contract performance is well underway, nearing completion, or even completed. In such circumstances, it is not realistic that the Department or the relevant contracting agency will be able to determine whether violations have occurred, and determine the back wage amount from such violations, in sufficient time to ensure that 100 percent of the back wage liability can be satisfied by straight withholding on the contract. Resource constraints also contribute to the need for cross-withholding as a remedy. As discussed in section V.A.2, approximately 61,200 firms currently hold DBA contracts or subcontracts and approximately 91,700 firms perform on Related Act contracts. While there is probably some overlap in those numbers, many of these contractors hold multiple contracts or subcontracts, resulting in hundreds of thousands of DBA contracts or subcontracts each year. In contrast, the Department had only 757 Wage and Hour investigators as of December 31, 2021, each of whom is also responsible for enforcing multiple other employment laws. In these circumstances, it is clearly not possible that the Department will be able to determine the nature and extent of any Davis-Bacon violations on every contract before all funds due on the prime contract have been disbursed. Where all funds have been disbursed on such a prime contract, cross-withholding is critical to obtaining the wages that workers are owed.

Similarly, while the Department appreciates commenters’ concerns as to whether the cross-withholding procedure provides sufficient due process to contractors, the Department believes that the withholding process, which is the same for both withholding and cross-withholding, provides ample due process. Contractors and subcontractors that choose to dispute WHD’s violation findings are afforded an opportunity to request an administrative hearing and appellate process before any withheld funds are disbursed to workers. If the appeal process results in a final determination in favor of the contractor or subcontractor, WHD requests that the contracting agency release withheld funds in accordance with applicable law and contract documents. Moreover, contractors do not have a present entitlement to contract funds, as the contractor is only entitled to payment under the contract to the extent that the contractor has complied with the

contract terms, including the requirement to pay laborers and mechanics the applicable prevailing wage rate. *See Ray Wilson Co.*, ARB No. 02–086, 2004 WL 384729, at \* 3–4 (citing *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195–97 (2001)).

For the foregoing reasons, the final rule adopts these changes as proposed, except for the following additional clarifying edits to the proposed withholding contract clauses in §§ 5.5(a)(2), (b)(3), and 5.9(b).

First, the Department deletes the references to § 5.5(a)(1), (a)(11), (b)(2), and (b)(5) to make clear that the scope of withholding has been and continues to be broad. The final rule therefore states that withholding for the full amount of unpaid wages and monetary relief, including interest, and liquidated damages required by the clauses in § 5.5(a) or (b) is appropriate. The references to paragraphs § 5.5(a)(1) and (11) and (b)(2) and (5) are deleted so as not to unintentionally exclude from the scope of withholding any monies determined to be due under other paragraphs of § 5.5, such as § 5.5(a)(6) or (b)(4) for lower-tier subcontractor violations. Similarly, the final rule in § 5.5(a)(2) replaces the current reference to “Davis-Bacon prevailing wage requirements” with “Davis-Bacon labor standards requirements” to be consistent with the definition of Davis-Bacon labor standards in § 5.2.

Second, the Department deleted “under this contract” from the first paragraph of § 5.5(a)(2) to clarify (consistent with current § 5.5(a)(2)) that withholding may be from the prime contract, as well as from other contracts or federally assisted contracts with the same prime contractor as defined in § 5.2.

Third, the Department added clauses to § 5.5(a)(2)(i) and 5.5(b)(3)(i) to emphasize that withheld and cross-withheld funds “may be used to satisfy the contractor liability for which the funds were withheld,” as well as a similar clause in § 5.9(b). These additions were made in response to questions about the source of the DBRA liability, to clarify that the back wage liability is the contractor’s and not the contracting agency’s.

Fourth, the Department changed “loan or grant recipient” to “recipient of Federal assistance” in the first sentences of § 5.5(a)(2) and (b)(3) to encompass Related Act assistance other than loans and grants.

Fifth, the Department revised § 5.5(b)(3) to refer to contracts subject to CWHSSA (consistent with current § 5.5(b)(3)) instead of subject to “Davis-

Bacon prevailing wage requirements” as proposed in the NPRM.

Sixth, the Department clarified in §§ 5.5(a)(2)(i), 5.5(b)(3)(i), and 5.9(a) that Federal and other agencies may withhold on their own initiative and must withhold at the Department’s request.

The Department also added language to § 5.9(a) to specify that, as in the withholding contract clause provisions, the suspension of funds must occur until funds are withheld “as may be considered necessary”—like the similar language in current § 5.5(a)(2) and (b)(3)—to compensate workers, even though there may not yet be a final administrative determination of the back wages and other monetary relief which workers are owed, or of liquidated damages, at the time of the withholding.

#### (B) Suspension of Funds for Recordkeeping Violations

The Department also proposed to add language in § 5.5(a)(3)(iv) to clarify that funds may be suspended when a contractor has failed to submit certified payroll or provide the required records as set forth at § 5.5(a)(3). Comments relating to this proposal are discussed in the preamble regarding § 5.5(a)(3). In accordance with that discussion, the final rule adopts this change as proposed.

#### (C) The Department’s Priority to Withheld Funds

The Department proposed to revise §§ 5.5(a)(2), 5.5(b)(3), and 5.9 to codify the Department’s longstanding position that, consistent with the DBRA’s remedial purpose to ensure that prevailing wages are fully paid to covered workers, the Department has priority to funds withheld (including funds that have been cross-withheld) for violations of Davis-Bacon prevailing wage requirements and CWHSSA overtime requirements. *See also* PWRB,<sup>281</sup> DBA/DBRA/CWHSSA Withholding and Disbursement, at 4. To ensure that underpaid workers receive the monies to which they are entitled, contract funds that are withheld to reimburse workers owed Davis-Bacon or CWHSSA wages, or both, must be reserved for that purpose and may not be used or set aside for other purposes until such time as the prevailing wage and overtime issues are resolved.

Affording the Department first priority to withheld funds, above competing claims, “effectuate[s] the plain purpose of these federal labor standards laws . . . [to] insure that

every laborer and mechanic is paid the wages and fringe benefits to which [the DBA and DBRA] entitle them.” *Quincy Hous. Auth. LaClair Corp.*, WAB No. 87–32, 1989 WL 407468, at \*3 (Feb. 17, 1989) (holding that “the Department of Labor has priority rights to all funds remaining to be paid on a federal or federally-assisted contract, to the extent necessary to pay laborers and mechanics employed by contractors and subcontractors under such contract the full amount of wages required by federal labor standards laws and the contract”). Withholding priority serves an important public policy of providing restitution for work that laborers and mechanics have already performed, but for which they were not paid the full DBA or Related Act wages they were owed.

Specifically, the Department proposed to set forth expressly that it has priority to funds withheld for DBA, CWHSSA, and other Related Act wage underpayments over competing claims to such withheld funds by:

- (1) A contractor’s surety(ies), including without limitation performance bond sureties, and payment bond sureties;
- (2) A contracting agency for its procurement costs;
- (3) A trustee(s) (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 assignee(s);
- (5) A contractor’s successor(s); or
- (6) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–07.

To the extent that a contractor did not have rights to funds withheld for Davis-Bacon wage underpayments, its sureties, assignees, successors, creditors (*e.g.*, IRS), or bankruptcy estate likewise do not have such rights, as it is well established that such entities do not have greater rights to contract funds than the contractor does. *See, e.g., Liberty Mut. Ins. Co.*, ARB No. 00–018, 2003 WL 21499861, at \*7–9 (The Department’s priority to DBA withheld funds where surety “ha[d] not satisfied all of the bonded [and defaulted prime] contractor’s obligations, including the obligation to ensure the payment of prevailing wages”); *Unity Bank & Tr. Co. v. United States*, 5 Cl. Ct. 380, 384 (1984) (assignees acquire no greater rights than their assignors); *Richard T. D’Ambrosia*, 55 Comp. Gen. 744, 746 (1976) (IRS tax levy cannot attach to money withheld for DBA underpayments in which contractor has no interest).

Withheld funds always should, for example, be used to satisfy DBA and Related Act wage claims before any

<sup>281</sup> See note 19, *supra*.

reprocurement costs (e.g., following a contractor's default or termination from all or part of the covered work) are collected by the Government. *See* WHD Opinion Letter DBRA-132 (May 8, 1985). The Department has explained that "[t]o hold otherwise . . . would be inequitable and contrary to public policy since the affected employees already have performed work from which the Government has received the benefit and that to give contracting agency reprocurement claims priority in such instances would essentially require the employees to unfairly pay for the breach of contract between their employer and the Government." *Id.*; *see also* PWRB, DBA/DBRA/CWHSSA Withholding and Disbursement, at 4.<sup>282</sup> This rationale applies with equal force in support of the Department's priority to withheld funds over the other types of competing claims listed in this proposed regulation.

The Department's rights to withheld funds for unpaid earnings also are superior to performance and payment bond sureties of a DBA or DBRA contractor. *See Westchester Fire Ins. Co. v. United States*, 52 Fed. Cl. 567, 581–82 (2002) (surety did not acquire rights that contractor itself did not have); *Liberty Mut. Ins. Co.*, ARB No. 00–018, 2003 WL 21499861, at \*7–9 (ARB found that Administrator's claim to withheld contract funds for DBA wages took priority over performance (and payment) bond surety's claim); *Quincy Hous. Auth. LaClair Corp.*, WAB No. 87–32, 1989 WL 407468, at \*3–4. The Department can withhold unaccrued funds such as advances until "sufficient funds are withheld to compensate employees for the wages to which they are entitled" under the DBA. *Liberty Mut. Ins. Co.*, ARB No. 00–018, 2003 WL 21499861, at \*6 (quoting 29 CFR 5.9).

Similarly, the Department also explained that it has priority over assignees (e.g., assignees under the Assignment of Claims Act, *see* 31 U.S.C. 3727, 41 U.S.C. 6305) to DBRA withheld funds. For example, in *Unity Bank & Trust Co.*, 5 Cl. Ct. at 383, the employees' claim to withheld funds for a subcontractor's DBA wage underpayments had priority over a claim to those funds by the assignee—a bank that had lent money to the subcontractor to finance the work.

Nor are funds withheld pursuant to the DBRA for prevailing wage underpayments property of a contractor's (debtor's) bankruptcy estate. *See In re Quinta Contractors, Inc.*, 34 B.R. 129; *cf. Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135–36 (1962)

(concluding, in a case under the Miller Act, that "[t]he Bankruptcy Act simply does not authorize a trustee to distribute other people's property among a bankrupt's creditors"). When a contractor has violated its contract with the government—as well as the DBA or DBRA—by failing to pay required wages and fringe benefits, it has not earned its contractual payment. Therefore, withheld funds are not property of the contractor-debtor's bankruptcy estate. *Cf. Pro. Tech. Servs., Inc. v. IRS*, No. 87–780C(2), 1987 WL 47833, at \*2 (E.D. Mo. Oct. 15, 1987) (when the Department finds [an SCA] violation and issues a withholding letter, that act "extinguish[es]" whatever property right the debtor (contractor) might otherwise have had to the withheld funds, subject to administrative review if the contractor chooses to pursue it); *In re Frank Mossa Trucking, Inc.*, 65 B.R. 715, 718–19 (Bankr. D. Mass. 1985) (pre-petition and post-petition SCA withholding was not property of the contractor-debtor's bankruptcy estate).

Various Comptroller General decisions further underscore these principles. *See, e.g., Carlson Plumbing & Heating*, B–216549, 1984 WL 47039 (Comp. Gen. Dec. 5, 1984) (DBA and CWHSSA withholding has first priority over IRS tax levy, payment bond surety, and trustee in bankruptcy); *Watervliet Arsenal*, B–214905, 1984 WL 44226, at \*2 (Comp. Gen. May 15, 1984) (DBA and CWHSSA wage claims for the benefit of unpaid workers had first priority to retained contract funds, over IRS tax claim and claim of payment bond surety), *aff'd on reconsideration sub nom. Int'l Fid. Ins. Co.*, B–214905, 1984 WL 46318 (Comp. Gen. July 10, 1984); *Forest Serv. Request for Advance Decision*, B–211539, 1983 WL 27408, at \*1 (Comp. Gen. Sept. 26, 1983) (The Department's withholding claim for unpaid DBA wages prevailed over claims of payment bond surety and trustee in bankruptcy).

The Department proposed codifying its position that DBRA withholding has priority over claims under the Prompt Payment Act, 31 U.S.C. 3901–07. The basis for this proposed provision is that a contractor's right to prompt payment does not have priority over legitimate claims—such as withholding—arising from the contractor's failure to fully satisfy its obligations under the contract. *See, e.g.,* 31 U.S.C. 3905(a) (requiring that payments to prime contractors be for performance by such contractor that conforms to the specifications, terms, and conditions of its contract).

The Department welcomed comments on whether the listed priorities should be effectuated by different language in

the contract clause, such as an agreement between the parties that a contractor forfeits any legal or equitable interest in withheld payments once it commits violations, subject to procedural requirements that allow the contractor to contest the violations.

The Department received multiple comments generally supporting the proposed language explicitly stating that the Department has priority to funds withheld for violations of Davis-Bacon prevailing wage requirements and CWHSSA overtime requirements over other competing claims. These commenters noted that the Department's priority over other competing claims is necessary to ensure that funds are available to pay workers the prevailing wages that they are due. NCDCL and FFC additionally noted that these provisions are particularly important as contractors who underpay their workers frequently have other significant debts. The Department did not receive any suggestions as to alternative language in the contract clause to effectuate these priorities, nor did the Department receive any comments opposing the proposed language prioritizing DBRA withholding over other competing claims. Accordingly, the final rule adopts the changes as proposed.

#### xxiv. Subpart C—Severability

The Department proposed to add a new subpart C, titled "Severability," which would contain a new § 5.40, also titled "Severability." The proposed severability provision explained that each provision is capable of operating independently from one another, and that if any provision of part 5 is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the Department intended that the remaining provisions remain in effect.

The Department received no comments on this proposal. The final rule therefore adopts this change as proposed. An expanded discussion of severability is below in section III.B.5.

### 4. Non-Substantive Changes

#### i. Plain Language

The Plain Writing Act of 2010 (Pub. L. 111–274) requires Federal agencies to write documents in a clear, concise, well-organized manner. The Department has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, "Plain Language in Government Writing," published June 10, 1998 (63 FR 31885). The Department encouraged comment with respect to clarity and

<sup>282</sup> See note 19, *supra*.



effectiveness of the language used. Comments addressing plain language and plain meaning are discussed in their respective sections.

#### ii. Other Changes

The Department proposed to make non-substantive revisions throughout the regulations to address typographical and grammatical errors and to remove or update outdated or incorrect regulatory and statutory cross-references. The Department also proposed to adopt more inclusive language, including terminology that is gender-neutral, in the proposed regulations. These changes are consistent with general practice for Federal government publications; for example, guidance from the Office of the Federal Register advises agencies to avoid using gender-specific job titles (e.g., “foremen”).<sup>283</sup> These non-substantive revisions do not alter the substantive requirements of the regulations.

#### 5. Severability

With respect to this final rule, it is the Department’s intent that all provisions and sections be considered separate and severable and operate independently from one another. In this regard, the Department intends that: (1) In the event that any provision within a section of the rule is stayed, enjoined, or invalidated, all remaining provisions within that section will remain effective and operative; (2) in the event that any whole section of the rule is stayed, enjoined, or invalidated, all remaining sections will remain effective and operative; and (3) in the event that any application of a provision is stayed, enjoined, or invalidated, the provision will be construed so as to continue to give the maximum effect to the provision permitted by law.

It is the Department’s position, based on its experience enforcing and administering the DBRA, that with limited exceptions described below, the provisions and sections of the rule can function sensibly in the event that any specific provisions, sections, or applications are invalidated, enjoined, or stayed. As an initial matter, the Department notes that this is the first comprehensive update of the DBRA regulations in four decades, and as such covers a wide range of diverse topics. Moreover, parts 1, 3, and 5 function independently as a legal and practical matter. The regulations in part 1 concern the procedures for predetermination of wage rates and

fringe benefits, such as the definition of the prevailing wage, the Department’s wage surveys, and the circumstances under which state or local wage rates may be adopted. The regulations in part 5, in contrast, establish rules providing for the payment of these minimum wages and fringe benefits, coverage principles and enforcement mechanisms for these obligations, and the clauses to be included in all covered contracts. The incorporation and enforcement of wage determinations and fringe benefits contained within part 5 are functionally independent from the development of those wage determinations discussed in part 1. Therefore, the Department’s intent is that all the provisions of part 5 remain in effect if a court should invalidate, stay, or enjoin any provision of part 1, or vice versa. The same is true with regard to part 3, which concerns the anti-kickback and other provisions of the Copeland Act.

Similarly, the Department believes that the various provisions within part 1 and part 5 are generally able to operate independently from one another and need not rise or fall as a whole. For example, the three-step process for calculating the prevailing wage in § 1.2 operates independently from § 1.6, which concerns the appropriate use of general and project wage determinations and when and how wage determinations should be incorporated into contracts, and the description of the wage survey process in § 1.3 operates independently from agencies’ obligations to furnish an annual report on their construction programs to the Administrator. Each provision addressing various aspects of how wages are determined also stands on its own as a practical matter, including, for example, the various definitions within § 1.2, and the scope of consideration at § 1.7. Likewise, the final rule’s provisions describing specific principles applicable to fringe benefits in §§ 5.22–5.33 are wholly separate from the provisions in § 5.6 concerning enforcement or provisions in § 5.12 concerning debarment proceedings. Accordingly, as described above in sections III.B.1.ix and III.B.3.xxiv, the Department has finalized, as proposed, new severability provisions in §§ 1.10 and 5.40.

The Department recognizes that a limited exception to the general principle of severability will apply where provisions of the final rule or the regulations are contingent upon other provisions for their existence and viability. For example, as discussed in section III.B.3.xx.C above, the Department’s proposed revisions to § 3.11 were made to conform this section to the operation-of-law

provision in § 5.5(e). If a court were to stay, invalidate, or enjoin § 5.5(e), the Department would have to consider whether changes to § 3.11 would be necessary. However, the Department intends that this exception be applied as narrowly as practicable so as to give maximum effect to the final rule and each regulatory provision within it.

#### C. Applicability Date

As a part of the Department’s general review of potential reliance interests affected by this final rule, it has considered how the rule will affect contractors with contracts that were entered into before the final rule’s effective date. With limited exceptions, the final rule will not affect such contracts. The Department concluded, however, that it would be helpful to address the timing of implementation in an “Applicability Date” subsection within the **DATES** section of the final rule.

The Applicability Date section of the final rule states that the provisions of the rule regarding wage determination methodology and related part 1 provisions prescribing the content of wage determinations may be applied only to wage determination revisions completed by the Department on or after the effective date of the final rule on October 23, 2023. This means that the Department will apply the amendments to §§ 1.2 (including the definitions of “prevailing wage” and “area”), 1.3 (discussion of functional equivalence), and 1.7 (scope of consideration) only to wage surveys for which data collection is completed after the effective date of the final rule. Similarly, the Department will be able to implement the new provisions in §§ 1.3(f) (frequently conformed rates), 1.3(g)–(j) (adoption of State/local prevailing rates), 1.5(b) (project wage determinations), and 1.6(c)(1) (periodic adjustments to non-collectively bargained rates) only in wage determination revisions and project wage determinations that are issued and applicable after that date.

The Department’s wage determination methodology and related provisions prescribing the content of wage determinations, as amended in this final rule, will generally apply only to contracts that are entered into after the effective date of the final rule. This is because, as explained in § 1.6 (“Use and effectiveness of wage determinations”), whenever a new wage determination or wage determination revision is issued (for example, after the completion of a new wage survey or through the new periodic adjustment mechanism), that revision will only apply to contracts that are entered into after the wage

<sup>283</sup> See Office of the Federal Register, “Drafting Legal Documents: Principles of Clear Writing” section 18, available at <https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html>.

determination is issued and will not apply to contracts which have already been entered into, with three exceptions. These exceptions are explained in § 1.6(c)(2)(iii). The first exception, discussed in § 1.6(c)(2)(iii)(A), is where a contract or order is changed to include substantial covered work that was not within the scope of work of the original contract. The second exception, discussed in the same paragraph of the rule, is where an option to extend the term of a contract is exercised. Each of these situations is effectively considered to be a new contract for which the most recent wage determination must be included, even if the wage determination was issued after the date that the original contract was first entered into. The third exception is for certain ongoing contracts that are not tied to the completion of any particular project (such as multiyear IDIQ contracts) for which new wage determinations must be incorporated on an annual basis under § 1.6(c)(2)(iii)(B) of the final rule. Accordingly, only for these limited types of contracts may wage determinations issued in accordance with the final rule be incorporated into contracts that were entered into prior to the effective date of the final rule.

The Applicability Date section provides that contracting agencies must apply the terms of § 1.6(c)(2)(iii) to existing contracts of the types referenced in that regulatory provision, without regard to the date of contract award, “if practicable and consistent with applicable law.” With regard to ongoing contracts covered by § 1.6(c)(2)(iii), such as long-term IDIQ contracts, this language requires contracting agencies to ensure, to the extent practicable, that any existing umbrella contract be amended to include the most updated wage determination on an annual basis, and to do so through the exercise of any and all authority that may be needed, including, where necessary, a contracting agency’s authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination. This requirement applies to both FAR-covered contracts and those that are not. Because this requirement only applies where practicable, it is not necessary for contracting agencies to amend contracts to retroactively impose recent wage determinations. Rather, umbrella contracts must be amended only if they are indefinite or if more than one year remains in their period of performance. In addition, amendment

need not be immediate following the effective date of the final rule. Rather, contracting agencies only need to amend covered umbrella contracts within one year of the effective date.

The Department considered whether the applicability of the new wage determination methodologies in this manner would result in harm to reliance interests of contractors that have entered into contracts covered by the exceptions in § 1.6(c)(2)(iii) and determined that there are no such reliance interests that would outweigh the benefits of the implementation of the final rule as described above. The final rule’s exceptions for new substantial out-of-scope covered work and for exercises of options represent regulatory codifications of existing subregulatory principles, not substantive changes to the Davis-Bacon program. They are consistent with the Department’s guidance, case law, and historical practice, under which such modifications are considered new contracts. See discussion above in section III.B.1.vi.(B). Accordingly, contractors should already expect that in any such covered circumstance, any new wage determination will be incorporated into the contract, and contracts therefore should already account for any resulting changes to prevailing wage rates in a manner that does not adversely affect contractors. Finally, as noted above in section III.B.1.vi.(B), many existing umbrella contracts that might be affected by this requirement may well have mechanisms requiring the contracting agency to compensate the contractor for increases in labor costs over time generally. Other contracts may not currently have such mechanisms, but compensation may be negotiated consistent with applicable law.

With the exception of § 1.6(c)(2)(iii), all of the remaining provisions of parts 1, 3, and 5 will be applicable only to new contracts entered into after the effective date of October 23, 2023. For any contracts entered into before October 23, 2023, the terms of those contracts and the regulations that were effective at the time those contracts were entered into (as interpreted by case law and the Department’s guidance) will continue to govern the duties of contractors and contracting agencies and the enforcement actions of the Department. Accordingly, with regard to the new operation-of-law provision at § 5.5(e), if a contract was entered into prior to the effective date and is missing a required contract clause or wage determination, the Department will seek to address the omission solely through the modification provisions in the

existing regulation at § 1.6(f) as it has been interpreted prior to this rulemaking. In other circumstances, where the Department has acted in this final rule only to clarify or codify existing interpretations and practices, the question of whether a contract was entered into prior to or after the applicability date of this final rule may not in practical terms change contractor duties or the parameters of any enforcement action. For contracts entered into after the effective date of this final rule, but before the Federal Acquisition Regulation or the relevant Related Act program regulations are amended to conform to this rule, agencies must use the contract clauses set forth in § 5.5(a) and (b) of this rule to the maximum extent possible under applicable law.

#### IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency’s need for its information collections, their practical utility, as well as the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. The Department invited public comments as part of the NPRM. 87 FR 15762 (Mar. 18, 2022).

This final rule would affect existing information collection requirements previously approved under OMB control number 1235–0008 (Davis-Bacon Certified Payroll) and OMB control number 1235–0023 (Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts/Contract Work Hours and Safety Standards Act). As required by the PRA, the Department submitted proposed information collection revisions as part of the NPRM to OMB for review to reflect changes that will result from this rulemaking. OMB issued a Notice of Action related to each Information Collection Request (ICR) continuing the collection and asking the Department to address any comments received and resubmit with the final rule.

*Circumstances Necessitating this Collection:* The Department administers enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects. The Copeland Act requires contractors

and subcontractors performing work on federally financed or assisted construction contracts to furnish weekly a statement on the wages paid each employee during the prior week. *See* 40 U.S.C. 3145; 29 CFR 3.3(b). The Copeland Act specifically requires the regulations to “include a provision that each contractor and subcontractor each week must furnish a statement on the wages paid each employee during the prior week.” 40 U.S.C. 3145(a). This requirement is implemented by 29 CFR 3.3 and 3.4 and the standard Davis-Bacon contract clauses set forth at 29 CFR 5.5. The provision at 29 CFR 5.5 (a)(3)(ii)(A) requires contractors to submit weekly a copy of all payrolls to the Federal agency contracting for or financing the construction project. This information collection is assigned OMB control number 1235–0008. Regulations at 29 CFR part 5 prescribe labor standards for federally financed and assisted construction contracts subject to the DBA, 40 U.S.C. 3141 *et seq.*, and Related Acts, including all contracts subject to the CWHSSA, 40 U.S.C. 3701, *et seq.* The DBA and DBRA require payment of locally prevailing wages and fringe benefits, as determined by the Department, to laborers and mechanics on most federally financed or federally assisted construction projects. *See* 40 U.S.C. 3142(a); 29 CFR 5.5(a)(1). CWHSSA requires the payment of one and one-half times the basic rate of pay for hours worked over 40 in a week on most Federal contracts involving the employment of laborers or mechanics. *See* 40 U.S.C. 3702(c); 29 CFR 5.5(b)(1). The requirements of this information collection consist of (A) reports of conformed classifications and wage rates, and (B) requests for approval of unfunded fringe benefit plans. This information collection is assigned OMB control number 1235–0023.

**Summary:** This final rule amends regulations issued under the Davis-Bacon and Related Acts that set forth rules for the administration and enforcement of the Davis-Bacon labor standards that apply to Federal and federally assisted construction projects.

In the NPRM, the Department proposed to add a new paragraph to § 5.5(a)(1), and has recodified the paragraphs as follows:

Current paragraph	New paragraph
§ 5.5(a)(1)(ii)(A) .....	§ 5.5(a)(1)(iii)(A). § 5.5(a)(1)(iii)(B) [paragraph added].
§ 5.5(a)(1)(ii)(B) .....	§ 5.5(a)(1)(iii)(C).
§ 5.5(a)(1)(ii)(C) .....	§ 5.5(a)(1)(iii)(D).
§ 5.5(a)(1)(ii)(D) .....	§ 5.5(a)(1)(iii)(E).

The final rule adopts the additions and revisions to § 5.5(a)(1) as proposed in the NPRM.

The Department also proposed to make non-substantive revisions to § 5.5(a)(1)(iii)(C) and (D) to describe the conformance request process more clearly, including by providing that contracting officers should submit the required conformance request information to WHD via email using a specified WHD email address. The Department adopted these proposals without changes as the changes merely clarified the existing conformance request process and did not alter the information collection burden on the public or on the Department.

Additionally, in the NPRM, the Department proposed adding a new paragraph (b)(5) to § 5.28, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and to replace the text in current paragraph (c) with language explaining the process contractors and subcontractors must use to request such approval. To accommodate these changes, the Department proposed to add a new paragraph (d) that contains the text currently located in paragraph (c) with non-substantive edits for clarity and readability. These changes are summarized as follows:

Current paragraph	New paragraph
§ 5.28(c) .....	§ 5.28(b)(5) [paragraph added]. § 5.28(c) [paragraph added]. § 5.28(d).

The final rule adopts the additions and revisions to § 5.28 as proposed in the NPRM, as these changes merely conformed regulatory language in § 5.28 to the existing approval process for unfunded fringe benefit plan under 29 CFR 5.5(a)(1)(iv). These changes did not alter the information collection burden on the public. The Department is adding regulatory citations to the collection under 1235–0023, however there is no change in burden.

The Department is adding two new recordkeeping requirements for contractors (telephone number and email address) to the collection under 1235–0008. However, it did not propose that such data be added to the “certified payrolls” submission (often collected on the WH–347 instrument); rather, this information must be provided to DOL and contracting agencies on request. The Department is adding a new requirement to 29 CFR 5.5 at renumbered paragraph (a)(3)(iii), which will require all contractors,

subcontractors, and recipients of Federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed. These related documents include contractor and subcontractor bids and proposals, amendments, modifications, and extensions to contracts, subcontracts, and agreements. The Department is amending § 5.5(a)(3)(i) to clarify that regular payrolls and other basic records required by this section must be preserved for a period of at least 3 years after all the work on the prime contract is completed. In other words, even if a project takes more than 3 years to complete, contractors and subcontractors must keep payroll and basic records for at least 3 years after all the work on the prime contract has been completed. This revision expressly states the Department’s longstanding interpretation and practice concerning the period of time that contractors and subcontractors must keep payroll and basic records required by § 5.5(a)(3). This is not a change. The Department notes that it is a normal business practice to keep such documents and previously explained that it does not expect an increase in burden associated with this requirement.

**Purpose and use:** This final rule continues the already existing requirements that contractors and subcontractors must certify their payrolls by attesting that persons performing work on DBRA covered contracts have received the proper payment of wages and fringe benefits. Contracting officials and WHD personnel use the records and certified payrolls to verify contractors pay the required rates for work performed.

Additionally, the Department reviews a proposed conformance action report to determine the appropriateness of a conformance action. Upon completion of review, the Department approves, modifies, or disapproves a conformance request and issues a determination. The Department also reviews requests for approval of unfunded fringe benefit plans to determine the propriety of the plans.

WHD obtains PRA clearance under control number 1235–0008 for an information collection covering the Davis-Bacon Certified Payroll. An ICR Revision will be submitted with this final rule to incorporate the regulatory citations in this final rule and adjust burden estimates to reflect a slight increase in burden associated with the new recordkeeping requirements finalized in this document.

WHD obtains PRA clearance under OMB control number 1235–0023 for an information collection related to reporting requirements related to Conformance Reports and Unfunded Fringe Benefit Plans. An ICR Revision will be submitted with the final rule that includes the shifting regulation citations as well as the addition of references to 29 CFR 5.28. The Agencies will notify the public when OMB approves the ICRs.

*Information and technology:* There is no particular order or form of records prescribed by the regulations. A respondent may meet the requirements of this final rule using paper or electronic means.

*Public comments:* The Department invited public comment on its analysis that the final rule created a slight increase in paperwork burden associated with ICR 1235–0008 and no increase in burden to ICR 1235–0023. The Department received some comments related to the PRA aspect of the NPRM.

The FFC–CT indicated their support for an update to the Department’s recordkeeping requirements, expressing the view that accurate records are critical to transparency and accountability in the construction industry. McKanna, Bishop, Joffe, LLP, and WA BCTC also expressed that they fully support strengthened recordkeeping requirements. Weinberg, Roger, and Rosenfeld, on behalf of the NCDCL concurred, stating the recordkeeping requirements in the proposed rule were “vast improvements” that would “increase transparency and allow the District Council and other organizations to ensure that contractors are complying with the law.” The comment also stated that the proposed rule’s “clarifications and supplemental requirements modernize the DBRA’s recordkeeping requirements and ensure that contractors maintain their records for years after projects are completed.” The UBC suggested that additional recordkeeping requirements should be enacted, including requirements to retain timesheets, job site orientation records, contact information for subcontractors, and records of payments to subcontractors.

