

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 Acts⁴ 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

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

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 rates⁹, 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

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.

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);

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. 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 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.¹⁵

¹⁵ *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 (NPRM Part 1); 44 FR 77080 (NPRM part 5); 46 FR 4306 (final rule part 1); 46 FR 4380 (final rule part 5). That 1981 final rule, however, was delayed and subsequently replaced by the 1981–1982 rulemaking. The 1982 final rule was delayed by litigation and re-published with amendments in 1983. 48 FR 19532 (Apr. 29, 1983).

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), the Department has not engaged in a comprehensive review and revision since the 1981–1982 rulemaking.

B. Overview of the Davis-Bacon program

The Wage and Hour Division (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 that is covered by the Related Acts to state and local governments and other funding recipients. The state and local governmental agencies and authorities 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, *see* 29 CFR 1.1–1.7, and its procedures are described in guidance documents such as the “Davis-Bacon Construction Wage Determinations Manual of Operations” (1986) (Manual of Operations) and “Prevailing Wage Resource Book” (2015) (PWRB).¹⁶ 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

¹⁶ The Manual of Operations is a 1986 guidance document that is still used internally for reference within WHD. The Prevailing Wage Resource Book 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>.

to the Department's regulations, this process is also guided by parallel regulations in part 22 of the Federal Acquisition Regulation (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 Handbook 1344.1, Federal Labor Standards Requirements in Housing and Urban Development Programs (2013).¹⁷

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 provides periodic guidance on this process, as well as other aspects of the DBRA program, to contracting agencies and other interested parties, particularly through All Agency Memoranda (AAMs) and ruling letters. In addition, the Department maintains a guidance document, the Field Operations Handbook (FOH), to provide external and internal guidance for the regulated community and for WHD investigators and staff on contract administration and enforcement policies.¹⁸

¹⁷ Available at: <https://www.hud.gov/sites/dfiles/OCHCO/documents/Work-Schedule-Request.pdf>

¹⁸ The Field Operations Handbook 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>.

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)(1), 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 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. *See* 29 CFR 5.12.

Where WHD conducts an investigation and finds that violations have occurred, it will notify the affected prime contractor and subcontractors of the findings of the investigation—including any determination that workers are owed 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 Administrative Review Board (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 in federal district court. *See* 5 U.S.C. 702, 704.¹⁹

III. Discussion of Proposed Rule

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 of Labor

¹⁹ In addition to reviewing liability determinations and debarment, the ARB and the courts also have jurisdiction 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.

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 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).

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. 5 U.S.C. app. 1.

The Secretary has delegated authority to promulgate these regulations to the Administrator of the WHD 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 proposed rule

1. 29 CFR Part 1

The procedural rules providing for the payment of minimum wages, including fringe benefits, 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 making and applying such determinations of prevailing wage rates and fringe benefits.

i. Section 1.1 purpose and scope

The Department proposes 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 proposes 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 proposes to revise § 1.1 to reflect the removal of Appendix A of part 1, as discussed further below. The Department also proposes to add new paragraph (a)(1) to reference the WHD website (<https://www.dol.gov/agencies/whd/government-contracts>) 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.

ii. Section 1.2 Definitions

(A) Prevailing wage

The Department proposes 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 § 2 (1935); 47 FR 23644.²⁰ This three-step 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 is 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.”²¹

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 rule. *See* 47 FR 23644. The new process required only two steps: first identifying if there was a single 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.

²⁰ Implemented Apr. 29, 1983. *See* 48 FR 19532.

²¹ *Administration of the Davis Bacon Act: Hearings before the Spec. Subcomm. of Lab. of the H. Comm. on Educ. and Lab.*, 87th Cong. 811–12 (1962) (testimony of Charles Donahue, Solicitor of Labor).

In eliminating the 30-percent rule, 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.²² 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* 5 Op. O.L.C. at 176–77.²³

²² *See, e.g.*, Act of Mar. 23, 1941, ch. 26, 55 Stat. 53 (1941) (applying the Act to alternative contract types); Contract Work Hours and Safety Standards Act of 1962, Pub. L. No. 87-581, 76 Stat. 357 (1962) (requiring payment of overtime on contracts covered by the Act); Act of July 2, 1964, Pub. L. No. 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).

²³ *See* note 1, *supra*.

In the 1982 final rule, when the Department eliminated the 30-percent rule, 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 the 30-percent rule was “inflationary” and gave “undue weight to collectively bargained rates.” 47 FR 23644–45.

Now, however, after reviewing the development of the Davis-Bacon Act program since the 1981–1982 rulemaking, the Department concludes that eliminating the 30-percent rule 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 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 CBAs that represented a predominant wage rate in the locality.²⁴ The Department estimates that prior to the 1982 final rule, as low as 15 percent of classification rates across all wage determinations were based on

²⁴ *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).

averages. After the 1982 rule was implemented, the use of averages may have initially increased to approximately 26 percent of all wage determinations.²⁵

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 17 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 64 percent of the observed classification determinations in this recent time period.²⁶

The Department believes that such an overuse of weighted averages is inconsistent with both the text and the purpose of the Act. It 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

²⁵ See *Oversight Hearing on the Davis-Bacon Act, Before the Subcomm. on Lab. Standards of the H. Comm. on Educ. and 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. Morrall 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.

²⁶ See below section V (Executive Order 12866, Regulatory Planning and Review et al.).

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 inconsistent 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.²⁷

To address the increasing tension between the current methodology and the purpose and definition of “prevailing,” the Department proposes to return to the original three-step process. The Department expects that re-introducing the 30-percent rule will reduce the use of average rates roughly by half—from 63 percent to 31 percent. The data

²⁷ 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. Elec. Contractors Ass’n*, ARB No. 03-020, 2004 WL 1261216, at *8 (May 28, 2004).

from the regulatory impact analysis included with this NPRM below in section V suggests that returning to the three-step process will continue to result in 36 percent of prevailing wage rates based on the majority rule, with the balance of 33 percent based on the 30-percent rule, and 31 percent based on the weighted average.

This estimated distribution illustrates why the Department is no longer persuaded, as it stated in the 1981 NPRM, that the majority rule is more appropriate than the three-step process (including the 30-percent rule) because the 30-percent rule “ignores the rate paid to up to 70 percent of the workers.” *See* 46 FR 41444.²⁸ That characterization ignores that the first step in the three-step process is still to adopt the majority rate if there is one. Under both the three-step process and the current majority 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 majority and the three-step methodologies 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

²⁸ The 30-percent rule can only be characterized as “ignoring” rates because it is a rule that applies a mathematical “mode,” in which the only relevant value is the value of the number that appears most frequently—instead of a mean (average), in which the values of all the numbers are averaged together. Both the 30-percent rule and the majority rule are modal rules in which the values of the non-prevailing wage rates do not factor into the final analysis.

percentage of workers. In such circumstances, the Department believes that a wage rate paid to between 30 and 50 percent of workers is clearly more of a “prevailing” wage rate than an average.

The Department has also considered the other explanations it provided in 1982 for eliminating the 30-percent rule, including any possible upward pressure on wages or prices and a perceived “undue weight” given to collectively bargained rates. These explanations are no longer persuasive for two fundamental reasons. First, the concerns appear to be unrelated to the text of the statute, and, if anything, contrary to its legislative purpose. Second, the Department’s estimates of the effects of a return to the 30-percent rule suggest that the concerns are misplaced.

The concerns about inflation at the time of the 1982 rule were based in part on a criticism of the Act itself.²⁹ A fundamental purpose of the Davis-Bacon Act was to limit low-bid contractors from depressing local wage rates. *See* 5 U.S. O.L.C. at 176.³⁰ This purpose necessarily contemplates an increase in wage rates over what could otherwise be

²⁹ 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 Act, Pub. L. No. 101-625, Sec. 811(j)(6), 104 Stat. 4329 (1990); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, Sec. 491(d), 121 Stat. 1651 (2007); American Recovery and Reinvestment Act, Pub. L. No. 111-5, Sec. 1606, 123 Stat. 303 (2009); Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, Sec. 9006(b), 134 Stat. 1182 (2021).

³⁰ *See* note 1, *supra*.

paid without the enactment of the statute. Moreover, the effect of maintaining such a prevailing rate can just as easily be seen as guarding against deflationary effects of the use of low-wage contractors—instead of resulting in inflation. Staff of the H. Subcomm. on Lab., 88th Cong., Administration of the Davis-Bacon Act, Rep. of the Subcomm. on Lab. of the Comm. on Educ. and Lab. (Comm. Print 1963) (1963 House Committee Report), at 2–3.

The 1982 final rule contained an economic analysis that suggested that the elimination of the 30-percent rule could save \$120 million (in 1982 dollars) in construction costs per year through reduced contract costs. However, the Department does not believe that this 40-year old analysis is reliable or accurate.³¹ For example, the 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. 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. Even if the Department were to rely on this analysis as an accurate

³¹ The Department has not attempted to assess the relative accuracy of this 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.

measure of impact, such savings (adjusted to 2019 dollars) would only amount to approximately two-tenths of a percent of total estimated covered contract costs.

The Department also does not believe that the proposed reversion to the 30-percent rule would have any noticeable impact on overall national inflation numbers.³² An 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. Under the 30-percent rule, some prevailing wage determinations may increase and others decrease, but the magnitude of these changes will, overall, be negligible. Additionally, recent research shows that wage increases, particularly at the lower end of the distribution, do not cause significant economy-wide price increases.³³ The Department thus does not believe that any limited net wage increase for the approximately 1.2 million covered workers (less than 1 percent of the total national

³² The 1979 GAO report about the DBA noted that “minimum wage rates [such as the Davis-Bacon Act prevailing wage requirements] tend to have an inflationary effect on . . . the national economy as a whole.” 1979 GAO Report, HRD-79-18 at 76, 83–84.

³³ 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/; Nguyen Viet Cuong, Do Minimum Wage Increases Cause 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; 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>.

workforce) will significantly increase prices or have any appreciable effect on the macro economy.

Further, since the DBA legislates that minimum wages must be paid to workers on construction projects, the effect of such requirement is not a permissible basis for departing from the longstanding interpretation of the plain meaning of the term “prevailing.” 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 federal government.” *Bldg. & Constr. Trades Dep’t, AFL-CIO v. Donovan*, 543 F. Supp. 1282, 1290 (D.D.C. 1982). Congress has considered cost concerns, and enacted and expanded the DBA notwithstanding them. *Id.* at 1290–91; 1963 House Committee Report at 2–3; Reorganization Plan No. 14 of 1950, 5 U.S.C. app. 1.³⁴ 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, the Department does not believe such reasoning now provides either a factual or legal basis to maintain the current majority rule.

The Department is also no longer persuaded that the 30-percent rule gives undue weight to collectively bargained rates. The underlying concern at the time was that identification of a single 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

³⁴ 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.” 5 U.S.C. app. 1.

plain meaning of the statutory term “prevailing,” which, as both the Department and OLC have concluded, refers to a predominant single wage rate, or a modal wage rate. The same weight is given to collectively bargained rates whether the Department chooses a 50-percent or 30-percent threshold. The Department accordingly now understands the concerns voiced at the time to be concerns about the potential outcome (of more wage determinations based on union rates) instead of concerns about any actual weight given to union 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”).

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. Specifically, in the V.D. illustration, Department estimates that the use of single wage rates that are not the product of collective bargaining agreements would increase from 12 percent to 36 percent of all wage rates—an overall increase of 24 percentage points. The use of single wage

rates that are based on collective bargaining agreements will increase from 25 percent to 34 percent—an overall increase of 9 percentage points.³⁵

The Department has 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 meaning of the term “prevailing.” *Accord* 47 FR 23645. The Department is therefore proposing to return to the three-step process and the 30-percent rule, and is not proposing as alternatives the use of either the median or mean as the primary or sole methods for making wage determinations.

(1) Former subsection § 1.2(a)(2)

In a non-substantive change, the Department proposes 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. Under the proposed rule, that language

³⁵ See below section V (Executive Order 12866, Regulatory Planning and Review et al.). 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. This would be largely unchanged under the proposed reversion to the 3-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 collective bargaining agreements 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.

(altered to update the cross-reference to the definition of prevailing wage) would now appear in § 1.3.

(2) Variable rates that are functionally equivalent

The Department also proposes 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 single 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 Construction*. 2006 WL 861357.

Historically, the Department has considered wage rates included in survey data 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 collective bargaining agreement (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 to be the “same wage” rate for purposes of calculating whether that wage rate prevailed under the majority rule that is discussed in the section above. 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 those rates as compensating workers for the burden of traveling or staying away from home and did not reflect 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. Wages for workers working under the same CBA could be reported differently on a survey based on 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. 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 the variable rates to use as the prevailing rate. In the case of rates that are variable because of an escalator-clause issue, it uses the most current rate under the collective bargaining agreement. Similarly, where the Department identified combinations of hourly and fringe rates as the “same,” the Department 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 has limited some of these practices. *See Mistick Constr.*, 2006 WL 861357, at *5–7. The decision affirmed the Administrator’s continued use of the escalator-clause rule, but found the use of the same combination of basic hourly and fringe rates did not amount to

exactly the “same” wage and thus violated the use of the term “same wage” in § 1.2(a). The ARB also viewed the flexibility shown to collective bargaining agreements 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. The ARB held that the Administrator could not consider variable rates under a collective bargaining agreement to be the “same wage” under § 1.2(a) as written—and therefore, if there was no strictly “same wage” that would prevail under the majority rule, the Administrator would have to use the fallback weighted average on the wage determination.

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 above, however, both the Department and OLC have agreed that averages should generally only be used as a last resort. 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 (emphasis in original).³⁶ In discussing those cases, OLC quoted from the 1963 House Report summarizing extensive congressional oversight hearings of the Act. 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.*³⁷ To the extent that an inflexible, “to the penny” approach to determining if wage data reflects the “same wage” promotes the use of average rates even when wage rate variations are exceedingly slight and are based on practices 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.

For these reasons, and particularly because a mechanical, “to the penny” approach ultimately undermines rather than promotes the determination of actual prevailing wage rates, the Department believes that it is consistent with the language and purpose of the statute to treat slight variations in wages as the same rate in appropriate circumstances.

As reflected in *Mistick*, the existing regulation does not clearly authorize the use of functionally equivalent wages to determine the local prevailing wage. *See* 2006 WL 861357, at *5–7. Accordingly, the Department proposes 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

³⁶ *See* note 1, *supra*.

³⁷ *See* 1963 House Committee Report, *supra*, at 7–8.

equivalent and the variation can be explained by a CBA or the written policy of a contractor.

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

The Department welcomes comments on all aspects of this proposal regarding proposed changes to the definition of “prevailing wage” in § 1.2 and to the regulation governing the obtaining and compiling of wage rate information in § 1.3.

(B) Area

The core definition of “area” in § 1.2 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 rule’s geography-based definition of area 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.”³⁸ 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 71-4, 1971 WL 17609, at *3–4 (Dec. 7, 1971).³⁹

The Department proposes to revise the definition of area to address projects that span multiple counties and to address highway projects specifically. 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 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*, 1971 WL 17609.

Critics of this policy have pointed out that workers are very often hired and paid a single wage rate for a project, and—unless there are different city or county minimum

³⁸ *See, e.g.*, National Housing Act, 12 U.S.C. 1715c(a) (locality); Housing and Community Development Act of 1974, 42 U.S.C. 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. 113(a) (immediate locality).

³⁹ The Wage Appeals Board (WAB) was the Department’s administrative appellate entity from 1964 until 1996, when it was eliminated and the Administrative Review Board was created and provided jurisdiction over appeals from decisions of the Administrator and the Department’s Administrative Law Judges (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.

wage laws—workers’ pay rates often do 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 requiring different wage rates for the same workers on the same multi-county project is “illogical.” *See* 2011 GAO Report at 24.⁴⁰

While requiring different prevailing wage rates for work by the same worker on the same project may be consistent with the current regulations, the DBA and Related Act statutes themselves do not address multi-jurisdictional projects. Issuing and applying a single project wage determination for such projects is not inconsistent with the text of the DBA. Nor is it inconsistent 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.

Accordingly, the Department proposes adding language in the definition of “area” in § 1.2 that would 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. The Department solicits 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 such a project wage determination would be appropriate.

The Department’s other proposed change to the definition of “area” in § 1.2 is to allow the use of State highway districts or similar transportation subdivisions as the

⁴⁰ *See* note 8, *supra*.

relevant wage determination area for highway projects. Although there is significant variation between states, most states maintain civil subdivisions responsible for certain aspects of transportation planning, financing, and maintenance.⁴¹ These districts tend to be organized within State departments of transportation or otherwise through State and County governments.

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 state").

In identifying the appropriate geographic area of a wage determination, the Federal-Aid Highway Act of 1956 (FAHA), one of the Related Acts, uses the term "immediate locality" instead of "civil subdivision." 23 U.S.C. 113. However, 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 Department also notes that Congress, in enacting the FAHA, envisioned that the federal aid would be provided in a manner that sought to complement and cooperate

⁴¹ *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: https://www.financingtransportation.org/pdf/50_state_review_nov16.pdf.

with State departments of transportation. *See Frank Bros. v. Wisconsin Dep't of Transp.*, 409 F.3d 880, 887–89 (7th Cir. 2005). As State highway or transportation districts often plan, develop, and oversee federally financed highway projects, the provision of a single wage determination for each district would simplify the procedure for incorporating federal financing into these projects.

As such, the Department proposes to authorize WHD to adopt State highway districts as the geographic area for determining prevailing wages on highway projects, where appropriate.

(C) Type of Construction (or Construction Type)

The Department proposes 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 provides 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 does 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 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 would provide additional clarity for these references, particularly for members of the regulated community who might be less familiar with the term.

(D) Other definitions

The Department proposes 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 proposes to revise the definition of “agency” (and add a sub-definition of “federal agency”) to mirror the definition proposed and discussed below in § 5.2. The Department also proposes to add to § 1.2 new defined terms also proposed in parts 3 and 5, including “employed”, “type of construction (or construction type),” and “United States or the District of Columbia.” For further discussion on these proposed terms, see the corresponding discussion in § 3.2 and 5.2 below.

