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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: Notice of proposed rulemaking.

SUMMARY: The Department of Labor (Department) proposes to amend 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. As the first comprehensive regulatory review in nearly 40 years, the Department believes that revisions to these regulations are needed to provide greater clarity and enhance their usefulness in the modern economy.

DATES: Interested persons are invited to submit written comments on this notice of proposed rulemaking (NPRM) on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA40, by either of the following methods:

- Electronic Comments: Submit comments through the Federal eRulemaking Portal at https://www.regulations.gov. Follow the instructions for submitting comments.

- Mail: Address written submissions to: Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, DC 20210.

Instructions: Response to this NPRM is voluntary. The Department requests that no business proprietary information, copyrighted information, or personally identifiable information be submitted in response to this NPRM. Commenters submitting file attachments on https://www.regulations.gov are advised that uploading text-recognized documents—*i.e.*, documents in a native file format or documents which have undergone optical character recognition (OCR)—enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration.

Anyone who submits a comment (including duplicate comments) should understand and expect that the comment will become a matter of public record and will be posted without change to https://www.regulations.gov, including any personal information provided. The Wage and Hour Division (WHD) posts comments gathered and submitted by a third-party organization as a group under a single document ID number on https://www.regulations.gov. All comments must be received by 11:59 p.m. on [INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], for consideration in this rulemaking; comments received after the comment period closes will not be considered.

The Department strongly recommends that commenters submit their comments electronically via https://www.regulations.gov to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail. Please submit only one copy of your comments by only one method.

Docket: For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at https://www.regulations.gov.

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). Copies of this proposal may be obtained in alternative formats (Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, large print, braille, audiotape, compact disc, or other accessible format), upon request, by calling (202) 693-0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

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/agencies/whd/contact/local-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, the Department proposes 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." *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 773 (1981) (quoting H. Comm. on Educ. and 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).[1]

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

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

DBA-covered construction projects.[2] *See* 40 U.S.C. 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. 5 U.S.C. app. 1, effective May 24, 1950, 15 FR 3176, 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.[3] Since that time, Congress has expanded the reach of the Davis-Bacon labor standards significantly, adding numerous new Related Act statutes to which these regulations apply. The Davis-Bacon Act and now 71 active Related Acts[4] 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.[5] The Department expects these numbers to continue to grow as Federal and state governments

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[2] The DBA and the Related Acts apply to both prime contracts and subcontracts of any tier thereunder. In this NPRM, 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.
[3] *See* 46 FR 41444 (NPRM); 47 FR 23644 (final rule); 48 FR 19532 (revised final rule).
[4] The Department maintains a list of the Related Acts at [cite website address].
[5] These estimates are discussed below in section V (Executive Order 12866, Regulatory Planning and Review et al.).

seek to address the significant infrastructure needs of the country, including, in particular, the energy and transportation infrastructure necessary to mitigate climate change.[6]

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), which contains a subsection 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

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[6] *See* Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, § 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/

2006 decision, the Department's Administrative Review Board (ARB) identified several survey-related wage determination procedures then in effect as inconsistent with the regulatory language that had resulted from the 1981–1982 rulemaking. *See Mistick Construction,* ARB No. 04-051, 2006 WL 861357, at *5–7 (Mar. 31, 2006).[7] 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.[8] The report also identified dissatisfaction among regulated parties regarding the rigidity of the Department's county-based system for identifying prevailing rates[9], and missing wage rates requiring an overuse of "conformances" for wage rates for specific job classifications. [10] A 2019 report from the

[7] Decisions of the ARB from 1996 to the present are available on the Department's website at https://www.dol.gov/agencies/arb/decisions.
[8] *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/products/gao-11-152.
[9] *Id*. at 23–24.
[10] *Id.* at 32–33.

Department's Office of the Inspector General (OIG) made similar findings regarding out-of-date wage determinations.[11]

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 $213 million in back wages for over 84,000 workers.[12] 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 contracting agency's struggle to rectify the situation led to a delay of 8 years before the workers were paid the wages they were owed.

The Department now 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 this rulemaking, the Department proposes to update and modernize the regulations implementing the DBRA at 29 CFR parts 1, 3, and 5. In some of these revisions, the Department has determined that changes it made in the

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[11] *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) (OIG Report), at 10, available at: https://www.oversight.gov/sites/default/files/oig-reports/04-19-001--Davis%20Bacon.pdf.