Alternatively, a comment submitted by the group of U.S. Senators expressed the view that adding to recordkeeping requirements places an impermissible administrative burden on small to mid-size contractors, many of whom lack the administrative resources to keep up with paperwork burdens. The commenters indicated that in addition to the certified payroll data, contractors

are required to maintain all contracts and subcontracts, as well as bids, proposals, amendments, modifications, and extensions for those contracts and subcontracts. This requirement is not novel, and the time period for DBRA record retention is consistent with other such regulatory requirements for contractors. For example, the SCA requires that contractors and subcontractors maintain many pay and time records “for 3 years from the completion of the work.” 29 CFR 4.6(g)(1). The FAR requires contractors to retain certain records for 3 or 4 years. *See, e.g.*, 48 CFR 4.705–2(a) (contractors must retain certain pay administration records for 4 years); 48 CFR 4.703(a)(1) (requiring contractor retention for 3 years after final payment of “records, which includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form, and other supporting evidence to satisfy contract negotiation, administration, and audit requirements of the contracting agencies and the Comptroller General”).

Moreover, maintaining copies of contracts to which you are a party is a sound business practice to document the parties’ obligations under the contracts, among other reasons. Not only are DBRA-covered construction contracts needed for reference during performance and completion about scope of work, specifications, pricing, etc., but if there is any dispute about the contract provisions, performance, etc., contract documents are the starting point for resolving contractual disputes. In addition, contract payment terms may be supporting documents for a contractor’s business tax filings. The Department is not requiring that contractors maintain originals or even paper copies of contracts and related documents; electronic copies are acceptable so long as they contain a valid electronic signature.

The III–FFC wrote in support of the Department’s proposal to add a recordkeeping requirement to retain telephone number and email address, noting that “[t]he proposed requirements, including maintaining relevant bid and contract information, as well as payroll record information like contact information and correct classifications, help further the purpose of the Act.” III–FFC added that such requirements are “particularly necessary where DOL must contact a worker for investigation or audit purposes and will further reduce the incentive to misclassify workers and commit wage theft.” Some individual commenters

supported recordkeeping requirements indicating that it effectively deters misclassification.

However, ABC opposed this requirement, writing that a requirement to disclose worker telephone numbers and email addresses “constitutes an invasion of employee privacy and exposes employees to the increased possibility of identity theft.” At a minimum, ABC stated, “such information should be redacted and not publicly disclosed under any circumstances.”

After consideration of the comments on this topic, the final rule adopts the changes to § 5.5(a)(3)(i) as proposed. As the various comments in support indicate, the proposed changes will clarify the recordkeeping requirements for contractors, discourage misclassification of workers, and increase the efficiency of the Department’s enforcement. While the Department appreciates ABC’s concerns for workers’ privacy and the need to protect workers from the danger of identity theft, the final rule does not require contractors to provide workers’ telephone numbers or emails on certified payrolls or post them on a publicly available database, but rather requires contractors to maintain this, like other worker contact information, in contractors’ internal records, and make this information available to DOL and contracting agencies upon request for use in the enforcement and administration of the DBRA.

The Department believes that email and telephone number are minimal additional recordkeeping requirements and does not require in this final rule that such data be added to the weekly certified payroll thereby minimizing burden. The Department is, therefore, finalizing these additional recordkeeping requirements as proposed.

The Department received some comments on the proposed changes to § 5.5(a)(1)(iii)(B), which prohibits the use of conformances to “split, subdivide or otherwise avoid application of classifications listed in the wage determination.” Similarly, the Department also received comments regarding other revisions to part 1 and part 5 of the DBA regulations. Commenters like the SNBTU supported the Department’s proposed rule, as did SMART and SMACNA, and LIUNA.

The Department also received some comments expressing concern about scrutiny related to unfunded fringe benefit plans. CC&M, and IUOE expressed their concerns. The comments appear to be premised on a misconception that the revisions impose

new substantive requirements with respect to unfunded plans. Nothing in these revisions alters the four substantive conditions for unfunded plans set out in § 5.28(b)(1)–(4) or the overall requirements that an unfunded plan must be “bona fide” and able to “withstand a test . . . of actuarial soundness.” Consistent with §§ 5.5(a)(1)(iv) and 5.29(e), the Department has long required written approval if a contractor seeks credit for the reasonably anticipated costs of an unfunded benefit plan towards its Davis-Bacon prevailing wage obligations, including with respect to vacation and holiday plans. The revisions to § 5.28 merely clarify this preexisting requirement and detail the process through which contractors may request such approval from the Department.

The FTBA expressed the view that the Department’s proposal that contractors and subcontractors must make available “any other documents deemed necessary to determine compliance with the labor standards provisions of any of the statutes referenced by § 5.1” is too broad and vague, and they expressed concern that such a requirement would have the effect of subjecting contractors to “burdensome, varied, unreasonable requests” left to the discretion of enforcement staff. Alternatively, LIUNA supported the proposed recordkeeping requirements as “clarifying DOL’s ‘longstanding’ approach to requiring contractors to maintain basic records and certified payrolls, including regular payroll and additional records relating to fringe benefit and apprenticeship and training.”

Smith, Summerset & Associates, LLC, suggested that the WH–347 collection instrument used to collect data for the Davis-Bacon Certified Payroll (under OMB control number 1235–0008) is difficult to understand and indicated that the form needs simplification and rearrangement. The commenter added that, “[t]he same changes—replacing ‘employee’ references with ‘worker’ references—should also be made asap to the WH–347 payroll reporting form. The WH–347 is the primary customer-facing document in the DBRA universe. It is used by thousands of contractors who still submit paper CPRs and, via operation of the computer programs, by other thousands of contractors who submit e-CPRs. It is frequently their main source of information about DBRA. WH–347 page 2, the signature page, still uses the terms ‘employees’ and ‘employed by.’ Those references need to be changed asap.” Smith, Summerset & Associates also suggested additional changes to WH–347 to

expand the universe of authorized persons who may sign the WH–347 and to simplify the tool for users. As we note below, changes to the WH–347 are beyond the scope of this rulemaking, but the Department will consider comments submitted as part of the form’s revision process.

The MnDOT, commenting on the Department’s proposal to require the Social Security number and last known address in payroll records, added that this information should also be included in the certified payroll. They suggested that excluding such data on the certified payroll would make it more difficult to track workers between contractors. With respect to comments about the WH–347, the Department reiterates that it proposed no changes to the form in the NPRM. However, the form is currently under review and the Department is considering such comments in the revision process. The Department appreciates this feedback and invites commenters to provide feedback and suggestions when the notice for revision is published in the **Federal Register**.

A copy of these ICRs may be obtained at <https://www.reginfo.gov> or by contacting the Wage and Hour Division as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Total burden for the subject information collections, including the burdens that will be unaffected by this final rule and any changes are summarized as follows:

*Type of review:* Revision to currently approved information collections.

*Agency:* Wage and Hour Division, Department of Labor.

*Title:* Davis-Bacon Certified Payroll.

*OMB Control Number:* 1235–0008.

*Affected public:* Private sector, businesses or other for-profits and Individuals or Households.

*Estimated number of respondents:* 152,900 (0 from this rulemaking).

*Estimated number of responses:* 9,194,616 (1,200,000 from this rulemaking).

*Frequency of response:* On occasion.

*Estimated annual burden hours:* 7,464,975 (3,333 burden hours due to this rulemaking).

*Capital/Start-up costs:* \$1,143,229 (\$0 from this rulemaking).

*Type of review:* Revision to currently approved information collections.

*Agency:* Wage and Hour Division, Department of Labor.

*Title:* Requests to Approve Conformed Wage Classifications and Unconventional Fringe Benefit Plans Under the Davis-Bacon and Related Acts

and Contract Work Hours and Safety Standards Act.

*OMB Control Number:* 1235–0023.

*Affected public:* Private sector, businesses or other for-profits and Individuals or Households.

*Estimated number of respondents:* 8,518 (0 from this rulemaking).

*Estimated number of responses:* 8,518 (0 from this rulemaking).

*Frequency of response:* on occasion.

*Estimated annual burden hours:* 2,143 (0 from this rulemaking).

*Estimated annual burden costs:* 0.

*Capital/Start-up costs:* \$5,366 (\$0 from this rulemaking).

## V. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improved Regulation and Regulatory Review

Under Executive Order 12866, OMB’s Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.<sup>284</sup> Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as a regulatory action that is likely to result in a rule that may:

(1) have an annual effect on the economy of \$100 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities (also referred to as economically significant); (2) create serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order. OIRA has determined that this final rule is a “significant regulatory action” within the scope of section 3(f)(1) of Executive Order 12866. OIRA has also designated this rule as a major rule under Subtitle E of the Small Business Regulatory and Enforcement Fairness Act of 1996. Although the Department has only quantified costs of \$39.3 million in Year 1, there are multiple components of the rule that could not be quantified due to data limitations, so it is possible that the aggregate effect of the rule is larger.

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits

<sup>284</sup> See 58 FR 51735, 51741 (Oct. 4, 1993).

justify its costs; that it is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives; and that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts. The analysis below outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above-mentioned executive orders.

#### A. Introduction

##### 1. Background and Need for Rulemaking

In order to provide greater clarity and enhance their usefulness in the modern economy, the Department is updating and modernizing the regulations that implement the Davis-Bacon and Related Acts. The DBA, enacted in 1931, requires the payment of locally prevailing wages and fringe benefits on Federal contracts for construction. See 40 U.S.C. 3142. The law applies to workers on contracts awarded directly by Federal agencies and the District of Columbia that are in excess of \$2,000 and for the construction, alteration, or repair of public buildings or public works. Congress subsequently incorporated DBA prevailing wage requirements into numerous statutes (referred to as Related Acts) under which Federal agencies assist construction projects through grants, loans, guarantees, insurance, and other methods.

The Department seeks to address a number of outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. In this rulemaking, the Department is updating and modernizing the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. Among other updates, as discussed more fully earlier in this preamble, under this rule the Department will:

- Return to the definition of “prevailing wage” in § 1.2 that it used from 1935 to 1983.<sup>285</sup> Currently, a wage rate may be identified as prevailing in the area only if it is paid to a majority of workers in a classification on the wage survey; otherwise, a weighted

average is used. The Department will return instead to the “three-step” method in effect before 1983. Under that method, in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Only if no wage rate is paid to at least 30 percent of workers in a classification will an average rate be used.

- Revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the ECI. The mechanism is intended to keep such rates more current between surveys so that they do not become out-of-date and fall behind prevailing wage rates in the area.

- Expressly give the Administrator authority and discretion to adopt State or local wage determinations as the Davis-Bacon prevailing wage where certain specified criteria are satisfied.

- Return to a prior policy made during the 1981–1982 rulemaking related to the delineation of wage survey data submitted for “metropolitan” or “rural” counties in § 1.7(b). Through this change, the Department seeks to more accurately reflect modern labor force realities, to allow more wage rates to be determined at smaller levels of geographical aggregation, and to increase the sufficiency of data at the statewide level.

- Include provisions to reduce the need for the use of “conformances” where the Department has received insufficient data to publish a prevailing wage for a classification of worker—a process that currently is burdensome for contracting agencies, contractors, and the Department.

- Strengthen enforcement, including by making effective, by operation of law, any contract clauses or wage determinations that were wrongly omitted from contracts, and by 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.

- Clarify and strengthen the scope of coverage under the DBRA, including by revising the definition of “site of the work” to further encompass certain construction of significant portions of a building or work at secondary worksites, to better clarify when demolition and similar activities are covered by the Davis-Bacon labor standards, and to clarify that the regulatory definitions of “building or work” and “public building or public work” can be met even when the

construction activity involves only a portion of an overall building, structure, or improvement.

##### 2. Summary of Affected Contractors, Workers, Costs, Transfers, and Benefits

The Department evaluates the impacts of two components of this rule in this regulatory impact analysis:

- The return to the “three-step” method for determining the prevailing wage, and

- The provision of a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on ECI data.

The numbers presented in this final rule are generally very similar to the numbers in the proposed rule. Differences are due to the use of more recent data and a larger time estimate for regulatory familiarization costs in response to comments. This rule predominantly affects firms that hold federally funded or assisted construction contracts, with the primary impact resulting from the rule’s changes affecting prevailing wage and fringe benefit rate determinations. The Department identified a range of potentially affected firms. The more narrowly defined population (those actively holding DBRA-covered contracts) includes 152,900 firms. The broader population (including those bidding on contracts but without active contracts, or those considering bidding in the future) includes 184,500 firms. Only a subset of potentially affected firms will be substantively affected and fewer may experience a change in payroll costs because some firms already pay above the prevailing wage rates that may result from this proposal.

The Department estimated there are 1.2 million workers on DBRA-covered contracts and who therefore may be potentially affected by this final rule. Some of these workers will not be affected because they work in occupations not covered by DBRA or, if they are covered by DBRA, workers may not be affected by the prevailing wage updates of this final rule because they may already earn above the updated prevailing wage and fringe benefit rates.

The Department estimated both regulatory familiarization costs and implementation costs for affected firms. Year 1 costs are estimated to total \$39.3 million. Average annualized costs across the first 10 years are estimated to be \$7.3 million (using a 7 percent discount rate). The transfer analysis discussed in section V.D. (“Transfer Payments”) draws on two illustrative analyses conducted by the Department. However, the Department does not definitively quantify annual transfer

<sup>285</sup> The 1981–1982 rulemaking went into effect Apr. 29, 1983. 48 FR 19532.

payments due to data limitations and uncertainty. Similarly, benefits are

discussed qualitatively due to data limitations and uncertainty. See Table 1

for a summary of affected contractor firms, workers, and costs.

TABLE 1—SUMMARY OF AFFECTED CONTRACTOR FIRMS, WORKERS, AND COSTS  
[2021 Dollars]

	Year 1	Future years		Average annualized value	
		Year 2	Year 10	3% Real rate	7% Real rate
Firms: Narrow definition <sup>a</sup> .....	152,900	152,900	152,900	.....	.....
Firms: Broad definition <sup>b</sup> .....	184,500	184,500	184,500	.....	.....
Potentially affected workers (millions) .....	1.2	1.2	1.2	.....	.....
Direct employer costs (million) .....	\$39.3	\$2.4	\$2.4	\$7.5	\$7.3
Regulatory familiarization .....	\$36.9	\$0.0	\$0.0	\$5.1	\$4.9
Implementation .....	\$2.4	\$2.4	\$2.4	\$2.4	\$2.4

<sup>a</sup> Firms actively holding DBRA-covered contracts.

<sup>b</sup> Firms actively holding DBRA-covered contracts or who may be bidding on DBRA contracts or considering bidding in the future.

### B. Number of Potentially Affected Contractor Firms and Workers

#### 1. Number of Potentially Affected Contractor Firms

The Department identified a range of potentially affected firms. The more narrowly defined population (firms actively holding DBRA-covered contracts) includes 152,900 firms: 61,200 impacted by DBA and 91,700 impacted by the Related Acts (Table 2). The broader population (including those bidding on DBA contracts but without active contracts, or those considering bidding in the future) includes 184,500 firms: 92,800 impacted by DBA and 91,700 impacted by the Related Acts. The Department explains how the three components of affected contractor firms were derived separately: (1) firms currently holding DBA contracts, (2) all potentially affected DBA contractors, and (3) firms holding DBRA contracts.

The Department notes that only a subset of these firms will experience a change in payroll costs. Those firms that already pay above the new wage determination rates will not be substantively affected. Because there are no readily usable data on the earnings of workers of these affected firms, the Department cannot definitively identify the number of firms that will experience changes in payroll costs due to changes in prevailing wage rates.

#### i. Firms Currently Holding DBA Contracts

*USASpending.gov*—the official source for spending data for the U.S. Government—contains Government award data from the Federal Procurement Data System Next Generation (FPDS-NG), which is the system of record for Federal procurement data. The Department used these data to identify the number of firms that currently hold DBA contracts. Although more recent data are available,

the Department used data from 2019 to avoid any shifts in the data associated with the COVID-19 pandemic that began in 2020. Additionally, for the final rule, the Department considered updating to 2021 data, but ultimately decided against it because of the reasoning above as well as variable differences between the 2019 and 2021 data. Any long-run impacts of COVID-19 are speculative because this is an unprecedented situation, so using data from 2019 may be the best approximation the Department has for future impacts. However, the pandemic could cause structural changes to the economy, resulting in shifts in industry employment and wages.

The Department identified firms working on DBA contracts as contracts with either an assigned NAICS code of 23 or if the “Construction Wage Rate Requirements” element is “Y,” meaning that the contracting agency flagged that the contract is covered by DBA.<sup>286 287</sup> The Department excluded (1) contracts for financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S. because DBA coverage is limited to the 50 states, the District of Columbia, and the U.S. territories.<sup>288</sup>

<sup>286</sup> The North American Industry Classification System (NAICS) is a method by which Federal statistical agencies classify business establishments in order to collect, analyze, and publish data about certain industries. Each industry is categorized by a sequence of codes ranging from two digits (most aggregated level) to six digits (most granular level). <https://www.census.gov/naics/>.

<sup>287</sup> The Department acknowledges that there may be affected firms that fall under other NAICS codes and for which the contracting agency did not flag in the FPDS-NG system that the contract is covered by DBA. Including these additional NAICS codes could result in an overestimate because they would only be affected by this rule if DBA-covered construction occurs. The data does not allow the Department to determine this.

<sup>288</sup> The DBA only applies in the 50 States and the District of Columbia and does not apply in the territories. However, some Related Acts provide Federal funding of construction in the territories

In 2019, there were 14,000 unique prime contractors with active construction contracts in *USASpending.gov*. However, subcontractors are also impacted by this final rule. The Department examined 5 years of *USASpending.gov* data (2015 through 2019) and identified 47,200 unique subcontractors who did not hold contracts as primes in 2019. The Department used 5 years of data for the count of subcontractors to compensate for lower-tier subcontractors that may not be included in *USASpending.gov*. In total, the Department estimates 61,200 firms currently hold DBA contracts and are potentially affected by this rulemaking under the narrow definition; however, to the extent that any of these firms already pay above the prevailing wage rates as determined under this final rule they will not actually be impacted by the rule.

#### ii. Potentially Affected Contractors Under the DBA

The Department also cast a wider net to identify other potentially affected contractors, both those directly affected (*i.e.*, holding contracts) and those that plan to bid on DBA-covered contracts in the future. To determine the number of these firms, the Department identified construction firms registered in the GSA’s System for Award Management (SAM) since all entities bidding on Federal procurement contracts or grants must register in SAM. The Department believes that firms registered in SAM include those that may be affected if the rulemaking impacts their decision to bid on contracts or their competitiveness in the bidding process. However, it is possible that some firms that are not already registered in SAM could decide

that, by virtue of the Related Act, is subject to DBA prevailing wage requirements. For example, the DBA does not apply in Guam, but a Related Act provides that base realignment construction in Guam is subject to DBA requirements.



to bid on DBA-covered contracts after this rulemaking; these firms are not included in the Department's estimate. The rule could also impact them if they are awarded a future contract.

Using August 2022 SAM data, the Department identified 45,600 registered firms with construction listed as the primary NAICS code.<sup>289</sup> The Department excluded firms with expired registrations, firms only applying for grants,<sup>290</sup> government entities (such as city or county governments),<sup>291</sup> foreign organizations, and companies that only sell products and do not provide services. SAM includes all prime contractors and some subcontractors (those who are also prime contractors or who have otherwise registered in SAM). However, the Department is unable to determine the number of subcontractors that are not in the SAM database. Therefore, the Department added the subcontractors identified in USASpending to this estimate. Adding these 47,200 firms identified in USASpending to the number of firms in SAM, results in 92,800 potentially affected firms.

### iii. Firms Impacted by the Related Acts

USASpending does not adequately capture all work performed under the Related Acts. Additionally, there is not a central database, such as SAM, where contractors working on Related Acts contracts must register. Therefore, the Department used a different methodology to estimate the number of firms impacted by the Related Acts. The Department estimated 883,900 workers work on Related Acts contracts (see section V.B.2.iii.), then divided that number by the average number of workers per firm (9.6) in the construction industry.<sup>292</sup> This results in 91,700 firms. Some of these firms likely also perform work on DBA contracts. However, because the Department has no information on the size of this overlap, the Department has assumed all are unique firms.

TABLE 2—RANGE OF NUMBER OF POTENTIALLY AFFECTED FIRMS

Source	Number
<b>Total Count (Davis-Bacon and Related Acts)</b>	
Narrow definition <sup>a</sup> .....	152,900
Broad definition <sup>b</sup> .....	184,500
<b>DBA (Narrow Definition)</b>	
Total .....	61,200
Prime contractors from USASpending .....	14,000
Subcontractors from USASpending .....	47,200
<b>DBA (Broad Definition)</b>	
Total .....	92,800
SAM .....	45,600
Subcontractors from USASpending .....	47,200
<b>Related Acts</b>	
Total .....	91,700
Related Acts workers .....	883,900
Employees per firm (SUSB) ....	9.6

<sup>a</sup> Firms actively holding DBRA-covered contracts

<sup>b</sup> Firms actively holding DBRA-covered contracts or who may be bidding on DBRA contracts or considering bidding in the future.

### 2. Number of Potentially Affected Workers

There are no readily available government data on the number of workers working on DBA contracts; therefore, to estimate the number of these workers, the Department employed the approach used in the 2021 final rule, "Increasing the Minimum Wage for Federal Contractors," which implemented Executive Order 14026.<sup>293</sup> That methodology is based on the 2016 rulemaking implementing Executive Order 13706's paid sick leave requirements, which contained an updated version of the methodology used in the 2014 rulemaking for Executive Order 13658.<sup>294</sup> Using this methodology, the Department estimated the number of workers who work on

DBRA contracts, representing the number of "potentially affected workers," is 1.2 million potentially affected workers. Some of these workers will not be affected because while they work on DBRA-covered contracts, they are not in occupations covered by the DBRA prevailing wage requirements.

The Department estimated the number of potentially affected workers in three parts. First, the Department estimated employees and self-employed workers working on DBA contracts in the 50 States and the District of Columbia. Second, the Department estimated the number of potentially affected workers working on contracts covered by the Related Acts in the 50 States and the District of Columbia. Third, the Department estimated the number of potentially affected workers working on contracts covered by the Related Acts in the territories.

### i. Workers on DBA Contracts in the 50 States and the District of Columbia

First, the Department calculated the share of construction activity that is covered by DBA by taking the ratio of Federal contracting expenditures<sup>295</sup> to gross output in NAICS 23: Construction.<sup>296</sup> This results in an estimated 3.27 percent of output in the construction industry covered by Federal Government contracts (Table 3).

The Department then multiplied the ratio of covered-to-gross output by private sector employment in the construction industry (9.1 million) to estimate the share of employees working on covered contracts. The Department's private sector employment number is primarily comprised of construction industry employment from the May 2019 OEWS, formerly the Occupational Employment Statistics.<sup>297</sup> However, the OEWS excludes unincorporated self-employed workers, so the Department supplemented OEWS data with data from the 2019 Current Population Survey Merged Outgoing Rotation Group (CPS MORG) to include the unincorporated self-employed.

<sup>289</sup> Data released in monthly files. Available at: <https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf>.

<sup>290</sup> Entities registering in SAM are asked if they wish to bid on contracts. If the firm answers "yes," then they are included as "All Awards" in the "Purpose of Registration" column in the SAM data. The Department included only firms with a value of "Z2," which denotes "All Awards."

<sup>291</sup> The Department believes that there may be certain limited circumstances in which State and local governments may be contractors but believes that this number would be minimal and including

government entities would result in an inappropriate overestimation.

<sup>292</sup> 2019 Statistics of U.S. Businesses (SUSB). U.S., NAICS sectors, larger employment sizes up to 20,000+. <https://www.census.gov/data/tables/2019/econ/susb/2019-susb-annual.html>.

<sup>293</sup> See 86 FR 38816, 38816–38898.

<sup>294</sup> See 81 FR 9591, 9591–9671 and 79 FR 60634–60733.

<sup>295</sup> The Department used 2019 Federal contracting expenditures from USASpending.gov data excluding (1) financial assistance such as direct payments, loans, and insurance; and (2) contracts performed outside the U.S.

<sup>296</sup> Bureau of Economic Analysis. (2020). Table 8. Gross Output by Industry Group. <https://www.bea.gov/news/2020/gross-domestic-product-industry-fourth-quarter-and-year-2019>. "Gross output of an industry is the market value of the goods and services produced by an industry, including commodity taxes. The components of gross output include sales or receipts and other operating income, commodity taxes, plus inventory change. Gross output differs from value added, which measures the contribution of the industry's labor and capital to its gross output."

<sup>297</sup> BLS. OEWS. May 2019. Available at: <https://www.bls.gov/oes/>.

Potentially Affected Employees =  $\frac{\text{Expenditures}}{\text{Gross Output}} \times \text{Employment}$

According to this methodology, the Department estimated there are 297,900 workers on DBA covered contracts in the 50 States and the District of Columbia. However, this estimate is imprecise for two reasons; one of which results in an overestimate and one that results in an underestimate. First, these laws only apply to wages for mechanics and laborers, so some of these workers would not be affected by these changes to DBA. Second, this methodology represents the number of year-round-equivalent potentially affected workers who work exclusively on DBA contracts. Thus, when the Department refers to potentially affected employees in this analysis, the Department is referring to this conceptual number of people working exclusively on covered contracts. Because workers often work on a combination of covered and non-covered contracts, this bias underestimates the number of unique workers.

ii. Workers on Related Acts Contracts in the 50 States and the District of Columbia

This rulemaking will also impact workers on Related Acts contracts in the

50 States and the District of Columbia. Data are not available on the number of workers covered by the Related Acts. Additionally, neither USASpending nor any other database fully captures this population.<sup>298</sup> Therefore, the Department used a different approach to estimate the number of potentially affected workers for Related Acts contracts.

The Census Bureau reports total State and local government construction spending was \$318 billion in 2019.<sup>299</sup> The Department then applied an adjustment factor to account for the share of State and local expenditures that are covered by the Related Acts. The Department assumed half of the total State and local government construction expenditures are subject to a DBRA, resulting in estimated expenditures of \$158 billion. To this, the Department added \$3 billion to represent HUD backed mortgage insurance for private construction projects.<sup>300</sup>

As was done for DBA, the Department divided contracting expenditures (\$161 billion) by gross output (\$1.7 billion) and multiplied that ratio by the estimate of private sector employment used

above (9.1 million) to estimate the share of workers working on Related Acts-covered contracts (883,900).

iii. Workers on Related Acts Contracts in the U.S. Territories

The methodology to estimate potentially affected workers in the U.S. territories is similar to the methodology above for the 50 States and the District of Columbia. The primary difference is that data on gross output in the territories are not available, and so the Department had to make some additional assumptions. The Department approximated gross output in the territories by calculating the ratio of gross output to Gross Domestic Product (GDP) for the U.S. (1.8), then multiplying that ratio by GDP in each territory to estimate total gross output.<sup>301</sup> To limit gross output to the construction industry, the Department multiplied it by the share of the territory's payroll in NAICS 23. For example, the Department estimated that Puerto Rico's gross output in the construction industry totaled \$3.6 billion.<sup>302</sup>

Gross Output<sub>i</sub> =  $\frac{\text{Gross Output}}{\text{GDP}} \times \text{GDP}_i$

where  
i = territory

The rest of the methodology follows the methodology for the 50 States and the District of Columbia. To determine the share of all output associated with Government contracts, the Department

divided contract expenditures by gross output. Federal contracting expenditures from USASpending.gov data show that the Government spent \$993.3 million on construction contracts in 2019 in American Samoa, the Commonwealth of the Northern Mariana

Islands, Guam, Puerto Rico, and the U.S. Virgin Islands. The Department then multiplied the ratio of covered contract spending to gross output by private sector employment to estimate the number of workers working on covered contracts (6,100).<sup>303</sup>

TABLE 3—NUMBER OF POTENTIALLY AFFECTED WORKERS

	Private output (billions) <sub>a</sub>	Contracting output (millions) <sub>b</sub>	Share output from covered contracting (%)	Private-sector workers (1,000s) <sub>c</sub>	Workers on covered contracts (1,000s) <sub>d</sub>
DBA, excl. territories .....	\$1,662	\$54,400	3.27	9,100	297.9
Related Acts, territories .....	5	993	(e)	35	6.1

<sup>298</sup> USASpending includes information on grants, assistance, and loans provided by the Federal government. However, this does not include all covered projects, it does not capture the full value of the project because it is just the Federal share (i.e., excludes spending by State and local governments or private institutions that are also subject to DBRA labor standards because of the Federal share on the project), and it cannot easily be restricted to construction projects because there is no NAICS or product service code (PSC) variable.

<sup>299</sup> Census Bureau. “Annual Value of Public Construction Put in Place 2009–2020.” Available at: [https://www.census.gov/construction/c30/historical\\_data.html](https://www.census.gov/construction/c30/historical_data.html).  
<sup>300</sup> Estimate based on personal communications with the Office of Labor Standards Enforcement and Economic Opportunity at HUD.  
<sup>301</sup> GDP limited to personal consumption expenditures and gross private domestic investment.

<sup>302</sup> In Puerto Rico, personal consumption expenditures plus gross private domestic investment equaled \$71.2 billion. Therefore, Puerto Rico gross output was calculated as \$71.2 billion × 1.8 × 2.7 percent.  
<sup>303</sup> For the U.S. territories, the unincorporated self-employed are excluded because CPS data are not available on the number of unincorporated self-employed workers in U.S. territories.

TABLE 3—NUMBER OF POTENTIALLY AFFECTED WORKERS—Continued

	Private output (billions) <sup>a</sup>	Contracting output (millions) <sup>b</sup>	Share output from covered contracting (%)	Private-sector workers (1,000s) <sup>c</sup>	Workers on covered contracts (1,000s) <sup>d</sup>
Related Acts, excl. territories .....		161,297	9.68	9,135	883.9
Total .....	1,667	216,700			1,188.0

<sup>a</sup>Bureau of Economic Analysis, NIPA Tables, Gross output. 2019. For territories, gross output estimated by multiplying (1) total GDP for the territory by the ratio of total gross output to total GDP for the U.S. and (2) the share of national gross output in the construction industry.

<sup>b</sup>For DBA, and Related Acts in the territories, data from *USASpending.gov* for contracting expenditures for covered contracts in 2019. For Related Acts, data from Census Bureau on value of State and local government construction put in place, adjusted for coverage ratios. The Census data includes some data for territories but may be underestimated.

<sup>c</sup>OEWS May 2019. For non-territories, also includes unincorporated self-employed workers from the 2019 CPS MORG.

<sup>d</sup>Assumes share of expenditures on contracting is same as share of employment. Assumes workers work exclusively, year-round on DBRA covered contracts.

<sup>e</sup>Varies by U.S. Territory.

### 3. Demographics of the Construction Industry

To provide information on the types of workers that may be affected by this rule, the Department presents demographic characteristics of production workers in the construction industry. For purposes of this demographic analysis only, the Department is defining the construction industry as workers in the following occupations:

- Construction and extraction occupations
- Installation, maintenance, and repair occupations
- Production occupations
- Transportation and material moving occupations

The Department notes that the demographic characteristics of workers on DBRA projects may differ from the general construction industry; however, data on the demographics of workers on DBRA projects is unavailable.

Demographics of the general workforce are also presented for comparison. Tabulated numbers are based on 2019 CPS data for consistency with the rest of the analysis and to avoid potential impacts of COVID-19. Additional information on the demographics of workers in the construction industry can be found in “The Construction Chart Book: The U.S. Construction Industry and Its Workers.”<sup>304</sup>

The vast majority of workers in the construction industry are men, 97 percent (Table 4), which is significantly

higher than the general workforce where 53 percent are men. Workers in construction are also significantly more likely to be Hispanic than the general workforce; 38 percent of construction workers are Hispanic, compared with 18 percent of the workforce.