(E) Paragraph designations

The Department is also proposing 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 proposes to make conforming edits throughout parts 1, 3, and 5 in any provisions that currently reference lettered paragraph definitions.

iii. Section 1.3 Obtaining and compiling wage rate information

(A) 29 CFR 1.3(b)

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

(B) 29 CFR 1.3(d)

As part of its effort to modernize the regulations governing the determination of Davis-Bacon prevailing wage rates, the Department is considering whether to revise

§ 1.3(d), regarding 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 is not proposing any specific revisions to § 1.3(d) in this NPRM, but rather is seeking comment on whether this regulatory provision—particularly its limitation on the use of Federal project data in determining wage rates for building and residential construction projects—should be revised.

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.”⁴² 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.”⁴³

With respect to building and residential construction, however, the 1982 final rule concluded that such construction often occurred without Federal financial assistance

⁴² See Final Rule, Procedures for Predetermination of Wage Rates, 47 FR 23644 (May 28, 1982).

⁴³ *Id.*

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.⁴⁴ 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 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.⁴⁵

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 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

⁴⁴ *See Donovan*, 712 F.2d at 620.

⁴⁵ *Id.* at 621–22.

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 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 federally funded 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-county group is insufficient, then WHD includes Federal project data from all the counties in that county group. If both non-federal project and Federal project data for a surrounding-county group is still insufficient to determine a prevailing wage rate, then, for classifications that have been designated as “key” classifications, WHD may expand to a “super group” of counties or even to the statewide level. *See Chesapeake Housing*, 2013 WL 5872049, at *6; PWRB, *Davis-Bacon Surveys*, at 6.⁴⁶ At each stage of data expansion for building and residential wage determinations, WHD first attempts to determine prevailing wages based on non-

⁴⁶ *See* note 16, *supra*.

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 all uses 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 where "there is insufficient wage data to determine the prevailing wages in the absence of such data." 29 CFR 1.3(d). WHD often uses Federal project data in calculating prevailing wage rates applicable to residential construction due to insufficient non-federal project survey data submissions. 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 26.⁴⁷

Notwithstanding the use of Federal project data in calculating prevailing wage rates for building and residential construction, the Department recognizes that some interested parties may believe that § 1.3(d) imposes an absolute barrier to the use of

⁴⁷ See note 8, *supra*.

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 strongly encourages robust participation in Davis-Bacon prevailing wage surveys, including building and residential surveys, and it therefore urges 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. In the absence of such Federal project data, for example, a prevailing wage rate may be calculated at the surrounding-county 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 recognizes that revisions to § 1.3(d) may nonetheless be warranted. Specifically, the Department is interested in 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 the U.S. Department of Housing and Urban Development—it may be appropriate to expand

the amount of Federal project data that is available to use in setting prevailing wage rates for residential construction.

There may also be other specific circumstances that particularly warrant greater use of Federal project data. More generally, if the current 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. Alternatively, § 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 invites comments on these and any other issues regarding the use of Federal project data in developing building and residential wage determinations.

(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 subsection are discussed below in part III.B.1.xii (“xiiFrequently ”), together with proposed changes to § 5.5(a)(1).

(D) 29 CFR 1.3(g)-(j) – Adoption of state/local prevailing wage determinations

The Department proposes 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.

About half of the States, as well as many localities, have their own prevailing wage laws (sometimes called “little” Davis-Bacon laws).⁴⁸ Additionally, a few states have processes for determining prevailing wages in public construction even in the absence of such state laws.⁴⁹ 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 statute and regulation to “consult[]” with “the highway department of the State” in which the work is to be performed, and to “give due regard to the information thus obtained.” 23 U.S.C. 113(b); 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

⁴⁸ 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> (last updated Jan. 2021).

⁴⁹ These states include Iowa, North Dakota, and South Dakota.

areas. According to a 2019 report by the Department’s Office of the Inspector General (OIG), WHD used highway wage determinations from 15 states between fiscal years 2013 and 2017. *See* 2019 OIG Report at 10.⁵⁰

The 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 recommended that WHD “should determine whether it would be statutorily permissible and programmatically appropriate to adopt state 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.

The Department shares OIG’s concern regarding outdated wage rates. Outdated and/or inaccurate wage determinations are inconsistent with the intent of the Davis-Bacon labor standards, which aim to ensure that laborers and mechanics on covered projects are paid locally prevailing wages and fringe benefits. Wage rates that are significantly out-of-date do not reflect this intent and could even have the effect of depressing wages if covered contractors pay no more than an artificially-low prevailing wage rate that has not been adjusted over time to continue to reflect the wages paid to workers in a geographic area. Accordingly, the Department agrees with OIG that, where

⁵⁰ *See* note 11, *supra*.

appropriate, adoption of more current wage determinations made by states and localities would be consistent with the DBA’s purpose. States often conduct wage surveys far more frequently than WHD.⁵¹ Furthermore, if a state or locality is already engaged in efforts to determine prevailing wages—and if the state’s methods are reliable, rigorous, and transparent—similar activities conducted by WHD on a less regular basis can be duplicative and an inefficient use of survey respondents’ efforts and WHD’s scarce resources. Relatedly, states and localities that regularly update their own wage determinations may have ongoing relationships with stakeholders in the relevant geographic areas that facilitate that process. In contrast, WHD may lack similarly strong relationships with those stakeholders given the relative infrequency with which it surveys any given area. Thus, many states and localities may be in a position to ensure greater participation in wage surveys, which can improve wage survey accuracy.

The Department believes that a regulatory revision would best ensure that WHD can incorporate state and local wage determinations where 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

⁵¹ Some states, such as Minnesota, conduct surveys annually. *See* Prevailing Wage: Annual Statewide Survey, Minn. Dep’t of Labor & Indus., <https://www.dli.mn.gov/business/employment-practices/prevailing-wage-annual-statewide-survey> (last visited Nov. 17, 2021). Others use a different frequency; for example, Nevada conducts a survey every 2 years. *See* Nevada’s 2021-2023 Prevailing Wage Survey Released, Nev. Dep’t of Bus. & Indus., https://business.nv.gov/News_Media/Press_Releases/2021/Labor_Commissioner/Nevada%E2%80%99s_2021-2023_Prevailing_Wage_Survey_Released/ (last visited Nov. 17, 2021).

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.⁵² 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 is proposing 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.

Additionally, the Department’s regulations apply numerous requirements and constraints to WHD’s own wage determinations, such as those concerning geographic scope, *see* § 1.7, and the type of project data that may be used, *see* § 1.3(d). Like the definition of prevailing wage, analogous requirements under state and local prevailing wage laws vary. Although, as noted above, the Department’s regulations permit WHD to “consider” state and local determinations and to give “due regard” to state rates for

⁵² For example, Washington uses a definition similar to the Department’s current majority rule. *See* Wash. Rev. Code § 39.12.010(1) (2021). Wyoming, in contrast, uses a method that mirrors the three-step process in this proposed rule. Wyo. Stat. Ann. §§ 27-4-401–413 (2021). Other states use CBA rates as a starting point. N.M. Stat. Ann. §§ 13-4-10–17 (2021); N.M. Code R. § 11.1.2.12 (2021); N.Y. Lab. Law §§ 220–224 (McKinney 2021).

highway construction, the current regulations do not specifically address whether WHD may adopt state or local rates derived using methods and requirements that differ from those used by WHD.

Accordingly, and in light of the advantages of adopting state and local rates discussed above, the Department is proposing to add a new paragraph, § 1.3(g), which would explicitly permit WHD to adopt prevailing wage rates set by State or local officials, even where the methods used to derive such rates, including the definition of the prevailing wage, may differ in some respects from the methods the Administrator uses under the DBA and the regulations in 29 CFR part 1. The proposal would permit WHD to adopt such wage rates provided that the Administrator, after reviewing the rate and the processes used to derive the rate, concludes that they meet certain listed criteria. The criteria, which are explained further below, 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 adopt state or local rates.

Importantly, the proposed rule requires the Administrator to make an affirmative determination that the enumerated criteria 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. This makes clear that if the proposed rule is finalized, 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*, 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. 6,516 (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 proposing 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) (agency’s use of “imperfect[]” data set was permissible under the Administrative Procedure Act).

The Department is proposing to permit the adoption of state and local rates for all types of construction. The FHWA’s 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.”). In sum, the FHWA’s requirement sets a floor for reliance on state data for highway construction, not a ceiling, and does not foreclose reliance on state or local data for other types of construction.

The criteria the Department proposes for the adoption of state or local rates, which are included in proposed new paragraph § 1.3(h), are as follows:

First, 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 requirement ensures that WHD will not adopt a prevailing wage rate where the process to set the rate artificially 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 use of the language “survey or other process” in the proposed regulatory text is 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.⁵³

Second, the State or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, each of which can be calculated separately. Thus, under the proposed rule, WHD must be able to confirm during its review process that both figures are prevailing for the relevant classification(s), and must be able to 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 in order to determine compliance with the Contract Work Hours and Safety Standards Act (CWHSSA) and the Fair Labor Standards Act (FLSA).

Third, the State or local government must classify laborers and mechanics in a manner that is recognized within the field of construction. The Department recognizes

⁵³ For example, a few states determine prevailing wage rates through stakeholder negotiations that typically involve labor and employer groups. The proposed rule does not foreclose acceptance of rates set using such a process providing that the process is generally open to full participation by all interested parties and that the other required criteria are met.

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. Indeed, unlike in the case of the Service Contract Act (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. 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 State or local government's criteria for setting prevailing wage rates must be substantially similar to those the Administrator uses in making wage determinations under 29 CFR part 1. The proposed regulation provides 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 their corresponding wage rate(s) will be accepted. While the proposed regulation lists the above factors as guidelines, it ultimately directs 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 intends 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).

Proposed § 1.3(g) permits the Administrator to adopt State or local wage rates with or without modification. This is 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. It is anticipated that the Administrator would cooperate with the State or locality to make the appropriate modifications to any wage rates.

The Department also proposes to add a new paragraph § 1.3(i), which would explain that in order for WHD to adopt a State or local government prevailing wage rate, the Administrator must obtain the wage rates and any relevant supporting documentation and data from the state or local entity, and provides instructions for submission.

Finally, the Department proposes to add a new paragraph § 1.3(j), which would explain that nothing in the additional proposed subsections described above 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 this 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 the proposed additional language is 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. These proposed revisions therefore address the concerns WHD voiced to OIG that the current regulations, and in

particular the definition of prevailing wage as interpreted by the ARB in *Mistick*, could preclude, or at least be in tension with, such an approach.

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 multi-year 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 careful consideration, the Department proposes to remove the language in the regulation that currently allows agencies to submit reports only "to the extent practicable." Instead, as proposed, § 1.4 would require federal agencies to submit the construction reports.

The Department also now proposes 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 as part of the regulations.

The Department also proposes new language requiring federal agencies to include notification of any expected options to extend the terms of current construction contracts. The Department is proposing 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, which will in turn contribute to the effectiveness of the overall Davis-Bacon wage survey program. The Department also proposes 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 proposes 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 proposes 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 proposes deleting the reference to the Interagency Reports Management Program as the requirements of that program were terminated by the General Services Administration (GSA) in 2005. *See* 70 FR 3132 (Jan. 19, 2005).

The Department does not believe that these proposed changes will 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. However, the Department also seeks comment on any alternative methods through which the Department may obtain the information and eliminate the need to require the agency reports.

- v. *Section 1.5 Publication of general wage determinations and procedure for requesting project wage determinations.*

The Department proposes 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 proposes to re-title § 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.

Additionally, the Department proposes 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 proposes to add language to § 1.5(b) to explain circumstances under which an agency 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 discussed above that would permit the issuance of project wage determinations for multi-county 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 proposes 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 e-mail or online submission, as directed by the Administrator. Additionally, consistent with the Department’s current practice, the Department proposes 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 proposes 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.

Finally, the Department proposes 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 proposes 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).

vi. Section 1.6 Use and effectiveness of wage determinations.

(A) Organizational, technical and clarifying revisions

The Department proposes to reorganize, rephrase, and/or re-number several regulatory provisions and text in § 1.6. These proposed revisions include adding headings to paragraphs and subparagraphs for clarity; changing the order of some of the paragraphs and subparagraphs 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 re-issued entirely (referred to in the current regulatory text as a “supersedes” wage determination), such as after a new wage survey; consolidating certain subsections 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 also proposes minor revisions to clarify that there is only one appropriate use for wage determinations that are no longer current—which are referred to in current regulatory text as “archived” wage determinations, and the Department now proposes to describe as “inactive” to conform to the terminology currently used on the System for Award Management (SAM.gov). That permissible circumstance is 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.

The Department also proposes that agencies should notify the Administrator prior to engaging in incorporation of an inactive wage determination, and that agencies may not incorporate the inactive wage determination if the Administrator instructs otherwise.

While the current regulation requires the Department to “approv[e]” the use of an inactive wage determination, the proposed change permits 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 is intended to ensure that contracting agencies incorporate omitted wage determinations promptly rather than waiting for approval.

The Department also proposes revisions to § 1.6(b) to clarify when contracting agencies must incorporate multiple wage determinations into a contract. The proposed language states 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 proposes 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 category of construction is substantial. This accords with the Department’s longstanding guidance published in AAM 130 (Mar. 17, 1978) and AAM 131 (July 14, 1978).⁵⁴ The

⁵⁴ 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

Department intends to continue interpreting the meaning of “substantial” in subregulatory guidance.⁵⁵ The Department requests 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 also proposes 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 proposes 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 proposes 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 also proposes 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

which they are closely related in function,” and construction is incidental to the overall project. AAM 130, p. 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, 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, p. 2.

⁵⁵ Most recently, on December 14, 2020, the Administrator issued AAM 236, 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 percent of the total project costs,” but that WHD will consider “exceptional situations” on a case-by-case basis. AAM 236, pp. 1–2.

precluding the Administrator from considering other factors 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” to determine the proper category of construction. AAM 130, at 2; *see also* AAM 131, at 1 (“area 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 regulatory reference to giving “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 revised language would resolve this perceived inconsistency and would streamline determinations 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).

In § 1.6(e), the Department proposes 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 Administrative Review Board decision, the wage determination may not be used for the contract, without regard to 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.

In § 1.6(g), the Department proposes 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 proposes 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 proposes 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 reflects 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.

(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 a wage determination to be applied to construction work to the extent that such a requirement does not cause undue disruption to the contracting process. *See* 47 FR 23644, 23646 (May 28, 1982); *United States 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 Department proposes to add language to § 1.6(a) to state this affirmative principle.

The Department also proposes to add a new subsection, § 1.6(c)(2)(iii), to clarify two circumstances where this general principle does not apply. First, the Department proposes to explain that the most recent version of any applicable wage determination(s) must be incorporated when a contract or order is changed to include additional, substantial construction, alteration, and/or repair work not within the scope of work of the original contract or order—or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract. This proposed change is consistent with the Department’s guidance, case law, and historical practice, under which such modifications are considered new contracts. *See United States Army*, 1997 WL 399373, at *6 (noting that DOL 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 (Dec. 9, 1992) (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”). 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, modern contracting methods 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.⁵⁶ Examples of such contracts would include, but are not limited to: a multi-year 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;⁵⁷ or a schedule contract or blanket purchase agreement 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 is contrary to the text and purpose of the DBA because it does not sufficiently ensure that workers are paid prevailing wages. Additionally, in the Department's experience, agencies are sometimes

⁵⁶ Depending on the circumstances, these types of contracts may be principally for services and therefore subject to the SCA, but contain substantial segregable work that is covered by the DBA. *See* 29 CFR 4.116(c)(2).

⁵⁷ The Department of Defense, for example, enters into such arrangements pursuant to the Military Housing Privatization Initiative, 10 U.S.C. 2871, *et seq.*

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 proposes 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 is 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 multi-year contract subject to annual fiscal appropriations of the Congress.” *See* 29 CFR 4.4(a)(1)(v). Additionally, consistent with the discussion above, if an option is exercised for one of these types of contracts, the most recent version of any wage determination(s) would 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. When any construction work under such a contract is obligated, the most up-to-date wage determination(s) incorporated into the underlying contract must be included in each task order, purchase order, or any other method used to direct performance. Once an applicable wage determination revision is included in such

an order, that revision would generally be applicable until the construction items originally called for by that order are completed, even if the completion of that work extends beyond the twelve-month period following the most recent anniversary date of the underlying contract. By proposing this revision, the Department seeks to ensure that workers are being paid prevailing wages 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 DBA. The Department has also included language noting that contracting and ordering agencies remain responsible for ensuring that the applicable updated wage determination(s) is included in task orders, purchase orders, or other similar contract instruments that are issued under the master contract.

(C) 29 CFR 1.6(c)(1) – Periodic adjustments

The Department proposes 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. 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 on the Davis-Bacon wage determinations that it issues: (1) modal rates (under the current majority rule, wage rates that are paid to a majority of workers in a particular classification), and (2) weighted

average rates, which are published whenever the wage data received by 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 majority rule, modal majority wage rates typically 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 Construction*, 2006 WL 861357, at *7 n.4.⁵⁸ 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. This proposal would expand WHD’s practice of updating collectively bargained rates between surveys to include updating non-collectively bargained rates.

While the goal of WHD is to conduct surveys in each area every 3 years, 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

⁵⁸ 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.

GAO Report found that, as of 2010, while 36 percent of “nonunion-prevailing rates”⁵⁹ were 3 years old or less, almost 46 percent of these rates were 10 or more years old. 2011 GAO Report at 18.⁶⁰ 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 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)).

This issue is one that program stakeholders raised with the GAO. According to several union and contractor officials interviewed in the 2011 report, the age of the Davis-Bacon “nonunion-prevailing rates” means they often do not reflect actual prevailing wages. 2011 GAO Report at 18.⁶¹ As a result, the officials 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.” *Id.* Regularly updating these rates would alleviate this situation and better protect workers’ wage rates. The Department anticipates

⁵⁹ “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.

⁶⁰ *See* note 8, *supra*.

⁶¹ *See* note 8, *supra*.

that updated rates would also better reflect construction industry compensation in communities where federally funded construction is occurring.

This 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 it 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. In this rule, the Department proposes to extend this practice to non-collectively bargained rates based on ECI data. The Department believes that “chang[ed] circumstances”—including an increase in 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. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 780 (1968) (Court “unwilling to prohibit administrative action imperative for the achievement of an agency’s ultimate purposes” absent “compelling evidence that such was Congress’ intention”).

This proposal is consistent with the Department’s broad authority under the statute to “establish the method to be used” to determine DBA prevailing wage rates. *Donovan*, 712 F.2d at 63. The Department believes 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 *American Trucking Ass’n v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967)).