[12] 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.

1981–1982 rulemaking were mistaken or ultimately resulted in outcomes that are increasingly in tension with the DBA statute itself. In others, the Department seeks 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. On all the proposed changes, the Department seeks comment and participation from the many stakeholders in the program.

The proposed rule includes several elements targeted at increasing the amount of information available for wage determinations and speeding up the determination process. In a proposal to amend § 1.3 of the regulations, the Department outlines a new methodology to expressly give the 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 would 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 proposal would 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 proposes changes, in § 1.2, to the definition of "prevailing wage," and, in § 1.7, to the scope of data considered to identify the prevailing wage in a given area. To address the overuse of weighted average rates, the Department proposes to

return to the definition of "prevailing wage" in § 1.2 that it used from 1935 to 1983.[13] Currently, a single 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 proposes to return 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 proposes to return 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 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.

Proposed 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. The proposed revisions would create 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 should reduce the need for conformances for classifications for which conformances are often required.

[13] The 1981–1982 rulemaking went into effect on April 29, 1983. 48 FR 19532.

The Department also proposes to revise § 1.6(c)(1) to provide a mechanism to regularly update certain non-collectively bargained prevailing wage rates based on the Bureau of Labor Statistics Employment Cost Index.[14] 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 seeks to strengthen enforcement in several critical ways. The proposed rule seeks to address 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 proposes to designate 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 proposal is an extension of the retroactive modification procedures that were put into effect in § 1.6 by the 1981–1982 rulemaking, and it promises to 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 proposes to include new anti-retaliation provisions in the Davis-Bacon contract clauses in new paragraphs at §§ 5.5(a)(11) (DBRA) and 5.5(b)(5) (Contract Work Hours and Safety Standards Act), and in a new subsection of part 5 at § 5.18. The new language is intended to ensure 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.

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[14] Available at: https://www.bls.gov/news.release/eci.toc.htm.

Finally, to reinforce the remedies available when violations are discovered, the Department proposes to clarify and strengthen the cross-withholding procedure for recovering back wages. The proposal does so by including new language in the withholding contract clauses at §§ 5.5(a)(2) (DBRA) and 5.5(b)(3) (Contract Work Hours and Safety Standards Act) to clarify that cross-withholding may be accomplished on contracts held by agencies other than the agency that awarded the contract. The proposal also seeks to create 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 proposed revisions include, as well, 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 of Labor 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 prohibited 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 the Contract Work Hours and Safety Standards Act, which, as amended, requires an overtime payment of additional half-time for hours worked over forty in the workweek by laborers and mechanics, including watchmen and guards, on federal contracts or federally assisted contracts containing federal prevailing wage standards. *See* 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 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, Pub. L. 88-349, 78 Stat 238.

Congress has delegated broad rulemaking authority under the DBRA to the Department of Labor. 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);

definition applies to both prime contractors and subcontractors. Finally, the proposed definition of "subcontractor" also clarifies that the term does not include laborers or mechanics for whom a prevailing wage must be paid. As discussed below, and as Congress expressly indicated, the requirement to pay a prevailing wage to ordinary laborers and mechanics cannot be evaded by characterizing such workers as "owner operators" or "subcontractors." *See* 40 U.S.C. 3142(c)(1) (requiring 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").

(E) Apprentice and helper

The Department proposes 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 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 proposes 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.

Surveying revisions begin here

(F) Laborer or mechanic

The Department proposes 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."[79] The Department does not propose any additional substantive changes to this definition.

However, because the Department frequently receives questions pertaining to the application of the definition of "laborer or mechanic"—and thus the application the Davis-Bacon labor standards—to members of survey crews, the Department provides the following information to clarify when survey crew members are laborers or mechanics under the existing definition of that term.

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.[80] Whether or not a specific survey crew member is covered by these standards is a question or 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

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[79] The proposal addressing trainees is discussed in greater detail below in section III.B.3.iii.(C) ("29 CFR 5.5(a)(4) Apprentices.").

[80] *See, e.g.*, AAM 212 (Mar. 22, 2013). While AAM 212 was rescinded to allow the Department to seek a broader appreciation of the coverage issue it addressed 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).

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.

The Department seeks 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.

(G) Site of the work and related provisions

The Department proposes 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.

(1) Current statutory and regulatory provisions related to site of the work

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