Lastly, while many construction workers may have completed registered apprenticeship programs, 84 percent of workers in the construction industry have a high school diploma or less, compared with 54 percent of the general workforce. The Department also looked at data on disability status in the construction industry and found that 6.4 percent of workers with a disability work in the construction industry, compared to 7.2 percent of workers with no disability.<sup>305</sup>

TABLE 4—DEMOGRAPHICS OF WORKERS IN THE CONSTRUCTION INDUSTRY

	Production workers in construction (%)	Total workforce (%)
By Region		
Northeast .....	16.4	17.9
Midwest .....	16.4	21.9
South .....	41.7	36.9
West .....	25.5	23.3
By Sex		
Male .....	97.1	53.4
Female .....	2.9	46.6
By Race		
White only .....	87.1	77.2
Black only .....	7.5	12.4
All others .....	5.4	10.4
By Ethnicity		
Hispanic .....	38.0	18.1

<sup>304</sup>Dong, Xiuwen, Xuanwen Wang, Rebecca Katz, Gavin West, and Bruce Lippy, “The Construction Chart Book: The U.S. Construction Industry and Its Workers,” (6th ed. Silver Spring: CPWR—The

Center for Construction Research and Training, 2018) at 18. [https://www.cpwr.com/wp-content/uploads/publications/The\\_6th\\_Edition\\_Construction\\_eChart\\_Book.pdf](https://www.cpwr.com/wp-content/uploads/publications/The_6th_Edition_Construction_eChart_Book.pdf).

<sup>305</sup>Persons with a Disability: Labor Force Characteristics—2019. Table 4. [https://www.bls.gov/news.release/archives/disabl\\_02262020.pdf](https://www.bls.gov/news.release/archives/disabl_02262020.pdf).

TABLE 4—DEMOGRAPHICS OF WORKERS IN THE CONSTRUCTION INDUSTRY—Continued

	Production workers in construction (%)	Total workforce (%)
Not Hispanic .....	62.0	81.9
By Race and Ethnicity		
White only, not Hispanic .....	52.2	61.1
Black only, not Hispanic .....	6.2	11.6
By Age		
16–25 .....	15.2	16.7
26–55 .....	71.6	64.2
56+ .....	13.3	19.1
By Education		
No degree .....	23.0	8.9
High school diploma .....	60.6	45.3
Associate's degree .....	9.3	10.7
Bachelor's degree or advanced .....	7.2	35.1

**Note:** CPS data for 2019.

The Department has also presented some demographic data on Registered Apprentices, as they are the pipeline for future construction workers. These demographics come from Federal Workload data, which covers the 25 states administered by the Department's OA and national registered apprenticeship programs.<sup>306</sup> Note that this data includes apprenticeships for other industries beyond construction, but 68 percent of the active apprentices are in the construction industry, so the Department believes this data could be representative of that industry. Of the active apprentices in this data set, 9.1 percent are female, and 90.9 percent are male. The data show that 78.7 percent of active apprentices are White, 14.1 percent are Black or African American, 3.2 percent are American Indian or Alaska Native, 2.1 percent are Asian, and 1.1 percent are Native Hawaiian or Other Pacific Islander.<sup>307</sup> The data also show that 23.6 percent of active apprentices are Hispanic.

### C. Costs of the Final Rule

This section quantifies direct employer costs associated with the final rule. The Department estimated both (1) regulatory familiarization costs and (2) implementation costs associated with more frequently updated rates. Year 1 costs are estimated to total \$39.3 million. Average annualized costs

across the first 10 years of implementation are estimated to be \$7.3 million (using a 7 percent discount rate). These cost estimates are higher than presented in the proposed rule due to a larger estimate of the time required to review the regulation. Non-quantified costs are discussed in sections V.C.3 and V.C.4. Transfers resulting from these provisions are discussed in section V.D.

#### 1. Regulatory Familiarization Costs

This rule's direct costs on some covered contractors who will review the regulations to understand how the prevailing wage determination methodology will change and how certain non-collectively bargained rates will be periodically updated will likely be small because not all of these firms will choose to familiarize themselves with the methodologies used to develop those prevailing wage rates, or any periodic adjustments to them. Regulatory familiarization time for other components of this final rule, such as the provisions clarifying regulatory language and coverage, are likely to take time when reviewed but will only be reviewed by a subset of firms. For example, a roofing company does not need to understand how the rule relates to prefabrication or truckers. Costs associated with ensuring compliance are included as implementation costs.

For this analysis, the Department has included all firms that either hold DBA or Related Acts contracts or are considering bidding on work (184,500 firms). However, this may be an overestimate, because firms that are

registered in SAM might not bid on a DBA contract, and therefore may not review these regulations. ABC asserted that this rule extends coverage to new types of construction, industries, and occupations and the associated firms are not covered by the Department's estimate. The Department believes most of these firms are already included in the estimate because the methodology covers all firms bidding, or considering bidding, on Federal construction contracts, not just DBA contracts. Furthermore, as explained below in section V.C.4.v, while some covered firms engaged in construction at secondary worksites may not be classified in the construction industry under NAICS and consequently may not be captured by this methodology, the Department believes that the number of such firms is small given the limited scope of this change to "site of the work" in the final rule.

The Department assumes that, on average, 4 hours of a human resources staff member's time will be spent reviewing the rulemaking. This time estimate is the average time per firm; some firms will spend more time reviewing the rule, but others will spend less or no time reviewing the rule. In the proposed rule, the Department used a time estimate of 1 hour. In response to commenters asserting that it would take more time, the Department increased this estimate to 4 hours. Commenters emphasized that the length of the rule and the need to have several employees review necessitate a longer review time estimate. For example, ABC noted,

<sup>306</sup> U.S. Department of Labor, Office of Apprenticeship, "FY2019 Data and Statistics," <https://www.dol.gov/agencies/eta/apprenticeship/about/statistics/2019>.

<sup>307</sup> This excludes apprentices who did not wish to answer or for whom race was not provided.

“reading the 432-page NPRM—clocking in at a robust 118,450 words—would actually take 8.3 hours per person at an average silent reading rate.” The Department acknowledges that it may take some reviewers at least this long to read the entire rule but, because some of the firms in the cost calculation will not bid on a Davis-Bacon contract and therefore will not spend any time reviewing this rule, an average time estimate of 4 hours is more appropriate.

The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$49.94 per hour.<sup>308</sup> Therefore, the Department has estimated regulatory familiarization costs to be \$36.9 million ( $\$49.94 \text{ per hour} \times 4.0 \text{ hours} \times 184,500 \text{ contractors}$ ) (Table 5). The Department has included all regulatory familiarization costs in Year 1. New entrants who would have been covered by previous DBA regulations will not incur any additional regulatory familiarization costs attributable to this rule; had this rule not been proposed, they still would have incurred the costs of regulatory familiarization with existing provisions. In addition, while the provision regarding periodic adjustments is new and could involve additional review time, the Department believes that any increased costs associated with that familiarization will be offset by a decrease in time needed to review some of the simplified or harmonized provisions, such as debarment. ABC disagreed with this approach to new entrants and claimed that this rule constitutes an added regulation and cost. The Department acknowledges that for the subset of firms that would not have been covered by Davis-Bacon prior to the implementation of this rule and who may enter Davis-Bacon covered contracting in future years, they may incur future rule familiarization costs. However, the Department does not have data to determine how many firms would be newly-covered in future years. Given these considerations, the Department believes it is appropriate to assume that new entrants in future years would not spend significantly more time reviewing this rule than they would the existing regulations.

Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are \$4.9 million.

## 2. Implementation Costs for More Frequently Updated Rates

Firms will incur costs associated with implementing updated prevailing wage rates. When preparing a bid on a DBRA-covered contract, the contractor must review the wage determination identified by the contracting agency as appropriate for the work and determine the wage rates applicable for each occupation or classification to perform work on the contract. Once that contract is signed, the specified prevailing wages generally remain in effect through the life of that contract.<sup>309</sup> This section considers only the additional time necessary to update pay rates that change more frequently over time due to the provision to periodically adjust out-of-date prevailing wage and fringe rates. Implementation costs associated with other provisions, such as the provision to clarify and strengthen the scope of coverage under the DBRA, are discussed in section V.C.4.

The periodic adjustment rule will generally affect the frequency with which prevailing wage rates are updated on wage determinations, through both the anticipated initial updates to old, outmoded rates, and moving forward, the periodic updates to certain rates that have not been published through the survey process for the past 3 or more years (see section V.D.). Affected firms may incur implementation costs if they need to update compensation rates in their payroll systems. Currently, only a fraction of non-collectively bargained prevailing wages can be expected to change each year. Firms may spend more time than they have in the past updating payroll systems to account for new prevailing wage rates that the firms must pay as a result of being awarded a DBRA contract that calls for such new rates. This change is because the Department will update older non-collectively bargained rates—as it currently does with collectively bargained prevailing rates—to better represent current wages and benefits being paid in the construction industry. In addition, moving forward, WHD expects to publish wage rates more frequently than in the past.

To estimate the additional cost attributable updated non-collectively bargained rates, it is necessary to estimate the number of firms with DBRA contracts that will need to pay updated rates, the subset of such firms that do not already pay updated prevailing wage rates regularly, and the additional time these firms will spend implementing the new wage and fringe

benefit rates. To do so, the Department estimated the number of firms with DBRA contracts that already pay updated prevailing wage rates regularly and will not incur additional implementation costs attributable to the periodic update provision.

First, the Department estimates that new wage rates are published from on average 7.8 wage surveys per year.<sup>310</sup> These surveys may cover an entire State or a subset of counties, and multiple construction types or a single type of construction. For simplicity, the Department assumed that each survey impacts all contractors in the State, all construction types, and all classes of laborers and mechanics covered by DBRA. Under these assumptions, the Department assumed that each year 15.6 percent of firms with DBRA contracts, roughly 23,900 firms ( $0.156 \times 152,900 \text{ firms}$ ), might already be affected by changes in prevailing wage rates in any given year and thus will not incur additional implementation costs attributable to the rule.<sup>311</sup>

Additionally, there may be some firms that already update prevailing wage rates periodically to reflect CBA increases. These firms generally will not incur any additional implementation costs because of this rule. The Department lacks specific data on how many firms fall into this category but used information on the share of rates that are collectively bargained under the current method to help refine the estimate of firms with implementation costs. According to section V.D., 24 percent of rates are CBA rates under the current method, meaning 31,000 firms ( $0.24 \times (152,900 - 23,900)$ ) might already be affected by changes in prevailing wages in any given year. Combining this number with the 23,900 firms calculated above, 54,800 firms in total would not incur additional implementation costs with this rule.

Therefore, 98,100 firms (152,900 firms – 54,800 firms) are assumed to not update prevailing wage information in any given year, absent this rule, because prevailing wage rates were unchanged in their areas of operation and would therefore incur implementation costs. The Department intends to first update

<sup>310</sup> The Department used the number of surveys started between 2002 (first year with data readily available) and 2019 (last year prior to COVID-19) to estimate that 7.8 surveys are started annually. This is a proxy for the number of surveys published on average in a year.

<sup>311</sup> The Department divided 7.8 surveys per year by 50 States to arrive at the 15.6 percent of firms assumption. The District of Columbia and the territories were excluded from the denominator because these tend to be surveyed less often (with the exception of Guam which is surveyed regularly due to Related Act funding).

<sup>308</sup> This includes the median base wage of \$30.83 from the 2021 OEWS plus benefits paid at a rate of 45 percent of the base wage, as estimated from the BLS's Employer Costs for Employee Compensation (ECEC) data, and overhead costs of 17 percent. OEWS data available at: <http://www.bls.gov/oes/current/oes131141.htm>.

<sup>309</sup> With the exception of certain significant changes; see section III.B.1.vi.(B).

certain outdated non-collectively bargained rates<sup>312</sup> (currently designated as “SU” rates) up to their current value to better track wages and benefits being paid in the construction industry, as soon as reasonably possible. Then, in the future, the Department intends to update non-collectively bargained rates afterward as needed, and not more frequently than every 3 years. The Department assumes that 98,100 firms may be expected to incur additional costs updating rates each year. The Department acknowledges that this estimate of firms may be an overestimate because this rule states that rates will be updated no more frequently than every 3 years. In each year, only a fraction of firms will have to update their prevailing wage rates, but the Department has included all firms in the estimate to not underestimate costs.

The Department estimated it will take a half hour on average for firms to adjust

their wage rates each year for purposes of bidding on DBRA contracts. The Department believes that this average estimated time is appropriate because only a subset of firms will experience a change in costs associated with adjusting payroll systems. Firms that already pay above the new wage determination rates will not need to incur any implementation costs.

Several commenters criticized the Department’s implementation time estimate as too low. For example, ABC noted that according to their 2022 survey of member contractors, the proposed rule would take more than 30 minutes to implement. ABC states that a more accurate implementation cost is more likely closer to 10–15 hours per impacted company but does not provide specifics as to how that estimate was derived. The Department clarifies here that the time estimate used in the implementation cost calculation is strictly for the marginal time to identify

updated rates and insert those rates into the contractor’s bid and/or payroll system. Costs associated with other provisions are discussed in section V.C.4. The Department also notes that the estimate of 30 minutes represents an average, because although some firms may spend more time adjusting payroll systems, firms that already pay above the new wage determination rates will not need to spend any time adjusting payroll.

Implementation time will be incurred by human resource workers (or a similarly compensated employee) who will implement the changes. As with previous costs, these workers earn a loaded hourly wage of \$49.94. Therefore, total Year 1 implementation costs were estimated to equal \$2.4 million ( $\$49.94 \times 0.5 \text{ hour} \times 98,100 \text{ firms}$ ). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is \$2.4 million.

TABLE 5—SUMMARY OF COSTS  
[2021 Dollars]

Variable	Total costs	Regulatory familiarization costs	Implementation costs for more frequently updated rates
<b>Year 1 Costs</b>			
Potentially affected firms .....	.....	184,500	98,100
Hours per firm .....	.....	4	0.5
Loaded wage rate <sup>a</sup> .....	.....	\$49.94	\$49.94
Cost (\$1,000s) .....	\$39,300	\$36,900	\$2,400
<b>Years 2–10 (\$1,000s)</b>			
Annual cost .....	\$2,400	\$0	\$2,400
<b>Average Annualized Costs (\$1,000s)</b>			
3% discount rate .....	\$7,500	\$5,100	\$2,400
7% discount rate .....	\$7,300	\$4,900	\$2,400

<sup>a</sup> 2021 OEWS median wage for Compensation, Benefits, and Job Analysis Specialists (SOC 13–1141) of \$30.83 multiplied by 1.62: the ratio of loaded wage to unloaded wage from the 2021 ECEC (45 percent) plus 17 percent for overhead.

### 3. Construction Costs and Inflation

Several commenters asserted that this rule will increase wages and construction costs, thereby increase government expenditures, and contribute to inflation. The Department believes both the impact on wages will be marginal, as demonstrated in the conceptual transfers analyses (see section V.D.) and the direct employer costs will be manageable. Additionally, the estimated 1.2 million potentially affected workers represent less than 1

percent of the total national workforce. Therefore, any impact on government budgets or inflation should be small. The III–FFC reviewed the relevant literature and reached the same conclusion. They assert that “[t]he economic consensus is that prevailing wages have no impact on total construction costs.”<sup>313</sup> This conclusion is drawn based on “19 studies on the impact of prevailing wages on the cost of school construction, highway construction, and municipal building

projects that have been published in peer-reviewed academic journals since 2000.”

### 4. Other Provisions Not Analyzed

The Department provides a qualitative discussion of other provisions of the rule in this section.

#### i. Adopting of State and Local Governments Prevailing Wage Rates

Under the final rule, prevailing wage rates set by State and local governments may be adopted as Davis-Bacon

<sup>312</sup> The “SU” designation currently is used on general wage determinations 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.

<sup>313</sup> Kevin Duncan & Russell Ormiston, “What Does the Research Tell Us about Prevailing Wage Laws,” 44 Lab. Stud. J., 139 (2018).

prevailing wage rates under specified conditions. Specifically, the Department proposes that the Administrator may adopt such a rate if the Administrator determines that: (1) the State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties; (2) the wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately; (3) the State or local government classifies 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 are substantially similar to those the Administrator uses in making wage determinations. These conditions are intended to provide WHD with the flexibility to adopt State and local rates where appropriate while also ensuring that adoption of such rates is consistent with the statutory requirements of the Davis-Bacon Act. These conditions are also intended to ensure that arbitrary distinctions are not created between jurisdictions where WHD makes wage determinations using its own surveys and jurisdictions where WHD adopts State or local prevailing wage rates.

The Department does not currently possess sufficient data to conduct an analysis comparing all prevailing wage rates set by State and local governments nationwide to those established by the Department. However, by definition, any adopted State or local prevailing wage must be set using criteria that are substantially similar to those used by the Administrator, so the resulting wage rates are likely to be similar to those which would have been established by the Administrator. This change will also allow WHD to have more current rates in places where wage surveys are out-of-date, and to avoid WHD duplicating wage survey work that States and localities are already doing. The Department believes that this could result in cost savings, which are discussed further in section V.E.

#### ii. Combining Rural and Metropolitan County Data

This final rule also eliminates the across-the-board restriction on combining rural and metropolitan county data to allow for a more flexible case-by-case approach to using such data. If sufficient data are not available to determine a prevailing wage in a county, the Department is permitted to use data from surrounding counties, regardless of whether those counties are designated as rural or metropolitan.

While sufficient data for analyzing the impact of this provision are not available, the Department believes this provision will improve the quality and accuracy of wage determinations by including data from counties that likely share and reflect the same labor market conditions when appropriate.

#### iii. Publishing Prevailing Wages When Receiving Insufficient Data

The provision to expressly authorize WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations even when WHD has received insufficient data through its wage survey process is expected to ease the burden on contracting entities, both public and private, by improving the timeliness of information about conformed wage rates. For classifications for which conformance requests are regularly submitted, the Administrator would be authorized to list the classification on the wage determination along with wage and fringe benefit rates that bear a "reasonable relationship" to the wage and fringe benefit rates contained in the wage determination, in the same manner that such classifications and rates are currently conformed by WHD pursuant to current § 5.5(a)(1)(ii)(A)(3). In other words, for a classification for which conformance requests are regularly submitted, WHD would be expressly authorized 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, reducing uncertainty and delays in determining wage rates for the classifications.

For example, suppose the Department was not able to publish a prevailing wage rate for carpenters on a building wage determination for a county due to insufficient data. Currently, every contractor in that county working on a Davis-Bacon building project that needed a carpenter would have to submit a conformance request for each of their building projects in that county. Moreover, because conformances cannot be submitted until after contract award, those same contractors would have a certain degree of uncertainty in their bidding procedure, as they would not know the exact rate that they would have to pay to their carpenters. This proposal would eliminate that requirement for classifications where conformance requests are common. While the Department does not have information on how much administrative time and money is spent

on these tasks, for the commonly requested classifications, this provision could make the process more streamlined and efficient for the contractors.

#### iv. Clarification of Existing Policies

The final rule adds language in a few places to clarify existing policies. For example, the Department added 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. Also, the Department added or revised language regarding the "material suppliers" exemption, application of the "site of the work" principle to flaggers, when crew members are laborers or mechanics, and coverage requirements for truck drivers. Although, for the most part, this language is just a clarification of existing guidelines and not a change in policy, the Department understands that contracting agencies may have differed in their implementation of Davis-Bacon labor standards. In these cases, there may be firms that are newly applying Davis-Bacon labor standards because of the clarifications in this rule. This could result in additional rule familiarization, implementation, and administrative costs for these firms, and transfers to workers in the form of higher wages and benefits if the contractors are currently paying below the prevailing wage. Commenters asserted that these provisions would result in additional firms being covered and consequently incurring familiarization, implementation, and administration costs. The Department continues to believe that these provisions are generally clarifications rather than an expansion of scope and, therefore, has not estimated the number of potentially affected small businesses.

#### v. Modification of Site of the Work Definition To Include Certain Secondary Worksites

In this final rule, the Department revises the definition of "site of the work" to further encompass certain construction of significant portions of a building or work at secondary worksites that are dedicated exclusively or nearly so to a project covered by the DBRA. Under this provision, some additional companies may be covered by the DBRA. Specifically, some firms that engage in construction at secondary worksites, such as modular construction firms, may potentially engage in work that was not previously covered by the DBRA regulations, but is now covered.



These firms could incur larger familiarization and implementation costs than currently covered firms (whose costs are discussed above). However, the Department does not have data to determine how many firms would be newly covered by DBRA requirements as a result of this provision and is unable to provide a quantitative estimate of these costs.

Although some commenters asserted that the increased costs under this aspect of the proposed rule would be substantial, no commenters provided applicable data that the Department could use to quantify the costs. The Department does not anticipate that any increased costs associated with this aspect of the final rule will be substantial. Whereas the proposed rule would have revised Davis-Bacon coverage of off-site construction to include sites at which “significant portions” of covered buildings or works were constructed for specific use in a designated building or work, the final rule significantly limits the scope of this expansion to sites dedicated exclusively or nearly so to the covered contract or project. Thus, while the Department does not have data to determine how many firms and workers will be newly covered by DBRA requirements as a result of this provision, these significant limitations will ensure that any associated costs will similarly be extremely limited.<sup>314</sup> *Cf.* 65 FR 80277 (projecting that the prevailing wage implications associated with a similar expansion of coverage of off-site construction in the 2000 final rule would not be substantial).

Commenters also noted other potential costs associated with this

provision. The CHC stated this provision will “limit the use of this technology which is currently facilitating construction of affordable housing developments in rural areas where labor is scarcer and costs can be higher.” Several commenters asserted that this will increase the price of modular construction.

The Department believes any potential cost increases related to this issue will be minimal and will not materially impact the use of modular construction technology. As explained above, based on the comments received, the Department believes that most modular construction facilities are engaged in more than one project at a time and therefore will not be considered “sites of the work” under this rule. Conversely, at secondary worksites that are dedicated exclusively or nearly so to a single DBRA-covered project for a period of time, application of the appropriate wage determination to workers at the site during that period of time should not be appreciably more difficult or burdensome than the application of a wage determination at such a site established specifically for contract performance, which is required under current regulations. Additionally, as noted above, the Department intends to work with contractors, agencies, and other stakeholders to resolve any questions associated with the application of wage determinations and classifications at secondary sites as early as possible. Finally, the Department notes that at least two state prevailing wage laws—Washington’s and New Jersey’s—cover custom components of public buildings or works to a greater degree than this final rule, and the Department is unaware of such laws having had significant detrimental impacts to modular construction in those states. See N.J.S.A. section 34:11–56.26(5), (12) (applying state prevailing wage requirements to components and structures “pre-fabricated to specifications for a particular project of public work”); Wash. Admin. Code section 296–127–010(7)(a)(vi) (applying prevailing wage regulations to “[t]he fabrication and/or manufacture of nonstandard items produced by contract specifically for a public works project”). The revisions regarding offsite construction are significantly less expansive than those proposed in the NPRM. The final rule only expands coverage to sites dedicated exclusively or nearly so to a single covered contract or project, and therefore will not encompass offsite facilities engaged in modular construction for more than one project or area.

vi. Post-Award Determinations and Operation-of-Law

This final rule also updates and codifies the procedures through which the Department enforces DBRA requirements when contract clauses and appropriate wage determinations are wrongly omitted from a contract. The final rule includes a provision that requires contract clauses and applicable wage determinations to be effective by operation of law in covered contracts, a requirement that will affect those cases in which the clauses and/or wage determinations have not been either properly included in a covered contract when awarded or otherwise retroactively incorporated at a later date by contract modification. These changes are intended to improve efficiency, reduce delays in investigations, and remedy enforcement challenges WHD has encountered under current regulations.

The Department does not have sufficient data to estimate how many firms would be affected by this provision, because any calculation would require information on the number of contracts that do not already include contract clauses and appropriate wage determinations, and those that would not include these requirements in absence of this rule. However, the Department believes that any impacts associated with this rule change will be minimal, because the Department already interprets the post-award modification provision at 29 CFR 1.6(f) to require agencies to incorporate missing contract clauses and wage determinations with retroactive effect in appropriate circumstances, and the new operation-of-law provision will therefore affect only a limited subset of matters in which the current regulations would not have resulted in timely compliance.

Some commenters expressed concerns that this provision would lead to increased costs, because firms would need to spend more time familiarizing themselves with the regulations in order to ensure that they are in compliance even if the contract clauses are not included in a contract. The Department notes that many such compliance costs are already borne by contractors as a best practice because under the current regulations contracts may be modified post-award to incorporate missing clauses retroactively—which has a similar effect as the operation-of-law provision. In addition, the Department’s cost estimates already account for rule familiarization.

To the extent that there are any workers who, in the absence of this final

<sup>314</sup> A theoretical upper bound of newly-covered firms would likely be the 1,364 total firms in NAICS codes 321991, Manufactured Home (Mobile Home) Manufacturing, 321992, Prefabricated Wood Building Manufacturing, and 332311 Prefabricated Metal Building and Component Manufacturing. See U.S. Census Bureau, 2019 Survey of U.S. Businesses data, [https://www2.census.gov/programs-surveys/susb/datasets/2019/us\\_state\\_naics\\_detailedsizes\\_2019.txt](https://www2.census.gov/programs-surveys/susb/datasets/2019/us_state_naics_detailedsizes_2019.txt). However, as a result of the limits in the final rule, Davis-Bacon coverage will apply only when such firms (1) are working on DBRA-covered projects, (2) are constructing “significant portions” of such projects, as defined in the final rule, as opposed to prefabricated components, (3) are building such significant portions for specific use in a designated building or work, and (4) are doing so at a site either established for a particular covered contract or project or dedicated exclusively or nearly so to a single covered contract or project. While the Department does not have the data to estimate how many firms not already covered by the DBRA would meet all of these criteria, the Department believes that the number be small, particularly given the numerous comments from stakeholders indicating that modular construction facilities typically work on multiple projects at a time and therefore will not be covered under the final rule. See *supra* section III.B.3.ii.G.2.a.

rule, would not have received timely compensation required under the DBRA, this provision could lead to limited transfers to workers in the form of increased wages. Because the operation-of-law provision requires contractors to be compensated for any increases in wages that result from a determination of missing clauses or wage determinations, any transfers associated with the rule change would ultimately come from the government in the way of reimbursement to contractors. The Department has not estimated these limited transfers because there is not sufficient data on the prevalence of missing contract clauses or wage determinations, or the extent to which the inclusion of these items by operation-of-law would lead to increases in wages for contract workers.

#### vii. Other Provisions

Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. The requirement for the contracting agency to incorporate into the contract the most recent revision(s) of any applicable wage determination(s) on each anniversary date of the contract's award could result in some minimal increased burden for contracting agencies. The contracting officer would need to locate the wage determinations that are currently incorporated in the master contract and incorporate the applicable wage determinations into their task or purchase order. As noted in the preamble, however, in the Department's experience contracting agencies' procedures for updating wage determinations for these types of contracts vary widely. Some contracting agencies incorporate the most recent wage determination modification in effect at the time each task order is issued, a process that would generally take more time than merely flowing down wage determination modifications that have already been incorporated into the master contract, as those contracting officers must identify the correct wage determination modification on *sam.gov* before incorporating it for each of the multiple task orders issued each year. Other agencies are already updating these orders annually and incorporating the updated wage determination, while others do not update wage determinations at all for at least some of these contracts. The Department does not have data to determine how many additional contracts would have to be updated annually following this rule or how many contracts currently require wage determinations to be flowed down to or updated for each task order. As a

result, the Department cannot determine the extent to which this revision would result in an increased or reduced administrative burden across agencies. However, the Department anticipates that to the extent that additional time would be needed to update these contracts and task orders, the total amount of time involved would not be significant.

Other provisions are also likely to have no significant economic impact, such as the provision regarding the applicable apprenticeship ratios and wage rates when work is performed by apprentices in a different State than the State in which the apprenticeship program was originally registered. Recordkeeping revisions are also expected to have a negligible cost and to generate benefits from enhanced compliance, enforcement, and clarity for the regulated community that outweigh such costs. The Department expanded on this topic and addressed public comments in section III.B.3.iii.B.

#### D. Transfer Payments

The Department conducted demonstrations to provide an indication of the possible transfers attributable to the provision revising the definition of "prevailing wage," and the provision to update out-of-date SU rates using the ECI. Both provisions may cause some prevailing wage rates to increase (relative to the existing method), while the former may cause other prevailing wage rates to decrease (relative to the existing method). However, due to many uncertainties in calculating a transfer estimate, the Department instead only presents this demonstration characterizing how wage and fringe rates may change.

##### 1. The Return to the "Three-Step" Method for Determining the Prevailing Wage

###### i. Overview

The revision to the definition of prevailing wage (*i.e.*, the return to the "three-step process") may lead to income transfers to or from workers. Under the "three-step process" when a wage rate is not paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. Thus, fewer future wage determinations will be established based on a weighted average. The Department is not able to quantify the impact of this change because it will apply to surveys yet to be conducted, covering classifications and projects in locations not yet determined. Nonetheless, in an effort to illustrate the

potential impact, the Department conducted a retrospective analysis that considers the impact of the 30-percent threshold had it been used to set the wage determinations for several occupations in recent years.

Specifically, to demonstrate the impact of this provision, the Department compiled data for 7 key classifications from 19 surveys across 17 states from 2015 to 2018 (see Appendix A).<sup>315</sup> This sample covers all four construction types, and includes metro and rural counties, and a variety of geographic regions. The seven select key classifications considered are as follows:

- Building and residential construction: Bricklayers, common laborers, plumbers, and roofers.
- Heavy and highway construction: Common laborers, cement masons, and electricians.

In total, the sample is comprised of 3,097 county-classification observations. Because this sample only covers seven out of the many occupations covered by DBRA and all classification-county observations are weighted equally in the analysis, the Department believes the results need to be interpreted with care and cannot be extrapolated to definitively quantify the overall impact of the 30-percent threshold. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this provision.

The Department began its retrospective analysis by applying the current prevailing wage setting protocols (see Appendix B) to this sample of wage data to calculate the current prevailing wage and fringe benefit rates.<sup>316</sup> The Department then applied the 30-percent threshold to the same sample of wage data.<sup>317</sup> Then the Department compared the wage rates determined under the two methods. Results are reported at the county level

<sup>315</sup> Data were obtained from the Automated Survey Data System (ASDS), the data system used by the Department to compile and process WD-10 submissions. Out of the 21 surveys that occurred during this time period and met sufficiency standards, these 19 surveys are all of the ones with usable data for this analysis; the other two had anomalies that could not be reconciled.

<sup>316</sup> The calculated current rates generally match the published wage and the fringe benefit rates within a few cents. However, there are a few instances that do not match, but the Department does not believe these differences bias the comparisons to the calculated 30 percent prevailing definition.

<sup>317</sup> This model, while useful for this illustrative analysis, may not be relevant for future surveys. The methodology assumes that the level of participation by firms in WHD's wage survey process would be the same if the standard were 30 percent and is mostly reflective of states with lower union densities.

(i.e., one observation represents one classification in one county).

The results differ depending on how heavily unionized the construction industry is in the states analyzed (and thus how many union rates are submitted in response to surveys). In Connecticut, for example, the Department found that estimated rates were little changed because the construction industry in Connecticut is highly unionized and union rates prevail under both the 30 percent and the 50 percent threshold. Conversely, in Florida, which is less unionized, there is more variation in how wage rates would change. For the rates that changed in Florida, calculated prevailing wage rates generally changed from an average rate (e.g., insufficient identical rates to determine a modal prevailing rate under the current protocol) to a non-collectively bargained modal prevailing rate. Depending on the classification and county, the prevailing hourly wage rate may have increased or decreased because of the change in methodology.

Results may also differ by construction type. In particular, changes

to highway prevailing wages may differ from changes in other construction types because they frequently rely on certified payroll. Thus, many of the wages used to calculate the prevailing wage reflect prevailing wages at the time of the survey.

#### ii. Results

Tables 6 and 7 compare the share of counties with calculated wage determinations by “publication rule” (i.e., the rule under which the wage rate was or would be published): (1) an average rate, (2) a collectively bargained single (modal) prevailing rate, and (3) a non-collectively bargained single (modal) prevailing rate. Fringe benefit rate results also include the number of counties where the majority of workers received zero fringe benefits. The tables also show the change in the number of rates in each publication rule category.