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 rates) on covered construction projects that are less than current wages for similar work prevailing in the private sector. Regularly increasing non-collectively bargained weighted average and prevailing rates that are more than 3 years old would be consistent with the DBA’s purpose of protecting local wage standards.

As proposed, the periodic adjustment provision would help effectuate the DBA’s purpose by updating significantly out-of-date non-collectively bargained wage rates, including thousands of wage rates that were published decades ago, that have not been updated since, and that therefore likely have fallen behind currently prevailing local rates. As of September 30, 2018, over 7,100 non-collectively bargained wage rates, or 5.3 percent of the 134,738 total unique published rates at that time, had not been updated in 11 to 40 years. *See* 2019 OIG Report at 3, 5. Updating such out-of-date construction wages would better align with the DBRA’s main objective.

Tethering the proposed periodic updates to existing non-collectively bargained prevailing wage rates is intended to keep such rates more current in the interim period between surveys. 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 Employment Cost Index changes from 2001 to 2020).

Table A. Current Population Survey (CPS) Wage Growth by Union Status - Construction

YEAR	MEDIAN WEEKLY EARNINGS			
	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%
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, Bureau of Labor Statistics, <https://www.bls.gov/cps/cpsaat43.htm> (last modified Jan. 22, 2021).

Note: Limited to workers in the construction industry.

Table B. Employment Cost Index (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 % CHANGE
2001	4.5
2002	3.5
2003	3.9
2004	4.5
2005	3.1
2006	3.5
2007	3.5
2008	3.7
2009	1.7
2010	2.0
2011	1.6
2012	1.5
2013	1.8
2014	2.0
2015	2.0
2016	2.4

2017	2.7
2018	2.3
2019	2.3
2020	2.4

Source: Bureau of Labor Statistics, <https://www.bls.gov/web/eci/eci-constant-real-dollar.pdf>.

(2) *Periodic adjustment proposal*

This proposal seeks to update non-collectively bargained 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 benefits. Specifically, the Department proposes to add language to § 1.6(c)(1) to expressly permit adjustments to non-collectively bargained rates on general wage determinations based on U.S. Bureau of Labor Statistics (BLS) Employment Cost Index (ECI) data or its successor data. The Department’s proposal provides 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 rates (wages and fringe benefits) would be adjusted from the date the rate was originally published and brought up to their present value. Going forward under the proposed 30-percent rule, any non-collectively bargained prevailing or weighted average rates published after this rule became effective would be updated if they were not re-surveyed within 3 years after publication. The Department anticipates implementing this new regulatory provision by issuing general wage determination modifications.

The Department believes that ECI data is appropriate for these proposed rate adjustments because the ECI tracks both wages and benefits, and may be used as a proxy for construction compensation changes over time. Therefore, the Department proposes 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 rates (both base hourly and fringe benefit rates) published in 2001 or after.⁶²

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

The Department seeks comments on this proposal, and invites comments on alternative data sources to adjust non-collectively bargained rates. The Department considered proposing to use the Consumer Price Index (CPI) but considers this data source to be a less appropriate index to use to update non-collectively bargained rates

⁶² Because this particular index is unavailable prior to 2001, the Department proposes 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 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.

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 invites comments on use of the CPI to adjust non-collectively bargained rates.

(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 subsection are discussed below in part 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 existing regulations in § 1.7 address two related concepts. The first is the level of geographic aggregation of wage data that should be the default for making a wage determination. The second is how 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. The Department is considering whether to update the language of § 1.7 to more clearly describe WHD’s process for expanding the geographic scope of survey data, and whether to modify the regulations by eliminating the current bar on mixing wage data from “metropolitan” and “rural” counties when the geographic scope is expanded.

(A) Background

With regard to the first concept addressed in § 1.7, the default level of geographic aggregation, the DBA specifies that the relevant geographic area for determining the

prevailing wage is the “civil subdivision of the State” where the contract is performed. 40 U.S.C. 3142(b). For many decades now, the Secretary has used the county as the default civil subdivision for making a wage determination. The Department codified this procedure in the 1981–1982 rulemaking in § 1.7(a), in which it stated that the relevant area for a wage determination will “normally be the county.” 29 CFR 1.7(a); *see* 47 FR 23644, 23647 (May 28, 1982).

The use of the county as the default “area” means that in making a wage determination the Administrator first considers the wage survey data WHD has received from projects of a “similar character” in a given county. *See* 40 U.S.C. 3142(b). If there is sufficient county-level data for a “corresponding class[]” of covered workers (e.g. laborers, painters, etc.) working on those projects, the Administrator then makes a determination of the prevailing wage rate for that class of workers. *Id.*; 29 CFR 1.7(a). This has a practical corollary for contracting agencies—in order to determine what wages apply to a given construction project, the agency needs to identify the county (or counties) in which the project will be constructed and obtain the wage determination for the correct type of construction for that county (or counties) from SAM.gov.

The second concept currently addressed in § 1.7 is the procedure that WHD follows when it does not receive sufficient survey wage data at the county level to determine a prevailing wage rate for a given classification of workers. This process is described in detail in the 2013 *Chesapeake Housing* ARB decision. 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*, 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 called a “supergroup,” and thereafter uses data at a statewide level. *See* 29 CFR 1.7(c); *Chesapeake Housing*, 2013 WL 5872049, at *2–3.⁶³ Currently, WHD identifies county groupings by using metropolitan statistical areas (MSAs) and other related designations from the Office of Management and Budget (OMB). *See* 75 FR 37246 (June 28, 2010).

The current regulations do not define the term “surrounding counties” that delineates the initial county grouping level. However, the provision at § 1.7(b) that describes “surrounding counties” limits the counties that may be used in this grouping by excluding the use of any data from a “metropolitan” county in any wage determination for a “rural” county, and vice versa. 29 CFR 1.7(b). To be consistent with the existing prohibition at § 1.7(b), WHD’s current practice is to use the OMB designations (discussed above) to identify whether a county is metropolitan or rural.⁶⁴ Under the

⁶³ As discussed above in part III.B.1.iii.(A), for residential and building construction, 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. 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.

⁶⁴ OMB does not specifically identify counties as “rural” and disclaims that its MSA standards “produce an urban-rural classification.” 75 FR 37246, 37246 (June 28, 2010). Nonetheless, because OMB identifies counties that have metropolitan characteristics as part of MSAs, the practice of the WHD Administrator has been to designate counties as rural if they are not within an OMB-designated MSA and metropolitan if they are within an MSA. *See Mistick Construction*, 2006 WL 861357, at *8.

current constraints, such a proxy designation is reasonable, and the practice has been approved by the ARB. *See Mistick Construction*, 2006 WL 861357, at *7–8. Although the language in § 1.7(b) does not apply explicitly to the consideration of data above the surrounding county level, *see* § 1.7(c), the Department’s current procedures do not mix metropolitan and rural county data at any level in the expansion of geographic scope, including even at the statewide level.

(B) Proposals for use of “metropolitan” and “rural” wage data

The current language in § 1.7(b) barring the cross-consideration of metropolitan and rural wage data was added to the Department’s regulations in the 1981–1982 rulemaking. *See* 47 FR 23644 (May 28, 1982). As the Department noted in that rulemaking, the prior practice up until that point had been to allow the Department to look to metropolitan wage rates for nearby rural areas when there was insufficient data from the rural area to determine a prevailing wage rate. *See id.* at 23647. In explaining the change in the longstanding policy, the Department noted commenters had stated that “importing” higher rates from metropolitan areas caused labor disruptions where workers were “unwilling to return to their usual pay scales after the project was completed.” *Id.* The Department stated that a more appropriate alternative would be to use data from rural counties in other parts of the state. *See id.* To effectuate this, it imposed the bar on cross-consideration of rural and metropolitan county data in § 1.7(b).

The Department has received feedback that that this blanket decision did not adequately consider the heterogeneity of commuting patterns and local labor markets between and among counties that may be designated overall as “rural” or “metropolitan.” As noted in the 2011 GAO report, the DBA program has been criticized 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 24.⁶⁵ . OMB itself notes that “[c]ounties included in Metropolitan and Micropolitan Statistical Areas and many other counties may contain both urban and rural territory and population.” 75 FR 37246, 37246 (June 28, 2010).

The Department understands the point articulated in the GAO report that actual local labor markets are not constrained by or defined by county lines—even those lines between counties identified (by OMB or otherwise) as “metropolitan” or “rural.” This is particularly the case for the construction industry, in which workers tend to commute longer distances 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 1, 6.⁶⁶ 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 34–35.⁶⁷

By excluding a metropolitan county’s wage rates from consideration in a determination for a bordering rural county, the current language in § 1.7(b) ignores the potential for projects in both counties to compete for the same supply of construction workers and be in the same local construction labor market. In many cases, the workers

⁶⁵ *See* note 8, *supra*.

⁶⁶ http://jedsnet.com/journals/jeds/Vol_8_No_4_December_2020/1.pdf.

⁶⁷ <http://ijah.cgrd.org/images/Vol6No1/3.pdf>.

working on the metropolitan county projects may themselves live across the county lines in the neighboring rural county and commute to the urban projects. In such cases, under the current bar, the Department may not be able to use the wage rates of the same workers to determine the prevailing wage rate for projects in the county in which they live. Instead, WHD would import wage rates from other “rural”-designated counties, potentially somewhere far across the state. Such a practice can result in Davis-Bacon wage rates that are lower than the wage rates that actually prevail in a bi-county labor market and that are based on wage data from distant locales rather than from neighboring counties.

For these reasons, the Department believes 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 has 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. The Department, however, has concluded that continuing the longstanding practice of using counties as the civil subdivision basis unit is more administratively feasible.⁶⁸ As a result, the Department is now considering the option of eliminating the metropolitan-rural bar in § 1.7(b) and relying instead on other approaches to determine how to appropriately expand geographic aggregation when necessary.

⁶⁸ 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 23644, 23647 (May 28, 1982).

In addition to allowing WHD to account for actual construction labor market patterns, this proposal could have other benefits. It could allow WHD to publish more rates at the 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 the group level. The proposal could also allow WHD to publish more rates overall by authorizing the use of both metropolitan and rural county data together when it must rely on statewide data. Combining rural and urban 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.⁶⁹ The Department believes that the purposes of the Act are better served by using such combined statewide data to determine the prevailing wage, when the alternative could be to fail to publish a wage rate at all.

The proposal to eliminate 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. Reverting to this prior status quo would be appropriate in light of 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. 12,366, 12,377 (1932) (remarks of Rep. Connery). Likewise, the Department's

⁶⁹ The Department is also considering the option of more explicitly tailoring the ban on mixing metropolitan and rural data so that it applies only at the “surrounding counties” level, but not at the statewide level or an intermediate level.

original 1935 regulations directed the Department to “the nearest large city” when there had been no similar construction in the locality in recent years. *See* Labor Department Regulation No. 503 § 7(2) (1935).

In light of the above, the Department solicits comments on its proposal to allow the Administrator the discretion to determine reasonable county groupings, at any level, without the requirement to make a distinction between counties WHD designates as rural or metropolitan.

(C) Proposals for amending the county grouping methodology

In addition to considering whether to eliminate the metropolitan-rural proviso language in § 1.7(b), the Department is also considering other potential changes to the methods for describing the county groupings procedure.

(1) Defining “surrounding counties”

One potential change is to more precisely define “surrounding counties,” as used in § 1.7(b). Because the term is not currently defined, this has from time to time led to confusion among stakeholders regarding 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 above, WHD’s current method of creating “surrounding county” 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 county” 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.⁷⁰

For example, in the *Chesapeake Housing* case, one “surrounding county” group that WHD had compiled included the independent city of Portsmouth, combined with Virginia Beach, Norfolk, and Suffolk counties. 2013 WL 5872049, at *1, n.1. That was appropriate because those jurisdictions all were part of the same contiguous OMB-designated metropolitan area, and each county thus shared a border with at least one other county in the group—even if they did not all share a border with every other county in the group. *See id.* at *5-6. Thus, by using the group, WHD combined data from Virginia Beach and Suffolk counties at the “surrounding counties” level, even though those two counties do not themselves touch each other.

This grouping strategy—of relying on OMB MSA designations—has been found to be consistent both with the term “surrounding counties” as well as with the metropolitan-rural limitation proviso in § 1.7(b). *See Mistick*, 2006 WL 861357, at *7–8. An OMB-designated metropolitan statistical area is, at least by OMB’s definition, made up entirely of “metropolitan” counties and thus WHD can group these counties together without violating the proviso. *See id.*; Manual of Operations at 39. Thus, the Department has used these OMB designations to put together pre-determined groups that can be used

⁷⁰ 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.

as the same first-level county grouping for any county within the grouping. While relying on OMB designations is not the only way that the Department could currently group counties together and comply with the proviso, the Department recognizes that, if it eliminates the metropolitan-rural proviso at § 1.7(b), it could be helpful to include in its place some further language to explain or delimit the meaning of “surrounding counties” in another way that would be both administrable and faithful to the purpose of the Davis-Bacon and Related Acts.

The first option would be to eliminate the metropolitan-rural proviso but not replace it with a further definition or limitation for “surrounding counties.” The Department has included this proposal in the proposed regulatory text of this NPRM. The term “surrounding counties” is not so ambiguous and devoid of meaning that it requires further definition. Even without some additional specific limitation, the Department believes the term could reasonably be 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 proviso would allow a nearby rural county to be included in a “surrounding county” grouping with metropolitan counties that it borders, it would not allow WHD to append a faraway rural county to a “surrounding county” group made up entirely of metropolitan counties with which the rural county shares no border at all. Conversely, the term does not allow the Department to consider a faraway metropolitan county to be part of the “surrounding counties” of a grouping of rural counties with which the metropolitan county shares no border at all. Although containing such an inherent definitional limit, this first option would allow the Department the discretion to develop new methodologies

of grouping counties at the “surrounding county” level and apply them as along as it does so in a manner that is not arbitrary or capricious.⁷¹

The second option the Department is considering is to limit surrounding counties to solely those counties that share a border with the county for which additional wage data is sought. Such a limitation would create a relatively narrow grouping at the initial county grouping stage—narrower than the current practice of using OMB MSAs. As discussed above, construction workers tend to commute longer than other professionals. This potential one-county-over grouping limitation would ensure that, in the vast majority of cases, the “surrounding county” grouping would not expand outward beyond the home counties or commuting range of the construction workers who would work on projects in the county at issue. 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. Another drawback is that such a limitation 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 significant burden on WHD in developing far more county-grouping rates than it currently does, and could result in less uniformity in required prevailing wage rates among nearby counties.

A third option would be to include language that would define the “surrounding counties” grouping as a grouping of counties that are all a part of the same “contiguous

⁷¹ For example, the Department could rely on county groupings in use by State governments for little Davis-Bacon laws or similar purposes, as long as they are contiguous county groupings that reasonably can be characterized as “surrounding counties.”

local construction labor market” or some comparable definition. 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. Under this option, the Department could consider other measures of construction labor market integration, including whether construction workers in general (or workers in specific construction trades) typically commute between or work in two bordering counties or in a cluster of counties.

This third option also would bring with it some potential benefits and drawbacks. On the one hand, the ability to identify local construction labor markets would allow the Department to make pre-determined county groupings much like it does now. This would reduce somewhat the burden of the second option—of calculating a different county grouping for each individual county to account for the counties that border specifically that county. It would also explicitly articulate the limitation that the Department believes is inherent in the term “surrounding counties”—that the grouping must be limited to a “contiguous” group of counties, with limited exceptions. On the other hand, the case-by-case determination of a local “construction” labor market (that might be different from an OMB MSA) could also be burdensome on WHD. The definition, however, could allow such a case-by-case determination but not require it. Accordingly, if such case-by-case

determinations become too burdensome, WHD could revert to the adoption of designations from OMB or some other externally-defined metric.

Finally, the Department recognizes that even if it retains the metropolitan-rural proviso, doing so does not bind WHD to the current practice of using OMB-designated county groupings and other procedures. Under the language of the current regulation, the Department retains the authority to make its own determinations regarding whether a county is “metropolitan” or “rural.” *See* 29 CFR 1.7(b). The Department also retains certain flexibility for determining how to group counties at each level and is not limited to using the OMB designations. As noted above, the Department also believes that the plain text of § 1.7(b) does not necessarily limit it from combining metropolitan and rural data beyond the “surrounding counties” group level.

(2) Other proposed changes to § 1.7

The Department is also considering other proposed changes to § 1.7. These include nonsubstantive changes to the wording of the paragraphs that clarify that the threshold for expansion in each one is insufficient “current wage data.” 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 one year prior to the beginning of the survey or the request for a wage determination, as appropriate.” The Department seeks comment on whether this definition should be kept in its current format or amended to narrow or expand its scope.

The Department is also considering whether to amend § 1.7(c) to better describe the process for expanding from the “surrounding county” level to consider data from an intermediary level (such as the current “supergroup” level) before relying on statewide

data. For example, as the Department has included in the current proposed regulatory text, the Department could describe this second level of county groupings as a consideration of “comparable counties or groups of counties in the State.” As with the third option discussed above for defining “surrounding counties,” this “comparable counties” language in § 1.7(c) would allow the Department to continue to use the procedure described in *Chesapeake Housing* of combining various MSAs or various non-contiguous groups of rural counties to create “supergroups.” It would also allow a more nuanced analysis of comparable labor markets using construction market data specifically.

As the foregoing discussion reflects, there is no perfect solution for identifying county groupings in § 1.7. Each possibility described above has potential benefits and drawbacks. In addition, the Department notes that the significance of this section in the wage determination process is also related to the level of participation by interested parties in WHD’s voluntary wage survey. 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. Absent sufficient survey information, however, WHD will need to continue to include a larger geographic scope to ensure that it effectuates the purposes of the DBA and Related Acts—to issue wage determinations to establish minimum wages on federally funded or assisted construction projects. The Department thus seeks comment on all aspects of amending the county grouping methodology of § 1.7—including administrative feasibility and the distinction between rural and metropolitan counties—to ensure that it has considered the relevant possibilities for amending or retaining the various elements of this methodology.

viii. *Section 1.8 Reconsideration by the Administrator*

The Department proposes revisions to §§ 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 to request reconsideration by the Administrator, often 30 days. To provide greater clarity and uniformity, the Department proposes to codify this practice and to clarify how and when reconsideration may be sought.

First, the Department proposes to amend § 1.8, which concerns reconsideration by the Administrator of wage determinations and decisions regarding the application of wage determinations under part 1, 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 request further reconsideration by the Administrator of the Wage and Hour Division. The Department proposes that such requests 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 proposes 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 proposes to apply the same procedures for such reconsideration requests as apply to reconsideration requests under § 1.8. The Department also proposes 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 or for rulings or interpretations, respectively.

ix. Section 1.10 Severability

The Department proposes to add a new § 1.10, titled "Severability." The proposed severability provision explains 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 intends that the remaining provisions remain in effect.

x. References to website for accessing wage determinations

The Department proposes 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, Pub. L. No. 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 the System for Award Management (SAM.gov)

became the authoritative and single location for obtaining DBA general wage determinations.⁷² The transition of wage determinations onto SAM.gov was part of the Integrated Award Environment, a government-wide initiative administered by GSA to manage and integrate multiple online systems used for awarding and administering federal financial assistance and contracts.⁷³

Currently, wage determinations can be found at <https://sam.gov/content/wage-determinations>. In order to avoid outdated website domain references in the regulations should the domain name change in the future, the Department proposes 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.

xi. Appendices A and B to part 1

The Department proposes to remove Appendices A and B from 29 CFR part 1 and make conforming technical edits to sections that reference those provisions. Appendix A lists the Davis-Bacon Act and the Related Acts, in other words, the statutes related to the Davis-Bacon Act that require the payment of wages at rates predetermined by the Secretary of Labor pursuant to the Davis-Bacon Act, and Appendix B lists regional offices of the Wage and Hour Division. The Department proposes to rescind these appendices as they 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/>.

⁷² 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>.

⁷³ About This Site, System for Award Management, <https://sam.gov/content/about/this-site> (last visited Nov. 19, 2021).

Specifically, a listing of statutes requiring the payment of wages at rates predetermined by the Secretary of Labor under the Davis-Bacon Act is currently at <https://www.dol.gov/agencies/whd/government-contracts>, and a listing of WHD regional offices is currently found at <https://www.dol.gov/agencies/whd/contact/local-offices>.

xii. Frequently conformed rates

The Department also proposes 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 proposes 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 welcomes comments regarding all aspects of this proposal, which is described more fully below.

WHD determines DBA prevailing wage rates based on wage survey data that responding contractors and other interested parties voluntarily provide. *See* 29 CFR 1.1–1.7. WHD sometimes receives robust participation in its wage surveys, thereby enabling it to publish wage determinations that list prevailing wage rates for numerous

construction classifications. However, stakeholder participation can be more limited, particularly in surveys for residential construction or in rural areas, and WHD therefore does not always receive sufficient wage data to publish prevailing wage rates for various classifications generally necessary for various types of construction.

Whenever a wage determination lacks a classification of work that is necessary for performance of DBRA-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 expedited process by which a classification and wage and fringe benefit rate are added to an existing wage determination applicable to a specific DBRA-covered contract. *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 to provide contractors 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 (sometimes over 10,000 in a given year). In some instances, including instances where contractors are unaware that their 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 considerable 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. If such uncertainty causes contractors to underbid on construction projects and subsequently to pay subminimum wages to workers, missing classifications on wage determinations can result in the underpayment of wages to workers.

To address this issue, the Department proposes revising 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,⁷⁴ 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 work within those classifications. 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

⁷⁴ As explained in WHD’s Prevailing Wage Resource Book, 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. Davis-Bacon Surveys at 6. The Prevailing Wage Resource Book 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.*

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 under 29 CFR 5.13. Moreover, under this 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.

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, popularly 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 proposes multiple revisions to various sections in part 3 to update the language and ensure that terms are used in a manner consistent with the terminology used in 29 CFR parts 1 and 5, to update websites and contact information, and to make other similar, non-substantive changes. The Department also proposes 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 welcomes 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 further proposes to change certain requirements associated with the submission of certified payrolls. To the extent that such changes are substantive, the reasons for these proposed changes are provided in the discussions of proposed §§ 5.2 and 5.5. The Department also proposes 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 proposes 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).

Finally, the Department proposes 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), discussed further below.

3. 29 CFR part 5

i. Section 5.1 Purpose and scope

The Department proposes minor technical revisions to § 5.1 to update statutory references, and further proposes to revise § 5.1 by deleting 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 proposes to add new sub-paragraph (a)(1) to reference the WHD website (<https://www.dol.gov/agencies/whd/government-contracts>) on which a listing of laws requiring Davis-Bacon labor standards provisions is currently found and regularly updated.

ii. *Section 5.2 Definitions*

(A) Agency, agency head, contracting officer, secretary, and Davis-Bacon labor standards

The Department proposes 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 definitional changes also are 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 current regulations refer to the obligations or authority of agencies, agency heads, and contracting officers, they are 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 define “agency head” and “contracting officer” as particular “Federal” officials or persons authorized to act on their behalf, which does 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 proposes to revise these definitions to reflect the role of state and local agencies. The proposed revisions also enable 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 also proposes 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 also proposes 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* 5 U.S.C. app 1. Accordingly, the proposed change to the definition of “federal agency” in § 5.2 clarifies that the District of Columbia is subject to the DBA and the regulations implemented by the Department pursuant to Reorganization Plan No. 14 of 1950.⁷⁵ The proposed change is 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 reflects the DBA’s applicability to the District of Columbia and is not intended to reflect a broader or more general characterization of the District as a federal government entity.

⁷⁵ The 1973 Home Rule Act, Pub. L. No. 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.

The Department also proposes a change to the definition of “Secretary” to delete a reference to the Under Secretary for Employment Standards; as noted above, the Employment Standards Administration was eliminated in a reorganization in 2009 and its authorities and responsibilities were devolved into its constituent components, including WHD.

Lastly, the Department proposes a minor technical edit to the definition of “Davis-Bacon labor standards” to reflect proposed changes to § 5.1, discussed above.

(B) Building or work

(1) Energy infrastructure and related activities

The Department proposes 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 changes to the definition are 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.”

(2) Coverage of a portion of a building or work

The Department proposes to add language to the definitions of “building or work” and “public building or public work” to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. 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 proposes 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 proposes 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.

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.

These proposed revisions are also 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, Director, Division of Contract Standards Operations, to Robert Olsen, Bureau of Reclamation (Mar. 18, 1985) (finding that the removal and 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 Administrator, 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 Administrator, 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).

Similarly, 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, a building or work includes 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 of a portion of a building, structure, or improvement may be a 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 asserted 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 would still need to 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, these proposed revisions would further the remedial purpose of the Davis-Bacon Act by ensuring that the Act’s protections apply to contracts for construction activity for which the government is responsible. *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 proposes revisions to the definitions of “building or work” and “public building or public work” that serve to clarify rather than change existing coverage requirements. However, the Department understands 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 will result in broader application of Davis-Bacon labor standards. The Department therefore invites 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.

(C) Construction, prosecution, completion, or repair

The Department also proposes to add 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.

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 fit 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). The Attorney General “reserve[d] . . . the question . . . of [the coverage of] 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 themselves constitute construction, alteration, or repair of a public building or work. Thus, 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 can apply to certain hazardous waste removal contracts, because “substantial 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 the 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 on a demolition site—either because the demolition is part of a contract for such construction or because such construction is contemplated as part of a future contract, then the demolition of the previously-existing structure is considered part of the construction of the subsequent building or work and therefore within the scope of the Davis-Bacon labor standards. *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 (Nov. 18, 1996), attachment: Superfund Guidance, Davis Bacon Act/Service Contract Act and Related Bonding, Jan. 1992) (emphasis in original).

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 within the scope of the DBA. This, in turn, would ensure that the correct contract provisions and wage determinations are incorporated into the contract, thereby providing contractors with the correct wage determinations prior to bidding and requiring the payment of Davis-Bacon prevailing wages where appropriate.⁷⁶ Accordingly, the Department proposes 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 DBA.

⁷⁶ 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.

Specifically, the Department proposes to clarify that demolition work is covered under any of three circumstances: (1) where the demolition and/or removal activities themselves constitute construction, alteration, and/or repair of an existing public building or work; (2) where subsequent construction covered in whole or in part by the Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or (3) where otherwise required by statute.⁷⁷

While determining whether demolition is performed in contemplation of a future construction project is a fact-specific question, the Department also proposes a non-exclusive list of factors that can inform this determination. Although the inclusion of demolition activities in the scope of a contract for the subsequent construction of a public building or work is sufficient to warrant Davis-Bacon coverage, such a condition is not a necessary one. Other factors that may be relevant include 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 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

⁷⁷ This third option accounts for Related Acts whose broader language may permit greater coverage of demolition work.

condemned building to eliminate it as a public hazard, reduce likelihood of squatters or trespassers, or to make the land more desirable for sale to private parties for purely private construction.

(D) Contract, contractor, prime contractor, and subcontractor

The Department proposes non-substantive revisions to the definition of “contract” and also proposes new definitions in § 5.2 for the terms “contractor,” “subcontractor” and “prime contractor.” These definitions apply to 29 CFR part 5, including the DBRA contract clauses in § 5.5(a) and (b) of this part.

Neither the DBA nor CWHSSA defines the terms “contract,” “contractor,” “prime contractor,” or “subcontractor.” The language of the Davis-Bacon and Related Acts, however, makes it 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). As indicated by the reference in the existing regulations to the laws listed in § 5.1, the term also may include the 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.

In other federal contractor labor standards regulations, the Department has sometimes included more detailed definitions of a “contract.” 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).

The term “contract” in the Davis-Bacon and Related Acts has been interpreted in a similarly broad manner. *See, e.g., 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.”). Similarly, 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 Arthur Linton Corbin, *Corbin on Contracts* §§ 1.2–1.3 (rev. ed., Joseph M. Perillo, ed., 1993)). 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.

However, the Department considers that it may not be necessary to include in the regulatory text itself a similarly detailed recitation of types of agreements that may be considered to be contracts, because such a list necessarily follows from the use of the term “contract” in the statute and the Department is not aware of any argument to the contrary. The Department thus seeks comment on whether a more detailed definition of the term “contract” is warranted, including whether aspects of the definition at 29 CFR 10.2 or the SCA regulations should or should not be included in the regulatory definition of contract at § 5.2.

The Department also seeks comment on whether it is necessary to explicitly promulgate in the definition of “contract” in § 5.2, or elsewhere in the regulations, an explanation regarding contracts that may be found to be void. The Department intends the use of the term in the regulations to apply also to any agreement in which the parties intended 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 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 addition to the term “contract,” the existing DBRA regulations use the terms “contractor,” “subcontractor,” and “prime contractor,” but do not currently define the latter three terms. The Department proposes to include a definition of the term “contractor” to clarify that, where used in the regulations, it applies to both prime contractors and subcontractors. In addition, the definition would clarify that sureties may

also—under appropriate circumstances—be considered “contractors” under the regulations. This is consistent with the Department’s longstanding interpretation. *See Liberty Mutual 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. 1155, at 3 (1935)). As discussed below, the proposed definition of contractor also reflects the long-held interpretation that bona fide “material suppliers” are generally not considered to be contractors under the DBRA, subject to certain exceptions.

The Department also proposes a nonsubstantive change to move, with minor nonsubstantive edits, two sentences from the existing definition of “contract” to the new definition of “contractor.” These sentences clarify that state and local governments are not regarded as contractors or subcontractors under the Related Acts in situations where construction is performed by their own employees, but that under statutes that require payment of Davis-Bacon prevailing wages to all laborers and mechanics employed in the assisted project or in the project’s development, State and local recipients of Federal aid must pay these employees according to Davis-Bacon labor standards. In addition, the Department proposes to supplement that language 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).

The Department proposes 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*, discussed above, the Department proposes a broad definition of prime contractor that prioritizes the appropriate allocation of responsibility for contract compliance and enhances the effectiveness of the withholding remedy. The proposed definition clarifies that the label an entity gives itself is not controlling, and 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 definition begins by identifying as a prime contractor any person or entity that enters into a covered contract with an agency. This includes, 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 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 also includes as a “prime contractor” the controlling shareholder or member of any entity holding a prime contract, the joint venturers or partners in any joint venture or partnership holding a prime contract, any contractor (e.g., a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing and/or performing the construction anticipated by the prime contract, and any other person or entity that has been delegated all or substantially all of the responsibility for overseeing Davis-Bacon labor standards compliance on a prime contract. Under this definition, more than one entity on a contract—for example, both the owner/developer and the general contractor—may be considered to be “prime contractors” on the same contract. Accordingly, the proposal also explains that any two of these nominally different legal entities are considered to be the “same prime contractor” for the purposes of cross-withholding.

Although the Department has not previously included a definition of prime contractor in the implementing regulations, the proposed definition is 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*, OALJ No. 2006-DBA-00001 (Aug. 3, 2007), at 16, *aff'd*, ARB No. 07-124, (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 (July 21, 1975).

The proposed definition of prime contractor is also similar to, although somewhat narrower than, 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 that 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.*⁷⁸ The

⁷⁸ 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 thus does not apply to the regulations within the FAR that implement the Davis-Bacon labor standards, which are

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 seeks comment on the proposed definition of “prime contractor,” in particular as it affects 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.

Finally, the Department proposes a new definition of the term “subcontractor.” The proposed definition would affirmatively state 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 “contract,” the proposed definition of “subcontractor” also reflects that the Act covers subcontracts of any tier—and thus the proposed definition of “subcontractor” would state 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 for “subcontractor” necessarily excludes material suppliers (except for narrow exceptions), because such material suppliers are excluded from the definition of “contractor,” as proposed, and that

located in FAR part 22 and the contract clauses 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 NPRM. Thus, the Department expects that, after this rule is final, the FAR Council will consider how to amend FAR part 22 and the FAR contract clauses to appropriately incorporate the new and amended definitions that are adopted in the Department’s final rule. The Department does not anticipate that this rulemaking would affect FAR subpart 9.4.

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.

(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 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

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

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 including “the physical place or places where the building or work called for in the contract will remain” and “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.” 29 CFR 5.2(l)(1). They further provide that in general, “job headquarters, tool yards, batch plants, borrow pits, etc.” are part of the “site of the work” if they are “dedicated exclusively, or nearly so, to performance of the covered contract or project” and also are “adjacent or virtually adjacent to the site of the work” itself. 29 CFR 5.2(l)(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* § 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 at 80275; *see, e.g., L.T.G. Constr. Co.*, WAB Case 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. Off-site 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. 29 CFR 5.2(j)(2). However, transportation to or from the site of the work is covered by the DBRA where a covered laborer or mechanic (1) 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 (2) transports portions of the building or work between a site where a significant portion of the building or 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.⁸¹

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” whose sole responsibility is to provide materials (such as sand, gravel, and ready-mixed concrete) to a project if they also supply those materials to the general public, and the plant manufacturing the materials is not established specifically for a particular contract or located at the site of the work. *See* AAM 45 (Nov. 9, 1962) (enclosing WHD Opinion Letter DB-30 (Oct. 15, 1962)); AAM 36 (Mar. 16, 1952) (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*

⁸¹ For more detail on this topic, see the section titled “Coverage of Construction Work at Secondary Construction Sites.”

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 (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.”). As the Department has explained, this exception applies to employees of companies “whose *only* contractual obligations for on-site work are to deliver materials and/or pick up materials.” PWRB, DBA/DBRA Compliance Principles at 7 (emphasis added).

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* existing regulation 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)”); existing regulation 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 discussed above were shaped by three appellate court decisions between 1992 and 2000. 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. Dep’t 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 80268 (“2000 final rule”).⁸² The “adjacent or virtually adjacent” requirement in the current regulatory text is one that the courts in *Ball* and *L.P. Cavett* suggested would be permissible. 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”), that implemented *Building & Construction Trades Dep’t, AFL-CIO v. U.S. Dep’t of Labor Wage Appeals Bd. (Midway)*, in which 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 because “the Act applies only to employees working directly on the physical

⁸² 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 80268, 80269 (Dec. 20, 2000); AAM 86 (Feb. 11, 1970).

site of the public building or public work under construction.” 932 F.2d 985, 990 (D.C. Cir. 1991).⁸³

(2) Proposed regulatory revisions

The Department proposes 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. Each proposal is explained in turn.

a. Coverage of Construction Work at Secondary Construction Sites

In the 2000 final rule, the Department amended the definition of “site of the work” to include a site away from the location where the building or work will remain, where the site is established specifically for the performance of the contract or project and a “significant portion” of a building or work is constructed at the site. 29 CFR 5.2(l)(1). The Department explained that this change was intended to respond to technological developments that had enabled companies in some cases to construct entire portions of public buildings or works off-site, 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

⁸³ 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).

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 Construction, Inc.*, WAB No. 86-1 (Aug. 22, 1986), and *Titan IV Mobile Serv. Tower*, WAB No. 89-14 (May 10, 1991)).

The Department stressed that this new provision would apply only at a location 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,” and reaffirmed its longstanding position that “[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components,” are not part of the site of the work. 65 FR at 80274; *see, e.g.*, AAM 86 (Feb. 11, 1970) at 1–2 (explaining that the site of the work does not include a contractor’s permanent “fabrication plant[s] . . . whose locations and continuance are governed by his general business operations . . . even though mechanics and laborers working at such an establishment may . . . make doors, windows, frames, or forms”). It accordingly described this expansion of coverage as a narrow one. *See* 65 FR at 80276 (“[T]he Department believes that the instances where substantial amounts of construction are performed at one location and then transported to another location for final installation are rare.”). 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 remain.

Since 2000, technological developments have continued to facilitate off-site construction that replaces on-site construction to an even greater degree, and the Department expects such trends to continue in the future. For example, one recent industry analysis notes that both design firms and contractors “are forecasting expanded use of both [prefabrication and modular construction] over the coming years as the benefits are more widely measured, owners become increasingly comfortable with the process and the outcomes, and the industry develops more resources to support innovative applications.” Dodge Data and Analytics, Prefabrication and Modular Construction 2020 (2020), at 4.⁸⁴ In the specific context of federal government contracting, a GSA document cites several benefits to “pre-engineered” or “modular” construction, including decreased construction time, cost savings, and fewer environmental and safety hazards. GSA, Schedule 56 – Building and Building Materials, Industrial Service and Supplies, Pre-Engineered/Prefabricated Buildings Customer Ordering Guide (GSA Schedule 56), at 5–7.⁸⁵

In the 2000 final rule, 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.” 65 FR at 80274. However, by limiting such coverage to facilities that are established specifically for the performance of a particular contract or project, the current regulation falls short of its stated goal. The Department

⁸⁴ <http://modular.org/documents/public/PrefabModularSmartMarketReport2020.pdf>.