For the surveys analyzed, the majority of current county wage rates were based on averages ( $1,954 \div 3,097 = 63$  percent), about 25 percent were a single (modal) prevailing collectively bargained rate, and 12 percent were a modal prevailing non-collectively bargained rate. Using

the 30 percent requirement for a modal prevailing rate, the number of county wage rates that would be based on averages decreased to 31 percent ( $948 \div 3,097$ ). The percentage of rates that would be based on a modal wage rate increased for both non-collectively bargained and collectively bargained rates, although more wage rates would be based on non-collectively bargained rates than collectively bargained rates.

For fringe benefit rates, fringe benefits do not prevail for a similar percent in both scenarios, (i.e., “no fringes”): 50 percent of current rates, 48 percent of “three-step process” rates. The share determined as average rates decreased from 22 percent to 10 percent. The prevalence of modal prevailing fringe benefit rates increased for both non-collectively bargained and collectively bargained rates, with slightly more becoming collectively bargained rates than non-collectively bargained rates.

The total number of counties will differ by classification based on the State, applicable survey area (e.g., statewide, metro only), and whether the data submitted for the classification met sufficiency requirements.

TABLE 6—PREVALENCE OF CALCULATED PREVAILING WAGES IN ANALYZED SUBSET, BY PUBLICATION RULE, BY CLASSIFICATION

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
Count .....	949	504	545	379	360	360	3,097
<b>Current Hourly Rate</b>							
Average .....	82%	57%	55%	42%	68%	53%	63%
Modal Prevailing—Union .....	12%	40%	23%	39%	4%	44%	25%
Modal Prevailing—Non-Union .....	6%	3%	22%	19%	28%	4%	12%
<b>“Three-Step Process” Hourly Rate <sup>a</sup></b>							
Average .....	47%	22%	26%	18%	40%	11%	31%
Modal Prevailing—Union .....	21%	46%	25%	45%	7%	80%	34%
Modal Prevailing—Non-Union .....	32%	31%	49%	37%	53%	9%	36%
<b>Change for Hourly Rate (Percentage Points)</b>							
Average .....	–35	–35	–29	–23	–28	–42	–32
Modal Prevailing—Union .....	9	7	2	5	3	36	9
Modal Prevailing—Non-Union .....	26	28	27	18	25	5	23
<b>Current Fringe Benefit Rate</b>							
Average .....	23%	27%	12%	13%	9%	48%	22%
Modal Prevailing—Union .....	14%	41%	23%	39%	4%	44%	25%
Modal Prevailing—Non-Union .....	4%	5%	3%	2%	2%	0%	3%
No fringes .....	59%	27%	62%	46%	85%	8%	50%
<b>“Three-Step Process” Fringe Benefit Rate <sup>a</sup></b>							
Average .....	13%	13%	9%	6%	5%	13%	10%
Modal Prevailing—Union .....	21%	47%	25%	46%	7%	80%	34%
Modal Prevailing—Non-Union .....	9%	13%	4%	2%	3%	7%	7%
No fringes .....	57%	27%	62%	46%	85%	0%	48%

TABLE 6—PREVALENCE OF CALCULATED PREVAILING WAGES IN ANALYZED SUBSET, BY PUBLICATION RULE, BY CLASSIFICATION—Continued

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
<b>Change for Fringe Benefit Rate (Percentage Points)</b>							
Average .....	–11	–14	–3	–7	–4	–35	–11
Modal Prevailing—Union .....	7	6	2	7	3	36	9
Modal Prevailing—Non—Union .....	6	8	1	0	1	7	4
No fringes .....	–2	0	0	0	0	–8	–2

<sup>a</sup> Using a threshold of 30 percent of employees' wage or fringe benefit rates being identical.

TABLE 7—PREVALENCE OF CALCULATED PREVAILING WAGES IN ANALYZED SUBSET, BY PUBLICATION RULE, BY CONSTRUCTION TYPE

	Residential	Building	Heavy	Highway	Total
Count .....	563	1,436	810	288	3,097
<b>Current Hourly Rate</b>					
Average .....	423	769	573	189	1,954
Majority—Union .....	99	456	143	64	762
Majority—Non-Union .....	41	211	94	35	381
<b>Proposed "Three-Step Process" Hourly Rate <sup>a</sup></b>					
Average .....	197	313	331	107	948
Modal Prevailing—Union .....	118	570	257	104	1,049
Modal Prevailing—Non-Union .....	248	553	222	77	1,100
<b>Change for Hourly Rate</b>					
Average .....	–226	–456	–242	–82	–1006
Modal Prevailing—Union .....	19	114	114	40	287
Modal Prevailing—Non-Union .....	207	342	128	42	719
<b>Current Fringe Benefit Rate</b>					
Average .....	26	347	235	65	673
Modal Prevailing—Union .....	99	470	154	64	787
Modal Prevailing—Non-Union .....	0	76	19	1	96
No fringes .....	438	543	402	158	1,541
<b>Proposed "Three-Step Process" Fringe Benefit Rate <sup>a</sup></b>					
Average .....	0	185	115	23	323
Modal Prevailing—Union .....	118	578	259	105	1,060
Modal Prevailing—Non-Union .....	7	150	51	14	222
No fringes .....	438	523	385	146	1,492
<b>Change for Fringe Benefit Rate</b>					
Average .....	–26	–162	–120	–42	–350
Modal Prevailing—Union .....	19	108	105	41	273
Modal Prevailing—Non-Union .....	7	74	32	13	126
No fringes .....	0	–20	–17	–12	–49

<sup>a</sup> Using a threshold of 30 percent of employees' wage or fringe benefit rates being identical.

Table 8 and Table 9 summarize the difference in calculated prevailing wage rates using the three-step process compared to the current process. Table 8 disaggregates results by craft and Table 9 disaggregated results by construction type. The first row entitled "Total" refers to the number of rates for the classification in the subset of surveys that the Department analyzed. The results show both average changes

across all observations and average changes when limited to those classification-county observations where rates are different (about 32 percent of all observations in the sample). Notably, all classification-county observations are weighted equally in the calculations. On average:

- Across all observations, the average hourly rate increases by only one cent, or 0.1 percent of the average hourly

wage rate. Across affected classification-counties only, the calculated hourly rate increases by 4 cents on average, or 0.2 percent of the average hourly wage rate. However, there is significant variation. The calculated hourly rate increased by as much as \$7.80 and decreased by as much as \$5.78.

- Across all observations, the average hourly fringe benefit rate increases by 19 cents, or 3.7 percent of the average

hourly fringe rate. Across affected classification-counties only, the calculated hourly fringe benefit rate increases by \$1.42 on average, or 26.8 percent of the average hourly fringe rate. As a percent of the average fringe rate, this percent change is large because many of these prevailing wage rates previously did not have prevailing fringes. The change ranges from –\$6.17 to \$11.16.

- Some crafts and construction types have larger changes than others.

However, it should be noted that when considering only one craft or construction type, the results are based on smaller samples and consequently less precise.

Based on this demonstration of the impact of changing from the current to the new definition of “prevailing,” some published wage rates and fringe benefit rates may increase and others may decrease. In the sample considered, wage rates changed very little on average, but fringe benefit rates

increased on average. As discussed above, the Department believes that these results need to be interpreted with care and cannot be extrapolated to definitively quantify the overall impact of the 30-percent threshold. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this provision.

TABLE 8—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF “PREVAILING”

	Laborers	Plumbers	Roofers	Bricklayers	Cement masons	Electricians	Total
<b>Hourly Rate</b>							
Total .....	949	504	545	379	360	360	3,097
Number changed .....	330	175	160	89	101	150	1,005
Increased .....	121	130	36	66	17	106	476
Decreased .....	209	45	124	23	84	44	529
Percent changed .....	35%	35%	29%	23%	28%	42%	32%
Increased .....	13%	26%	7%	17%	5%	29%	15%
Decreased .....	22%	9%	23%	6%	23%	12%	17%
Average (non-zero) .....	\$0.37	\$1.10	–\$1.06	\$0.44	–\$1.35	\$0.94	\$0.04
Average (all) .....	\$0.13	\$0.38	–\$0.31	\$0.10	–\$0.38	\$0.39	\$0.01
Maximum .....	\$7.80	\$7.07	\$4.40	\$1.02	\$2.54	\$4.14	\$7.80
Minimum .....	–\$3.93	–\$4.23	–\$2.51	–\$0.95	–\$5.78	–\$4.74	–\$5.78
<b>Fringe Benefit Rate</b>							
Total .....	949	504	545	379	360	360	3,097
Number changed .....	137	69	17	26	14	184	447
Increased .....	109	59	9	19	11	174	381
Decreased .....	28	10	8	7	3	10	66
Percent changed .....	14%	14%	3%	7%	4%	51%	14%
Increased .....	11%	12%	2%	5%	3%	48%	12%
Decreased .....	3%	2%	1%	2%	1%	3%	2%
Average (non-zero) .....	\$2.10	\$2.14	–\$1.67	\$1.21	\$0.74	\$2.11	\$1.42
Average (all) .....	\$0.30	\$0.29	–\$0.05	\$0.08	\$0.03	\$1.08	\$0.19
Max .....	\$9.42	\$11.16	\$1.42	\$2.19	\$6.00	\$4.61	\$11.16
Min .....	–\$4.82	–\$1.35	–\$4.61	–\$0.17	–\$6.17	–\$0.86	–\$6.17

TABLE 9—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF “PREVAILING,” BY CONSTRUCTION TYPE

	Residential	Building	Heavy	Highway	Total
<b>Hourly Rate</b>					
Total .....	563	1,436	810	288	3,097
Number changed .....	226	455	242	82	1,005
Increased .....	102	215	118	41	476
Decreased .....	124	240	124	41	529
Percent changed .....	40%	32%	30%	28%	32%
Increased .....	18%	15%	15%	14%	15%
Decreased .....	22%	17%	15%	14%	17%
Average (non-zero) .....	\$0.45	\$0.04	–\$0.09	\$1.10	\$0.04
Average (all) .....	\$0.18	\$0.01	–\$0.03	\$0.31	\$0.01
Maximum .....	\$6.57	\$7.07	\$7.80	\$4.14	\$7.80
Minimum .....	–\$1.73	–\$4.23	–\$5.78	–\$4.74	–\$5.78
<b>Fringe Benefit Rate</b>					
Total .....	563	1,436	810	288	3,097
Number changed .....	26	201	154	66	447
Increased .....	26	163	139	53	381
Decreased .....	0	38	15	13	66
Percent changed .....	5%	14%	19%	23%	14%
Increased .....	5%	11%	17%	18%	12%
Decreased .....	0%	3%	2%	5%	2%

TABLE 9—CHANGE IN RATES ATTRIBUTABLE TO CHANGE IN DEFINITION OF “PREVAILING,” BY CONSTRUCTION TYPE—  
Continued

	Residential	Building	Heavy	Highway	Total
Average (non-zero) .....	\$6.89	\$1.27	\$1.34	\$2.95	\$1.42
Average (all) .....	\$0.32	\$0.18	\$0.26	\$0.68	\$0.19
Max .....	\$9.42	\$11.16	\$4.61	\$6.19	\$11.16
Min .....	\$0.01	–\$4.82	–\$6.17	–\$2.21	–\$6.17

## 2. Adjusting Out-of-Date Prevailing Wage and Fringe Benefit Rates

Updating older Davis-Bacon prevailing wage and fringe benefit rates will increase the minimum required hourly compensation paid to workers on Davis-Bacon projects. This would result in transfers of income to workers on Davis-Bacon projects who are currently being paid only the required minimum hourly rate and fringe benefits. To the extent that the Federal Government pays for increases to the prevailing wage through higher contract bids, an increase in the prevailing wage will transfer income from the Federal Government to the worker. This transfer will be reflected in increased costs paid by the Federal Government for construction.

However, to estimate transfers, many assumptions need to be made. For example, the Department would need to determine if workers really are being paid the prevailing wage rate; some published rates are so outdated that it is highly likely effective labor market rates exceed the published rates, and the published prevailing wage rates are functionally irrelevant. In addition, the Department would need to predict which Davis-Bacon projects would occur each year, in which counties these projects will occur, and the number of hours of work required from each class of laborer and mechanic. Because of many uncertainties, the Department instead characterizes the number and size of the changes in published Davis-Bacon hourly rates and fringe benefits rather than formally estimating the income change to those potentially affected by the proposal to update rates.

To provide an illustrative analysis, the Department used the entire set of wage and fringe benefit rates published on wage determinations as of May 2019 to demonstrate the potential changes in Davis-Bacon wage and fringe benefit rates resulting from updating certain out-of-date non-collectively bargained rates to 2021 values using the BLS ECI. For this demonstration, the Department considered the impact of updating rates for key classifications published prior to 2019 that were based on weighted averages, which comprises 172,112

wage and fringe benefit rates lines in 3,999 wage determinations.<sup>318</sup> The Department has focused on wage and fringe benefit rates prior to 2019 because these are the universe of key classification rates that are likely to be more than 3 years old at the time of this final rule, and the rule calls for updating non-collectively-bargained wage rates that are 3 or more years old.

After dropping hourly wages greater than \$100 and wage rates that were less than \$7.25 when originally published but were updated to the minimum wage of \$7.25 in 2009, 159,562 wage rates were updated for this analysis.<sup>319</sup> To update these wage rates, the Department used the BLS ECI, which measures the change over time in the cost of labor total compensation.<sup>320</sup> The Department believes that the ECI for private industry workers, total compensation, “construction, and extraction, farming, fishing, and forestry” occupations, not seasonally adjusted, is the most appropriate index. However, the index for this group is only available starting in 2001. Thus, for updating wages and fringe benefits from 1979 through 2000, the Department determined the ECI for private industry workers, total compensation, in the goods-producing industries was the most appropriate series to use that was available back to 1979.<sup>321</sup>

To consider potential transfers to workers due to changes in wages, the full increase in the hourly rate would only occur if workers on DBRA projects

are currently paid the exact prevailing rates.<sup>322</sup> However, due to market conditions in some areas, workers already may be receiving more than the published rate. While completely comparable data on wages paid to workers on DBRA projects in specific classifications and counties are not readily available and usable for this analysis, the BLS OEWS data provide a general estimate of wages paid to certain categories of workers performing construction and construction-related duties. Although the OEWS data can be informative for this illustrative analysis, it is not a representative data set of professional construction workers performing work on DBRA projects and it does not include benefits.

To provide an example of transfers, the Department compared the ECI-updated Davis-Bacon wage rates to the applicable median hourly rate in the OEWS data.<sup>323</sup> To estimate the approximate median 2021 wage rates, the Department used the median hourly wage rate for each key classification in the construction industry in the May 2021 State OEWS data. Using the OEWS as a general measure of the market conditions for construction worker wages in a given State, the Department assumed that an updated Davis-Bacon wage rate below the median OEWS rates would likely not lead to sizable income transfers to construction workers because most workers are likely already paid more than the updated Davis-Bacon rate. After removing the 99,337 updated Davis-Bacon wage rates that were less than the corresponding OEWS median rates, there remained 60,225 updated Davis-Bacon wage rates that may result in transfers to workers. However, the Department notes that some of the updated Davis-Bacon rates may be lower than the median because they are a wage rate for a rural county, and the OEWS data represents the statewide median.

<sup>318</sup> In each type of construction covered by the DBRA, some classifications are called “key” because most projects require these workers. Building construction has 16 key classifications, residential construction has 12 key classifications and heavy and highway construction each have the same eight key classifications. A line reflects a key classification by construction type in a specific geographic area. For example, a line could reflect a plumber in building construction in Fulton County, GA.

<sup>319</sup> The 54 wage rates greater than \$100 were day or shift rates. The remaining 12,496 rates excluded were less than \$7.25 prior to July 24, 2009, but were published from surveys conducted before the establishment of the Department’s ASDS in 2002. The Department no longer has records of the original published wage rates in these cases.

<sup>320</sup> Available at: <https://www.bls.gov/ect/>.

<sup>321</sup> Continuous Occupational and Industry Series, Table 5. <https://www.bls.gov/web/eci/eci-continuous-dollar.txt>.

<sup>322</sup> The hourly wage rate increase would only occur when the next contract goes into effect and a new wage determination with an updated wage rate is incorporated into the contract.

<sup>323</sup> The Department used OEWS data for certain occupations matching key classifications in the construction industry by State.

Further investigating the ECI-updated Davis-Bacon wage rates in this example that were substantially above the OEWS median wage rate, the Department found that 23,200 of the originally published Davis-Bacon wage rates were already higher than the OEWS median. For at least some of these wage rates, the comparison to the OEWS median may not be appropriate because such Davis-Bacon wage rates are for work in specialty construction. For example, most of the prevailing wage rates published specifically for a 2014 wage determination for Iowa Heavy Construction River Work exceed the 2021 OEWS median rates for the same classifications in Iowa.<sup>324</sup> This may be an indication that comparing Davis-Bacon rates for this type of construction to a more general measure of wages may not be appropriate because workers are generally paid more for this type of specialty construction than for other types of construction work measured by the OEWS data.

Therefore, to measure possible transfers per hour to workers on Davis-Bacon projects due to the periodic updating of certain non-collectively bargained wage rates, the Department began by taking the lesser of:

- The difference between the updated wage rate and the OEWS median wage rate.
- The difference between the updated and currently published wage rates.

The second difference accounts for the 23,200 Davis-Bacon wage rates that were higher than the 2021 OEWS median rate even before they were updated, because otherwise the Department would overestimate the potential hourly wage transfer.

The Department also examined an additional adjustment for DBA wage rates because they are also subject to Executive Order 13658: Establishing a Minimum Wage for Contractors, which sets the minimum wage paid to workers on Federal contracts at \$11.25 in 2022.<sup>325</sup> Thus, the Department analyzed

an additional restriction that the maximum possible hourly transfer to workers on Davis-Bacon projects cannot exceed the difference between the updated wage rate and \$11.25.

However, the added restriction has no impact on estimated transfers because any updated wage rates that were less than \$11.25 were also less than the OEWS median wage rate. Thus, the potential possible hourly transfers attributable to updated Davis-Bacon wage rates are identical for construction projects covered by the Davis-Bacon Act and by the Related Acts.

Table 10 provides the summary statistics of the per hour transfers to workers that may occur due to updating out-of-date non-collectively bargained Davis-Bacon wage rates. Among the wage rates considered in this demonstration, there are 60,225 wage rate updates that may result in transfers to workers. On average, the potential hourly transfer is \$4.11.

TABLE 10—DISTRIBUTION OF POTENTIAL PER HOUR TRANSFERS DUE TO UPDATED RATES

	Number of rates	Mean	Median	Standard deviation
Wage rates .....	60,225	\$4.11	\$3.29	\$3.93
Fringe benefits .....	75,480	1.50	1.06	1.62
Total compensation .....	94,050	3.83	2.32	4.70

Of the 172,112 pre-2019 non-collectively bargained key classification fringe benefit rates, 75,480 were non-zero, and thus would be updated, possibly resulting in some transfers to workers (Table 10). On average, these non-zero fringe benefits would increase by \$1.50 per hour.

Adding the required Davis-Bacon wage and fringe benefit rates together measures the required total compensation rate on DBRA projects. Due to updating old rates, 94,050 Davis-Bacon total compensation hourly rates would increase by \$3.83 on average.<sup>326</sup>

The two demonstrations provide an indication of the possible changes to Davis-Bacon wage rates and fringe benefit rates attributable to the proposed provision revising the definition of “prevailing,” and the provision to update out-of-date SU rates using the ECI (only one of which would affect a location-occupation pair at a particular time). Both provisions may lead to higher hourly payments, while the

former also has the potential to lead to lower hourly payments.

Because accurate data to measure the current county-level labor conditions for specific construction classifications are not available, it is unclear if an increase or decrease in Davis-Bacon minimum required rates will impact what workers earn on DBRA projects. Furthermore, even if some of these rate changes do lead to different rates paid to workers on DBRA projects, data are not available to estimate how large transfers might be. To do so would require detailed information on what federally funded construction contracts will be issued, the types of projects funded, where the projects will occur (specific county or counties), the value of the projects, and the labor mix needed to complete the project.

*E. Cost Savings*

This final rule could lead to cost savings for both contractors and the Federal Government because the rule would reduce ambiguity and increase efficiency, which could reduce the

amount of time necessary to comply with the rule. For example, as discussed in section V.C.4, expressly authorizing WHD to list classifications and corresponding wage and fringe benefit rates on wage determinations when WHD has received insufficient data through its wage survey process will increase certainty and reduce administrative burden for contracting entities. It would reduce the number of conformance requests needed, which could save time for the contractors, contracting agencies, and the Department. Additionally, permitting the Administrator to adopt prevailing wage rates set by State and local governments could result in cost savings for the Department, because it avoids WHD duplicating wage survey work that states and localities are already doing. It could also result in cost savings in the form of time savings for contractors, as they will only have one wage determination that they will have to reference.

<sup>324</sup> WD IA20190002.

<sup>325</sup> The Department also ran an analysis using the minimum wage of \$15.00 as proposed by Executive Order 14026, “Increasing the Minimum Wage for Federal Contractors.” The results were similar.

<sup>326</sup> The average increase in total compensation is less than the average wage increase because more

wage and fringe benefit lines are included for total compensation.



Additionally, the Department is providing clarifications throughout the rule, which will make clear which contract workers are covered by DBRA. For example, the Department is clarifying provisions related to the site of work, demolition and removal workers, and truck drivers and their assistants, among others. These clarifications will make it clear to both contractors and contract workers who is covered, and therefore could help reduce legal disputes between the two, resulting in cost savings.

Because the Department does not have information on how much additional time contractors and the Federal Government currently spend complying with this rule due to lack of clarity, these cost savings are discussed qualitatively.

#### F. Benefits

Among the multiple provisions discussed above, the Department recognizes that the provision to update the definition of prevailing wage using the “30 percent rule” could have various impacts on wage rates. The effect of this proposal on actual wages paid is uncertain for the reasons discussed in section V.D.1. However, the Department’s proposal to update out-of-date wage rates using the ECI would result in higher prevailing wage rates due to the increases in employer costs over time. Any DBRA-covered workers that were not already being paid above these higher wage rates would receive a raise when these updated rates were implemented. These higher wages could lead to benefits such as improved government services, increased productivity, and reduced turnover, which are all discussed here qualitatively. The magnitude of these wage increases could influence the magnitude of these benefits.

The Department notes that the literature cited in this section sometimes does not directly consider changes in the DBRA prevailing wages. Additionally, much of the literature is based on voluntary changes made by firms. However, the Department has presented the information here because the general findings may still be applicable in this context.

#### 1. Improved Government Services

For workers who are paid higher wage rates as a result of this rulemaking, the Department expects that the quality of construction could improve. Higher wages can be associated with a higher number of bidders for Government contracts, which can be expected to generate greater competition and an improved pool of contractors. Multiple

studies have shown that the bidding for municipal contracts remained competitive or even improved when living wage ordinances were implemented (Thompson and Chapman, 2006).<sup>327</sup> In a study on the impact of bid competition on final outcomes of State department of transportation construction projects, Delaney (2018) demonstrated that each additional bidder reduces final project cost overruns by 2.2 percent and increases the likelihood of achieving a high-quality bid by 4.9 times.<sup>328</sup>

A comment submitted by two individuals agreed with the Department’s assertion that the number of bidders would not decrease. They pointed to a paper that found no difference in the number of bidders on federally funded projects and state-funded projects.<sup>329</sup> Conversely, the NAHB asserted that DBRA requirements can be a deterrent to small businesses considering bidding and that this rule could further discourage these contractors from participating. The Department believes this final rule clarifies the requirements and thus would not deter small businesses from participating.

#### 2. Increased Productivity

For workers whose wages increase as a result of the Department’s provision to update out-of-date wage rates, these increases could result in increased productivity. Increased productivity could occur through numerous channels, such as employee morale, level of effort, and reduced absenteeism. A strand of economic research, commonly referred to as “efficiency wage” theory, considers how an increase in compensation may be met with greater productivity.<sup>330</sup> Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.<sup>331</sup> A comment submitted by two individuals affirmed

the likely relationship between this final rule and increased productivity.

Allen (1984) estimates the ratio of the marginal product of union and non-union labor.<sup>332</sup> He finds that union workers are 17 to 22 percent more productive than non-union members. Although it is unclear whether this entire productivity difference is attributable to higher wages, it is likely a large contributing factor. The Construction Labor Research Council (2004) compared the costs to build a mile of highway in higher wage and lower wage states using data reported to the FHWA from 1994 to 2002.<sup>333</sup> They found that in higher wage states, 32 percent fewer labor hours are needed to complete a mile of highway than in lower wage states, despite hourly wage rates being 69 percent higher in those states. While this increased worker productivity could be due in part to other factors such as greater worker experience or more investment in capital equipment in higher wage states, the higher wages likely contribute.

Conversely, Vedder (1999) compared output per worker across states with and without prevailing wage laws.<sup>334</sup> Data on construction workers is from the Department of Labor and data on construction contracts is from the Department of Commerce. A worker in a prevailing wage law State produced \$63,116 of value in 1997 while a worker from a non-prevailing wage law State produced \$65,754. Based on this simple comparison, workers are more productive without prevailing wage laws. However, this is a somewhat basic comparison in that it does not control for other differences between states that may influence productivity (for example, the amount of capital used or other State regulations) and it is unclear whether this difference is statistically significant.

Studies on absenteeism have demonstrated that there is a negative effect on firm productivity as absentee rates increase.<sup>335</sup> Zhang et al., in their study of linked employer-employee data in Canada, found that a 1 percent

<sup>327</sup> Thompson, J. and J. Chapman. (2006). “The Economic Impact of Local Living Wages,” EPI, Briefing Paper #170, 2006.

<sup>328</sup> Delaney, J. (2018). “The Effect of Competition on Bid Quality and Final Results on State DOT Projects.” <https://www.proquest.com/openview/33655a0e4c7b8a6d25d30775d350b8ad/1?pq-origsite=gscholar&cbl=18750>.

<sup>329</sup> Duncan, K. (2015). “The Effect of Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations on Highway Maintenance Costs.” *ILR Review*, 68(1), pp. 212–237. <https://doi.org/10.1177/0019793914546304>.

<sup>330</sup> Akerlof, G.A. (1982). “Labor Contracts as Partial Gift Exchange.” *The Quarterly Journal of Economics*, 97(4), 543–569.

<sup>331</sup> Another model of efficiency wages, which is less applicable here, is the adverse selection model in which higher wages raise the quality of the pool of applicants.

<sup>332</sup> Allen, S.G. (1984). “Unionized Construction Workers are More Productive.” *The Quarterly Journal of Economics*, 251–174.

<sup>333</sup> The Construction Labor Research Council (2004). “The Impact of Wages on Highway Construction Costs.” <http://niabuild.org/WageStudybooklet.pdf>.

<sup>334</sup> Vedder, R. (1999). “Michigan’s Prevailing Wage Law and Its Effects on Government Spending and Construction Employment. Midland, Michigan: Mackinac Center for Public Policy.” <https://www.mackinac.org/archives/1999/s1999-07.pdf>.

<sup>335</sup> Allen, S.G. (1983). “How Much Does Absenteeism Cost?” *Journal of Human Resources*, 18(3), 379–393. <https://www.jstor.org/stable/145207?seq=1>.

decline in the attendance rate reduces productivity by 0.44 percent.<sup>336</sup> Allen (1983) similarly noted that a 10-percentage point increase in absenteeism corresponds to a decrease of 1.6 percent in productivity.<sup>337</sup> Hanna et al. (2005) find that while absenteeism rates of between 0 and 5 percent among contractors on electrical construction projects lead to no loss of productivity, absenteeism rates of between 6 and 10 percent can spark a 24.4 percent drop in productivity.<sup>338</sup>

Fairris et al. (2005) demonstrated that as a worker's wage increases there is a reduction in unscheduled absenteeism.<sup>339</sup> They attribute this effect to workers standing to lose more if forced to look for new employment and an increase in pay paralleling an increase in access to paid time off. Pfeifer's (2010) study of German companies provides similar results, indicating a reduction in absenteeism if workers experience an overall increase in pay.<sup>340</sup> Conversely, Dionne and Dostie (2007) attribute a decrease in absenteeism to mechanisms other than an increase in worker pay, specifically scheduling that provides both the option to work-at-home and for fewer compressed work weeks.<sup>341</sup> However, the relevance of such policies in the context of construction is unclear. The Department believes both the connection between prevailing wages and absenteeism, and the connection between absenteeism and productivity are well enough established that this is a feasible benefit of this final rule.

<sup>336</sup> Zhang, W., Sun, H., Woodcock, S., & Anis, A. (2013). "Valuing Productivity Loss Due to Absenteeism: Firm-level Evidence from a Canadian Linked Employer-Employee Data." *Health Economics Review*, 7(3). <https://healtheconomicreview.biomedcentral.com/articles/10.1186/s13561-016-0138-y>.

<sup>337</sup> Allen, S.G. (1983). "How Much Does Absenteeism Cost?," *Journal of Human Resources*, 18(3), 379–393. <https://www.jstor.org/stable/145207?seq=1>.

<sup>338</sup> Hanna, A., Menches, C., Sullivan, K., & Sargent, J. (2005) "Factors Affecting Absenteeism in Electrical Construction." *Journal of Construction Engineering and Management* 131(11). [https://ascelibrary.org/doi/abs/10.1061/\(ASCE\)0733-9364\(2005\)131:11\(1212\)](https://ascelibrary.org/doi/abs/10.1061/(ASCE)0733-9364(2005)131:11(1212)).

<sup>339</sup> Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses." LAANE. [https://laane.org/downloads/Examining\\_the\\_Evidence.pdf](https://laane.org/downloads/Examining_the_Evidence.pdf).

<sup>340</sup> Pfeifer, C. (2010). "Impact of Wages and Job Levels on Worker Absenteeism." *International Journal of Manpower* 31(1), 59–72. <https://doi.org/10.1108/01437721011031694>.

<sup>341</sup> Dionne, G., & Dostie, B. (2007). "New Evidence on the Determinants of Absenteeism Using Linked Employer-Employee Data." *Industrial and Labor Relations Review* 61(1), 108–120. <https://journals.sagepub.com/doi/abs/10.1177/001979390706100106>.

### 3. Reduced Turnover

Little evidence is available on the impact of prevailing wage laws and turnover, but an increase in the minimum wage has been shown to decrease both turnover rates and the rate of worker separation (Dube, Lester and Reich, 2011; Liu, Hyclak and Regmi, 2015; Jardim et al., 2018).<sup>342</sup> This decrease in turnover and worker separation can lead to an increase in the profits of firms, as the hiring process can be both expensive and time consuming. A review of 27 case studies found that the median cost of replacing an employee was 21 percent of the employee's annual salary.<sup>343</sup> Fairris et al. (2005)<sup>344</sup> found the cost reduction due to lower turnover rates ranges from \$137 to \$638 for each worker.

Although the impacts cited here are not limited to government construction contracting, because data specific to government contracting and turnover are not available, the Department believes that a reduction in turnover could be observed among those workers on DBRA contracts whose wages increase following this final rule. The potential reduction in turnover is a function of several variables: the current wage, the change in the wage rate, hours worked on covered contracts, and the turnover rate. Therefore, the Department has not quantified the impacts of potential reduction in turnover.

### 4. Additional Benefits

A comment submitted by two individuals mentioned several other potential benefits. First, they noted that research has shown a positive correlation between state prevailing wage laws and apprenticeship enrollment. Second, they pointed to literature demonstrating that states with prevailing wage laws have lower injury

<sup>342</sup> Dube, A., Lester, T.W., & Reich, M. (2011). "Do Frictions Matter in the Labor Market? Accessions, Separations, and Minimum Wage Effects." (Discussion Paper No. 5811). IZA. <https://www.iza.org/publications/dp/5811/do-frictions-matter-in-the-labor-market-accessions-separations-and-minimum-wage-effects>.

Liu, S., Hyclak, T.J., & Regmi, K. (2015). "Impact of the Minimum Wage on Youth Labor Markets." *Labour* 29(4). <https://doi.org/10.1111/labr.12071>.

Jardim, E., Long, M.C., Plotnick, R., van Inwegen, E., Vigdor, J., & Wething, H. (Oct. 2018). "Minimum Wage Increases and Individual Employment Trajectories" (Working paper No. 25182). NBER. <https://doi.org/10.3386/w25182>.

<sup>343</sup> Boushey, H. and Glynn, S. (2012). "There are Significant Business Costs to Replacing Employees. Center for American Progress." Available at: <http://www.americanprogress.org/wp-content/uploads/2012/11/CostofTurnover.pdf>.

<sup>344</sup> Fairris, D., Runstein, D., Briones, C., & Goodheart, J. (2005). "Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses." LAANE. [https://laane.org/downloads/Examining\\_the\\_Evidence.pdf](https://laane.org/downloads/Examining_the_Evidence.pdf).

and disability rates. Depending on the channel through which these correlations occur, this final rule could result in more apprenticeships and reduced workplace injuries, disabilities and fatalities. The extent to which these impacts occur would likely depend on the extent of coverage expansion and wage rate changes.

## VI. Final Regulatory Flexibility Act (FRFA) Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), requires Federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 604.

Response to comments from small businesses and SBA's Office of Advocacy are incorporated throughout the FRFA where applicable.

### A. Need for Rulemaking and Objectives of the Final Rule

In order to provide greater clarity and enhance their usefulness in the modern economy, this final rule updates and modernizes the regulations at 29 CFR parts 1, 3, and 5, which implement the DBRA. The Department has not undertaken a comprehensive revision of the DBRA regulations since 1982. Since that time, Congress has expanded the reach of the DBRA regulations significantly, adding numerous new Related Act statutes to which they apply. The DBA and now more than 70 active Related Acts collectively apply to an estimated tens of billions of dollars in Federal and federally assisted construction spending per year and provide minimum wage rates for hundreds of thousands of U.S. construction workers. The Department expects these numbers to continue to grow as Congress seeks to address the significant infrastructure needs in the country, including, in particular, energy and transportation infrastructure necessary to address climate change. These regulations will provide additional clarity that will be helpful given the increased number of

construction projects subject to Davis-Bacon labor standards requirements, due to the substantial increases in federally funded construction provided for in legislation such as the IIJA.

Additionally, the Federal contracting system itself has undergone significant changes since 1982. Federal agencies have increased spending through the use of interagency Federal schedules. Contractors have increased their use of single-purpose entities such as joint ventures and teaming agreements. Offsite construction of significant components of public buildings and works has also increased. The regulations need to be updated to ensure their continued effectiveness in the face of changes such as these.

In this final rule, the Department seeks to address a number of outstanding challenges in the program while also providing greater clarity in the DBRA regulations and enhancing their usefulness in the modern economy. Specifically, the Department returns to the definition of “prevailing wage” that was used from 1935 to 1983 to address the overuse of average rates and ensure that prevailing wages reflect actual wages paid to workers in the local community. The Department will also periodically update non-collectively bargained prevailing wage rates to address out-of-date wage rates. The final rule will allow WHD to adopt State or local wage determinations as the Federal prevailing wage where certain specified criteria are satisfied, to issue supplemental rates for key classifications where there is insufficient survey data, to modernize the scope of work to include energy infrastructure and the site of work to include certain secondary worksites, to ensure that DBRA requirements protect workers by operation of law, and to strengthen enforcement, including through debarment and anti-retaliation protections. See section III.B. for a full discussion of the Department’s changes to these regulations.

#### *B. Significant Issues Raised by Public Comment, Including Those Filed by the Chief Counsel for Advocacy of the Small Business Administration*

SBA Advocacy commented that DOL’s Initial Regulatory Flexibility Analysis did not properly inform the public about the impact of this rule on small entities. They asserted that DOL should have estimated the compliance costs of expanding DBRA coverage to new industries and state that the proposed rule expands coverage to prefabrication companies, material suppliers, and truck drivers,

professional surveyors, and additional small businesses.

As explained above, neither the proposed nor the final rule expanded coverage to prefabrication companies, which remain generally outside the scope of the DBRA. While the proposed rule would have broadened coverage to include secondary construction sites at which “significant portions” of buildings or works (as opposed to prefabricated components) are constructed, the final rule limits such coverage to facilities dedicated exclusively or nearly so to a particular covered contract or project. While the Department cannot estimate the precise number of small entities that will be impacted by this change, as explained above in Section V.C.4.v, the Department expects that number to be small since, based on the comments received, most modular construction companies’ facilities are engaged in more than one project at a time and therefore will be outside the scope of the “site of the work” under the final rule. Additionally, as explained above, the final rule does not expand coverage to material suppliers or truck drivers but rather codifies existing policy with minor changes. Likewise, the preamble’s guidance on coverage of survey crews is consistent with the Department’s current interpretation and emphasizes that coverage of survey crews is highly fact-dependent. As such, the Department does not anticipate that it will substantially broaden coverage to entities not previously covered.

Small business commenters also noted that DOL underestimated rule familiarization costs. As discussed further in Section V.C.1, the Department reconsidered the time it would take for the regulated community to read this Final Rule and has increased the time estimate to an average of 4 hours. The Department believes that this average estimate is appropriate, because while some firms will spend more time reading the rule, other firms in our estimate will not bid on a DBA contract and will spend zero time reading the rule.

They also claimed that the changes to the methodology for calculating prevailing wages will increase wages for covered Federal contractors, which will add costs for covered contractors. As explained in Section V.D., the Department does not have data on the current wages of DBRA-covered workers, so it is not possible to definitively calculate how wages will change following this proposed rule. Although the Department performed an illustrative analysis of example changes in wage rates, without data on actual

wages paid this analysis cannot be used to estimate the total impact of this rule on wages. Furthermore, if businesses do see a significant increase in the wage that they must pay for a classification of worker because of an increase prevailing wage rate for that classification (beyond the rate the business is already paying its workers in that classification), the business will be able to account for this cost by incorporating the increased cost into their bid or price negotiation and will be in effect reimbursed by the Federal government.

Overall, the Department believes that the data analysis it has provided is sufficient given the lack of available data on covered workers.

#### *C. Estimating the Number of Small Businesses Affected by the Rulemaking*

As discussed in section V.B., the Department identified a range of firms potentially affected by this rulemaking. This includes both firms impacted by the Davis-Bacon Act and firms impacted by the Related Acts. The more narrowly defined population includes firms actively holding Davis-Bacon contracts and firms affected by the Related Acts. The broader population includes those bidding on Davis-Bacon and Related Acts contracts but without active contracts, or those considering bidding in the future. As described in section V.B., the total number of potentially affected firms ranges from 152,900 to 184,500. This includes firms that pay at or above the new wage determination rates and thus will not be substantially affected. The Department does not have data to identify the number of firms that will experience changes in payroll costs.

To identify the number of small firms, the Department began with the total population of firms and identified some of these firms as small based on several methods.

- For prime contractors in USASpending, the Department used the variable “Contracting Officer’s Determination of Business Size.”<sup>345</sup>

- For subcontractors from USASpending, the Department identified those with “small” or “SBA” in the “Subawardee Business Types” variable.<sup>346</sup>

<sup>345</sup> The description of this variable in the *USASpending.gov* Data Dictionary is: “The Contracting Officer’s determination of whether the selected contractor meets the small business size standard for award to a small business for the NAICS code that is applicable to the contract.” The Data Dictionary is available at: <https://www.usaspending.gov/data-dictionary>.

<sup>346</sup> The description of this variable in the *USASpending.gov* Data Dictionary is: “Comma separated list representing sub-contractor business types pulled from FPDS-NG or the System for Award Management (SAM).”

• For SAM data, the Department used the small business determination in the data, in variable “NAICS Code String.” This is flagged separately for each NAICS reported for the firm; therefore,

the Department classified a company as a small business if SAM identified it as a small business in any 6-digit NAICS beginning with 23.

This results in an estimated number of potentially affected small businesses ranging from 101,700 to 127,800 (Table 11).

TABLE 11—RANGE OF NUMBER OF POTENTIALLY AFFECTED SMALL FIRMS

Source	Small firms
<b>Total Count (Davis-Bacon and Related Acts)</b>	
Narrow definition .....	101,700
Broad definition .....	127,800
<b>DBA (Narrow Definition)</b>	
Total .....	26,700
Prime contractors from USASpending .....	11,200
Subcontractors from USASpending [a] .....	15,500
<b>DBA (Broad Definition)</b>	
Total .....	52,800
SAM .....	37,300
Subcontractors from USASpending [a] .....	15,500
<b>Related Acts</b>	
Total .....	75,000

[a] Determination based on inclusion of “small” or “SBA” in the business types.

Several commenters believe the number of small businesses is underestimated. ABC and SBA’s Office of Advocacy assert that the methodology excludes newly covered firms. The Department believes most of these firms are included in the estimate because the methodology covers all firms bidding, or considering bidding, on Federal construction contracts, not just those currently holding DBA contracts. However, the Department notes that there may be limited cases in which some firms covered by the final rule’s modification of the “site of the work” to include certain secondary worksites may not be classified in the construction industry and consequently may not be

captured by this methodology. As noted in the Executive Order 12866 analysis, the Department believes the extent to which these firms are not captured is small, given that the final rule significantly limits the circumstances under which such secondary worksites are covered.<sup>347</sup> The Department estimated in section V.B. that 1.2 million employees are potentially affected by the rulemaking. That methodology does not include a variation to identify only workers employed by small firms. The Department therefore assumed that the share of contracting expenditures attributed to small businesses is the best approximation of the share of

employment in small businesses. In USASpending, expenditures are available by firm size. In 2019, \$55.4 billion was spent on DBA covered contracts (see section V.B.2.) and of that, \$19.8 billion (36 percent) was awarded to small business prime contractors.<sup>348</sup> For territories, the share of expenditures allocated to small businesses is 38 percent.

Data on expenditures by firm size are unavailable for the Related Acts (Table 12). Therefore, the Department assumed the same percentage applies to such expenditures as for Davis-Bacon contracts. In total, an estimated 424,800 workers are employed by potentially affected small businesses.

TABLE 12—NUMBER OF POTENTIALLY AFFECTED WORKERS IN SMALL COVERED CONTRACTING FIRMS

	Total workers (thousands)	Percent of expenditures in small contracting firms [a]	Workers in small businesses (thousands)
DBA, excl. territories .....	297.9	35.7	106.4
DBA, territories .....	6.1	38.2	2.3
Related Acts [b] .....	883.9	35.8	316.0
Total .....	1,188.0	.....	424.8

[a] Source: *USASpending.gov*. Percentage of contracting expenditures for covered contracts in small businesses in 2019.

[b] Because data on expenditures by firm size are unavailable for Related Acts. The Department assumed the same percentage applied as for Davis-Bacon.

<sup>347</sup> See section V.C.4.v and *supra* note 314.

<sup>348</sup> If subcontractors are more likely to be small businesses than prime contractors, then this

methodology may underestimate the number of workers who are employed by small businesses.

In several places, the final rule adds or revises language to clarify existing policies rather than substantively changes them. For example, the final rule adds 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. Also, the Department added language clarifying the applicability of the “material supplier” exemption, the applicability of the DBRA to truck drivers and flaggers, and the extent to which demolition activities are covered by the DBRA. However, the Department acknowledges that some contracting agencies may not have been applying Davis-Bacon in accordance with those policies. Where this was the case, the clarity provided by this rule could lead to expanded application of the Davis-Bacon labor standards, which could lead to more small firms being required to comply with Davis-Bacon labor standards. Additionally, the Department’s provision to revise the definition of “site of the work” to further encompass certain construction of significant portions of a building or work at secondary worksites, which could clarify and strengthen the scope of coverage under DBA and would also lead to more small firms being required to comply with Davis-Bacon labor standards. The Department does not have data to determine how many of these small firms exist.

#### *D. Compliance Requirements, Including Reporting and Recordkeeping*

Many of the provisions in this rule only affect how the prevailing wage rate is calculated. For these provisions there will be no new compliance requirements for small firms, as they will still need to pay the published prevailing wage. The Department is also making a number of revisions to existing recordkeeping requirements to better effectuate compliance and enforcement, including revisions to clarify the record

retention period and add requirements to maintain worker telephone numbers and email addresses. The Department is clarifying language used to better distinguish the records that contractors must make and maintain (regular payrolls and other basic records) from the payroll documents that contractors must submit weekly to contracting agencies (certified payrolls). The Department is also clarifying that electronic signatures and certified payroll submission methods may be used.

#### *E. Calculating the Impact of the Final Rule on Small Business Firms*

The Department considered employer costs associated with both (a) the change in determining the prevailing wage based on a 30 percent threshold instead of a 50 percent threshold and (b) the incorporation of using the change in the ECI to update certain non-collectively bargained prevailing wage rates. The Department estimated both regulatory familiarization costs and implementation costs associated with these two provisions. An overview of these costs is explained here but additional details can be found in section V.C. Non-quantified direct employer costs are explained in section V.C.4.

The Department acknowledges that if some wage rates increase due to either of the provisions listed above, there could be an increase in payroll costs for some small firms. Due to data limitations and uncertainty, the Department did not quantify payroll costs (*i.e.*, transfers). The change in the definition of prevailing wage will only be applied to wage data received through surveys finalized after the effective date of this rule, for geographic areas and classifications that have not yet been identified. Both this provision and the updating of out-of-date rates will not have any impact if firms are already paying at or above the new prevailing wage rate because of labor market forces. Please see section V.D. for a more thorough discussion of these

potential payroll costs, including an illustrative example of the potential impact of the rule on prevailing wage rates.

Year 1 direct employer costs for small businesses are estimated to total \$39.3 million. Average annualized costs across the first 10 years are estimated to be \$7.3 million (using a 7 percent discount rate). On a per firm basis, direct employer costs are estimated to be \$224.73 in Year 1. These costs are somewhat higher than the costs presented in the NPRM because the Department increased the time for regulatory familiarization in response to comments.

The rule will impose direct costs on some covered contractors who will review the regulations to understand how the prevailing wage setting methodology will change. However, the Department believes these regulatory familiarization costs will be small because firms are not required to understand how the prevailing wage rates are set in order to comply with DBRA requirements, they are just required to pay the prevailing wage rates. The Department included all small potentially affected firms (127,800 firms). The Department assumed that on average, 4 hours of a human resources staff member’s time will be spent reviewing the rulemaking. This was increased from 1 hour in the NPRM per comments.

The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$49.94 per hour.<sup>349</sup> Therefore, the Department has estimated regulatory familiarization costs to be \$25.5 million (\$49.94 per hour × 4.0 hour × 127,800 contractors) (Table 13). The Department has included all regulatory familiarization costs in Year 1. New entrants will not incur any additional regulatory familiarization costs attributable to this rule. Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are \$3.4 million.

**TABLE 13—DIRECT EMPLOYER COSTS TO SMALL BUSINESSES**  
(2021 Dollars)

Variable	Total	Regulatory familiarization costs	Implementation costs
<b>Year 1 Costs</b>			
Potentially affected firms .....	.....	127,800	65,200
Hours per firm .....	.....	4	0.5
Loaded wage rate .....	.....	\$49.94	\$49.94

<sup>349</sup> This includes the median base wage of \$30.83 from the May 2020 OEWS estimates plus benefits

paid at a rate of 45 percent of the base wage, as estimated from the BLS’s ECEC data, and overhead

costs of 17 percent. OEWS data available at: <http://www.bls.gov/oes/current/oes131141.htm>.

TABLE 13—DIRECT EMPLOYER COSTS TO SMALL BUSINESSES—Continued  
(2021 Dollars)

Variable	Total	Regulatory familiarization costs	Implementation costs
Cost (\$1,000s) .....	\$27,157	\$25,529	\$1,628
<b>Years 2–10 (\$1,000s)</b>			
Annual cost .....	\$1,628	\$0	\$1,628
Average Annualized Costs (\$1,000s):			
3% discount rate .....	\$5,156	\$3,528	\$1,628
7% discount rate .....	\$2,025	\$3,397	\$1,628

When firms update prevailing wage rates, they can incur costs associated with adjusting payrolls, adjusting contracts, and communicating this information to employees (if applicable). This rule will generally affect the frequency with which prevailing wage rates are updated through the anticipated update of old, outmoded rates to their present value, and moving forward, to periodically update rates when that does not occur through the survey process. Currently, only a fraction of non-collectively bargained prevailing wages can be expected to change each year. Firms may spend more time than they have in the past updating payroll systems to account for new prevailing wage rates that the firms must pay as a result of being awarded a DBRA contract that calls for such new rates. This change is because the Department will update older non-collectively bargained rates—as it currently does with collectively bargained prevailing rates—to better represent current wages and benefits being paid in the construction industry. In addition, moving forward, WHD expects to publish wage rates more frequently than in the past.

The Department does not believe that there will be additional implementation costs associated with the proposal to update the definition of the prevailing wage (30 percent threshold). This change will only apply to new surveys, for which employers would have already had to update wage rates.

To estimate the size of the implementation cost associated with the periodic updates, the Department assumed that each year a share of potentially affected firms are already checking rates due to newly published surveys (section V.C.2.).<sup>350</sup> Multiplying the remaining 64.1 percent by the

101,700 small firms holding DBRA contracts results in 65,200 firms impacted annually (Table 13). The change to update current non-collectively bargained rates will have a one-time implementation cost to firms. The change to update non-collectively bargained rates moving forward will result in ongoing implementation costs. Each time a non-collectively bargained weighted average rate is updated on a wage determination applicable to a newly awarded DBRA contract, firms will incur some costs to adjust payroll (if applicable) and communicate the new rates to employees. The Department assumed that this provision would impact all small firms currently holding DBRA contracts (65,200 firms). For the initial increase, the Department estimated this will take approximately 0.5 hours for firms to adjust their rates. As with previous costs, implementation time costs are based on a loaded hourly wage of \$49.94. Therefore, total Year 1 implementation costs were estimated to equal \$1.6 million ( $\$49.94 \times 0.5 \text{ hour} \times 65,200 \text{ firms}$ ). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is \$1.6 million.

To determine direct employer costs on a per firm basis, the Department considers only those firms who are fully affected. These are firms who actively hold DBRA contracts, and who have new wage rates to incorporate into their bids and, as needed, into their payroll systems. For these firms, the Year 1 costs are estimated as four and a half hours of time (4 hour for regulatory familiarization and 0.5 hours for implementation) valued at \$49.94 per hour. This totals \$224.73 in Year 1 costs per firm.

Several commenters believed the costs presented here are too low. Some commenters noted that regulatory familiarization time will be much longer than the one hour estimated. The Department agrees and has consequently increased this time to 4

hours. Many commenters focus on implementation and administration costs for newly covered firms. As noted above, the Department only quantified implementation costs for impacts of the provision to update out-of-date SU rates using the ECI. Costs associated with provisions that clarify coverage are not quantified because they are merely clarifications, and thus are not an expansion of scope. Additionally, data are not available to estimate the number of newly covered firms.

Commenters asserted that compliance costs for newly covered small firms will be prohibitive. MBI wrote that “[m]any small and disadvantaged businesses in the modular sector will not have the budget to cover the costs of DBA prevailing wages.” ABC similarly noted that this rule will discourage small businesses participation. They also presented findings from a survey of members demonstrating that many small businesses believe the DBA increases administrative costs and labor costs. The Department disagrees that costs are prohibitive and points to the many contractors, both large and small, who already work on DBRA covered projects. Additionally, the added clarity from this rule may increase small business participation.

Commenters noted a range of costs for newly covered small entities. These commenters asserted that small businesses do not employ staff familiar with regulatory or legal affairs, and consequently this rule will entail hiring outside consultants. The Department provides compliance assistance resources to assist small businesses comply but acknowledges that sometimes businesses will want to engage their own counsel. The SBA noted that any potential scope expansion could also deter small businesses from participating due to the associated risks, such as citations and back wages. They also stated that newly covered small businesses will incur paperwork costs, such as submitting

<sup>350</sup> 15.6 percent update rates due to newly published survey data and 24 percent of the remainder update rates due to CBA escalators. Therefore, 64.1 percent are impacted  $[(1-0.156) \times (1-0.24)]$ .

certified payroll and evaluating prevailing wages, and administrative burdens. As discussed above, the Department believes that the number of newly covered entities will be small. The final rule does not significantly expand the scope of Davis-Bacon coverage, as most of the coverage-related regulatory provisions primarily represent clarifications of existing coverage principles, not expansions of coverage.

Furthermore, the Department does not believe that this rule would deter small businesses from participating. For example, a study that looked at the highway construction industry found no difference in bids between Federal projects with Davis-Bacon prevailing wage determinations and less-regulated state projects.<sup>351</sup> Also, as discussed above, the Department estimated that 101,700 small firms currently hold Davis-Bacon contracts, representing 67 percent of all firms holding Davis-Bacon contracts. Given the prevalence of small businesses in performing DBRA-covered construction, it seems reasonable to conclude that existing Davis-Bacon requirements do not impose a substantial barrier to entry for small businesses. To the extent that any firms would see a significant increase in wages paid to covered contract workers, the firms could incorporate any increased labor costs into their bids or contract price negotiations with the contracting agency.

#### *F. Alternatives to the Final Rule and Steps Taken To Minimize Significant Economic Impact on Small Entities*

The RFA directs agencies to assess the impacts that various regulatory alternatives would have on small entities and to consider ways to minimize those impacts. Regarding the alternatives considered by the Department in the NPRM, the NFIB commented that the Department should “tailor its Davis-Bacon regulations to meet the needs of small and independent businesses.” SBA’s Office of Advocacy also suggested the Department develop less-costly alternatives for small businesses. ABC noted that the Department should discuss the impact of the proposed rule and describe the steps the agency took to minimize the significant economic

impact of the rule on small entities. Accordingly, the Department has revised its discussion of alternatives, but believes the approach taken in this final rule is the best way to provide greater clarity in the DBRA regulations and enhance their usefulness in the modern economy.

One potential alternative to this rule would be to relax the requirements regarding recordkeeping. Currently the regulations require contractors and subcontractors to keep payrolls and basic records (including the name, address, and social security number of each worker, their correct classification, hourly rates of wages paid, daily and weekly number of hours worked, deductions made and actual wages paid) and records related to apprentices. It would be within the Department’s discretion to not require some of these records, but the Department has decided that continuing to require these documents would promote substantially more effective compliance and enforcement. Furthermore, it is likely that many contractors already keep these records of their workers, so the requirement does not represent too large of a burden.

Another alternative would be for the Department not to finalize the proposed rule, which would therefore result in no rule familiarization or implementation costs to small businesses. However, as discussed throughout the rule, the Department believes that the changes in this regulation will lead to improved government services, increased productivity, and reduced turnover. Clarifications made in this rule will also help businesses comply with the Davis-Bacon regulations and improve enforcement efforts for the Department.

The Department notes that in other places in this final rule, the Department has chosen alternatives that minimize the impact of the rule on small businesses. For example, in their comments on the proposed rule, small businesses stated that the potential administrative costs associated with the proposed expansion to the site of the work would deter them from participating, because tracking time and wage rates at facilities engaged in work on multiple projects at once would be infeasible. In the final rule, the Department has chosen to narrow the

scope of coverage at secondary construction sites to locations where specific portions of a building or work are constructed and were either established specifically for contract performance or are dedicated exclusively or nearly so to the contract or project. This narrower scope will help alleviate the cost concerns of small businesses.

#### **VII. Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of \$100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and Tribal governments in the aggregate, or by the private sector. This rulemaking is not expected exceed that threshold. See section V. for an assessment of anticipated costs, transfers, and benefits.

#### **VIII. Executive Order 13132, Federalism**

The Department has (1) reviewed this rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### **IX. Executive Order 13175, Indian Tribal Governments**

This rule would not have Tribal implications under Executive Order 13175 that would require a Tribal summary impact statement. The rule would not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

#### **Appendix A: Surveys Included in the Prevailing Wage Demonstration**

Survey year	Publication date	State	Metro/rural	Construction type(s)
<b>Surveys Included</b>				
2018 .....	12/25/2020	Utah .....	Metro .....	Heavy.

<sup>351</sup> Duncan, K. “Do Federal Davis-Bacon and Disadvantaged Business Enterprise Regulations

Affect Aggressive Bidding? Evidence from Highway

Resurfacing Procurement Actions,” *Journal of Public Procurement* 15(3), 291–316. 2015.



Survey year	Publication date	State	Metro/rural	Construction type(s)
2017 .....	12/14/2018	Nevada .....	Both .....	Highway.
2017 .....	12/25/2020	New York .....	Rural .....	Building.
2017 .....	12/25/2020	North Dakota .....	Both .....	Heavy.
2017 .....	2/7/2020	Oklahoma .....	Metro .....	Residential.
2017 .....	2/7/2020	Pennsylvania .....	East Metro .....	Residential.
2017 .....	1/24/2020	Vermont .....	Both .....	Heavy, highway. <sup>a</sup>
2016 .....	12/14/2018	Connecticut .....	Metro <sup>b</sup> .....	Building.
2016 .....	12/14/2018	New Mexico .....	Metro .....	Building and heavy.
2016 .....	9/29/2017	New York .....	4 metro counties .....	Building.
2016 .....	2/7/2020	North Carolina .....	Both .....	Residential.
2016 .....	12/8/2017	South Carolina .....	Metro <sup>c</sup> .....	Residential.
2015 .....	10/6/2017	Alabama .....	Both <sup>d</sup> .....	Building and heavy.
2016 .....	2/7/2020	Alabama .....	Both .....	Highway.
2015 .....	4/21/2017	Arkansas .....	Both .....	Building and heavy.
2015 .....	9/28/2018	Minnesota .....	Both .....	Building.
2015 .....	7/28/2017	Mississippi .....	Both .....	Building and heavy.
2015 .....	9/29/2017	New Hampshire .....	Both .....	Building and heavy.
2014 .....	12/16/2016	Florida .....	Metro <sup>c</sup> .....	Building.

<sup>a</sup> Building component not sufficient.

<sup>b</sup> Only one rural county so excluded.

<sup>c</sup> Rural component of survey was not sufficient.

<sup>d</sup> Excludes heavy rural which were not sufficient.

This includes most surveys with published rates that began in 2015 or later. They include all four construction types, metro and rural counties, and a variety of geographic regions. Two surveys were excluded because they did not meet sufficiency standards (2016 Alaska residential and 2015 Maryland highway). A few surveys were excluded due to anomalies that could not be reconciled. These include:

- 2016 Kansas highway
- 2016 Virginia highway

## Appendix B: Current DOL Wage Determination Protocols

**Sufficiency requirement:** For a classification to have sufficient responses there generally must be data on at least six workers from at least three contractors. Additionally, if data is received for either exactly six workers or exactly three contractors, then no more than 60 percent of the total can be employed by any one contractor. Exceptions to these criteria are allowed under limited circumstances. Examples include surveys conducted in rural counties, or residential and heavy surveys with limited construction activity, or for highly specialized classifications. In these circumstances, the rule can be three workers and two contractors.

**Aggregation:** If the classification is not sufficient at the county level, data are aggregated to the surrounding-counties group level, an intermediate grouping level, and a Statewide level (metro or rural), respectively. For building and residential construction, at each level of aggregation (as well as at the county level) WHD first attempts to calculate a prevailing rate using data only for projects not subject to Davis-Bacon labor standards; if such data are insufficient to calculate a prevailing rate, then data for projects subject to Davis-Bacon labor standards is also included.

**Majority rate:** If more than 50 percent of workers are paid the exact same hourly rate, then that rate prevails. If not, the Department

calculates a weighted average. If a majority of workers are not paid the same wage rate, but all of the data reflects the payment of collectively bargained rates, then a union weighted average rate is calculated.

**Prevailing fringe benefits:** Before a fringe benefit is applicable, it must prevail. The first step is to determine if more than 50 percent of the workers in the reported classification receive a fringe benefit. If more than 50 percent of the workers in a single classification are paid any fringe benefits, then fringe benefits prevail. If fringe benefits prevail in a classification and:

- more than 50 percent of the workers receiving fringe benefits are paid the same total fringe benefit rate, then that total fringe benefit rate prevails.
- more than 50 percent of the workers receiving benefits are *not* paid at the same total rate, then the average rate of fringe benefits weighted by the number of workers who received fringe benefits prevails. If more than 50 percent are not paid the same total rate, but 100 percent of the data are union, then a union weighted average is calculated.

However, if 50 percent or less of the workers in a single classification are paid a fringe benefit, then fringe benefits will not prevail, and a fringe benefit rate of \$0.00 will be published for that classification.

## List of Subjects

### 29 CFR Part 1

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Reporting and recordkeeping requirements, Wages.

### 29 CFR Part 3

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement,

Penalties, Reporting and recordkeeping requirements, Wages.

### 29 CFR Part 5

Administrative practice and procedure, Construction industry, Government contracts, Government procurement, Law enforcement, Penalties, Reporting and recordkeeping requirements, Wages.

For reasons stated in the preamble, the Wage and Hour Division, Department of Labor, amends 29 CFR subtitle A as follows:

## PART 1—PROCEDURES FOR PREDETERMINATION OF WAGE RATES

- 1. The authority citation for part 1 is revised to read as follows:

**Authority:** 5 U.S.C. 301; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 40 U.S.C. 3141 *et seq.*; 40 U.S.C. 3145; 40 U.S.C. 3148; Secretary of Labor's Order 01–2014, 79 FR 77527; and the laws referenced by 29 CFR 5.1.

- 2. Amend § 1.1 by revising paragraphs (a) and (b) to read as follows:

### § 1.1 Purpose and scope.

(a) The procedural rules in this part apply under the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*), and any laws now existing or subsequently enacted, which require the payment of minimum wages, including fringe benefits, to laborers and mechanics engaged in construction activity under contracts entered into or financed by or with the assistance of agencies of the United States or the District of Columbia, based on

determinations by the Secretary of Labor of the wage rates and fringe benefits prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the local areas where such work is to be performed.

(1) A listing of laws requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act can be found at [www.dol.gov/agencies/whd/government-contracts](http://www.dol.gov/agencies/whd/government-contracts) or its successor website.

(2) Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (15 FR 3176, effective May 24, 1950, reprinted as amended in 5 U.S.C. app. 1 and in 64 Stat. 1267), except for functions assigned to the Office of Administrative Law Judges (*see* part 6 of this subtitle) and appellate functions assigned to the Administrative Review Board (*see* part 7 of this subtitle) or reserved by the Secretary of Labor (*see* Secretary's Order 01–2020 (Feb. 21, 2020)), have been delegated to the Administrator of the Wage and Hour Division and authorized representatives.

(b) The regulations in this part set forth the procedures for making and applying such determinations of prevailing wage rates and fringe benefits pursuant to the Davis-Bacon Act and any laws now existing or subsequently enacted providing for determinations of such wages by the Secretary of Labor in accordance with the provisions of the Davis-Bacon Act.

\* \* \* \* \*

■ 3. Revise § 1.2 to read as follows:

**§ 1.2 Definitions.**

*Administrator.* The term “Administrator” means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or authorized representative.

*Agency.* The term “agency” means any Federal, State, or local agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards, as defined in § 5.2 of this subtitle.

(1) *Federal agency.* The term “Federal agency” means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

*Area.* The term “area” means the city, town, village, county or other civil subdivision of the State in which the work is to be performed.

(1) For highway projects, the area may be State department of transportation highway districts or other similar State geographic subdivisions.

(2) Where a project requires work in multiple counties, the area may include all counties in which the work will be performed.

*Department of Labor-approved website for wage determinations (DOL-approved website).* The term “Department of Labor-approved website for wage determinations” means the government website for both Davis-Bacon Act and Service Contract Act wage determinations. In addition, the DOL-approved website provides compliance assistance information. The term will also apply to any other website or electronic means that the Department of Labor may approve for these purposes.

*Employed.* Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is employed regardless of any contractual relationship alleged to exist between the contractor and such person.

*Prevailing wage.* The term “prevailing wage” means:

(1) 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;

(2) If the same wage is not paid to a majority of those employed in the classification, the prevailing wage will be the wage paid to the greatest number, *provided* that such greatest number constitutes at least 30 percent of those employed; or

(3) If no wage rate is paid to 30 percent or more of those so employed, the prevailing wage will be the average of the wages paid to those employed in the classification, weighted by the total employed in the classification.