⁸⁵ https://www.gsa.gov/cdnstatic/SCHEDULE_56_-_ORDERING_GUIDE.pdf.

stated at the time that this limit was necessary to exclude “[o]rdinary commercial fabrication plants, such as plants that manufacture prefabricated housing components.” 65 FR at 80274. However, such an exclusion can be more effectively accomplished with language that expands on the term “significant portion.”

The Department accordingly proposes to revise Davis-Bacon coverage of off-site construction of “significant portions” of a building or work so that such coverage is not limited to facilities established specifically for the performance of a contract or project. Rather, the Department proposes to amend the definition of “site of the work” to include off-site construction where the “significant portions” are constructed for specific use in a designated building or work, rather than simply reflecting products that the contractor or subcontractor makes available to the general public. The Department also proposes to explain the term “significant portions” to ensure that this expansion does not result in the coverage of activities that have long been understood to be outside the DBA’s scope.

Specifically, the Department proposes to explain that “significant portion” means that entire portions or modules of the building or work, as opposed to smaller prefabricated components, are delivered to the place where the building or work will remain, with minimal construction work remaining other than the installation and/or assembly of the portions or modules. As the *Midway* court observed, the 1932 House debate on the DBA demonstrates that its drafters understood that off-site *prefabrication* sites would generally not be considered part of the site of the work. *See Midway*, 932 F.2d at 991 n.12. As in 2000, the Department does not propose to alter this well-established principle. Such prefabrication, however, is distinguishable from modern methods of “pre-engineering” or “modular” construction, in which significant portions of a building or

work are constructed and then simply assembled onsite “similar to a child’s building block kit.” GSA Schedule 56 at 5.⁸⁶ 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 at 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”). In other words, 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.

In light of the contractor/material supplier distinction discussed above, the Department also proposes to add, as an additional requirement for coverage of offsite construction, that the portions or modules are constructed for specific use in a designated building or work, rather than simply reflecting products that the contractor or subcontractor makes available to the general public. When significant portions or modules are constructed specifically for a particular building or work and not as part of the contractor’s regular manufacturing operations, the company is not a material supplier but a contractor or subcontractor. *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

⁸⁶ *See* note 85, *supra*.

independent of the primary project to determine that the function of the support activities may be viewed as similar to that of materialman”).

For clarity, the Department also proposes to amend § 5.2 to use the term “secondary construction sites” to describe such locations, and to use the term “primary construction sites” to describe the place where the building or work will remain. The Department additionally proposes to use the term “nearby dedicated support site” to describe locations such as 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.

The Department specifically seeks public comment on (1) examples of the types of off-site construction techniques described above, and the extent to which they are used in government and government-funded contracting, and (2) whether the proposed limits, including the clarification of “significant portion,” are appropriate.

b. Clarification of application of “site of the work” principle to flaggers

The Department also proposes to clarify that workers engaged in traffic control and related activities adjacent or nearly 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 (June 12, 2002). The Department now proposes 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 proposes 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 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 as interpreted by courts. *See Bechtel Constructors Corp.*, ARB No. 97-149, 1998 WL 168939, at *5 (March 25, 1998) (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 would therefore be consistent with the DBA and would eliminate any ambiguity regarding these workers' coverage.

c. Clarification of “material supplier” distinction

Next, the Department proposes to clarify the distinction between subcontractors and “material suppliers” and to make explicit that employees of material suppliers are not covered by the DBA and most of the Related Acts. Although, as explained above, 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 litigation.

The Department proposes to clarify the scope of the material supplier exception consistent with case law and WHD guidance. First, the Department proposes to add a new definition of “material supplier” to § 5.2, and to define the term as an employer meeting three criteria: first, 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;⁸⁷ second, the employer also supplies materials to the general public; and third, 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. *See H.B. Zachry*, 344 F.2d at 359;

⁸⁷ The Department notes that under this definition, an employer that contracts *only* for pickup of materials from the site of the work is not a material supplier but a subcontractor. This is consistent with the plain meaning of the term “material supplier” and with the Department’s case law. *See Kiewit-Shea*, Case No. 84-DBA-34, 1985 WL 167240 (OALJ Sept. 6, 1985), at *2 (concluding that companies whose contractual duties “called for hauling away material and not for its supply” were subcontractors, not material suppliers”), *aff’d*, *Maryland Equipment, Inc.*, WAB No. 85-24, 1986 WL 193110 (June 13, 1986).

AAM 5 (Dec. 26, 1957); AAM 31 (Dec. 11, 1961); AAM 36 (Mar. 16, 1962); AAM 45 (Nov. 9, 1962); AAM 53 (July 22, 1963). The subsection further clarifies 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. *See* PWRB, DBA/DBRA Compliance Principles, 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).

While the Davis-Bacon regulations have not previously included definitions of “contractor” or “subcontractor,” this proposed rule, as discussed above, would add such definitions into § 5.2. The Department therefore proposes to incorporate the material supplier exception into the proposed new definition of “contractor,” which is incorporated into the proposed definition of “subcontractor.” Specifically, the Department proposes to exclude material suppliers from the regulatory definition of “contractor,” with the exception of entities performing work under Related Acts that apply the Davis-Bacon labor standards to all laborers and mechanics employed in a project’s development, given that, as explained, the application of such statutes is not limited to “contractors” or “subcontractors.”

d. Coverage of Time for Truck Drivers

Finally, the Department proposes to revise the regulations to clarify coverage of truck drivers under the DBA. Since *Midway*, various questions have arisen regarding the

application of the DBA and the Related Acts to truck drivers. While the Department’s regulations address this issue to a certain extent, the Department has expanded on these issues in regulatory preambles and subregulatory guidance, which differ depending on whether truck drivers are employed by material suppliers or by contractors or subcontractors.

As noted above, the DBA does not apply to workers employed by bona fide material suppliers. However, under current WHD policy, if a material supplier, in addition to providing supplies, also performs onsite construction, alteration, or repair work as a subcontractor—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—then its workers are covered for any on-site time for such construction work that is “more than . . . incidental.” FOH 15e16(c); PWRB, DBA/DBRA Compliance Principles at 7–8. For enforcement purposes, if a material supplier’s worker spends more than 20 percent of the workweek performing such construction work on-site, all of the employee’s on-site time during that workweek is covered.

For truck drivers employed by contractors or subcontractors, the Department has explained that such drivers’ time is covered under certain circumstances. *See* FOH 15e22. First, “truck drivers who haul materials or supplies from one location on the site of the work to another location on the site of the work” are covered. 65 FR at 80275. Such “on-site hauling” is unaffected by *Midway*, which concerned the coverage of off-site hauling. Based on the same principle, any other construction work that drivers perform on the site of the work that is not related to off-site hauling is also covered. *See* FOH 15e22(a)(1) (stating that drivers are covered “for time spent working on the site of the work”).

Second, “truck drivers who haul materials or supplies from a dedicated facility that is adjacent or virtually adjacent to the site of the work” are covered for all of their time spent in those activities. 65 FR at 80275–76; 29 CFR 5.2(j)(1)(iv)(A); FOH 15e22(a)(3). Such drivers are hauling materials or supplies between two locations on the site of the work, and given the requirement of adjacency or virtual adjacency, any intervening off-site time is likely extremely minimal. Third, drivers are covered for time spent transporting portion(s) of the building or work between a secondary site, established specifically for contract or project performance and where a “significant portion” of the work is constructed, and the site where the building or work will remain. *See* 29 CFR 5.2(j)(1)(iv)(B); 65 FR at 80276; FOH 15e22(a)(4). As the Department has explained, “under these circumstances[,] the site of the work is literally moving between the two work sites,” 65 FR 57269, 57273, 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 at 80276. Fourth, drivers are covered for any 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 at 80276; FOH 15e22(a)(2); PWRB, DBA/DBRA Compliance Principles, at 6–7.

Feedback from stakeholders, including contractors and contracting agencies, indicates that there is significant uncertainty regarding this topic. Such uncertainty includes the distinction between drivers for material supply companies versus drivers for

construction contractors or subcontractors; what constitutes *de minimis*; whether the *de minimis* determination is made on a per trip, per day, or per week basis; 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. This lack of clarity has also led to divergent interpretations by Department ALJs. *Compare Rogers Group*, ALJ No. 2012-DBA-00005 (OALJ May 28, 2013) (concluding that a subcontractor was not required to pay its drivers prevailing wages for sometimes-substantial amounts of on-site 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 (OALJ May 25, 2021), *appeal pending*, ARB No. 21-054 (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 the above into account, the Department proposes to revise the regulations to clarify coverage of truck drivers in the following manner:

First, as noted above, the Department has proposed to clarify that employees of “material suppliers” are not covered by the DBRA, except for those Related Acts to which the material supplier exception does not apply. The proposed definition of a “material supplier” is limited to companies whose only contractual responsibilities are material supply and thus excludes companies that also perform any on-site construction, alteration, or repair. The Department believes that this proposed clarification will make the distinction between contractors/subcontractors and material suppliers clear. It also obviates the need for the 20 percent threshold for coverage of construction work

performed onsite by material supply drivers discussed above, because, by definition, any drivers whose responsibilities include performing onsite construction work in addition to material supply are employed by subcontractors, not material suppliers. Thus, under this proposed rule, any time that drivers spend performing such construction work on the site of the work would be covered regardless of amount, as is the case for other laborers and mechanics.

Second, the Department proposes 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 certain Related Acts). Specifically, the Department proposes to amend the definition of "construction, prosecution, completion, or repair" in § 5.2 to include "transportation" under five specific circumstances, which the Department proposes to define, collectively, as "covered transportation": (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," discussed further below, 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 statute that extends Davis-Bacon coverage to all laborers and mechanics employed in the construction or development of a project.

Items (1), (2), (3), and (5) set forth principles reflected in the current regulations, but in a clearer and more transparent fashion. Item (4) seeks to resolve the ambiguities discussed above regarding the coverage of on-site time by delivery drivers. Specifically, the Department proposes to explain that truck drivers and their assistants are covered for their time engaged in “onsite activities essential or incidental to offsite transportation,” defined as activities 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 unloading, loading, and waiting time, where the driver or assistant’s time is not “so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded.”

This proposed language is identical to the standard the Department uses to describe the *de minimis* principle under the Fair Labor Standards Act. *See* 29 CFR 785.47. Importantly, while the amount of time is relevant to this principle, the key inquiry is not merely whether the amount of time is small, but rather whether it is administratively feasible to track it, as 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.” *Id.* (emphasis added). Moreover, “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.* Thus, under the proposed language, where a driver’s

duties include dropping off and/or picking up materials on the site of the work, the driver must be compensated under the DBRA for any “practically ascertainable” time spent on the site of the work. The Department anticipates that in the vast majority of cases, it will be feasible to record the amount of time a truck driver or driver’s assistant spends on the site of the work, and, therefore, that the Davis-Bacon labor standards will apply to any such time under the proposed rule. However, under the narrow circumstances where it is infeasible or impractical to measure a driver’s very small amount of time spent on the site of the work, such time need not be compensated under this proposed rule.

This proposal is also consistent with the statutory “site of the work” restriction as interpreted in *Midway*. As the Department has previously explained, given the small amount of time the *Midway* drivers spent on-site, no party in the case had argued whether such on-site time alone could be subject to coverage. *See* 65 FR at 80275–76. Given that the court did not consider this issue, 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.” 65 FR at 80275–76. However, as with the FLSA, the Department proposes to exclude such time from DBRA coverage under the rare circumstances where it is very small in duration and industrial realities make it impossible or impractical to measure such time.

e. Non-substantive changes for conformance and clarity

In addition to the above changes, the Department proposes 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 proposes 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.” Instead, the Department proposes 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. Additionally, the Department proposes to remove the citation to *Midway* from the definition of the term “construction (or prosecution, completion, or repair)”; although, as discussed above, some of the regulatory changes the Department has made reflect the holdings in the three appellate cases noted above, the Department does not believe it is necessary to cite the case in the regulation.

The Department also proposes defining 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. As noted above, some statutes extend Davis-Bacon coverage to all laborers and mechanics employed in the “development” of a project, regardless of whether they are working on the site of the work or employed by “contractors” or “subcontractors.” 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. Use of the defined term “development statute” would improve regulatory clarity and ensure that the regulations do not become obsolete if existing statutes meeting this description are revised or if new statutes meeting this description are added. The Department proposes to make conforming changes in § 5.5 to incorporate this new term.

Finally, the Department proposes several linguistic changes to defined terms in § 5.2 to improve clarity and readability.

(H) Paragraph Designations

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

iii. Section 5.5 Contract provisions and related matters.

The Department proposes to remove the table at the end of § 5.5 related to the display of OMB control numbers. This table aids in fulfilling the requirements of the Paperwork Reduction Act; however, the Department maintains an inventory of OMB control numbers on <https://www.reginfo.gov> under “Information Collection Review.” This website is updated regularly and interested persons are encouraged to consult this website for the most up-to-date information.

(A) 29 CFR 5.5(a)(1)

The Department proposes 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.*, 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 welcomes any comments on this proposal.

The Department also proposes 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 has also proposed changes relating to the publication of rates for frequently conformed classifications. The Department's proposed changes to this

subsection are discussed above in part III.B.1.xii (“Frequently ”), together with proposed changes to § 1.3.

The Department also proposes to add language to the contract clauses at § 5.5(a)(1)(vi), § 5.5(a)(6), and § 5.5(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.

(B) 29 CFR 5.5(a)(3)

The Department proposes a number of revisions to § 5.5(a)(3) to better effectuate compliance and enforcement by clarifying and supplementing existing recordkeeping requirements. Similar changes proposed in § 5.5(c) are discussed here.

As an initial matter, all references to employment (e.g., employee, employed, employing, etc.) in §§ 5.5(a)(3) and 5.5(c), as well as in § 5.6 and various other sections, have been revised to refer instead to “workers” or “laborers and mechanics.” These changes are discussed in greater detail below in section xxii, “Employment Relationship Not Required.”

(1) 29 CFR 5.5(a)(3)(i)

The Department proposes to amend § 5.5(a)(3)(i) to clarify its longstanding interpretation and enforcement of this recordkeeping regulation to require contractors to maintain and preserve basic records and information, as well as certified payrolls. The required basic records include but are not limited to regular payroll (sometimes referred

to as “in-house” payroll) and additional records relating to fringe benefits and apprenticeship and training. 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, which provide the basis for the contractor’s subsequent submission of certified payroll.

The Department also proposes to amend § 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).

The Department also proposes a new requirement that records required by §§ 5.5(a)(3) and 5.5(c) must include last known worker telephone numbers and email addresses. Updating the Davis-Bacon regulations to require this additional worker contact information would reflect 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), clarifies the Department’s longstanding interpretation of these regulatory provisions that contractors and subcontractors must maintain records of each worker’s correct classification or classifications of work actually performed and the hours worked in each classification.

See, e.g., Pythagoras Gen. Contracting Corp., ARB Nos. 08-107, 09-007, 2011 WL 1247207, at *7 (Mar. 1, 2011) (“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.”), *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). 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 recognize that laborers or mechanics may perform work in more than one classification and more expressly provide 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 revising the language in §§ 5.5(a)(3)(i) and 5.5(c) to require records of the “correct classification(s) of work actually performed,” the Department intends to clarify its longstanding interpretation that contractors and subcontractors must keep records of (and include on certified payrolls) hours worked segregated by each separate classification of work performed. 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.

It is implicit—and expressly stated in various parts of current § 5.5—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 proposes 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 5.5(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 is not intended to 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.

(2) 29 CFR 5.5(a)(3)(ii)–(iii)

The Department proposes to revise the language in §§ 5.5(a)(3)(ii) and (iii) to expressly apply to all entities that might be responsible for maintaining the payrolls and basic records 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 would add 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 proposes 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 revision clarifies that compliance actions may be accomplished by various

means, not solely by an investigation or audit of compliance. A similar change is proposed in § 5.6. Compliance actions include, without limitation, full investigations, limited investigations, office audits, self-audits, and conciliations. This proposed revision expressly sets 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 any additional types that the Department may use in the future. This revision does 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 proposes 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. 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. 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.⁸⁸

However, under the proposal, 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 the system. For example, if a contractor does not have internet access or is unable to access 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 proposes a new sub-paragraph, § 5.5(a)(3)(ii)(D), 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.").⁸⁹ Valid electronic signatures include any electronic process that indicates acceptance of the certified payroll record and

⁸⁸ The Department 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.

⁸⁹ <https://www.fhwa.dot.gov/construction/cqit/111204dol.cfm>

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 recognizes 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. As a matter of longstanding policy, the Department considers an original signature to be legally binding evidence of the intention of a person with regard to a document, record, or transaction. Modern technologies and evolving business practices are rendering the distinction between original paper and electronic signatures nearly obsolete.

The Department proposes 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. These related documents include, without limitation, contractors' and subcontractors' bids and proposals, as well as amendments, modifications, and extensions to contracts, subcontracts, or agreements.

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. It is also the Department's experience that Davis-Bacon contractors and subcontractors that do not keep their contracts, agreements, and related legally binding documents are more likely to disregard their obligations to workers and subcontractors. 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).

This proposed revision also could help level the playing field for contractors and subcontractors that comply with Davis-Bacon labor standards. 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 proposes to renumber current § 5.5(a)(3)(iii) as § 5.5(a)(3)(iv). In addition, the Department proposes 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), expand and clarify 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 proposes adding a 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) 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 the proposed § 5.5(a)(3)(iii). These records help WHD determine whether contractors are in compliance with the labor standards provisions of any of the statutes referenced by § 5.1, and what the appropriate back wages and other remedies, if any, should be. The Department believes that these clarifications will 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. These revisions make explicit the Department's longstanding practice and do not impose any new or additional requirements upon a Federal agency (or applicant, sponsor, owner, or other entity, as the case may be).