*Type of construction (or construction type).* The term “type of construction (or construction type)” means the general category of construction, as established by the Administrator, for the publication of general wage determinations. Types of construction may include, but are not limited to, building, residential, heavy, and highway. As used in this part, the terms “type of construction” and

“construction type” are synonymous and interchangeable.

*United States or the District of Columbia.* The term “United States or the District of Columbia” means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, and any corporation for which all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

■ 4. Revise § 1.3 to read as follows:

**§ 1.3 Obtaining and compiling wage rate information.**

For the purpose of making wage determinations, the Administrator will conduct a continuing program for the obtaining and compiling of wage rate information. In determining the prevailing wages at the time of issuance of a wage determination, the Administrator will be guided by the definition of prevailing wage in § 1.2 and will consider the types of information listed in this section.

(a) The Administrator will encourage the voluntary submission of wage rate data by contractors, contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. The Administrator may also obtain data from agencies on wage rates paid on construction projects under their jurisdiction. The information submitted should reflect the wage rates paid to workers employed in a particular classification in an area, the type or types of construction on which such rate or rates are paid, and whether or not such wage rates were paid on Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements.

(b) The following types of information may be considered in making wage rate determinations:

(1) Statements showing wage rates paid on projects, including the names and addresses of contractors, including subcontractors; the locations, approximate costs, dates of construction and types of projects, as well as whether or not the projects are Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements; and the number of workers employed in each classification

on each project and the respective wage rates paid such workers.

(2) Signed collective bargaining agreements, for which the Administrator may request that the parties to such agreements submit statements certifying to their scope and application.

(3) Wage rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation.

(4) Wage rate data submitted to the Department of Labor by contracting agencies pursuant to § 5.5(a)(1)(iii) of this subtitle.

(5) For Federal-aid highway projects under 23 U.S.C. 113, information obtained from the highway department(s) of the State(s) in which the project is to be performed. For such projects, the Administrator must consult the relevant State highway department and give due regard to the information thus obtained.

(6) Any other information pertinent to the determination of prevailing wage rates.

(c) The Administrator may initially obtain or supplement such information obtained on a voluntary basis by such means, including the holding of hearings, and from any sources determined to be necessary. All information of the types described in paragraph (b) of this section, pertinent to the determination of the wages prevailing at the time of issuance of the wage determination, will be evaluated in light of the definition of prevailing wage in § 1.2.

(d) In compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data. Data from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations.

(e) In determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to workers within the same classification as the same wage where the pay rates are functionally equivalent, as explained by one or more collective bargaining agreements or written policies otherwise maintained by a contractor or contractors.

(f) If the Administrator determines that there is insufficient wage survey data to determine the prevailing wage for a classification for which conformance requests are regularly submitted pursuant to § 5.5(a)(1)(iii) of

this subtitle, the Administrator may list the classification and wage and fringe benefit rates for the classification on the wage determination, provided that:

(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.

(g) Under the circumstances described in paragraph (h) of this section, the Administrator may make a wage determination by adopting, with or without modification, one or more prevailing wage rates determined for public construction by State and/or local officials. Provided that the conditions in paragraph (h) are met, the Administrator may do so even if the methods and criteria used by State or local officials differ in some respects from those that the Administrator would otherwise use under the Davis-Bacon Act and the regulations in this part. Such differences may include, but are not limited to, a definition of prevailing wage under a State or local prevailing wage law or regulation that differs from the definition in § 1.2, a geographic area or scope that differs from the standards in § 1.7, and/or the restrictions on data use in paragraph (d) of this section.

(h) The Administrator may adopt a State or local wage rate as described in paragraph (g) of this section if the Administrator, after reviewing the rate and the processes used to derive the rate, determines that:

(1) The State or local government sets wage rates, and collects relevant data, using a survey or other process that is open to full participation by all interested parties;

(2) The wage rate reflects both a basic hourly rate of pay as well as any prevailing fringe benefits, each of which can be calculated separately;

(3) The State or local government classifies 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 are substantially similar to those the Administrator uses in making wage determinations under this part. This determination will be based on the totality of the circumstances, including, but not limited to, the State or local government's definition of prevailing wage; the types of fringe benefits it accepts; the information it solicits from interested parties; its classification of construction projects, laborers, and mechanics; and its method for

determining the appropriate geographic area(s).

(i) In order to adopt wage rates of a State or local government entity pursuant to paragraphs (g) and (h) of this section, the Administrator must obtain the wage rates and any relevant supporting documentation and data from the State or local government entity. Such information may be submitted via email to *dba.statelocalwagerates@dol.gov*, via mail to U.S. Department of Labor, Wage and Hour Division, Branch of Wage Surveys, 200 Constitution Avenue NW, Washington, DC 20210, or through other means directed by the Administrator.

(j) Nothing in paragraphs (g), (h), and (i) of this section precludes the Administrator from otherwise considering State or local prevailing wage rates, consistent with paragraph (b)(3) of this section, or from giving due regard to information obtained from State highway departments, consistent with paragraph (b)(4) of this section, as part of the Administrator's process of making prevailing wage determinations under this part.

■ 5. Revise § 1.4 to read as follows:

#### **§ 1.4 Report of agency construction programs.**

On an annual basis, each Federal agency using wage determinations under the Davis-Bacon Act or any of the laws referenced by § 5.1 of this subtitle, must furnish the Administrator with a report that contains a general outline of its proposed construction programs for the upcoming 3 fiscal years based on information in the Federal agency's possession at the time it furnishes its report. This report must include a list of proposed projects (including those for which options to extend the contract term of an existing construction contract are expected during the period covered by the report); the estimated start date of construction; the anticipated type or types of construction; the estimated cost of construction; the location or locations of construction; and any other project-specific information that the Administrator requests. The report must also include notification of any significant changes to previously reported construction programs, such as the delay or cancellation of previously reported projects. Reports must be submitted no later than April 10 of each year by email to *DavisBaconFedPlan@dol.gov*, and must include the name, telephone number, and email address of the official responsible for coordinating the submission.

■ 6. Revise § 1.5 to read as follows:

**§ 1.5 Publication of general wage determinations and procedure for requesting project wage determinations.**

(a) *General wage determinations.* A “general wage determination” contains, among other information, a list of wage and fringe benefit rates determined to be prevailing for various classifications of laborers or mechanics for specified type(s) of construction in a given area. The Department of Labor publishes “general wage determinations” under the Davis-Bacon Act on the DOL-approved website.

(b) *Project wage determinations.* (1) A “project wage determination” is specific to a particular project. An agency may request a “project wage determination” for an individual project under any of the following circumstances:

(i) The project involves work in more than one county and will employ workers who may work in more than one county;

(ii) There is no general wage determination in effect for the relevant area and type(s) of construction for an upcoming project, or

(iii) All or virtually all of the work on a contract will be performed by a classification that is not listed in the general wage determination that would otherwise apply, and contract award (or bid opening, in contracts entered into using sealed bidding procedures) has not yet taken place.

(2) To request a project wage determination, the agency must submit Standard Form (SF) 308, Request for Wage Determination and Response to Request, to the Department of Labor, either by mailing the form to U.S. Department of Labor, Wage and Hour Division, Branch of Construction Wage Determinations, Washington, DC 20210, or by submitting the form through other means directed by the Administrator.

(3) In completing Form SF-308, the agency must include the following information:

(i) A sufficiently detailed description of the work to indicate the type(s) of construction involved, as well as any additional description or separate attachment, if necessary, for identification of the type(s) of work to be performed. If the project involves multiple types of construction, the requesting agency must attach information indicating the expected cost breakdown by type of construction.

(ii) The location (city, county, state, zip code) or locations in which the proposed project is located.

(iii) The classifications needed for the project. The agency must identify only those classifications that will be needed in the performance of the work. Inserting a note such as “entire

schedule” or “all applicable classifications” is not sufficient. Additional classifications needed that are not on the form may be typed in the blank spaces or on a separate list and attached to the form.

(iv) Any other information requested in Form SF-308.

(4) A request for a project wage determination must be accompanied by any pertinent wage information that may be available. When the requesting agency is a State highway department under the Federal-Aid Highway Acts as codified in 23 U.S.C. 113, such agency must also include its recommendations as to the wages which are prevailing for each classification of laborers and mechanics on similar construction in the area.

(5) The time required for processing requests for project wage determinations varies according to the facts and circumstances in each case. An agency should anticipate that such processing by the Department of Labor will take at least 30 days.

■ 7. Revise § 1.6 to read as follows:

**§ 1.6 Use and effectiveness of wage determinations.**

(a) *Application, validity, and expiration of wage determinations—*(1) *Application of incorporated wage determinations.* Once a wage determination is incorporated into a contract (or once construction has started when there is no contract award), the wage determination generally applies for the duration of the contract or project, except as specified in this section.

(2) *General wage determinations.* (i) “General wage determinations” published on the DOL-approved website contain no expiration date. Once issued, a general wage determination remains valid until revised, superseded, or canceled.

(ii) If there is a current general wage determination applicable to a project, an agency may use it without notifying the Administrator, *Provided* that questions concerning its use are referred to the Administrator in accordance with paragraph (b) of this section.

(iii) When a wage determination is revised, superseded, or canceled, it becomes inactive. Inactive wage determinations may be accessed on the DOL-approved website for informational purposes only. Contracting officers may not use such an inactive wage determination in a contract action unless the inactive wage determination is the appropriate wage determination that must be incorporated to give retroactive effect to the post-award incorporation of a contract clause under

§ 5.6(a)(1)(ii) of this subtitle or a wage determination under paragraph (f) of this section. Under such circumstances, the agency must provide prior notice to the Administrator of its intent to incorporate an inactive wage determination and may not incorporate it if the Administrator instructs otherwise.

(3) *Project wage determinations.* (i) “Project wage determinations” initially issued will be effective for 180 calendar days from the date of such determinations. If a project wage determination is not incorporated into a contract (or, if there is no contract award, if construction has not started) in the period of its effectiveness it is void.

(ii) Accordingly, if it appears that a project wage determination may expire between bid opening and contract award (or between initial endorsement under the National Housing Act or the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937, and the start of construction) the agency must request a new project wage determination sufficiently in advance of the bid opening to assure receipt prior thereto.

(iii) However, when due to unavoidable circumstances a project wage determination expires before award but after bid opening (or before the start of construction, but after initial endorsement under the National Housing Act, or before the start of construction but after the execution of an agreement to enter into a housing assistance payments contract under section 8 of the U.S. Housing Act of 1937), the head of the agency or the agency head’s designee may request the Administrator to extend the expiration date of the project wage determination in the bid specifications instead of issuing a new project wage determination. Such request must be supported by a written finding, which must include a brief statement of factual support, that the extension of the expiration date of the project wage determination is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all of the circumstances, including an examination to determine if the previously issued rates remain prevailing. If the request for extension is denied, the Administrator will proceed to issue a new wage determination for the project.

(b) *Identifying and incorporating appropriate wage determinations.* (1) Contracting agencies are responsible for making the initial determination of the appropriate wage determination(s) for a project and for ensuring that the appropriate wage determination(s) are incorporated in bid solicitations and contract specifications and that inapplicable wage determinations are not incorporated. When a contract involves construction in more than one area, and no multi-county project wage determination has been obtained, the solicitation and contract must incorporate the applicable wage determination for each area. When a contract involves more than one type of construction, the solicitation and contract must incorporate the applicable wage determination for each type of construction involved that is anticipated to be substantial. The contracting agency is responsible for designating the specific work to which each incorporated wage determination applies.

(2) The contractor or subcontractor has an affirmative obligation to ensure that its pay practices are in compliance with the Davis-Bacon Act labor standards.

(3) Any question regarding application of wage rate schedules or wage determinations must be referred to the Administrator for resolution. The Administrator should consider any relevant factors when resolving such questions, including, but not limited to, relevant area practice information.

(c) *Revisions to wage determinations.* (1) General and project wage determinations may be revised from time to time to keep them current. A revised wage determination replaces the previous wage determination. "Revisions," as used in this section, refers both to modifications of some or all of the rates in a wage determination, such as periodic updates to reflect current rates, and to instances where a wage determination is re-issued entirely, such as after a new wage survey is conducted. Revisions include adjustments to non-collectively bargained prevailing wage and fringe benefit rates on general wage determinations, with the adjustments based on U.S. Bureau of Labor Statistics Employment Cost Index (ECI) data or its successor data. Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication. Such periodic revisions to wage determinations are distinguished from the circumstances described in paragraphs (d), (e), and (f) of this section.

(2)(i) Whether a revised wage determination is effective with respect to a particular contract or project generally depends on the date on which the revised wage determination is issued. The date on which a revised wage determination is "issued," as used in this section, means the date that a revised general wage determination is published on the DOL-approved website or the date that the contracting agency receives actual written notice of a revised project wage determination.

(ii) If a revised wage determination is issued before contract award (or the start of construction when there is no award), it is effective with respect to the project, except as follows:

(A) For contracts entered into pursuant to sealed bidding procedures, a revised wage determination issued at least 10 calendar days before the opening of bids is effective with respect to the solicitation and contract. If a revised wage determination is issued less than 10 calendar days before the opening of bids, it is effective with respect to the solicitation and contract unless the agency finds that there is not a reasonable time still available before bid opening to notify bidders of the revision and a report of the finding is inserted in the contract file. A copy of such report must be made available to the Administrator upon request. No such report is required if the revision is issued after bid opening.

(B) In the case of projects assisted under the National Housing Act, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the mortgage is initially endorsed, whichever occurs first.

(C) In the case of projects to receive housing assistance payments under section 8 of the U.S. Housing Act of 1937, a revised wage determination is effective with respect to the project if it is issued prior to the beginning of construction or the date the agreement to enter into a housing assistance payments contract is signed, whichever occurs first.

(D) If, in the case of a contract entered into pursuant to sealed bidding procedures under paragraph (c)(2)(ii)(A) of this section the contract has not been awarded within 90 days after bid opening, or if, in the case of projects assisted under the National Housing Act or receiving housing assistance payments section 8 of the U.S. Housing Act of 1937 under paragraph (c)(2)(ii)(B) or (C) of this section, construction has not begun within 90 days after initial endorsement or the signing of the agreement to enter into a housing assistance payments contract, any

revised general wage determination issued prior to award of the contract or the beginning of construction, as appropriate, is effective with respect to that contract unless the head of the agency or the agency head's designee requests and obtains an extension of the 90-day period from the Administrator. Such request must be supported by a written finding, which includes a brief statement of the factual support, that the extension is necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment in the conduct of Government business. The Administrator will either grant or deny the request for an extension after consideration of all the circumstances.

(iii) If a revised wage determination is issued after contract award (or after the beginning of construction where there is no contract award), it is not effective with respect to that project, except under the following circumstances:

(A) Where 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 option to extend the term of a contract is exercised, the contracting agency must include the most recent revision of any wage determination(s) at the time the contract is changed or the option is exercised. This does not apply where the 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.

(B) Some contracts call for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project. Examples of such contracts include, but are not limited to, indefinite-delivery-indefinite-quantity construction contracts to perform any necessary repairs to a Federal facility over a period of time; long-term operations-and-maintenance contracts that may include construction, alteration, and/or repair work covered by Davis-Bacon labor standards; or schedule contracts or blanket purchase agreements in which a contractor agrees to provide certain construction work at agreed-upon prices to Federal agencies. These types of contracts often involve a general commitment to perform necessary construction as the need arises, but do not necessarily specify the exact construction to be performed. For the types of contracts described here,

the contracting agency must incorporate into the contract the most recent revision(s) of any applicable wage determination(s) on each anniversary date of the contract's award (or each anniversary date of the beginning of construction when there is no award) unless the agency has sought and received prior written approval from the Department for an alternative process. The Department may grant such an exception when it is necessary and proper in the public interest or to prevent injustice and undue hardship. Such revised wage determination(s) will apply to any construction work that begins or is obligated under such a contract during the 12 months following that anniversary date until such construction work is completed, even if the completion of that work extends beyond the twelve-month period. Where such contracts have task orders, purchase orders, or other similar contract instruments awarded under the master contract, the master contract must specify that the applicable updated wage determination must be included in such task orders, purchase orders, or other similar contract instrument, and the ordering agency must so incorporate the applicable updated wage determinations into their orders. Once the applicable updated wage determination revision has been incorporated into such task orders, purchase orders, or other similar contract instruments, that wage determination revision remains applicable for the duration of such order, unless the order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work, when the wage determination must be updated as set forth in paragraph (c)(2)(iii)(A) of this section, or the order itself includes the exercise of options. Where such orders do include the exercise of options, updated applicable wage determination revision, as incorporated into the master contract must be included when an option is exercised on such an order.

(C) For contracts to which both paragraphs (c)(2)(iii)(A) and (B) of this section apply, updated wage determinations must be incorporated pursuant to the requirements of both paragraphs. For example, if a contract calls for construction, alteration, and/or repair work over a period of time that is not tied to the completion of any particular project and also has an option provision to extend the contract's term, the most recent revision(s) of any applicable wage determination(s) must be incorporated any time an option is

exercised, as described in paragraph (c)(2)(iii)(A) of this section, and on the contract anniversary date, as described in paragraph (c)(2)(iii)(B) of this section. However, when a contract has been changed as described in paragraph (c)(2)(iii)(A) of this section, including by the exercise of an option, the date of that modification will be considered the contract anniversary date for the purpose of annually updating the wage determination(s) in accordance with paragraph (c)(2)(iii)(B) of this section for that year and any subsequent years of contract performance.

(d) *Corrections for clerical errors.* Upon the Administrator's own initiative or at the request of an agency, the Administrator may correct any wage determination, without regard to paragraph (a) or (c) of this section, whenever the Administrator finds that it contains clerical errors. Such corrections must be included in any solicitations, bidding documents, or ongoing contracts containing the wage determination in question, and such inclusion, and application of the correction(s), must be retroactive to the start of construction if construction has begun.

(e) *Pre-award determinations that a wage determination may not be used.* A wage determination may not be used for a contract, without regard to whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred, if, prior to the award of a contract (or the start of construction under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), the Administrator provides written notice that:

(1) The wrong wage determination or the wrong schedule was included in the bidding documents or solicitation; or

(2) A wage determination included in the bidding documents or solicitation was withdrawn by the Department of Labor as a result of a decision by the Administrative Review Board.

(f) *Post-award determinations and procedures.* (1) If a contract subject to the labor standards provisions of the laws referenced by § 5.1 of this subtitle is entered into without the correct wage determination(s), the agency must, upon the request of the Administrator or upon its own initiative, incorporate the correct wage determination into the contract or require its incorporation. Where the agency is not entering directly into such a contract but instead is providing Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly

incorporates the correct wage determination(s) into its contracts.

(2) The Administrator may require the agency to incorporate a wage determination after contract award or after the beginning of construction if the agency has failed to incorporate a wage determination in a contract required to contain prevailing wage rates determined in accordance with the Davis-Bacon Act or has used a wage determination which by its terms or the provisions of this part clearly does not apply to the contract. Further, the Administrator may require the application of the correct wage determination to a contract after contract award or after the beginning of construction when it is found that the wrong wage determination has been incorporated in the contract because of an inaccurate description of the project or its location in the agency's request for the wage determination.

(3) Under any of the circumstances described in paragraphs (f)(1) and (2) of this section, the agency must either terminate and resolicit the contract with the correct wage determination or 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 method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:

(i) Unless the Administrator directs otherwise, the incorporation of the correct wage determination(s) must be retroactive to the date of contract award or start of construction if there is no award.

(ii) If incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.

(iii) Before the agency requires incorporation upon its own initiative, it must provide notice to the Administrator of the proposed action.

(iv) The contractor must be compensated for any increases in wages resulting from incorporation of a missing wage determination.

(v) If a recipient or sub-recipient of Federal assistance under any of the applicable laws referenced by § 5.1 of this subtitle refuses to incorporate the wage determination as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract

until the recipient incorporates the required wage determination into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13 of this subtitle.

(vi) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back-wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

(4) Under any of the above circumstances, notwithstanding the requirement to incorporate the correct wage determination(s) within 30 days, the correct wage determination(s) will be effective by operation of law, retroactive to the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), in accordance with § 5.5(e) of this subtitle.

(g) *Approval of Davis-Bacon Related Act Federal funding or assistance after contract award.* If Federal funding or assistance under a statute requiring payment of wages determined in accordance with the Davis-Bacon Act is not approved prior to contract award (or the beginning of construction where there is no contract award), the applicable wage determination must be incorporated based upon the wages and fringe benefits found to be prevailing on the date of award or the beginning of construction (under the National Housing Act, under section 8 of the U.S. Housing Act of 1937, or where there is no contract award), as appropriate, and must be incorporated in the contract specifications retroactively to that date, *Provided* that upon the request of the head of the Federal agency providing the Federal funding or assistance, in individual cases the Administrator may direct incorporation of the wage determination to be effective on the date of approval of Federal funds or assistance whenever the Administrator finds that it is necessary and proper in the public interest to prevent injustice or undue hardship, *Provided further* that the Administrator finds no evidence of intent to apply for Federal funding or assistance prior to contract award or the start of construction, as appropriate.

■ 8. Revise § 1.7 to read as follows:

#### § 1.7 Scope of consideration.

(a) In making a wage determination, the “area” from which wage data will be drawn will normally be the county unless sufficient current wage data (data

on wages paid on current projects or, where necessary, projects under construction no more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate) is unavailable to make a wage determination.

(b) If sufficient current wage data is not available from projects within the county to make a wage determination, wages paid on similar construction in surrounding counties may be considered.

(c) If sufficient current wage data is not available in surrounding counties, the Administrator may consider wage data from similar construction in comparable counties or groups of counties in the State, and, if necessary, overall statewide data.

(d) If sufficient current statewide wage data is not available, wages paid on projects completed more than 1 year prior to the beginning of the survey or the request for a wage determination, as appropriate, may be considered.

(e) The use of “helpers and apprentices” is permitted in accordance with part 5 of this subtitle.

■ 9. Revise § 1.8 to read as follows:

#### § 1.8 Reconsideration by the Administrator.

(a) Any interested party may seek reconsideration of a wage determination issued under this part or of a decision of the Administrator regarding application of a wage determination.

(b) Such a request for reconsideration must be in writing, accompanied by a full statement of the interested party’s views and any supporting wage data or other pertinent information. Requests must be submitted via email to [dba.reconsideration@dol.gov](mailto:dba.reconsideration@dol.gov); by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210; or through other means directed by the Administrator. The Administrator will respond within 30 days of receipt thereof, or will notify the requestor within the 30-day period that additional time is necessary.

(c) If the decision for which reconsideration is sought was made by an authorized representative of the Administrator of the Wage and Hour Division, the interested party seeking reconsideration may request further reconsideration by the Administrator of the Wage and Hour Division. Such a request must be submitted within 30 days from the date the decision is issued; this time may be extended for good cause at the discretion of the Administrator upon a request by the interested party. The procedures in

paragraph (b) of this section apply to any such reconsideration requests.

■ 10. Add § 1.10 to read as follows:

#### § 1.10 Severability.

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event the provision is severable from this part and will not affect the remaining provisions.

#### Appendix A to Part 1—[Removed]

■ 11. Remove appendix A to part 1.

#### Appendix B to Part 1—[Removed]

■ 12. Remove appendix B to part 1.

### PART 3—CONTRACTORS AND SUBCONTRACTORS ON PUBLIC BUILDING OR PUBLIC WORK FINANCED IN WHOLE OR IN PART BY LOANS OR GRANTS FROM THE UNITED STATES

■ 13. The authority citation for part 3 continues to read as follows:

**Authority:** R.S. 161, 48 Stat. 848, Reorg. Plan No. 14 of 1950, 64 Stat. 1267; 5 U.S.C. 301; 40 U.S.C. 3145; Secretary’s Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

■ 14. Revise § 3.1 to read as follows:

#### § 3.1 Purpose and scope.

This part prescribes “anti-kickback” regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 3145), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. The part is intended to aid in the enforcement of the minimum wage provisions of the Davis-Bacon Act and the various statutes dealing with federally assisted construction that contain similar minimum wage provisions, including those provisions which are not subject to Reorganization Plan No. 14 of 1950 (e.g., the College Housing Act of 1950, the Federal Water Pollution Control Act, and the Housing Act of 1959), and in the enforcement of the overtime provisions of the Contract Work Hours and Safety



Standards Act whenever they are applicable to construction work. The part details the obligation of contractors and subcontractors relative to the weekly submission of statements regarding the wages paid on work covered thereby; sets forth the circumstances and procedures governing the making of payroll deductions from the wages of those employed on such work; and delineates the methods of payment permissible on such work.

■ 15. Revise § 3.2 to read as follows:

### § 3.2 Definitions.

As used in the regulations in this part:

*Affiliated person.* The term “affiliated person” includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with the contractor or subcontractor as parent, subsidiary, or otherwise, and an officer or agent of such corporation.

*Agency.* The term “agency” means any Federal, State, or local government agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, for a project subject to the Davis-Bacon labor standards, as defined in § 5.2 of this subtitle.

(1) *Federal agency.* The term “Federal agency” means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

*Building or work.* The term “building or work” generally includes construction activity of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, powerlines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals; dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The term “building or work” also includes a portion of a building or work,

or the installation (where appropriate) of equipment or components into a building or work.

(1) *Building or work financed in whole or in part by loans or grants from the United States.* The term “building or work financed in whole or in part by loans or grants from the United States” includes any building or work for which construction, prosecution, completion, or repair, as defined in this section, payment or part payment is made directly or indirectly from funds provided by loans or grants by a Federal agency. The term includes any building or work for which the Federal assistance granted is in the form of loan guarantees or insurance.

(2) [Reserved]

*Construction, prosecution, completion, or repair.* The term “construction, prosecution, completion, or repair” mean all types of work done on a particular building or work at the site thereof as specified in § 5.2 of this subtitle, including, without limitation, altering, remodeling, painting and decorating, installation on the site of the work of items fabricated offsite, covered transportation as reflected in § 5.2, demolition and/or removal as reflected in § 5.2, and the manufacturing or furnishing of materials, articles, supplies, or equipment on the site of the building or work, performed by laborers and mechanics at the site.

*Employed (and wages).* Every person paid by a contractor or subcontractor in any manner for their labor in the construction, prosecution, completion, or repair of a public building or public work or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is “employed” and receiving “wages”, regardless of any contractual relationship alleged to exist between the contractor and such person.

*Public building (or public work).* The term “public building (or public work)” includes a building or work the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the general public regardless of whether title thereof is in a Federal agency. The construction, prosecution, completion, or repair of a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work, may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by the Federal agency, as long as the construction, prosecution, completion,

or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

*United States or the District of Columbia.* The term “United States or the District of Columbia” means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, and any corporation for which all or substantially all of the stock of which is beneficially owned by the United States, by the District of Columbia, or any of the foregoing departments, establishments, agencies, and instrumentalities.

■ 16. Revise § 3.3 to read as follows:

### § 3.3 Certified payrolls.

(a) [Reserved]

(b) Each contractor or subcontractor engaged in the construction, prosecution, completion, or repair of any public building or public work, or building or work financed in whole or in part by loans or grants from the United States, each week must provide a copy of its weekly payroll for all laborers and mechanics engaged on work covered by this part and part 5 of this chapter during the preceding weekly payroll period, accompanied by a statement of compliance certifying the accuracy of the weekly payroll information. This statement must be executed by the contractor or subcontractor or by an authorized officer or employee of the contractor or subcontractor who supervises the payment of wages, and must be on the back of Form WH-347, “Payroll (For Contractors Optional Use)” or on any form with identical wording. Copies of WH-347 may be obtained from the contracting or sponsoring agency or from the Wage and Hour Division website at <https://www.dol.gov/agencies/whd/government-contracts/construction/forms> or its successor site. The signature by the contractor, subcontractor, or the authorized officer or employee must be an original handwritten signature or a legally valid electronic signature.

(c) The requirements of this section do not apply to any contract of \$2,000 or less.

(d) Upon a written finding by the head of a Federal agency, the Secretary of Labor may provide reasonable limitations, variations, tolerances, and exemptions from the requirements of

this section subject to such conditions as the Secretary of Labor may specify.

■ 17. Revise § 3.4 to read as follows:

**§ 3.4 Submission of certified payroll and the preservation and inspection of weekly payroll records.**

(a) *Certified payroll.* Each certified payroll required under § 3.3 must be delivered by the contractor or subcontractor, within 7 days after the regular payment date of the payroll period, to a representative at the site of the building or work of the agency contracting for or financing the work, or, if there is no representative of the agency at the site of the building or work, the statement must be delivered by mail or by any other means normally assuring delivery by the contractor or subcontractor, within that 7 day time period, to the agency contracting for or financing the building or work. After the certified payrolls have been reviewed in accordance with the contracting or sponsoring agency's procedures, such certified payrolls must be preserved by the agency for a period of 3 years after all the work on the prime contract is completed and must be produced for inspection, copying, and transcription by the Department of Labor upon request. The certified payrolls must also be transmitted together with a report of any violation, in accordance with applicable procedures prescribed by the United States Department of Labor.

(b) *Recordkeeping.* Each contractor or subcontractor must preserve the regular payroll records for a period of 3 years after all the work on the prime contract is completed. The regular payroll records must set out accurately and completely the name; Social Security number; last known address, telephone number, and email address of each laborer and mechanic; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid. The contractor or subcontractor must make such regular payroll records, as well as copies of the certified payrolls provided to the contracting or sponsoring agency, available at all times for inspection, copying, and transcription by the contracting officer or their authorized representative, and by authorized representatives of the Department of Labor.

■ 18. Revise § 3.5 to read as follows:

**§ 3.5 Payroll deductions permissible without application to or approval of the Secretary of Labor.**

Deductions made under the circumstances or in the situations described in the paragraphs of this section may be made without application to and approval of the Secretary of Labor:

(a) Any deduction made in compliance with the requirements of Federal, State, or local law, such as Federal or State withholding income taxes and Federal social security taxes.

(b) Any deduction of sums previously paid to the laborer or mechanic as a bona fide prepayment of wages when such prepayment is made without discount or interest. A bona fide prepayment of wages is considered to have been made only when cash or its equivalent has been advanced to the person employed in such manner as to give him complete freedom of disposition of the advanced funds.

(c) Any deduction of amounts required by court process to be paid to another, unless the deduction is in favor of the contractor, subcontractor, or any affiliated person, or when collusion or collaboration exists.

(d) Any deduction constituting a contribution on behalf of the laborer or mechanic employed to funds established by the contractor or representatives of the laborers or mechanics, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries, illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits, vacation pay, savings accounts, or similar payments for the benefit of the laborers or mechanics, their families and dependents: *Provided, however,* That the following standards are met:

(1) The deduction is not otherwise prohibited by law;

(2) It is either:

(i) Voluntarily consented to by the laborer or mechanic in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of or for the continuation of employment; or

(ii) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and representatives of its laborers or mechanics;

(3) No profit or other benefit is otherwise obtained, directly or indirectly, by the contractor or subcontractor or any affiliated person in

the form of commission, dividend, or otherwise; and

(4) The deductions must serve the convenience and interest of the laborer or mechanic.

(e) Any deduction requested by the laborer or mechanic to enable him or her to repay loans to or to purchase shares in credit unions organized and operated in accordance with Federal and State credit union statutes.

(f) Any deduction voluntarily authorized by the laborer or mechanic for the making of contributions to governmental or quasi-governmental agencies, such as the American Red Cross.

(g) Any deduction voluntarily authorized by the laborer or mechanic for the making of contributions to charitable organizations as defined by 26 U.S.C. 501(c)(3).

(h) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments: *Provided, however,* That a collective bargaining agreement between the contractor or subcontractor and representatives of its laborers or mechanics provides for such deductions and the deductions are not otherwise prohibited by law.

(i) Any deduction not more than for the "reasonable cost" of board, lodging, or other facilities meeting the requirements of section 3(m) of the Fair Labor Standards Act of 1938, as amended, and 29 CFR part 531. When such a deduction is made the additional records required under 29 CFR 516.25(a) must be kept.

(j) Any deduction for the cost of safety equipment of nominal value purchased by the laborer or mechanic as their own property for their personal protection in their work, such as safety shoes, safety glasses, safety gloves, and hard hats, if such equipment is not required by law to be furnished by the contractor, if such deduction does not violate the Fair Labor Standards Act or any other law, if the cost on which the deduction is based does not exceed the actual cost to the contractor where the equipment is purchased from the contractor and does not include any direct or indirect monetary return to the contractor where the equipment is purchased from a third person, and if the deduction is either:

(1) Voluntarily consented to by the laborer or mechanic in writing and in advance of the period in which the work is to be done and such consent is not a condition either for the obtaining of employment or its continuance; or

(2) Provided for in a bona fide collective bargaining agreement between the contractor or subcontractor and

representatives of its laborers and mechanics.

■ 19. Revise § 3.7 to read as follows:

**§ 3.7 Applications for the approval of the Secretary of Labor.**

Any application for the making of payroll deductions under § 3.6 must comply with the requirements prescribed in the following paragraphs of this section:

(a) The application must be in writing and addressed to the Secretary of Labor. The application must be submitted by email to [dbadeductions@dol.gov](mailto:dbadeductions@dol.gov), by mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave., NW, Room S-3502, Washington, DC 20210, or by any other means normally assuring delivery.

(b) The application need not identify the contract or contracts under which the work in question is to be performed. Permission will be given for deductions on all current and future contracts of the applicant for a period of 1 year. A renewal of permission to make such payroll deduction will be granted upon the submission of an application which makes reference to the original application, recites the date of the Secretary of Labor's approval of such deductions, states affirmatively that there is continued compliance with the standards set forth in the provisions of § 3.6, and specifies any conditions which have changed in regard to the payroll deductions.

(c) The application must state affirmatively that there is compliance with the standards set forth in the provisions of § 3.6. The affirmation must be accompanied by a full statement of the facts indicating such compliance.

(d) The application must include a description of the proposed deduction, the purpose of the deduction, and the classes of laborers or mechanics from whose wages the proposed deduction would be made.

(e) The application must state the name and business of any third person to whom any funds obtained from the proposed deductions are to be transmitted and the affiliation of such person, if any, with the applicant.

■ 20. Revise § 3.8 to read as follows:

**§ 3.8 Action by the Secretary of Labor upon applications.**

The Secretary of Labor will decide whether or not the requested deduction is permissible under provisions of § 3.6; and will notify the applicant in writing of the decision.

■ 21. Revise § 3.11 to read as follows:

**§ 3.11 Regulations part of contract.**

All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part must expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see § 5.5(a) of this subtitle. However, these requirements will be considered to be effective by operation of law, whether or not they are incorporated into such contracts, as set forth in § 5.5(e) of this subtitle.

**PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)**

■ 22. The authority citation for part 5 is revised to read as follows:

**Authority:** 5 U.S.C. 301; Reorganization Plan No. 14 of 1950, 5 U.S.C. appendix; 28 U.S.C. 2461 note; 40 U.S.C. 3141 *et seq.*; 40 U.S.C. 3145; 40 U.S.C. 3148; 40 U.S.C. 3701 *et seq.*; Secretary's Order No. 01-2014, 79 FR 77527; and the laws referenced by § 5.1(a).

■ 23. Revise § 5.1 to read as follows:

**§ 5.1 Purpose and scope.**

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1950 (64 Stat. 1267, as amended, 5 U.S.C. appendix) and the Copeland Act (48 Stat. 948; 18 U.S.C. 874; 40 U.S.C. 3145) in order to coordinate the administration and enforcement of labor standards provisions contained in the Davis-Bacon Act (46 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*) and its related statutes ("Related Acts").

(1) A listing of laws requiring Davis-Bacon labor standards provisions can be found at [www.dol.gov/agencies/whd/government-contracts](http://www.dol.gov/agencies/whd/government-contracts) or its successor website.

(2) [Reserved]

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determinations and the issuance and use of such wage determinations under the Davis-Bacon Act and its Related Acts.

■ 24. Revise § 5.2 to read as follows:

**§ 5.2 Definitions.**

**Administrator.** The term "Administrator" means the Administrator of the Wage and Hour Division, U.S. Department of Labor, or authorized representative.

**Agency.** The term "agency" means any Federal, State, or local government agency or instrumentality, or other similar entity, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards, as defined in this section.

(1) **Federal agency.** The term "Federal agency" means an agency or instrumentality of the United States or the District of Columbia, as defined in this section, that enters into a contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to a project subject to the Davis-Bacon labor standards.

(2) [Reserved]

**Agency Head.** The term "Agency Head" means the principal official of an agency and includes those persons duly authorized to act on behalf of the Agency Head.

**Apprentice and helper.** The terms "apprentice" and "helper" are defined as follows:

(1) "Apprentice" means:

(i) A person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship; or

(ii) A person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) These provisions do not apply to apprentices and trainees employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(3) A distinct classification of helper will be issued in wage determinations applicable to work performed on construction projects covered by the labor standards provisions of the Davis-Bacon and Related Acts only where:

(i) The duties of the helper are clearly defined and distinct from those of any

other classification on the wage determination;

(ii) The use of such helpers is an established prevailing practice in the area; and

(iii) The helper is not employed as a trainee in an informal training program. A “helper” classification will be added to wage determinations pursuant to § 5.5(a)(1)(iii)(A) only where, in addition, the work to be performed by the helper is not performed by a classification in the wage determination.

**Building or work.** The term “building or work” generally includes construction activities of all types, as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The term includes, without limitation, buildings, structures, and improvements of all types, such as bridges, dams, solar panels, wind turbines, broadband installation, installation of electric car chargers, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railroads, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The term “building or work” also includes a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work.

**Construction, prosecution, completion, or repair.** The term “construction, prosecution, completion, or repair” means the following:

(1) These terms include all types of work done—

(i) On a particular building or work at the site of the work, as defined in this section, by laborers and mechanics employed by a contractor or subcontractor, or

(ii) In the construction or development of a project under a development statute.

(2) These terms include, without limitation (except as specified in this definition):

(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated offsite;

(ii) Painting and decorating;

(iii) Manufacturing or furnishing of materials, articles, supplies or equipment, but only if such work is done by laborers or mechanics

(A) Employed by a contractor or subcontractor, as defined in this section, on the site of the work, as defined in this section, or

(B) In the construction or development of a project under a development statute;

(iv) “Covered transportation,” defined as any of the following activities:

(A) Transportation that takes place entirely within a location meeting the definition of “site of the work” in this section;

(B) Transportation of one or more “significant portion(s)” of the building or work between a “secondary construction site” as defined in this section and a “primary construction site” as defined in this section;

(C) Transportation between an “adjacent or virtually adjacent dedicated support site” as defined in this section and a “primary construction site” or “secondary construction site” as defined in this section;

(D) “Onsite activities essential or incidental to offsite transportation,” defined as activities conducted by a truck driver or truck driver’s assistant on the site of the work that are essential or incidental to the transportation of materials or supplies to or from the site of the work, such as loading, unloading, or waiting for materials to be loaded or unloaded, but only where the driver or driver’s assistant’s time spent on the site of the work is not *de minimis*; and

(E) Any transportation and related activities, whether on or off the site of the work, by laborers and mechanics employed in the construction or development of the project under a development statute.

(v) Demolition and/or removal, under any of the following circumstances:

(A) Where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing building or work. Examples of such activities include the removal of asbestos, paint, components, systems, or parts from a facility that will not be demolished; as well as contracts for hazardous waste removal, land recycling, or reclamation that involve substantial earth moving, removal of contaminated soil, re-contouring surfaces, and/or habitat restoration.

(B) Where subsequent construction covered in whole or in part by the labor standards in this part is contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract. In determining whether covered construction is contemplated within the meaning of this provision, relevant factors include, but are not limited to, the existence of engineering or architectural plans or surveys of the site; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the

relevant government officials; and the disposition of the site after demolition.

(C) Where otherwise required by statute.

(3) Except for transportation that constitutes “covered transportation” as defined in this section, construction, prosecution, completion, or repair does not include the transportation of materials or supplies to or from the site of the work.

**Contract.** The term “contract” means any prime contract which is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1 and any subcontract of any tier thereunder, let under the prime contract. With the exception of work performed under a development statute, the terms contract and subcontract do not include agreements with employers that meet the definition of a material supplier under this section.

**Contracting officer.** The term “contracting officer” means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of an agency, sponsor, owner, applicant, or other similar entity.

**Contractor.** The term “contractor” means any individual or other legal entity that enters into or is awarded a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced by § 5.1, including any prime contract or subcontract of any tier under a covered prime contract. In addition, the term contractor includes any surety that is completing performance for a defaulted contractor pursuant to a performance bond. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of the labor standards provisions of any of the laws referenced by § 5.1. A State or local government is not regarded as a contractor or subcontractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under development statutes or other statutes requiring payment of prevailing wages to all laborers and mechanics employed on the assisted project, such as the U.S. Housing Act of 1937, State and local recipients of Federal-aid must pay these workers according to Davis-Bacon labor standards. The term “contractor” does not include an entity that is a material supplier, except if the entity is performing work under a development statute.

**Davis-Bacon labor standards.** The term “Davis-Bacon labor standards” as

used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes referenced in § 5.1, and the regulations in this part and in parts 1 and 3 of this subtitle.

**Development statute.** The term “development statute” includes the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self-Determination Act of 1996, and any other Davis-Bacon Related Act that requires payment of prevailing wages under the Davis-Bacon labor standards to all laborers and mechanics employed in the development of a project and for which the Administrator determines that the statute’s language and/or legislative history reflected clear congressional intent to apply a coverage standard different from the Davis-Bacon Act itself.

**Employed.** Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by assistance from the United States through loan, grant, loan guarantee or insurance, or otherwise, is “employed” regardless of any contractual relationship alleged to exist between the contractor and such person.

**Laborer or mechanic.** The term “laborer or mechanic” includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term “laborer” or “mechanic” includes apprentices, helpers, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchpersons or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR part 541 are not deemed to be laborers or mechanics. Forepersons who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of part 541, are laborers and mechanics for the time so spent.

**Material supplier.** The term “material supplier” is defined as follows:

(1) A material supplier is an entity meeting all of the following criteria:

(i) Its only obligations for work on the contract or project are the delivery of

materials, articles, supplies, or equipment, which may include pickup of the same in addition to, but not exclusive of, delivery, and which may also include activities incidental to such delivery and pickup, such as loading, unloading, or waiting for materials to be loaded or unloaded; and

(ii) Its facility or facilities that manufactures the materials, articles, supplies, or equipment used for the contract or project:

(A) Is not located on, or does not itself constitute, the project or contract’s primary construction site or secondary construction site as defined in this section; and

(B) Either was established before opening of bids on the contract or project, or is not dedicated exclusively, or nearly so, to the performance of the contract or project.

(2) If an entity, in addition to being engaged in the activities specified in paragraph (1)(i) of this definition, also engages in other construction, prosecution, completion, or repair work at the site of the work, it is not a material supplier.

**Prime contractor.** The term “prime contractor” means any person or entity that enters into a contract with an agency. For the purposes of the labor standards provisions of any of the laws referenced by § 5.1, the term prime contractor also includes the controlling shareholders or members of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, and any contractor (e.g., a general contractor) that has been delegated the responsibility for overseeing all or substantially all of the construction anticipated by the prime contract. For the purposes of the provisions in §§ 5.5 and 5.9, any such related entities holding different prime contracts are considered to be the same prime contractor.

**Public building or public work.** The term “public building or public work” includes a building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. The construction, prosecution, completion, or repair of a portion of a building or work, or the installation (where appropriate) of equipment or components into a building or work, may still be considered a public building or work, even where the entire building or work is not owned, leased by, or to be used by a Federal agency,

as long as the construction, prosecution, completion, or repair of that portion of the building or work, or the installation (where appropriate) of equipment or components into that building or work, is carried on by authority of or with funds of a Federal agency to serve the interest of the general public.

**Secretary.** The term “Secretary” includes the Secretary of Labor, and their authorized representative.

**Site of the work.** The term “site of the work” is defined as follows:

(1) “Site of the work” includes all of the following:

(i) The primary construction site(s), defined as the physical place or places where the building or work called for in the contract will remain.

(ii) Any secondary construction site(s), defined as any other site(s) where a significant portion of the building or work is constructed, *provided* that such construction is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public, and *provided further* that the site is either established specifically for the performance of the contract or project, or is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time. A “significant portion” of a building or work means one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly of the portions or modules at the place where the building or work will remain. A “significant portion” does not include materials or prefabricated component parts such as prefabricated housing components. A “specific period of time” means a period of weeks, months, or more, and does not include circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline.

(iii) Any adjacent or virtually adjacent dedicated support sites, defined as:

(A) Job headquarters, tool yards, batch plants, borrow pits, and similar facilities of a contractor or subcontractor that are dedicated exclusively, or nearly so, to performance of the contract or project, *and* adjacent or virtually adjacent to either a primary construction site or a secondary construction site, and

(B) Locations adjacent or virtually adjacent to a primary construction site at which workers perform activities associated with directing vehicular or

pedestrian traffic around or away from the primary construction site.

(2) With the exception of locations that are on, or that themselves constitute, primary or secondary construction sites as defined in paragraphs (1)(i) and (ii) of this definition, site of the work does not include:

(i) Permanent home offices, branch plant establishments, fabrication plants, tool yards, etc., of a contractor or subcontractor whose location and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project; or

(ii) Fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a material supplier, which are established by a material supplier for the project before opening of bids and not on the primary construction site or a secondary construction site, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

**Subcontractor.** The term “subcontractor” means any contractor that agrees to perform or be responsible for the performance of any part of a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1. The term subcontractor includes subcontractors of any tier.

**United States or the District of Columbia.** The term “United States or the District of Columbia” means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including non-appropriated fund instrumentalities and any corporation for which all or substantially all of its stock is beneficially owned by the United States or by the foregoing departments, establishments, agencies, or instrumentalities.

**Wages.** The term “wages” means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon

Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

**Wage determination.** The term “wage determination” includes the original decision and any subsequent decisions revising, modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination must be in accordance with the provisions of § 1.6 of this subtitle.

■ 25. Amend § 5.5 by:

- a. Revising paragraphs (a) introductory text and (a)(1) through (4), (6), and (10);
- b. Adding paragraph (a)(11);
- c. Revising paragraphs (b) introductory text and (b)(2) through (4);
- d. Adding paragraph (b)(5);
- e. Revising paragraph (c); and
- f. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

**§ 5.5 Contract provisions and related matters.**

(a) *Required contract clauses.* The Agency head will cause or require the contracting officer to require the contracting officer to insert in full, or (for contracts covered by the Federal Acquisition Regulation (48 CFR chapter 1)) by reference, in any contract in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the laws referenced by § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, *Provided*, That such modifications are first approved by the Department of Labor):

(1) *Minimum wages*—(i) *Wage rates and fringe benefits.* All laborers and mechanics employed or working upon

the site of the work (or otherwise working in construction or development of the project under a development statute), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of basic hourly wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. As provided in paragraphs (d) and (e) of this section, the appropriate wage determinations are effective by operation of law even if they have not been attached to the contract. Contributions made or costs reasonably anticipated for bona fide fringe benefits under the Davis-Bacon Act (40 U.S.C. 3141(2)(B)) on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(v) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics must be paid the appropriate wage rate and fringe benefits on the wage determination for the classification(s) of work actually performed, without regard to skill, except as provided in paragraph (a)(4) of this section. Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer’s payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (a)(1)(iii) of this section) and the Davis-Bacon poster (WH-1321) must be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii) *Frequently recurring classifications.* (A) In addition to wage and fringe benefit rates that have been

determined to be prevailing under the procedures set forth in 29 CFR part 1, a wage determination may contain, pursuant to § 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to paragraph (a)(1)(iii) of this section, provided that:

(1) The work performed by the classification is not performed by a classification in the wage determination for which a prevailing wage rate has been determined;

(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 prevailing wage rates contained in the wage determination.

(B) The Administrator will establish wage rates for such classifications in accordance with paragraph (a)(1)(iii)(A)(3) of this section. Work performed in such a classification must be paid at no less than the wage and fringe benefit rate listed on the wage determination for such classification.

(iii) *Conformance.* (A) The contracting officer must require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract be classified in conformance with the wage determination. Conformance of an additional classification and wage rate and fringe benefits is appropriate only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is used in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) The conformance process may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination.

(C) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken will be sent by the contracting officer by email to [DBAconformance@dol.gov](mailto:DBAconformance@dol.gov). The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting

officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer will, by email to [DBAconformance@dol.gov](mailto:DBAconformance@dol.gov), refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(E) The contracting officer must promptly notify the contractor of the action taken by the Wage and Hour Division under paragraphs (a)(1)(iii)(C) and (D) of this section. The contractor must furnish a written copy of such determination to each affected worker or it must be posted as a part of the wage determination. The wage rate (including fringe benefits where appropriate) determined pursuant to paragraph (a)(1)(iii)(C) or (D) of this section must be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iv) *Fringe benefits not expressed as an hourly rate.* Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor may either pay the benefit as stated in the wage determination or may pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(v) *Unfunded plans.* If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, in accordance with the criteria set forth in § 5.28, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(vi) *Interest.* In the event of a failure to pay all or part of the wages required

by the contract, the contractor will be required to pay interest on any underpayment of wages.

(2) *Withholding—(i) Withholding requirements.* The [write in name of Federal agency or the recipient of Federal assistance] may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for the full amount of wages and monetary relief, including interest, required by the clauses set forth in paragraph (a) of this section for violations of this contract, or to satisfy any such liabilities required by any other Federal contract, or federally assisted contract subject to Davis-Bacon labor standards, that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld. In the event of a contractor's failure to pay any laborer or mechanic, including any apprentice or helper working on the site of the work (or otherwise working in construction or development of the project under a development statute) all or part of the wages required by the contract, or upon the contractor's failure to submit the required records as discussed in paragraph (a)(3)(iv) of this section, the [Agency] may on its own initiative and after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph (a)(2)(i) or (b)(3)(i) of this section, or both, over claims to those funds by:

(A) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(B) A contracting agency for its procurement costs;



(C) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(D) A contractor's assignee(s);

(E) A contractor's successor(s); or

(F) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

(3) *Records and certified payrolls*—(i) *Basic record requirements*—(A) *Length of record retention*. All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.

(B) *Information required*. Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid.

(C) *Additional records relating to fringe benefits*. Whenever the Secretary of Labor has found under paragraph (a)(1)(v) of this section that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act, the contractor must maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(D) *Additional records relating to apprenticeship*. Contractors with apprentices working under approved programs must maintain written evidence of the registration of apprenticeship programs, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable programs.

(ii) *Certified payroll requirements*—(A) *Frequency and method of submission*. The contractor or

subcontractor must submit weekly, for each week in which any DBA- or Related Acts-covered work is performed, certified payrolls to the [write in name of appropriate Federal agency] if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the certified payrolls to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the [write in name of agency]. The prime contractor is responsible for the submission of all certified payrolls by all subcontractors. A contracting agency or prime contractor may permit or require contractors to submit certified payrolls through an electronic system, as long as the electronic system requires a legally valid electronic signature; the system allows the contractor, the contracting agency, and the Department of Labor to access the certified payrolls upon request for at least 3 years after the work on the prime contract has been completed; and the contracting agency or prime contractor permits other methods of submission in situations where the contractor is unable or limited in its ability to use or access the electronic system.

(B) *Information required*. The certified payrolls submitted must set out accurately and completely all of the information required to be maintained under paragraph (a)(3)(i)(B) of this section, except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead, the certified payrolls need only include an individually identifying number for each worker (e.g., the last four digits of the worker's Social Security number). The required weekly certified payroll information may be submitted using Optional Form WH-347 or in any other format desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division website at <https://www.dol.gov/sites/dolgov/files/WH/legacy/files/wh347.pdf> or its successor website. It is not a violation of this section for a prime contractor to require a subcontractor to provide full Social Security numbers and last known addresses, telephone numbers, and email addresses to the prime contractor for its own records, without weekly submission by the subcontractor to the sponsoring government agency (or the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records).

(C) *Statement of Compliance*. Each certified payroll submitted must be accompanied by a "Statement of

Compliance," signed by the contractor or subcontractor, or the contractor's or subcontractor's agent who pays or supervises the payment of the persons working on the contract, and must certify the following:

(1) That the certified payroll for the payroll period contains the information required to be provided under paragraph (a)(3)(ii) of this section, the appropriate information and basic records are being maintained under paragraph (a)(3)(i) of this section, and such information and records are correct and complete;

(2) That each laborer or mechanic (including each helper and apprentice) working on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in 29 CFR part 3; and

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification(s) of work actually performed, as specified in the applicable wage determination incorporated into the contract.

(D) *Use of Optional Form WH-347*. The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 will satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(C) of this section.

(E) *Signature*. The signature by the contractor, subcontractor, or the contractor's or subcontractor's agent must be an original handwritten signature or a legally valid electronic signature.

(F) *Falsification*. The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under 18 U.S.C. 1001 and 31 U.S.C. 3729.

(G) *Length of certified payroll retention*. The contractor or subcontractor must preserve all certified payrolls during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

(iii) *Contracts, subcontracts, and related documents*. The contractor or subcontractor must maintain this contract or subcontract and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related

documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed.

(iv) *Required disclosures and access—*  
(A) *Required record disclosures and access to workers.* The contractor or subcontractor must make the records required under paragraphs (a)(3)(i) through (iii) of this section, and any other documents that the [write the name of the agency] or the Department of Labor deems necessary to determine compliance with the labor standards provisions of any of the applicable statutes referenced by § 5.1, available for inspection, copying, or transcription by authorized representatives of the [write the name of the agency] or the Department of Labor, and must permit such representatives to interview workers during working hours on the job.

(B) *Sanctions for non-compliance with records and worker access requirements.* If the contractor or subcontractor fails to submit the required records or to make them available, or refuses to permit worker interviews during working hours on the job, the Federal agency may, after written notice to the contractor, sponsor, applicant, owner, or other entity, as the case may be, that maintains such records or that employs such workers, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available, or to permit worker interviews during working hours on the job, may be grounds for debarment action pursuant to § 5.12. In addition, any contractor or other person that fails to submit the required records or make those records available to WHD within the time WHD requests that the records be produced will be precluded from introducing as evidence in an administrative proceeding under 29 CFR part 6 any of the required records that were not provided or made available to WHD. WHD will take into consideration a reasonable request from the contractor or person for an extension of the time for submission of records. WHD will determine the reasonableness of the request and may consider, among other things, the location of the records and the volume of production.

(C) *Required information disclosures.* Contractors and subcontractors must maintain the full Social Security number and last known address, telephone number, and email address of each covered worker, and must provide them upon request to the [write in name

of appropriate Federal agency] if the agency is a party to the contract, or to the Wage and Hour Division of the Department of Labor. If the Federal agency is not such a party to the contract, the contractor, subcontractor, or both, must, upon request, provide the full Social Security number and last known address, telephone number, and email address of each covered worker to the applicant, sponsor, owner, or other entity, as the case may be, that maintains such records, for transmission to the [write in name of agency], the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or other compliance action.

(4) *Apprentices and equal employment opportunity—*(i) *Apprentices—*(A) *Rate of pay.* Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. A person who is not individually registered in the program, but who has been certified by the OA or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice, will be permitted to work at less than the predetermined rate for the work they perform in the first 90 days of probationary employment as an apprentice in such a program. In the event the OA or a State Apprenticeship Agency recognized by the OA withdraws approval of an apprenticeship program, the contractor will no longer be permitted to use apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(B) *Fringe benefits.* Apprentices must be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringe benefits must be paid in accordance with that determination.

(C) *Apprenticeship ratio.* The allowable ratio of apprentices to journeyworkers on the job site in any

craft classification must not be greater than the ratio permitted to the contractor as to the entire work force under the registered program or the ratio applicable to the locality of the project pursuant to paragraph (a)(4)(i)(D) of this section. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in paragraph (a)(4)(i)(A) of this section, must be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under this section must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(D) *Reciprocity of ratios and wage rates.* Where a contractor is performing construction on a project in a locality other than the locality in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyworker's hourly rate) applicable within the locality in which the construction is being performed must be observed. If there is no applicable ratio or wage rate for the locality of the project, the ratio and wage rate specified in the contractor's registered program must be observed.

(ii) *Equal employment opportunity.* The use of apprentices and journeyworkers under this part must be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

\* \* \* \* \*

(6) *Subcontracts.* The contractor or subcontractor must insert in any subcontracts the clauses contained in paragraphs (a)(1) through (11) of this section, along with the applicable wage determination(s) and such other clauses or contract modifications as the [write in the name of the Federal agency] may by appropriate instructions require, and a clause requiring the subcontractors to include these clauses and wage determination(s) in any lower tier subcontracts. The prime contractor is responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in this section. In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier

subcontractors, and may be subject to debarment, as appropriate.

\* \* \* \* \*

(10) *Certification of eligibility.* (i) By entering into this contract, the contractor certifies that neither it nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of 40 U.S.C. 3144(b) or § 5.12(a).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of 40 U.S.C. 3144(b) or § 5.12(a).

(iii) The penalty for making false statements is prescribed in the U.S. Code, Title 18 Crimes and Criminal Procedure, 18 U.S.C. 1001.

(11) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

(i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the DBA, Related Acts, this part, or 29 CFR part 1 or 3;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under the DBA, Related Acts, this part, or 29 CFR part 1 or 3;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, this part, or 29 CFR part 1 or 3; or

(iv) Informing any other person about their rights under the DBA, Related Acts, this part, or 29 CFR part 1 or 3.

(b) *Contract Work Hours and Safety Standards Act (CWHSSA).* The Agency Head must cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1) through (5) of this section in full, or (for contracts covered by the Federal Acquisition Regulation) by reference, in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses must be inserted in addition to the clauses required by paragraph (a) of this section or 29 CFR 4.6. As used in this paragraph (b), the terms "laborers and mechanics" include watchpersons and guards.

\* \* \* \* \*

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages and interest from the date of the underpayment. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchpersons and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$31 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1).

(3) *Withholding for unpaid wages and liquidated damages—*(i) *Withholding process.* The [write in the name of the Federal agency or the recipient of Federal assistance] may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor so much of the accrued payments or advances as may be considered necessary to satisfy the liabilities of the prime contractor or any subcontractor for any unpaid wages; monetary relief, including interest; and liquidated damages required by the clauses set forth in this paragraph (b) on this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the same prime contractor (as defined in § 5.2). The necessary funds may be withheld from the contractor under this contract, any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency, and such funds may be used to satisfy the contractor liability for which the funds were withheld.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with paragraph (a)(2)(i) or (b)(3)(i) of this section, or both, over claims to those funds by:

(A) A contractor's surety(ies), including without limitation performance bond sureties and payment bond sureties;

(B) A contracting agency for its procurement costs;

(C) A trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate;

(D) A contractor's assignee(s);

(E) A contractor's successor(s); or

(F) A claim asserted under the Prompt Payment Act, 31 U.S.C. 3901–3907.

(4) *Subcontracts.* The contractor or subcontractor must insert in any subcontracts the clauses set forth in paragraphs (b)(1) through (5) of this section and a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor is responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (5). In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and associated liquidated damages and may be subject to debarment, as appropriate.

(5) *Anti-retaliation.* It is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, or to cause any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against, any worker or job applicant for:

(i) Notifying any contractor of any conduct which the worker reasonably believes constitutes a violation of the Contract Work Hours and Safety Standards Act (CWHSSA) or its implementing regulations in this part;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting or seeking to assert on behalf of themselves or others any right or protection under CWHSSA or this part;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or this part; or

(iv) Informing any other person about their rights under CWHSSA or this part.

(c) *CWHSSA required records clause.* In addition to the clauses contained in paragraph (b) of this section, in any contract subject only to the Contract Work Hours and Safety Standards Act

and not to any of the other laws referenced by § 5.1, the Agency Head must cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor must maintain regular payrolls and other basic records during the course of the work and must preserve them for a period of 3 years after all the work on the prime contract is completed for all laborers and mechanics, including guards and watchpersons, working on the contract. Such records must contain the name; last known address, telephone number, and email address; and social security number of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid; daily and weekly number of hours actually worked; deductions made; and actual wages paid. Further, the Agency Head must cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph must be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview workers during working hours on the job.

(d) *Incorporation of contract clauses and wage determinations by reference.* Although agencies are required to insert the contract clauses set forth in this section, along with appropriate wage determinations, in full into covered contracts, and contractors and subcontractors are required to insert them in any lower-tier subcontracts, the incorporation by reference of the required contract clauses and appropriate wage determinations will be given the same force and effect as if they were inserted in full text.

(e) *Incorporation by operation of law.* The contract clauses set forth in this section (or their equivalent under the Federal Acquisition Regulation), along with the correct wage determinations, will be considered to be a part of every prime contract required by the applicable statutes referenced by § 5.1 to include such clauses, and will be effective by operation of law, whether or not they are included or incorporated by reference into such contract, unless the Administrator grants a variance, tolerance, or exemption from the application of this paragraph. Where the clauses and applicable wage determinations are effective by operation of law under this paragraph, the prime contractor must be compensated for any resulting increase

in wages in accordance with applicable law.

■ 26. Revise § 5.6 to read as follows:

**§ 5.6 Enforcement.**

(a) *Agency responsibilities.* (1)(i) The Federal agency has the initial responsibility to ascertain whether the clauses required by § 5.5 and the appropriate wage determination(s) have been incorporated into the contracts subject to the labor standards provisions of the laws referenced by § 5.1. Additionally, a Federal agency that provides Federal financial assistance that is subject to the labor standards provisions of the Act must promulgate the necessary regulations or procedures to require the recipient or sub-recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency unless it ensures that the clauses required by § 5.5 and the appropriate wage determination(s) are incorporated into such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds will be approved by the Federal agency after the beginning of construction unless there is on file with the Federal agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5 or unless there is on file with the Federal agency a certification by the contractor that there is a substantial dispute with respect to the required provisions.

(ii) If a contract subject to the labor standards provisions of the applicable statutes referenced by § 5.1 is entered into without the incorporation of the clauses required by § 5.5, the agency must, upon the request of the Administrator or upon its own initiative, either terminate and resolicit the contract with the required contract clauses, or incorporate the required clauses into the contract (or ensure they are so incorporated) through supplemental agreement, change order, or any and all authority that may be needed. Where an agency has not entered directly into such a contract but instead has provided Federal financial assistance, the agency must ensure that the recipient or sub-recipient of the Federal assistance similarly incorporates the clauses required into its contracts. The method of incorporation of the correct wage determination, and adjustment in contract price, where appropriate, should be in accordance with applicable law. Additionally, the following requirements apply:

(A) Unless the Administrator directs otherwise, the incorporation of the

clauses required by § 5.5 must be retroactive to the date of contract award or start of construction if there is no award.

(B) If this incorporation occurs as the result of a request from the Administrator, the incorporation must take place within 30 days of the date of that request, unless the agency has obtained an extension from the Administrator.

(C) The contractor must be compensated for any increases in wages resulting from incorporation of a missing contract clause.

(D) If the recipient refuses to incorporate the clauses as required, the agency must make no further payment, advance, grant, loan, or guarantee of funds in connection with the contract until the recipient incorporates the required clauses into its contract, and must promptly refer the dispute to the Administrator for further proceedings under § 5.13.

(E) Before terminating a contract pursuant to this section, the agency must withhold or cross-withhold sufficient funds to remedy any back wage liability resulting from the failure to incorporate the correct wage determination or otherwise identify and obligate sufficient funds through a termination settlement agreement, bond, or other satisfactory mechanism.

(F) Notwithstanding the requirement to incorporate the contract clauses and correct wage determination within 30 days, the contract clauses and correct wage determination will be effective by operation of law, retroactive to the beginning of construction, in accordance with § 5.5(e).

(2)(i) Certified payrolls submitted pursuant to § 5.5(a)(3)(ii) must be preserved by the Federal agency for a period of 3 years after all the work on the prime contract is completed, and must be produced at the request of the Department of Labor at any time during the 3-year period, regardless of whether the Department of Labor has initiated an investigation or other compliance action.