The new or additional recordkeeping requirements in the proposed revisions to § 5.5(a)(3) likely do 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 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 in re-numbered § 5.5(a)(3)(iv)(B) proposes to add a sanction 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 time WHD requests that the records be produced. Specifically, the Department proposes that contractors that fail

to comply with WHD record requests 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. The Department proposes this sanction to enhance enforcement of recordkeeping requirements and encourage cooperation with its investigations and other compliance actions. The proposal provides that 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) 29 CFR 5.5(a)(4) Apprentices.

The Department proposes 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 proposes to revise the subsection of § 5.5(a)(4)(i) regarding reciprocity to better align with the purpose of the DBA and the Department’s Employment and Training Administration (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 journeymen, 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 it 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 is 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.”⁹⁰

In adopting the current approach in a final rule issued in 1981, the Department noted that several commenters had objected to the 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.⁹¹ 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.”⁹²

In 2008, ETA amended its apprenticeship regulations in a manner that is seemingly in tension with the 1981 final rule’s approach to Davis-Bacon apprenticeship “portability.” Specifically, in December 2007, ETA issued an NPRM to revise the agency’s labor standards for the registration of apprenticeship programs regulations.⁹³ One of the NPRM proposals was to expand the provisions of then-existing 29 CFR

⁹⁰ Proposed Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 44 FR 77080, 77085 (Dec. 28, 1979).

⁹¹ Final Rule, Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction, 46 FR 4380, 4383 (Jan. 16, 1981).

⁹² *Id.* The 1981 final rule was suspended, 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).

⁹³ *See* Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations Notice of Proposed Rulemaking, 72 FR 71020 (Dec. 13, 2007).

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.⁹⁴ ETA proposed to move the provision to 29 CFR 29.13(b)(7) and to remove the exception for the building and construction trades.⁹⁵ 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.”⁹⁶ 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.”⁹⁷ 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 wage and hour and apprentice ratio standards.⁹⁸

⁹⁴ *Id.* at 71026.

⁹⁵ *Id.*

⁹⁶ Final Rule, Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 73 FR 64402, 64419 (Oct. 29, 2008).

⁹⁷ *Id.*

⁹⁸ *Id.* at 64420. *See* 29 CFR 29.13(b)(7).

In order to better harmonize the Davis-Bacon regulations and ETA's apprenticeship regulations, the Department proposes to revise § 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 for one State but wishes to employ apprentices to work on a project in a different State with an SAA, the contractor must seek and obtain reciprocal approval from the project State SAA and adhere to the wage rate and ratio standards approved by the project State SAA. Accordingly, upon receiving reciprocal approval, the apprentices in such a scenario would be considered 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 that could result 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 notes that multiple apprenticeship programs may be 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 welcomes 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 likely be less confusing to apply.

Lastly, the Department proposes 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.⁹⁹ 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 proposes 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 proposes a minor revision to proposed § 5.5(a)(4)(ii) to align with the gender-neutral term of “journeyworker” used by ETA in its apprenticeship regulations. The Department also proposes 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 encourages comments on this proposal, including any relevant information about the use of training programs in the construction industry.

(D) Flow-down Requirements in §§ 5.5(a)(6) and 5.5(b)(4)

The Department proposes to add clarifying language to the DBRA- and CWHSSA-specific contract clause provisions at § 5.5(a)(6) and § 5.5(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), 5.5(b)(4). The Department’s proposed rule would affect these contract clauses in several ways.

⁹⁹ 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).

(1) Flow-down of wage determinations

The Department proposes adding clarifying language to § 5.5(a)(6) 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 above in the discussion of § 5.2, the Department is proposing to codify a definition of “prime contractor” in § 5.2 that would include controlling shareholders or members, joint venturers or partners, and general contractors or others to whom all or substantially all of the construction or Davis-Bacon labor standards compliance duties have been delegated under the prime contract. These entities would therefore also be “responsible” under §§ 5.5(a)(6) and 5.5(b)(4) for the same violations as the legal entity that signed the prime contract. The proposed change is intended to ensure that contractors do not interpose single-purpose corporate entities as the nominal “prime contractor” in order to escape liability or responsibility for the contractors’ Davis-Bacon labor standards compliance duties.

(3) Responsibility for the payment of unpaid wages

The proposal includes new language underscoring that being “responsible for . . . compliance” means the prime contractor has the contractual obligation to cover any unpaid wages or other liability for contractor or subcontractor violations of the contract clauses. 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).¹⁰⁰ 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 proposed new language clarifies that underpayments of a subcontractor's workers may in certain circumstances subject the prime contractor itself 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) does currently explain 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 proposed new language would provide more explicit notice (in § 5.5(a)(6) and (b)(4) themselves) of this potential that a prime contractor may be debarred where there are violations on the contract (including

¹⁰⁰ The new language also clarifies that, consistent with the proposed language in § 5.10, such responsibility also extends to any interest assessed on backwages or other monetary relief.

violations perpetrated by a subcontractor) and the prime contractor has failed to take responsibility for compliance.

In providing this additional notice of the potential for debarment, the Department does 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 currently subject to a strict liability standard. 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).¹⁰¹

(5) The Department does not intend to change this standard. Responsibility and liability of upper-tier subcontractors

The proposed language in §§ 5.5(a)(6) and 5.5(b)(4) would also eliminate confusion regarding the responsibility and liability of upper-tier subcontractors. The existing language in §§ 5.5(a)(6) and 5.5(b)(4) creates express contractual responsibility

¹⁰¹ See also *Martell Constr. Co.*, ALJ No. 86-DBA-32, 1986 WL 193129, at *9 (DOL OALJ 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.

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).¹⁰²

The current contract clauses in §§ 5.5(a)(6) and 5.5(b)(4) do not expressly identify further contractual responsibility or liability of upper-tier subcontractors for violations that are committed against the employees of their lower-tier subcontractors. 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 by their own 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); *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 of its lower-tier subcontractor’s misclassification of workers. As the ARB held, the higher-tier subcontractor had an “obligation[] to be aware of DBA

¹⁰² 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.”

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 had discussed the misclassification scheme with the lower-tier subcontractor and thus “knowingly countenanced” the violations. *Id.* at *8.

The Department proposes in this rulemaking 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 proposal would clarify that this responsibility would require upper-tier subcontractors to pay back wages on behalf of their lower-tier subcontractors and subject 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). The proposal would include, in the §§ 5.5(a)(6) and 5.5(b)(4) contract clauses, 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 does not receive required wages, but also on the upper-tier subcontractors that may also have disregarded their obligations to be responsible for compliance.

With this proposal, the Department does not intend to place the same strict liability responsibility on all upper-tier subcontractors as, discussed above, the existing language already places on prime contractors for lower-tier subcontractors’ back wages. Rather, the new proposed language is intended to clarify that, in appropriate

circumstances, as in *Ray Wilson Co.*, upper-tier subcontractors may be held responsible—both subjecting them to possible debarment and requiring them to pay back wages jointly and severally with the prime contractor and the lower-tier subcontractor that directly failed to pay the prevailing wages.

A key principle in enacting regulatory requirements is that liability should, to the extent possible, be placed on the entity that best can control whether or not a violation occurs. *See Bongiovanni*, 1991 WL 494751, at *1.¹⁰³ For this reason, the Department proposes language assigning liability to upper-tier subcontractors, who have the ability to 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.

¹⁰³ *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 proposed 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.

(E) 29 CFR 5.5(d) – Incorporation by reference

Proposed new section 5.5(d) clarifies that, notwithstanding the continued requirement that agencies incorporate contract clauses and wage determinations “in full” into a covered contract, the clauses and wage determinations are equally effective if they are incorporated by reference. The Department’s proposal for this subsection is discussed further below in part III.B.3.xx (“Post-award determinations and operation-of-law”), together with proposed changes to §§ 1.6(f), 5.5(e), and 5.6.

(F) 29 CFR 5.5(e) – Operation of law

In a new section at § 5.5(e), the Department proposes language making effective by operation of law a contract clause or wage determination that was wrongly omitted from the contract. The Department’s proposal for this subsection is discussed below in part III.B.3.xx (“Post-award determinations and operation-of-law”), together with proposed changes to §§ 1.6(f), 5.5(d), and 5.6.

iv. Section 5.6 Enforcement.

(A) 29 CFR 5.6(a)(1)

The Department proposes to revise § 5.6(a)(1) by renumbering the existing regulatory text § 5.6(a)(1)(i), and adding an additional sub-section, § 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. The Department’s proposal for this subsection is discussed further below in part III.B.3.xx (“Post-award determinations and operation-of-law”), together with proposed changes to §§ 1.6(f) and 5.5(e).

(B) 29 CFR 5.6(a)(2)

The Department proposes to amend § 5.6(a)(2) to reflect the Department’s longstanding practice and interpretation that certified payrolls required pursuant to § 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.¹⁰⁴ The Department further proposes 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 proposes 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.

First, the proposed revisions are intended to clarify that an investigation or other compliance action is not a prerequisite to the Department’s ability to obtain from the Federal agency certified payrolls submitted pursuant to § 5.5(a)(3)(ii). Second, the proposed revisions are intended to remove any doubt or uncertainty that the Federal

¹⁰⁴ See 2020 GAO Report, note 12, *supra*, at 6 tbl.1, for descriptions of WHD Compliance Actions.

agency has an obligation to produce such certified payrolls, even in those circumstances in which it may not be the entity actually maintaining the requested certified payrolls. These revisions would make explicit the Department's longstanding practice and interpretation of this provision.

These proposed revisions would 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.

These proposed revisions 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 proposed revisions would 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.

(C) 29 CFR 5.6(a)(3)-(5), 5.6(b)

The Department proposes revisions to §§ 5.6(a)(3) and (5) and 5.6(b), similar to the above-mentioned 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 proposes 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 categories that the Department may use in the future. These revisions make explicit the Department's longstanding practice and interpretation of these provisions and do not impose any new or additional requirements upon a Federal agency.

Proposed revisions to § 5.6(a)(3) clarify the records and information that contracting agencies should include in their DBRA investigations. These proposed changes conform to proposed changes in § 5.5(a)(3).

The Department also proposes updating current § 5.6(a)(5) to reflect its practice of redacting portions of confidential statements of workers or other informants that would tend to reveal those informants' identities. Finally, the Department proposes renumbering current § 5.6(a)(5) as a stand-alone new paragraph § 5.6(c). This proposed change is made to emphasize—without making substantive changes—that this regulatory provision mandating protection of information that identifies or would tend to identify confidential sources, or constitute an unwarranted invasion of personal privacy, applies to both the Department's and other agencies' confidential statements and other related documents.

v. *Section 5.10 Restitution, criminal action.*

To correspond with proposed language in the underlying contract clauses, the Department proposes 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 has proposed new anti-retaliation contract clauses at §§ 5.5(a)(11) and 5.5(b)(5), along with a related section of the regulations at § 5.18.

Those clauses and section provide for the provision of monetary relief that would include, but not be limited to, back wages. Reference to this relief in § 5.10 is proposed to correspond to those proposed new clauses and section. For further discussion of those proposals, see part III.B.3.xix (“Anti-Retaliation”).

The reference to interest in § 5.10 is 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), 5.5(a)(2), 5.5(a)(6), 5.5(b)(2), 5.5(b)(3), and 5.5(b)(4), and on any other monetary relief for violations of the proposed anti-retaliation clauses. The existing Davis-Bacon regulations and contract clauses do not specifically provide for the payment of interest on back wages. The ARB and the Department’s administrative law judges, however, have held that interest calculated to the date of the underpayment or loss is generally appropriate where back wages are due under other similar remedial employee protection statutes enforced by the Department. *See, e.g., Lawn Restoration Serv. Corp.*, No. 2002-SCA-00006, slip op. at 74 (OALJ Dec. 2, 2003) (awarding prejudgment interest under the SCA).¹⁰⁵ Under the DBRA, as in the INA and SCA and other similar statutes, an assessment of interest on backwages and other monetary relief will ensure that the workers Congress intended to protect from

¹⁰⁵ *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).

substandard wages will receive the full compensation that they were owed under the contract.¹⁰⁶

The proposed language establishes that interest will be calculated from the date of the underpayment or loss, using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621, and will be compounded daily. Various 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).*

vi. Section 5.11 Disputes concerning payment of wages.

The Department proposes minor revisions to § 5.11(b)(1) and § 5.11(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. As has been recently

¹⁰⁶ The Department does not propose any requirement of interest on assessments of liquidated damages under the CWHSSA clause at § 5.5(b)(2). Under CHWSSA, unlike the FLSA, there is no requirement that liquidated damages be provided to affected workers. Contracting agencies can provide liquidated damages that they recover to employees, but they are also allowed to retain liquidated damages to compensate themselves for the costs of enforcement or otherwise for their own benefit. *See* 40 U.S.C. 3702(b)(2)(B), 3703(b)(2)(A).

highlighted during the COVID-19 pandemic, while registered or certified mail may generally be a reliable means of delivery, in some circumstances other delivery methods may be just as reliable or even more successful at assuring delivery. These revisions allow the Department to choose methods to ensure that the necessary notifications are delivered to the affected contractors and subcontractors.

In addition, the Department proposes similar changes to allow contractors and subcontractors to also 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 proposes replacing the term "letter" with the term "notification" in this section, since the notification of investigation findings may be delivered by letter or other means, such as email. Similarly, the Department proposes to replace the term "postmarked" with "sent" to reflect that other methods of delivery may be confirmed by other means, such as by the date stamp on an email or the delivery confirmation provided by a commercial delivery service.

For additional discussion related to § 5.11, see part III.B.3.xxi ("Debarment").

vii. Section 5.12. Debarment proceedings.

The Department proposes minor revisions to § 5.12(b)(1) and § 5.12(d)(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 proposed revisions will allow the Department to choose the most appropriate method to confirm that the necessary notifications reach their recipients. The Department proposes 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 proposes a slight change to § 5.12(b)(2), to state that the Administrator's findings will be final if no hearing is requested within 30 days of the date of the Administrator's notification, 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 in § 5.11 and other sub-sections 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 part III.B.3.xxi ("Debarment").

viii. Section 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.

As noted above (*see* part III.B.3.iii(C) "29 CFR 5.5(a)(4) Apprentices."), the Department proposes 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 having to seek 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 proposes to rescind and reserve the section. The Department also proposes several technical edits to § 5.5(a)(4)(ii) to remove references to § 5.16.

ix. *Section 5.17 Withdrawal of approval of a training program.*

As discussed in detail above, the Department proposes to remove references to trainees and training programs throughout parts 1 and 5 (*see* section iii(C) “29 CFR 5.5(a)(4) Apprentices.”) as well as rescind and reserve § 5.16 (*see* section viii “Section 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.”). Accordingly, the Department also proposes to rescind and reserve § 5.17.

x. *Section 5.20 Scope and significance of this subpart.*

The Department proposes two technical corrections to § 5.20. First, the Department proposes 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 proposes to replace the incorrect reference to § 5.12 with the correct reference to § 5.13.

xi. *Section 5.23 The statutory provisions.*

The Department proposes 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 proposes 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. 3141.¹⁰⁷ The Department proposes 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.¹⁰⁸ In light of this drafting convention, and because the existing quotation in § 5.23 no longer accurately reflects the statutory language, the Department is proposing to revise § 5.23 so that it paraphrases the statutory language set forth at 40 U.S.C. 3141(2).

xii. Section 5.25 Rate of contribution or cost for fringe benefits.

The Department proposes 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 also work on private projects. 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 would require annualization of fringe benefits unless a contractor is approved for an exception and provide guidance on how to properly annualize fringe benefits. The proposed revision

¹⁰⁷ See Revision of Title 40, U.S.C., "Public Buildings, Property, and Works," Pub. L. 107-217, § 3141, 116 Stat. 1062, 1150 (Aug. 21, 2002).

¹⁰⁸ See Office of the Federal Register, Document Drafting Handbook § 3.6 (Aug. 2018 ed., rev. Mar. 24, 2021), available at <https://www.archives.gov/files/federal-register/write/handbook/ddh.pdf>.

also creates a new administrative process that contractors must follow to obtain 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 calculate Davis-Bacon credit for all its contributions to a fringe benefit plan in a given time period based solely upon the workers' hours on a Davis-Bacon project when the contractor's 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); *see also, e.g.*, 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). WHD's guidance explains that 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, and a contractor 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 working hours (DBRA and non-covered) to determine the amount creditable towards meeting its obligation to pay the prevailing wage under the DBRA. *See* FOH 15f11(b), 15f12(b).

This principle, which is referred to as "annualization," thus generally compels a contractor performing work on a Davis-Bacon covered project to divide its contributions to a fringe benefit plan for a worker by that worker's total hours of work on both Davis-Bacon and private projects for the employer in that year, rather than attribute those contributions solely to the worker's work on Davis-Bacon covered projects. Annualization effectively prohibits contractors from using fringe benefit plan contributions attributable to work on private jobs 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 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 Davis-Bacon covered and private. Despite the longstanding nature of this policy, however, the concept of annualization is not expressly referred to in the Davis-Bacon regulations.

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. WHD’s rationale for requiring annualization is that such contributions finance benefits that: (1) are continuous in nature, and (2) reflect compensation for all of the work performed by a laborer or mechanic, including work on both DBA-covered and private projects. One notable exception to this general rule compelling the annualization of fringe benefit plan contributions, however, is that WHD has not required annualization 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). The rationale for such exclusion is that DCPPs are not continuous in nature, as the benefits are not available until a worker’s retirement, and that they ensure that the vast majority of workers will receive the full amount of contributions made on their behalf. However, WHD does not currently have

any public guidance explaining the extent to which other plans may also share those characteristics and warrant an exception from the annualization principle.

To clarify when an exception to the general annualization principle may be appropriate, the Department proposes language stating that a fringe benefit plan may only qualify for such an exception when three criteria are satisfied: (1) the benefit provided is not continuous in nature; (2) the benefit does not provide compensation for both public and private work; and (3) the plan provides for immediate participation and essentially immediate vesting. In accordance with the Department's longstanding guidance, a plan will generally be considered to have essentially immediate vesting if the benefits vest after a worker works 500 or fewer hours. These criteria are not necessarily limited to DCPPs. However, to ensure that the criteria are applied correctly and that workers' Davis-Bacon wages are not disproportionately used to fund benefits during periods of private work, such an exception can only apply when the plan in question has been submitted to the Department for review and approval. Such requests may be submitted by plan administrators, contractors, or their representatives. However, to avoid any disruption to the provision of worker benefits, the Department also proposes that any plan that does not require annualization under the Department's existing guidance, such as DCPPs, may continue to use such an exception until the plan has either requested and received a review of its exception status under this process, or until 18 months have passed from the effective date of this rule, whichever comes first.