(ii) In situations where the Federal agency does not itself maintain certified payrolls required to be submitted pursuant to § 5.5(a)(3)(ii), upon the request of the Department of Labor the Federal agency must ensure that such certified payrolls are provided to the Department of Labor. Such certified payrolls may be provided by the applicant, sponsor, owner, or other entity, as the case may be, directly to the Department of Labor, or to the Federal agency which, in turn, must provide those records to the Department of Labor.

(3) The Federal agency will cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes referenced in § 5.1. Investigations will be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations will include interviews with workers, which must be taken in confidence, and examinations of certified payrolls, regular payrolls, and other basic records required to be maintained under § 5.5(a)(3). In making such examinations, particular care must be taken to determine the correctness of classification(s) of work actually performed, and to determine whether there is a disproportionate amount of work by laborers and of apprentices registered in approved programs. Such investigations must also include evidence of fringe benefit plans and payments thereunder. Federal agencies must give priority to complaints of alleged violations.

(4) In accordance with normal operating procedures, the contracting agency may be furnished various investigatory material from the investigation files of the Department of Labor. None of the material, other than computations of back wages, liquidated damages, and monetary relief for violations of § 5.5(a)(11) or (b)(5), and the summary of back wages due, may be disclosed in any manner to anyone other than Federal officials charged with administering the contract or program providing Federal assistance to the contract, without requesting the permission and views of the Department of Labor.

(b) *Department of Labor investigations and other compliance actions.* (1) The Administrator will investigate and conduct other compliance actions as deemed necessary in order to obtain compliance with the labor standards provisions of the applicable statutes referenced by § 5.1, or to affirm or reject the recommendations by the Agency Head with respect to labor standards matters arising under the statutes referenced by § 5.1.

(2) Federal agencies, contractors, subcontractors, sponsors, applicants, owners, or other entities, as the case may be, must cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigations or other compliance actions.

(3) The findings of such an investigation or other compliance action, including amounts found due,

may not be altered or reduced without the approval of the Department of Labor.

(4) Where the underpayments disclosed by such an investigation or other compliance action total \$1,000 or more, where there is reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, or where liquidated damages may be assessed under CWHSSA, the Department of Labor will furnish the Federal agency an enforcement report detailing the labor standards violations disclosed by the investigation or other compliance action and any action taken by the contractor or subcontractor to correct the violations, including any payment of back wages or any other relief provided workers or remedial actions taken for violations of § 5.5(a)(11) or (b)(5). In other circumstances, the Department of Labor will furnish the Federal agency a notification summarizing the findings of the investigation or other compliance action.

(c) *Confidentiality requirements.* It is the policy of the Department of Labor to protect from disclosure the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of a worker or other informant who makes a written or oral statement as a complaint or in the course of an investigation or other compliance action, as well as portions of the statement which would tend to reveal the identity of the informant, will not be disclosed in any manner to anyone other than Federal officials without the prior consent of the informant. Disclosure of such statements is also governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see part 70 of this subtitle) and the "Privacy Act of 1974" (5 U.S.C. 552a, see part 71 of this subtitle).

■ 27. Amend § 5.7 by revising paragraph (a) to read as follows:

**§ 5.7 Reports to the Secretary of Labor.**

(a) *Enforcement reports.* (1) Where underpayments by a contractor or subcontractor total less than \$1,000, where there is no reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations to the Administrator, unless the investigation or other compliance action was made at the request of the Department of Labor. In the latter case, the Federal agency will submit a factual summary report detailing any violations including any

data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken (such as "letters of notice" or remedial action taken for violations of § 5.5(a)(11) or (b)(5)), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments by a contractor or subcontractor total \$1,000 or more, or where there is reason to believe that the contractor or subcontractor has disregarded its obligations to workers or subcontractors, the Federal agency will furnish within 60 days after completion of its investigation, a detailed enforcement report to the Administrator.

\* \* \* \* \*

■ 28. Revise § 5.9 to read as follows:

**§ 5.9 Suspension of funds.**

(a) *Suspension and withholding.* In the event of failure or refusal of the contractor or any subcontractor to comply with the applicable statutes referenced by § 5.1 and the labor standards clauses contained in § 5.5, whether incorporated into the contract physically, by reference, or by operation of law, the Federal agency (and any other agency), may, upon its own action, or must, upon written request of an authorized representative of the Department of Labor, take such action as may be necessary to cause the suspension of the payment, advance, or guarantee of funds until such time as the violations are discontinued and/or until sufficient funds are withheld as may be considered necessary to compensate workers for the full amount of wages and monetary relief to which they are entitled, and to cover any liquidated damages and pre-judgment or post-judgment interest which may be due.

(b) *Cross-withholding.* To satisfy a contractor's liability for back wages on a contract, in addition to the suspension and withholding of funds from the contract(s) under which the violation(s) occurred, the necessary funds also may be withheld under any other Federal contract with the same prime contractor, or any other federally assisted contract that is subject to Davis-Bacon labor standards and/or the Contract Work Hours and Safety Standards Act and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency.

(c) *Cross-withholding from different legal entities.* Cross-withholding of

funds may be requested from contracts held by other entities that may be considered to be the same prime contractor as that term is defined in § 5.2. Such cross-withholding is appropriate where the separate legal entities have independently consented to it by entering into contracts containing the withholding provisions at § 5.5(a)(2) and (b)(3). Cross-withholding from a contract held by a different legal entity is not appropriate unless the withholding provisions were incorporated in full or by reference in that different legal entity's contract. Absent exceptional circumstances, cross-withholding is not permitted from a contract held by a different legal entity where the Davis-Bacon labor standards were incorporated only by operation of law into that contract.

■ 29. Revise § 5.10 to read as follows:

**§ 5.10 Restitution, criminal action.**

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b) of this section where violations of the labor standards clauses contained in § 5.5 and the applicable statutes referenced by § 5.1 result in underpayment of wages to workers or monetary damages caused by violations of § 5.5(a)(11) or (b)(5), the Federal agency or an authorized representative of the Department of Labor will request that restitution be made to such workers or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of 40 U.S.C. 3141(2)(B), including interest from the date of the underpayment or loss. Interest on any back wages or monetary relief provided for in this part will be calculated using the percentage established for the underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the matter will be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator will be informed simultaneously of the action taken.

■ 30. Revise § 5.11 to read as follows:

**§ 5.11 Disputes concerning payment of wages.**

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, proper classification, or monetary relief for violations of § 5.5(a)(11) or (b)(5). The procedures in this section may be

initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor.

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor, if any, by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that either the contractor, the subcontractor, or both, should also be subject to debarment under the Davis-Bacon Act or any of the other applicable statutes referenced by § 5.1, the notification will so indicate.

(2) A contractor or subcontractor desiring a hearing concerning the Administrator's investigation findings must request such a hearing by letter or by any other means normally assuring delivery, sent within 30 days of the date of the Administrator's notification. The request must set forth those findings which are in dispute and the reasons therefor, including any affirmative defenses.

(3) Upon receipt of a timely request for a hearing, the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, with an attached copy of the notification from the Administrator and the response of the contractor or subcontractor, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearings will be conducted in accordance with the procedures set forth in part 6 of this subtitle.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 5.12, the Administrator will notify the contractor and subcontractor, if any, by registered or certified mail to the last known address or by any other means normally assuring delivery, of the investigation findings, and will issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor or subcontractor disagrees with the factual findings of the Administrator or believes that there are relevant facts in dispute, the contractor or subcontractor must advise the Administrator by letter or by any other means normally assuring delivery, sent within 30 days of the date of the

Administrator's notification. In the response, the contractor or subcontractor must explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(2)(i) of this section alleging the existence of a factual dispute, the Administrator will examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator will refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator will so rule and advise the contractor and subcontractor, if any, accordingly.

(3) If the contractor or subcontractor desires review of the ruling issued by the Administrator under paragraph (c)(1) or (2) of this section, the contractor or subcontractor must file a petition for review thereof with the Administrative Review Board within 30 days of the date of the ruling, with a copy thereof to the Administrator. The petition for review must be filed in accordance with part 7 of this subtitle.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings or ruling will be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator will advise the Comptroller General of the Administrator's recommendation in accordance with § 5.12(a)(2). If a timely response or petition for review is filed, the findings or ruling of the Administrator will be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Administrative Review Board.

■ 31. Revise § 5.12 to read as follows:

**§ 5.12 Debarment proceedings.**

(a) *Debarment standard and ineligible list.* (1) Whenever any contractor or subcontractor is found by the Secretary of Labor to have disregarded their obligations to workers or subcontractors under the Davis-Bacon Act, any of the other applicable statutes referenced by § 5.1, this part, or part 3 of this subtitle, such contractor or subcontractor and their responsible officers, if any, and any firm, corporation, partnership, or association in which such contractor, subcontractor, or responsible officer has an interest will be ineligible for a period of 3 years to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor

standards provisions of any of the statutes referenced by § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator will transmit to the Comptroller General the name(s) of the contractors or subcontractors and their responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest, who have been found to have disregarded their obligations to workers or subcontractors, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. In cases arising under contracts covered by any of the applicable statutes referenced by § 5.1 other than the Davis-Bacon Act, the Administrator determines the name(s) of the contractors or subcontractors and their responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest, to be debarred. The names of such ineligible persons or firms will be published on SAM or its successor website, and an ineligible person or firm will be ineligible for a period of 3 years from the date of publication of their name on the ineligible list, to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of any of the statutes referenced by § 5.1.

(b) *Procedure.* (1) In addition to cases under which debarment action is initiated pursuant to § 5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed violations which constitute a disregard of its obligations to workers or subcontractors under the Davis-Bacon Act, the labor standards provisions of any of the other applicable statutes referenced by § 5.1, this part, or part 3 of this subtitle, the Administrator will notify by registered or certified mail to the last known address or by any other means normally assuring delivery, the contractor or subcontractor and responsible officers, if any, and any firms, corporations, partnerships, or associations in which the contractors, subcontractors, or responsible officers are known to have an interest of the finding.

(i) The Administrator will afford such contractor, subcontractor, responsible officer, and any other parties notified an opportunity for a hearing as to whether

debarment action should be taken under paragraph (a) of this section. The Administrator will furnish to those notified a summary of the investigative findings.

(ii) If the contractor, subcontractor, responsible officer, or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request must be made by letter or by any other means normally assuring delivery, sent within 30 days of the date of the notification from the Administrator, and must set forth any findings which are in dispute and the basis for such disputed findings, including any affirmative defenses to be raised.

(iii) Upon timely receipt of such request for a hearing, the Administrator will refer the case to the Chief Administrative Law Judge by Order of Reference, with an attached copy of the notification from the Administrator and the responses of the contractor, subcontractor, responsible officers, or any other parties notified, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute.

(iv) In considering debarment under any of the statutes referenced by § 5.1 other than the Davis-Bacon Act, the Administrative Law Judge will issue an order concerning whether the contractor, subcontractor, responsible officer, or any other party notified is to be debarred in accordance with paragraph (a) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge will issue a recommendation as to whether the contractor, subcontractor, responsible officers, or any other party notified should be debarred under 40 U.S.C. 3144(b).

(2) Hearings under this section will be conducted in accordance with part 6 of this subtitle. If no hearing is requested within 30 days of the date of the notification from the Administrator, the Administrator's findings will be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

(c) *Interests of debarred parties.* (1) A finding as to whether persons or firms whose names appear on the ineligible list have an interest under 40 U.S.C. 3144(b) or paragraph (a) of this section in any other firm, corporation, partnership, or association, may be made through investigation, hearing, or otherwise.

(2)(i) The Administrator, on their own motion or after receipt of a request for a determination pursuant to paragraph

(c)(3) of this section, may make a finding on the issue of interest.

(ii) If the Administrator determines that there may be an interest but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (c)(4) of this section.

(iii) If the Administrator finds that no interest exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(iv)(A) If the Administrator finds that an interest exists, the person or firm affected will be notified of the Administrator's finding (by certified mail to the last known address or by any other means normally assuring delivery), which will include the reasons therefore, and such person or firm will be afforded an opportunity to request that a hearing be held to decide the issue.

(B) Such person or firm will have 20 days from the date of the Administrator's ruling to request a hearing. A person or firm desiring a hearing must request it by letter or by any other means normally assuring delivery, sent within 20 days of the date of the Administrator's notification. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, must be submitted with the request for a hearing.

(C) If no hearing is requested within the time mentioned in paragraph (c)(2)(iv)(B) of this section, the Administrator's finding will be final and the Administrator will notify the Comptroller General in cases arising under the DBA. If a hearing is requested, the ruling of the Administrator will be inoperative unless and until the Administrative Law Judge or the Administrative Review Board issues an order that there is an interest.

(3)(i) A request for a determination of interest may be made by any interested party, including contractors or prospective contractors and associations of contractors, representatives of workers, and interested agencies. Such a request must be submitted in writing to the Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(ii) The request must include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the ineligible list has an interest in any firm, corporation, partnership, or association



that is seeking or has been awarded a contract or subcontract of the United States or the District of Columbia, or a contract or subcontract that is subject to the labor standards provisions of any of the statutes referenced by § 5.1. No particular form is prescribed for the submission of a request under this section.

(4) The Administrator, on their own motion under paragraph (c)(2)(ii) of this section or upon a request for hearing where the Administrator determines that relevant facts are in dispute, will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who will conduct such hearings as may be necessary to render a decision solely on the issue of interest. Such proceedings must be conducted in accordance with the procedures set forth in part 6 of this subtitle.

(5) If the person or firm affected requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Administrative Review Board to render a decision solely on the issue of interest. Such proceeding must be conducted in accordance with the procedures set forth in part 7 of this subtitle.

■ 32. Revise § 5.13 to read as follows:

**§ 5.13 Rulings and interpretations.**

(a) All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to part 1 of this subtitle, of the rules contained in this part and in parts 1 and 3 of this subtitle, and of the labor standards provisions of any of the laws referenced in § 5.1 must be referred to the Administrator for appropriate ruling or interpretation. These rulings and interpretations are authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be submitted via email to [dgceinquiries@dol.gov](mailto:dgceinquiries@dol.gov); by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210; or through other means directed by the Administrator.

(b) If any such ruling or interpretation is made by an authorized representative of the Administrator of the Wage and Hour Division, any interested party may seek reconsideration of the ruling or interpretation by the Administrator of the Wage and Hour Division. The procedures and time limits set out in

§ 1.8 of this subtitle apply to any such request for reconsideration.

■ 33. Amend § 5.15 by revising paragraphs (c)(4) and (d)(1) to read as follows:

**§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.**

\* \* \* \* \*

(c) \* \* \*

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice comes within the definition contained in § 5.2.

(iii) The time in question does not involve productive work or performance of the apprentice's regular duties.

(d) \* \* \*

(1) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully the unpaid wages and any back pay or other monetary relief due laborers and mechanics, with interest, and the liquidated damages due the United States, the available funds will be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, will be used for the payment of liquidated damages.

\* \* \* \* \*

**§ 5.16 [Removed and Reserved]**

■ 34. Remove and reserve § 5.16.

**§ 5.17 [Removed and Reserved]**

■ 35. Remove and reserve § 5.17.

■ 36. Add § 5.18 to subpart A to read as follows:

**§ 5.18 Remedies for retaliation.**

(a) *Administrator request to remedy violation.* When the Administrator finds that any person has discriminated in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), or caused any person to discriminate in any way against any worker or job applicant in violation of § 5.5(a)(11) or (b)(5), the Administrator will notify the person, any contractors for whom the person worked or on whose behalf the person acted, and any upper tier contractors, as well as the

relevant contracting agency(ies) of the discrimination and request that the person and any contractors for whom the person worked or on whose behalf the person acted remedy the violation.

(b) *Administrator directive to remedy violation and provide make-whole relief.*

If the person and any contractors for whom the person worked or on whose behalf the person acted do not remedy the violation, the Administrator in the notification of violation findings issued under § 5.11 or § 5.12 will direct the person and any contractors for whom the person worked or on whose behalf the person acted to provide appropriate make-whole relief to affected worker(s) and job applicant(s) or take appropriate remedial action, or both, to correct the violation, and will specify the particular relief and remedial actions to be taken.

(c) *Examples of available make-whole relief and remedial actions.* Such relief and remedial actions may include, but are not limited to, employment, reinstatement, front pay in lieu of reinstatement, and promotion, together with back pay and interest; compensatory damages; restoration of the terms, conditions, and privileges of the worker's employment or former employment; the expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and the posting of a notice to workers that the contractor or subcontractor agrees to comply with the Davis-Bacon Act and Related Acts anti-retaliation requirements.

■ 37. Revise § 5.20 to read as follows:

**§ 5.20 Scope and significance of this subpart.**

The 1964 amendments (Pub. L. 88–349) to the Davis-Bacon Act require, among other things, that the prevailing wage determined for Federal and federally assisted construction include the basic hourly rate of pay and the amount contributed by the contractor or subcontractor for certain fringe benefits (or the cost to them of such benefits). The purpose of this subpart is to explain the provisions of these amendments and make available in one place official interpretations of the fringe benefits provisions of the Davis-Bacon Act. These interpretations will guide the Department of Labor in carrying out its responsibilities under these provisions. These interpretations are intended also to provide guidance to contractors and their associations; laborers and mechanics and their organizations; and local, State, and Federal agencies. The interpretations contained in this subpart are authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C.

259). The omission to discuss a particular problem in this subpart or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor with respect to such problem or to constitute an administrative interpretation, practice, or enforcement policy. Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.13.

■ 38. Revise § 5.22 to read as follows:

**§ 5.22 Effect of the Davis-Bacon fringe benefits provisions.**

The Davis-Bacon Act and the prevailing wage provisions of the statutes referenced in § 1.1 of this subtitle confer upon the Secretary of Labor the authority to predetermine, as minimum wages, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is to be performed. See the definitions of the terms “prevailing wage” and “area” in § 1.2 of this subtitle. The fringe benefits amendments enlarge the scope of this authority by including certain bona fide fringe benefits within the meaning of the terms “wages”, “scale of wages”, “wage rates”, “minimum wages”, and “prevailing wages”, as used in the Davis-Bacon Act.

■ 39. Revise § 5.23 to read as follows:

**§ 5.23 The statutory provisions.**

Pursuant to the Davis-Bacon Act, as amended and codified at 40 U.S.C. 3141(2), the term “prevailing wages” and similar terms include the basic hourly rate of pay and, for the listed fringe benefits and other bona fide fringe benefits not required by other law, the contributions irrevocably made by a contractor or subcontractor to a trustee or third party pursuant to a bona fide fringe benefit fund, plan, or program, and the costs to the contractor or subcontractor that may be reasonably anticipated in providing bona fide fringe benefits pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the affected laborers and mechanics. Section 5.29 discusses specific fringe benefits that may be considered to be bona fide.

■ 40. Amend § 5.25 by adding paragraph (c) to read as follows:

**§ 5.25 Rate of contribution or cost for fringe benefits.**

\* \* \* \* \*

(c) Except as provided in this section, contractors must “annualize” all

contributions to fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) to determine the hourly equivalent for which they may take credit against their fringe benefit obligation. The “annualization” principle reflects that DBRA credit for contributions made to bona fide fringe benefit plans (or the reasonably anticipated costs of an unfunded benefit plan) is allowed based on the effective rate of contributions or costs incurred for total hours worked during the year (or a shorter time period) by a laborer or mechanic.

(1) *Method of computation.* To annualize the cost of providing a fringe benefit, a contractor must divide the total cost of the fringe benefit contribution (or the reasonably anticipated costs of an unfunded benefit plan) by the total number of hours worked on both private (non-DBRA) work and work covered by the Davis-Bacon Act and/or Davis-Bacon Related Acts (DBRA-covered work) during the time period to which the cost is attributable to determine the rate of contribution per hour. If the amount of contribution varies per worker, credit must be determined separately for the amount contributed on behalf of each worker.

(2) *Exception requests.* Contractors, plans, and other interested parties may request an exception from the annualization requirement by submitting a request to the WHD Administrator. A request for an exception may be granted only if each of the requirements of paragraph (c)(3) of this section is satisfied. Contributions to defined contribution pension plans (DCPPs) are excepted from the annualization requirement, and exception requests therefore are not required in connection with DCPPs, provided that each of the requirements of paragraph (c)(3) is satisfied and the DCPP provides for immediate participation and essentially immediate vesting (*i.e.*, the benefit vests within the first 500 hours worked). Requests must be submitted in writing to the Division of Government Contracts Enforcement by email to [DBAannualization@dol.gov](mailto:DBAannualization@dol.gov) or by mail to Director, Division of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave. NW, Room S-3502, Washington, DC 20210.

(3) *Exception requirements.* Contributions to a bona fide fringe benefit plan (or the reasonably anticipated costs of an unfunded benefit plan) are excepted from the annualization requirement if all of the following criteria are satisfied:

(i) The benefit provided is not continuous in nature. A benefit is not continuous in nature when it is not available to a participant without penalty throughout the year or other time period to which the cost of the benefit is attributable; and

(ii) The benefit does not compensate both private work and DBRA-covered work. A benefit does not compensate both private and DBRA-covered work if any benefits attributable to periods of private work are wholly paid for by compensation for private work.

■ 41. Revise § 5.26 to read as follows:

**§ 5.26 “\* \* \* contribution irrevocably made \* \* \* to a trustee or to a third person”.**

(a) *Requirements.* The following requirements apply to any fringe benefit contributions made to a trustee or to a third person pursuant to a fund, plan, or program:

(1) Such contributions must be made irrevocably;

(2) The trustee or third person may not be affiliated with the contractor or subcontractor;

(3) A trustee must adhere to any fiduciary responsibilities applicable under law; and

(4) The trust or fund must not permit the contractor or subcontractor to recapture any of the contributions paid in or any way divert the funds to its own use or benefit.

(b) *Excess payments.* Notwithstanding the above, a contractor or subcontractor may recover sums which it had paid to a trustee or third person in excess of the contributions actually called for by the plan, such as excess payments made in error or in order to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions is not yet known. For example, a benefit plan may provide for definite insurance benefits for employees in the event of contingencies such as death, sickness, or accident, with the cost of such definite benefits borne by the contractor or subcontractor. In such a case, if the insurance company returns the amount that the contractor or subcontractor paid in excess of the amount required to provide the benefits, this will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan. (See Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

■ 42. Revise § 5.28 to read as follows:

**§ 5.28 Unfunded plans.**

(a) The costs to a contractor or subcontractor which may be reasonably

anticipated in providing benefits of the types described in the Act, pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the Act (*see* 40 U.S.C. 3141(2)(B)(ii)). The legislative history suggests that these provisions were intended to permit the consideration of fringe benefits meeting these requirements, among others, and which are provided from the general assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4; *see also* S. Rep. No. 963, p. 6.)

(b) Such a benefit plan or program, commonly referred to as an unfunded plan, may not constitute a fringe benefit within the meaning of the Act unless:

(1) It could be reasonably anticipated to provide the benefits described in the Act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program;

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected; and

(5) The contractor or subcontractor requests and receives approval of the plan or program from the Secretary, as described in paragraph (c) of this section.

(c) To receive approval of an unfunded plan or program, a contractor or subcontractor must demonstrate in its request to the Secretary that the unfunded plan or program, and the benefits provided under such plan or program, are “bona fide,” meet the requirements set forth in paragraphs (b)(1) through (4) of this section, and are otherwise consistent with the Act. The request must include sufficient documentation to enable the Secretary to evaluate these criteria. Contractors and subcontractors may request approval of an unfunded plan or program by submitting a written request in one of the following manners:

(1) By mail to the United States Department of Labor, Wage and Hour Division, Director, Division of Government Contracts Enforcement, 200 Constitution Ave. NW, Room S-3502, Washington, DC 20210;

(2) By email to [unfunded@dol.gov](mailto:unfunded@dol.gov) (or its successor email address); or

(3) By any other means directed by the Administrator.

(d) Unfunded plans or programs may not be used as a means of avoiding the Act’s requirements. The words “reasonably anticipated” require that any unfunded plan or program be able to withstand a test of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the Act, an unfunded plan or program must be “bona fide” and not a mere simulation or sham for avoiding compliance with the Act. To prevent these provisions from being used to avoid compliance with the Act, the Secretary may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet future obligations under the plan. Such an account must be preserved for the purpose intended. (S. Rep. No. 963, p. 6.)

■ 43. Amend § 5.29 by revising paragraph (e) and adding paragraph (g) to read as follows:

**§ 5.29 Specific fringe benefits.**

\* \* \* \* \*

(e) Where the plan is not of the conventional type described in paragraph (d) of this section, the Secretary must examine the facts and circumstances to determine whether fringe benefits under the plan are “bona fide” in accordance with requirements of the Act. This is particularly true with respect to unfunded plans discussed in § 5.28. Contractors or subcontractors seeking credit under the Act for costs incurred for such plans must request specific approval from the Secretary under § 5.5(a)(1)(iv).

\* \* \* \* \*

(g) For a contractor or subcontractor to take credit for the costs of an apprenticeship program, the following requirements must be met:

(1) The program, in addition to meeting all other relevant requirements for fringe benefits in this subpart, must be registered with the Department of Labor’s Employment and Training Administration, Office of Apprenticeship (“OA”), or with a State Apprenticeship Agency recognized by the OA.

(2) The contractor or subcontractor may only take credit for amounts reasonably related to the costs of the apprenticeship benefits actually provided to the contractor’s employees, such as instruction, books, and tools or materials. It may not take credit for voluntary contributions beyond such costs. Amounts the employer is required

to contribute by a collective bargaining agreement or by a bona fide apprenticeship plan will be presumed to be reasonably related to such costs in the absence of evidence to the contrary.

(3) Costs incurred for the apprenticeship for one classification of laborer or mechanic may not be used to offset costs incurred for another classification.

(4) In applying the annualization principle to compute the allowable fringe benefit credit pursuant to § 5.25, the total number of working hours of employees to which the cost of an apprenticeship program is attributable is limited to the total number of hours worked by laborers and mechanics in the apprentice’s classification. For example, if a contractor enrolls an employee in an apprenticeship program for carpenters, the permissible hourly Davis-Bacon credit is determined by dividing the cost of the program by the total number of hours worked by the contractor’s carpenters and carpenters’ apprentices on covered and non-covered projects during the time period to which the cost is attributable, and such credit may only be applied against the contractor’s prevailing wage obligations for all carpenters and carpenters’ apprentices for each hour worked on the covered project.

■ 44. Revise § 5.30 to read as follows:

**§ 5.30 Types of wage determinations.**

(a) When fringe benefits are prevailing for various classes of laborers and mechanics in the area of proposed construction, such benefits are includable in any Davis-Bacon wage determination. The examples contained in paragraph (c) of this section demonstrate how fringe benefits may be listed on wage determinations in such cases.

(b) Wage determinations do not include fringe benefits for various classes of laborers and mechanics whenever such benefits do not prevail in the area of proposed construction. When this occurs, the wage determination will contain only the basic hourly rates of pay which are prevailing for the various classes of laborers and mechanics. An illustration of this situation is contained in paragraph (c) of this section.

(c) The following illustrates examples of the situations discussed in paragraph (a) and (b) of this section:

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**Figure 1 to Paragraph (c)**

CLASSIFICATION	RATE	FRINGES
Bricklayer	\$21.96	\$0.00
Electrician	\$47.65	3%+\$14.88
Elevator mechanic	\$48.60	\$35.825+a+b a. PAID HOLIDAYS: New Year's Day, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, Christmas Day and the Friday after Thanksgiving.  b. VACATIONS: Employer contributes 8% of basic hourly rate for 5 years or more of service; 6% of basic hourly rate for 6 months to 5 years of service as vacation pay credit.
Ironworker, structural	\$32.00	\$12.01
Laborer: common or general	\$21.93	\$6.27
Operator: bulldozer	\$18.11	\$0.00
Plumber (excludes HVAC duct, pipe and unit installation)	\$38.38	\$16.67

Note 1 to paragraph (c): This format is not necessarily in the exact form in which determinations will issue; it is for illustration only.

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■ 45. Revise § 5.31 to read as follows:

**§ 5.31 Meeting wage determination obligations.**

(a) A contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge their minimum wage obligations for the payment of both straight time wages and fringe benefits by paying in cash, making payments or incurring costs for “bona fide” fringe benefits of the types listed in the applicable wage determination or otherwise found prevailing by the

Secretary of Labor, or by a combination thereof.

(b) A contractor or subcontractor may discharge their obligations for the payment of the basic hourly rates and the fringe benefits where both are contained in a wage determination applicable to their laborers or mechanics in the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for “bona fide” fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination. For example, the

obligations for “Laborer: common or general” in § 5.30, figure 1 to paragraph (c), will be met by the payment of a straight time hourly rate of not less than \$21.93 and by contributions of not less than a total of \$6.27 an hour for “bona fide” fringe benefits; or

(2) By paying in cash directly to laborers or mechanics for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, they would meet their obligations for “Laborer: common or general” in § 5.30,

figure 1 to paragraph (c), by paying directly to the laborers a straight time hourly rate of not less than \$28.60 (\$21.93 basic hourly rate plus \$6.27 for fringe benefits); or

(3) As stated in paragraph (a) of this section, the contractor or subcontractor may discharge their minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in paragraphs (b)(1) and (2) of this section. Thus, for example, their obligations for “Laborer: common or general” may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less than \$28.60 (\$21.93 basic hourly rate plus \$6.27 for fringe benefits).

■ 46. Add § 5.33 to read as follows:

**§ 5.33 Administrative expenses of a contractor or subcontractor.**

(a) *Creditable costs.* The costs incurred by a contractor’s insurance carrier, third-party trust fund, or other third-party administrator that are directly related to the administration and delivery of bona fide fringe benefits to the contractor’s laborers and mechanics can be credited towards the contractor’s obligations under a Davis-Bacon wage determination. Thus, for example, a contractor may take credit for the premiums it pays to an insurance carrier or the contributions it makes to a third-party trust fund that both administers and delivers bona fide fringe benefits under a plan, where the insurance carrier or third-party trust fund uses those monies to pay for bona fide fringe benefits and for the administration and delivery of such benefits, including evaluating benefit

claims, deciding whether they should be paid, approving referrals to specialists, and other reasonable costs of administering the plan. Similarly, a contractor may also take credit for monies paid to a third-party administrator to perform tasks that are directly related to the administration and delivery of bona fide fringe benefits, including under an unfunded plan.

(b) *Noncreditable costs.* A contractor’s own administrative expenses incurred in connection with the provision of fringe benefits are considered business expenses of the firm and are therefore not creditable towards the contractor’s prevailing wage obligations, including when the contractor pays a third party to perform such tasks in whole or in part. For example, a contractor may not take credit for the costs of office employees who perform tasks such as filling out medical insurance claim forms for submission to an insurance carrier, paying and tracking invoices from insurance carriers or plan administrators, updating the contractor’s personnel records when workers are hired or separate from employment, sending lists of new hires and separations to insurance carriers or plan administrators, or sending out tax documents to the contractor’s workers, nor can the contractor take credit for the cost of paying a third-party entity to perform these tasks. Additionally, recordkeeping costs associated with ensuring the contractor’s compliance with the Davis-Bacon fringe benefit requirements, such as the cost of tracking the amount of a contractor’s fringe benefit contributions or making sure contributions cover the fringe

benefit amount claimed, are considered a contractor’s own administrative expenses and are not considered directly related to the administration and delivery of bona fide fringe benefits. Thus, such costs are not creditable whether the contractor performs those tasks itself or whether it pays a third party a fee to perform those tasks.

(c) *Questions regarding administrative expenses.* Any questions regarding whether a particular cost or expense is creditable towards a contractor’s prevailing wage obligations should be referred to the Administrator for resolution prior to any such credit being claimed.

■ 47. Add subpart C, consisting of § 5.40, to read as follows:

**Subpart C—Severability**

**§ 5.40 Severability.**

The provisions of this part are separate and severable and operate independently from one another. If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision is to be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding is one of utter invalidity or unenforceability, in which event the provision is severable from this part and will not affect the remaining provisions.

**Julie A. Su,**

*Acting Secretary, Department of Labor.*

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