By requiring annualization, the proposed paragraph (c) furthers the above policy goal of protecting workers' fringe benefits from dilution by preventing contractors from taking credit for fringe benefits attributable to work on non-governmental projects against

fringe benefits required on DBA-covered work. The proposed exception also provides the flexibility for plans that do not dilute workers' fringe benefits to avoid the annualization requirement if they meet the proposed criteria, which are based on the Department's existing guidance with which stakeholders are already familiar. In this way, the Department hopes to strike a balance between protecting workers and preserving access to the types of plans that have traditionally been considered exempt from the annualization requirement.

xiii. Section 5.26 “ * * contribution irrevocably made * * * to a trustee or to a third person”.*

The Department proposes several non-substantive technical corrections to § 5.26 to improve clarity and readability.

xiv. Section 5.28 Unfunded plans.

The Department proposes several revisions to this section. First, the Department proposes 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 non-substantive revisions.

Additionally, the Department proposes adding a new paragraph (b)(5) to this section, explicitly stating that unfunded benefit plans or programs must be approved by the Secretary in order to qualify as bona fide fringe benefits, and a new paragraph (c) explaining the process contractors and subcontractors must use to request such approval. To accommodate these proposed additions, the text currently located in paragraph (c) of this section would be moved to new paragraph (d).

As other regulatory sections make clear, if a contractor provides its workers with fringe benefits through an unfunded plan instead of by making irrevocable payments to a trustee or other third person, 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, even though it is the section that most specifically discusses requirements for unfunded plans. Incorporating this requirement and a description of the approval process into § 5.28 would therefore help improve regulatory clarity. Accordingly, the Department proposes 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, including sufficient documentation, 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 proposes to add language to explain that such requests must be submitted by mail to WHD’s Division of Government Contracts Enforcement, via e-mail to unfunded@dol.gov or any successor address, or via any other means directed by the Administrator.

The proposed revised regulation provides that a request for approval of an unfunded plan must include sufficient documentation to enable the Department to evaluate whether the plan satisfies the regulatory criteria. To provide flexibility, the proposed revised regulation does not itself specify the documentation that must be

submitted with the request. However, current paragraph (c) of this section, and proposed paragraph (d), explain that the words “reasonably anticipated” contemplate a plan that can “withstand a test” of “actuarial soundness.” While WHD’s determination whether or not 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: (1) identification of the benefit(s) to be provided; (2) an explanation of the funding/contribution formula; (3) 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; (4) 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; (5) an explanation of whether employer contribution amounts are different for Davis-Bacon and non-prevailing wage work; (6) identification of 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; (7) specification of the Employee Retirement Income Security Act of 1974 (ERISA) status of the plan or program; and (8) an explanation of how the plan or program is communicated to laborers or mechanics.

xv. *Section 5.29 Specific fringe benefits.*

The Department proposes to revise § 5.29 to add a new paragraph (g) that addresses how contractors may claim a fringe benefit credit for the costs of an apprenticeship program. While § 5.29(a) states that fringe benefits may be used for the defrayment of the costs of apprenticeship programs, the regulations do not presently

address how to properly credit such contributions against a contractor's fringe benefit obligations. The proposed revision would codify the Department's longstanding practice and interpretation. *See* WHD Opinion Letters DBRA-116 (May 17, 1978), DBRA-18 (Sept. 7, 1983), DBRA-16 (July 28, 1987), DBRA-160 (March 10, 1990); *see also* FOH 15f17. The proposed revision also reflects relevant case law. *See Miree Constr. Corp.*, WAB No. 87-13, 1989 WL 407466 (Feb. 17, 1989); *Miree Constr. Corp. v. Dole*, 730 F. Supp. 385 (N.D. Ala. 1990); *Miree Constr. Corp. v. Dole*, 930 F.2d at 1537.

Proposed paragraph (g) clarifies when a contractor may take credit for contributions made to an apprenticeship program and how to calculate the credit a contractor may take against its fringe benefit obligation. First, the proposed paragraph states 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 the Department of Labor's Employment and Training Administration, Office of Apprenticeship (OA), or with a State Apprenticeship Agency recognized by the OA. Additionally, the proposed paragraph explains that contractors may take credit for the actual costs of the apprenticeship program, such as tuition, books, and materials, but may not take credit for additional contributions that are beyond the costs actually incurred for the apprenticeship program. It also reiterates the Department's position that the contractor may only claim credit towards its prevailing wage obligations for the classification of laborer or mechanic that is the subject of the apprenticeship program. 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 the electricians or laborers on the project. Likewise, the proposed paragraph explains that, when applying the annualization principle discussed above, 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 also proposes a minor technical revision to subsection (e) to include a citation to § 5.28, which provides additional guidance on unfunded plans.

xvi. Section 5.30 Types of wage determinations.

The Department proposes several non-substantive revisions to § 5.30. In particular, the Department proposes to update the illustrations 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 proposes to update the illustrations to reflect the way in which fringe benefits are typically listed on wage determinations. The Department has also proposed several non-substantive revisions to § 5.30(a) and (b), including revisions pertaining to the updated illustrations in § 5.30(c).

xvii. *Section 5.31 Meeting wage determination obligations.*

The Department has proposed to update the illustrations in § 5.30(c) to more closely resemble the current format of wage determinations under the DBRA. The Department therefore proposes to make technical, non-substantive changes to § 5.31 to reflect the updated illustration in § 5.30(c).

xviii. *Section 5.33 Administrative expense of a contractor or subcontractor.*

The Department proposes 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 the administration of a fringe benefit plan. *See* WHD Opinion Letter DBRA-72 (June 5, 1978); *see also* FOH 15f18. This is consistent with Department case law under the DBA, under which such payments 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 (Apr. 20, 1977) (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”) (emphasis in original); *see also* *Cody-Zeigler, Inc.*, ARB Nos. 01-014, 01-015, 2003 WL 23114278, at *20 (Dec. 19, 2003) (applying *Collinson* and concluding that a contractor improperly claimed its administrative costs for “bank fees, payments to clerical workers for preparing paper work and dealing with insurance companies” as a fringe benefit). This 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 seeks public comment regarding whether it should clarify this principle further with respect to third-party administrative costs. Under both the DBA and SCA, fringe benefits include items such as health insurance, which necessarily involves both the payment of benefits and administration of benefit claims. 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, in a circumstance in which an SCA contractor contributed to a pension plan on behalf of its employees, that “the plan itself may recoup [its] administrative costs”). For example, a contractor may take credit for the premiums it pays to a health insurance carrier, and the insurance carrier may use those premium payments both to pay for workers’ medical expenses and to pay the reasonable costs of tasks related to the administration and delivery of benefits, such as evaluating benefit claims, deciding whether they should be paid, and approving referrals to specialists. *See* FOH 14j00(a)(2). The Department applies a similar standard under the DBA.

However, whether fees charged by a third party are creditable depends on the facts and circumstances. As noted above, a contractor’s own administrative costs incurred in connection with the provision of fringe benefits are not creditable, as they are considered the contractor’s business expenses. *See Collinson*, 1977 WL 24826, at *2; 29 CFR 4.172. As such, WHD has previously advised that if a third party is merely performing on the contractor’s behalf administrative functions associated with providing fringe benefits to employees, rather than actually administering claims and paying benefits, the contractor’s payments to such a third party are not creditable because they

substitute for the contractor's own administrative costs. Such functions include, for example, 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 administrators, and sending lists of new hires to the plan administrators. Essentially, the principle explained in 29 CFR 4.172, FOH 14j00(a)(1), FOH 15f18, and proposed § 5.33 that a contractor may not take credit for its own administrative expenses applies regardless of whether a contractor uses its own employees to perform this sort of administrative work or engages another company to handle these tasks.

The Department has received an increasing number of inquiries in recent years regarding the extent to which fees charged by third parties for performing such administrative tasks are or are not creditable. As such, while not proposing specific regulatory text, the Department proposes to clarify this matter in a final rule. The Department seeks comment on whether it should incorporate the above-described policies, or other policies regarding third-party entities, into its regulations. In addition, the Department seeks comment on examples of the administrative duties performed by third parties that do not themselves pay benefits or administer benefit claims.

The Department also seeks 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. For instance, should the Department consider the cost of the administrative functions in (1) non-creditable

business expenses, and the cost of actual benefits administration and payment in (2) to be creditable as fringe benefit contributions? Alternatively, should the creditability of payments to such an entity depend on what the third-party entity's primary function is? Should the answer to these questions depend on whether the third-party entity is an employee welfare plan within the meaning of ERISA, 29 U.S.C. 1002(1)?

xix. Anti-Retaliation

The Department proposes 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 new anti-retaliation provisions are 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 regulations are 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 and their pay is often essential to uncover violations such as falsification of certified payrolls or wage underpayments by contractors or subcontractors who fail to keep any pay or time records, or whose records are inaccurate or incomplete. 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 contractors for whom they work. *See* 29 CFR 5.6(a)(5), 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, neither worker confidentiality nor the Davis-Bacon remedial measures of back wages or debarment can make workers whole. The Department’s proposed anti-retaliation provisions aim to remedy such situations by providing make-whole relief to workers who are retaliated against, as well as by deterring or correcting interference with Davis-Bacon 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 the 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 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*, 828 F.2d at 91, so too are the proposed anti-retaliation provisions—as well as the revised Related Act debarment provisions discussed below in part III.B.3.xxi (“Debarment”). The Department believes 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 proposed 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.*, 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 (OALJ 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 (OALJ 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 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).

Though 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, 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. For example, WHD 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 back pay for the period after a worker is fired. Similarly, WHD 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 and 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 proposes 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 sections 5.5(a)(11) and 5.5(b)(5)

The Department proposes to implement anti-retaliation in part by adding a new anti-retaliation provision to all contracts subject to the DBA or Related Acts. Proposed contract clauses provided for in §§ 5.5(a)(11) and 5.5(b)(5) state that it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass,

or in any other manner discriminate, or to cause any person to do the same, against any worker for engaging in a number of protected activities. The protected activities include 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 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 is intended to be broad in order to better effectuate the remedial purpose of the DBRA to protect workers and 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, and with co-workers—about conduct that they reasonably believe to be a violation of the prevailing wage requirements or other Davis-Bacon labor standards. These proposed anti-retaliation provisions recognize that worker cooperation is critical to enforcement of the DBRA. They 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 intends the proposed anti-retaliation provisions to protect internal complaints, or other assertions of workers' Davis-Bacon or CWHSSA labor standards protections set forth in §§ 5.5(a)(11) and 5.5(b)(5), as well as interference that may not have an adverse monetary impact on the

affected workers. Similarly, the Department intends 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 seeks 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 5.5(b)(5).

(B) Proposed new section 5.18

The Department proposes remedies to assist in enforcement of the DBRA labor standards provisions. Section 5.18 sets forth the proposed remedies for violations of the new anti-retaliation provisions. This proposed section also includes 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 provision are 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. Available remedies include, but are not limited to, any back pay and benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct 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 specifies 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 will apply.

Conforming revisions are being proposed to the withholding provisions at §§ 5.5(a)(2), 5.5(b)(3), and 5.9 to indicate that withholding includes monetary relief for violations of the anti-retaliation provisions, §§ 5.5(a)(11) and 5.5(b)(5), in addition to withholding of back wages for DBRA prevailing wage violations and CWHSSA overtime violations.

Similarly, conforming changes are being proposed to §§ 5.6(a)(4) and 5.10(a). Computations of monetary relief for violations of the anti-retaliation provisions have been 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 violations of anti-retaliation provisions have been added as a type of restitution.

As explained above, contractors, subcontractors, and their responsible officers have long been subject to debarment for their retaliatory actions. This rulemaking updates DBRA enforcement mechanisms by ensuring that workers may cooperate with WHD or complain internally about perceived prevailing wage violations without fear of reprisal. This proposed rule is a reasonable extension of the Department's broad regulatory authority to enforce and administer the DBRA. Further, adding anti-retaliation 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. This important new tool will help carry out the DBRA's remedial purposes by bolstering WHD's enforcement.

xx. Post-award determinations and operation-of-law

The Department proposes several revisions throughout parts 1 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 that the appropriate contract clauses are inserted "in full" into any covered contracts, and the contract clause language at § 5.5(a)(1) states that the wage determination(s) 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.

Under the current regulations, WHD has faced multiple longstanding enforcement challenges. 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 are lost 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 multiple award schedule (MAS) contracts, blanket purchase

agreements (BPAs), and other similar schedule contracts negotiated by GSA.¹⁰⁹

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,¹¹⁰ 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 clear

¹⁰⁹ Sales on the GSA Multiple Award Schedule (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>.

¹¹⁰ 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 (CICA) challenge based solely on the incorporation of missing labor standards clauses or appropriate wage determinations is without merit. See *Booz Allen Hamilton Eng’g Servs., LLC*, B-411065 (May 1, 2015), available at <https://www.gao.gov/products/b-411065>.

mechanism that would allow the Department or contracting agencies to seek to recover the back wages that the workers should have been paid on the terminated contract.

(B) Proposed regulatory revisions

To address these longstanding enforcement challenges, the Department proposes to exercise its authority under Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145 to adopt several changes to sections 1.6, 5.5, and 5.6.

(1) § 5.5(e) Proposed operation-of-law language

The Department proposes to include language in a new paragraph at § 5.5(e) to provide that the labor standards contract clauses and appropriate wage determinations are effective “by operation of law” in circumstances where they have been wrongly omitted from a covered contract. This proposed language would assure 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. It would also ensure that workers receive the correct prevailing wages if the correct wage determination was not attached to the original contract or was not incorporated during the exercise of an option. In addition, as discussed below, the Department is proposing language in other regulatory provisions to reflect this change and to provide safeguards for both contractors and contracting agencies.

Under the proposed language in § 5.5(e), 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 provides 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 § 5.5(b)(1), respectively; the withholding clauses at § 5.5(a)(2) and § 5.5(b)(3); and the labor-standards disputes clause at § 5.5(a)(9).

The operation-of-law proposal is intended to complement the existing requirements in § 1.6(f) and would not entirely replace them. Thus, the contracting agency would still be required to take action as appropriate to terminate or modify the contract. Under the new proposed procedure, however, the Administrator 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.¹¹¹ The application of the clauses and the correct wage determination as a matter of law would also provide the Administrator with a tool to enforce the labor standards on any contract that a contracting agency decides it must terminate instead of modify.

Under the proposal, when the contract clause or wage determination is incorporated into the prime contract by operation of law, prime contractors would be responsible for the payment of applicable prevailing wages to all workers under the contract—including the workers of their subcontractors—retroactive to the contract award or beginning of construction, whichever occurs first. This is consistent with the current Davis-Bacon regulations and case law. *See* 29 CFR 5.5(a)(6); *All Phase Elec. Co.*,

¹¹¹ The Department proposes 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.

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 proposed language in § 5.5(e) adding a compensation provision that would require that the prime contractor be compensated for any increases in wages resulting from a post-award incorporation of a contract clause or wage determination by operation of law under § 5.5(e). This proposed language is modeled after similar language that has been included in § 1.6(f) since 1983.¹¹²

The Department recognizes that post-award coverage or correction determinations can cause difficulty for contracting agencies. Contracting agencies avoid such difficulty 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 5.13.¹¹³ In addition, the new language provides that a contracting agency will continue to be able to request that the Administrator grant 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

¹¹² *See* 46 FR 4306, 4313 (Jan. 16, 1981); 47 FR 23644, 23654 (May 28, 1982) (implemented by 48 FR 19532 (Apr. 29, 1983)).

¹¹³ A ruling of the Administrator under § 5.13 that Davis-Bacon labor standards do not apply to the contract is authoritative and prevents a different post-award determination unless the Administrator determines that the pre-award ruling was based on a factual description provided by the contracting agency that was incomplete or inaccurate at the time, or that no longer is accurate after unanticipated changes were made to the scope of the contractor's work.

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).¹¹⁴

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 § 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 inserted in full into 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, the Department does not believe that extending the operation-of-law

¹¹⁴ 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, 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.

provision itself to subcontracts is 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 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 (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 federal 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.¹¹⁵

The Department's proposal, however, differs from 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 *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 29 CFR 5.14, which

¹¹⁵ The Federal Circuit has also noted that the *Christian* doctrine applies to 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 Davis-Bacon Act and Service Contract Act are similar statutes with the same basic purpose, the Department has long noted that court decisions relating to one of these acts have a direct bearing on the other. *See* WHD Opinion Letter SCA-3 (Dec. 7, 1973).

the Department believes will foster a more orderly and predictable process and reduce the likelihood of any unintended consequences.

In proposing this new regulatory provision, the Department has considered the implications of *Universities Research Ass’n, Inc. v. Coutu*. In that case, the Supreme 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. The Court also stated that the workers could not rely on the *Christian* doctrine to read the missing DBA contract clause into the contract. *Id.* at 784 & n.38. The Department has carefully considered the *Coutu* decision, and for the reasons discussed below, has determined that the proposed regulation is consistent with *Coutu* and that the distinctions between the proposed regulation 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 of Labor’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.9.¹¹⁶ If an implied private right of action existed under those circumstances, private parties could effectively avoid raising any

¹¹⁶ Subsection 1.6(f) did not go into effect until April 29, 1983, nearly 2 years after the *Coutu* decision. *See* 48 FR 19532. Moreover, although the Department has used § 1.6(f) to address post-award coverage determinations, as discussed above, the language of that subsection 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).

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 Department’s current proposed procedure would alleviate both of these concerns. As described above, the procedure differs from the *Christian* doctrine because—as 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.

Nor does the proposal 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 operation-of-law provision would 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 proposal would 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) (citing GAO decisions); *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1312–13 (Fed. Cir. 2007).¹¹⁷

The proposal as currently drafted also would not affect the well-settled case law—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 Department’s current operation-of-law proposal, the disputes clause at § 5.5(a)(9) would continue to be effective even when it has been omitted from a contract because the Department’s proposal applies the operation-of-law principle to all of the required contract clauses in § 5.5(a)—including § 5.5(a)(9). As a result, under the proposal, disputes regarding DBRA coverage or other related matters would continue to be heard only through the Department’s administrative process prior to any judicial review, and

¹¹⁷ 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 the 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.

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 the Court of Federal Claims.

Given all of these continued safeguards, the Department believes it is not necessary to expressly limit the proposed operation-of-law provision to be effective only after an administrative determination. However, in addition to input on the proposed regulatory text at § 5.5(e), the Department also seeks input from commenters regarding the alternative proposal to require such a determination. Under that alternative, the operation-of-law provision would only become effective after a determination by the Administrator or a contracting agency that the contract clauses or wage determination was wrongly omitted.

Regardless of whether the proposed operation-of-law language will be subject to a threshold requirement of an administrative determination, the provision would operate in tandem with the continued requirements that contracting agencies must insert the contract clause in full into any new contracts and into existing contracts by modification where the clause had been wrongly omitted. The Department proposes language to clarify that these parallel provisions are both effective, with proposed language in §§ 1.6(f), 5.5(a)(1)(i), and 5.6(a)(1)(ii) that explains that contracting agencies continue to be required to insert the relevant clauses and wage determinations in full notwithstanding that the clauses and wage determinations are also effective by operation of law. As the clauses and applicable wage determination(s) will still be effective as a matter of law even if omitted from the contract, it will be advisable for contractors to promptly raise any such errors of omission with their contracting agencies. A contractor's failure to raise such issues will not relieve the contractor from any of their obligations under the Davis-Bacon labor standards. *See,*

e.g., Coleman Construction Co., ARB No. 15-002, 2016 WL 4238468, at *6 & n.40 (June 8, 2016) (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”); 48 CFR 52.222–52(c).

Similarly, proposed § 5.5(d) also includes a parallel provision that clarifies that the clauses and wage determinations are equally effective if they are incorporated by reference, as a contract that contains a provision expressly incorporating the clauses and the applicable wage determination by reference may be tantamount to insertion in full under the FAR. *See* 48 CFR 52.107, 52.252-2. In addition, independent of the FAR, the terms of a document appropriately incorporated by reference into a contract effectively bind the parties to that contract. *See* 11 Williston on Contracts § 30:25 (4th ed.) (“Interpretation of several connected writings”).

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.

(2) § 1.6(f) Post-award correction of wage determinations

In addition to the operation-of-law language at § 5.5(e), the Department proposes to make several changes to the current regulation at § 1.6(f) that contains the post-award procedure requiring contracting agencies to incorporate an omitted wage determination.

First, as discussed above in section III.B.1.vi. of this NPRM (Section 1.6 Use and effectiveness of wage determinations), the Department proposes adding titles for each subsection in § 1.6 in order to improve readability of the section as a whole. The proposed title for § 1.6(f) is “Post-award determinations and procedures.” The Department also proposes dividing § 1.6(f) into multiple subsections to improve the organization and readability of the important rules it articulates.

At the beginning of the section, the Department proposes 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 proposes 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 now proposes 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 would locate the discussion of the Administrator’s determination that a correction is necessary in a new

§ 1.6(f)(2). The only change to the language of that subsection is 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 was 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 proposes to amend the language in this subsection 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 proposes to amend the language in § 1.6(f) that describes the potential corrective actions that an agency may take. In a nonsubstantive change, the Department proposes 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, in a new § 1.6(f)(3), would 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 proposes 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 proposes 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, at *6–8.

In the new § 1.6(f)(3)(iv), the Department proposes 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 proposes 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 proposes 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 includes 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 provides 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 assure 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 includes a proposed provision at § 1.6(f)(4) that clarifies 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 necessary in order to provide notice to all interested parties, such as contract assignees, subcontractors, sureties, and employees and their representatives.

(3) § 5.6(a)(1) Post-award incorporation of contract clauses

The Department proposes 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). The Department now proposes to eliminate any confusion by creating a separate procedure at § 5.6(a)(1)(ii) that applies specifically to missing contract clauses in a similar manner as § 1.6(f) continues to apply to missing or incorrect wage determinations.

The Department proposes to revise § 5.6(a)(1) by renumbering the existing regulatory text § 5.6(a)(1)(i), and adding an additional sub-section, § 5.6(a)(1)(ii), to include the provision clarifying that where a contract is awarded without the incorporation of the required 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 sub-recipient 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 subsection contains a similar set of provisions as § 1.6(f), with its proposed amendments—including that the incorporation must be retroactive unless the Administrator directs otherwise; that retroactive incorporation is 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 subsection.

The Department also proposes 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) would explain 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 proposes 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 to § 5.6 do not impose any additional requirements on federal agencies, as the existing regulation at § 5.6 clearly states that the federal agency is responsible for incorporating the required clauses into its own contracts subject to the Davis-Bacon labor standards and for ensuring the incorporation of the required clauses into contracts subject to the Davis-Bacon labor standards entered into by the federal agency's funding recipients. Moreover, as noted above, this additional language is analogous to the existing language at 29 CFR 1.6(f) under which the Department historically has requested the incorporation of missing contract clauses.

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 Department’s proposal similarly makes 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.

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 Department welcomes comments on all aspects of this proposal.

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 proposes a number of revisions to the debarment

regulations that are 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)(1) and (b)(2) (emphasis added); *see also* 29 CFR 5.12(a)(1)–(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 DBRA will be debarred “for a period *not to exceed 3 years*.” 29 CFR 5.12(a)(1) (emphasis added). The Department proposes 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 proposes five changes to the Related Act debarment regulations so that they mirror the provisions governing DBA debarment.

First, the Department proposes 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 proposes 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 list¹¹⁸). Third, the Department proposes to expressly permit debarment of “responsible officers” under the Related Acts. Fourth, the Department proposes 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 proposes to make the scope of debarment 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 statutes listed in § 5.1.” *See* 29 CFR 5.12(a)(1)–(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, 776; *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).

¹¹⁸ 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.

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 DBRA 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, 5 U.S.C. app. 1. 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.” *Id.* (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, 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 proposal.

(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 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. Indeed, 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 proposes to revise the governing regulations so that conduct that warrants debarment on

DBA construction projects would also warrant debarment on Related Acts projects. This proposal fits within the Department’s well-established authority to adopt regulations governing debarment of Related Acts 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 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 from the use of workers’ wages, an advantage which can allow such contractors to underbid more law-abiding contractors. If the violations never come to light, such contractors pocket wages that belong to workers. Strengthening the remedy of debarment encourages such unprincipled contractors to comply with Davis-Bacon prevailing wage requirements by expanding the reach of this remedy when they do not. *Facchiano Constr. Co. v. U.S. Dep’t of Labor*, 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 noncompliance’” (quoting *Janik Paving & Constr.*, 828 F.2d at 91)).

In proposing a unitary debarment standard, the Department intends that well-established case law applying the DBA “disregard of obligations” debarment standard would now also apply to Related Acts 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 sufficient to 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.*¹¹⁹ 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 will 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 below, the Department proposes to harmonize debarment standards by reorganizing § 5.12. As proposed, paragraph (a)(1) sets forth the disregard of obligations debarment standard, which would apply to both DBA and Related Acts violations. The proposed changes accordingly

¹¹⁹ For the same reason, except in unusual circumstances, it would generally not be appropriate to debar a contractor for violations in circumstances where the contracting agency omitted the contract clause and the clause was subsequently incorporated retroactively or found to be effective by operation of law.

remove the “willful or aggravated” language from § 5.12, with conforming changes proposed in 29 CFR 5.6(b) and 5.7(a). Proposed paragraph (a)(2) combines 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 would already be 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. 97-49, 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, the subset of violations that would only have been debarable under the DBA disregard of obligations standard now will 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 (citations omitted). 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)–(a)(7). *See 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”).

c. Benefits of proposed debarment standard change

i. Improved compliance and enforcement

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 Const. Co.*, 347 U.S. at 178). Both the DBA statutory and the Related Acts regulatory debarment sanctions are intended to foster compliance with labor standards. *Interstate Rock Products*, 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.” (citations omitted)); *Howell Constr., Inc.*, WAB No. 93-12, 1994 WL 269361, at *7 (May 31, 1994). Using the disregard of obligations debarment standard for all DBA and DBRA 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 their incentive to comply with DBA 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 will serve the important public policy of holding contractors’ responsible officials accountable for non-compliance 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 believes that applying the DBA debarment and debarment-related standards to all Related Act prevailing wage cases would eliminate 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) (ALJ applied inapplicable DBA standard rather than applicable aggravated or willful standard; legal error of ALJ required remand for consideration of debarment under the correct 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 “conflat[ion 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 Department 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-federal 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).

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 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 the 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”); *see also Pythagoras Gen. Cont. 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.”), *aff’d sub. nom. on other grounds Pythagoras Gen. Cont. Corp. v. U.S. Dept. of Labor*, 926 F. Supp. 2d 490 (S.D.N.Y. 2013).

The Department believes 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 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 proposes to revise § 5.12 (*see* proposed § 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 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’s 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 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. 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. At times, the WAB has treated a 3-year debarment period as presumptive and therefore has reversed ALJ decisions imposing debarment for fewer than 3 years. *See, e.g., Brite Maint. Corp.*, WAB No. 87-07, 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, at *1–2 (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 three-year debarment period “*absent extraordinary circumstances.*” *A. Vento Constr.*, WAB No. 87-51, 1990 WL 484312, at *6 (emphasis added). ALJs have grappled with what constitutes “extraordinary circumstances,” and when to consider the factors outlined in the DBRA early removal process. *Id.*; *see also* current 29 CFR 5.12(a)(1) and 5.12(c).¹²⁰ The Department believes that setting a uniform 3-year debarment period would provide clarity and promote consistency.

¹²⁰ *See* 29 CFR 5.12(a)(1) (“shall be ineligible for a period *not to exceed 3 years* (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list” (emphasis added)); 29 CFR 5.12(c) (“Any person or firm debarred under paragraph (a)(1) of this section may in writing

Further, the Department has concluded that in instances—usually decades ago—when debarment for a period of less than 3 years was warranted, it has 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, 1031–32 (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 proposes 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 proposes to eliminate the provision at 29 CFR 5.12(c) that allows for Related Acts contractors and subcontractors the possibility of early removal from the debarment list. 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 has been granted even less often. The Department’s experience has shown that the possibility of early removal from the debarment list has not improved the debarment process. Likewise, the ARB and WAB do not appear to have addressed early removal for

request removal from the debarment list *after six months* from the date of publication by the Comptroller General of such person or firm's name on the ineligible list.” (emphasis added)).

decades. At that time, the ARB and WAB affirmed denials of early removal requests. *See Atlantic Elec. Servs., AES, 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. 96-07, 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 DBA contractor not be debarred. *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 proposes to amend § 5.12 by deleting paragraph (c) and renumbering the remaining paragraph to accommodate this revision.

(3) Debarment of responsible officers

The Department also proposes 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. Co., 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 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. Thus, by expressly stating that responsible officers may be debarred under both the DBA and Related Acts, this proposed revision is consistent with current law. The Department intends that Related Acts debarment of individuals will continue to be interpreted in the same way as debarment of DBA responsible officers has been interpreted.

(4) Debarment of other entities

The Department proposes another revision so that the Related Acts regulations mirror the DBA regulations not only in practice, but also in letter. Specifically, the Department proposes 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 also* 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 also* 29 CFR 5.12(b)(1), (d).

The 1982 final rule preamble for these provisions indicates that the determination of “interest” (DBA) and “substantial interest” (Related Acts) are 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, *implemented by* 48 FR 19540. 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.” 47 FR 23658, 23661. The Department now proposes 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 proposes to revise the scope of Related Acts debarment so that it mirrors the scope of DBA debarment set out in current 29 CFR 5.12(a)(1). Currently, under the Related Acts, contractors are not generally debarred from being awarded any contracts or subcontracts of the United States or the District of Columbia, but rather are only barred from being awarded contracts subject to Davis-Bacon prevailing wage standards. 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 believes that there is no reasoned basis to prohibit debarred contractors or subcontractors whose violations have warranted debarment for Related

Acts violations from receiving Related Acts contracts or subcontracts, but to permit them to continue to be awarded direct DBA contracts during the Related Acts 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 source of federal funding or assistance for the work.

xxii. Employment Relationship Not Required

The Department proposes a few changes 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.

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 coverage to include “[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 similarly make it clear 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.” (emphasis in original)); 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.” (emphasis in original)); *cf.* 41 U.S.C. 6701(3)(B) (defining “service employee” under the Service Contract Act 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 reached similar conclusions. *See Star Brite Constr. Co., Inc.*, ARB No. 98-113, 2000 WL 960260, at *5 (June 30, 2000) (“the 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) (Reorganization Plan No. 14 of 1950 and 40 U.S.C. 3145—the authority for the 29 CFR

parts 3 and 5 regulations— 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 workers met the DBA’s “functional [rather than formalistic] test of employment” and affirming ALJ’s order of prevailing wages and overtime due workers of second-tier subcontractor); *Joseph Morton Co.*, WAB No. 80-15, 1984 WL 161739, at *2–3 (July 23, 1984) (rejecting contractor’s argument that workers were subcontractors not subject to DBA requirements and affirming ALJ finding that contractor owed prevailing wage and overtime back wages on 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 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 proposes a few specific changes to the regulations in recognition of this principle. First, the Department proposes to amend § 1.2 and 3.2 to include a definition of “employed” that is substantively identical to the definition in § 5.2. This change would clarify that the DBA’s expansive scope of “employment” also applies in the context of wage surveys and determinations under part 1 and certified payrolls under part 3. Second, references to employment (e.g., employee, employed, employing, etc.) in §§ 5.5(a)(3) and 5.5(c), as well as elsewhere in the regulations, have been revised to refer instead to “workers,” “laborers and mechanics,” or “work.” Notwithstanding the broad scope of employment reflected in the existing and proposed definitions and in case law, the Department believes that this language, particularly in the contract clauses themselves, will clarify this principle and eliminate ambiguity. Consistent with the above,

however, to the extent that the words “employee,” “employed,” or “employment” are used in this preamble or in the regulations, the Department intends that those words be interpreted expansively to *not* limit coverage to workers in an employment relationship. Finally, the Department proposes to clarify in the definitions of “employed” in parts 1, 3, and 5 that the broad definition applies equally to “public building[s] or public work[s]” and to “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.”

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), 5.5(b)(3), 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), (b)(3), 5.9. The Department proposes a number of regulatory revisions to reinforce the current withholding provisions.

(A) Cross-withholding

Cross-withholding is currently permitted and 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 specifically provide for cross-withholding. *See* 47 FR 23658, 23659–60¹²¹ (cross-withholding permitted as stated in §§ 5.5(a)(2) and 5.5(b)(3)); *Group Dir., Claims Grp./GGD*, B-225091 et al., 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”).

The Department proposes additional amendments to the cross-withholding contract clause language at § 5.5(a)(2) and § 5.5(b)(3) to 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 above with reference to the proposed definition of prime contractor, the interposition of another entity between the agency and the general contractor is not a new phenomenon. In general, however, the use of single-purpose limited liability company (LLC) entities and similar joint ventures and teaming agreements in government contracting has been increasing in recent decades. *See, e.g.,* John W. Chierichella & Anne

¹²¹ The May 28, 1982 final rule was implemented in part, including §§ 5.5(a)(2) and 5.5(b)(3), in 1983. 48 FR 19540, 19540, 19545–47 (Apr. 29, 1983).

Bluth Perry, Fed. Publ'ns LLC, Teaming Agreements and Advanced Subcontracting Issues, 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).

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.

Without amendment to the existing regulations, however, the Government is not able to effectively demand similar guarantees to secure performance of Davis-Bacon prevailing wage requirements. Unless the cross-withholding regulations are amended, the core DBRA remedy of cross-withholding may be of limited effectiveness as to joint ventures and other similar contracting vehicles such as single-purpose LLCs. 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 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 payment of any back wages 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 of corporate veil.”¹²² However, where a policy is enacted by contract, it is inefficient and unnecessary to rely on post hoc veil-piercing to assure that the legislative policy is enacted. The Government can instead, by contract, assure that the use of single-purpose entities, subsidiaries, or

¹²² 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 Wage Appeals Board’s own decision); *Griffin v. Sec’y of Labor*, 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 Act debarment action).

joint ventures interposed as nominal “prime contractors” does not inhibit the application of the Congressional mandate to assure back wages are recovered through withholding.¹²³

Accordingly, the Department proposes amending the withholding contract clauses at § 5.5(a)(2) and § 5.5(b)(3) to ensure that any entity that directly enters into a contract covered by the DBRA must agree to cross-withholding against it to cover any violations of specified affiliates under *other* covered contracts entered into by those affiliates. The covered affiliates are those entities included within the proposed definition of prime contractor in § 5.2: controlling shareholders or members, joint venturers or partners, and contractors (e.g., general contractors) that have been delegated significant construction and/or compliance responsibilities. 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 new cross-withholding language would allow the Department to seek cross-withholding on either contract even though the contracts are nominally with separate legal entities. Or, if a general contractor is delegated all of the construction and compliance duties on a first contract held by an unrelated developer-owner, but the general contractor itself holds a prime contract on a separate second contract, the Department could seek cross-withholding from the general contractor on the second contract, which it holds directly, to remedy violations on the first contract.

¹²³ 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”).

The Department also proposes to add language to § 5.5(a)(2) and § 5.5(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 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 by other 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 have also been proposed for § 5.9.

The Department also proposes certain non-substantive changes to streamline the withholding clauses. The Department proposes 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—instead of the specific language currently in 5.5(a)(2) that re-states the lists of the types of covered employees already listed in 5.5(a)(1)(i). The Department also proposes using the same term “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 also proposes 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 5.5(b)(3) have also been proposed for the explanatory section at § 5.9. In addition, the Department proposes 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 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 the labor standards were incorporated only by operation of law into that contract.

(B) Suspension of funds for recordkeeping violations

The Department also proposes to add language clarifying that, as proposed in § 5.5(a)(3)(iv), funds may be suspended when a contractor has refused to submit certified payroll or provide the required records as set forth at § 5.5(a)(3).

(C) The Department’s priority to withheld funds

The Department proposes revising §§ 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 PWRB¹²⁴, DBA/DBRA/CWHSSA Withholding and Disbursement, at 4. In order 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. . .”). The proposed 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 DBRA wages they were owed in the first place.

Specifically, the Department proposes 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:

¹²⁴ See note 14, *supra*.

- (1) A contractor's surety(ies), including without limitation performance bond sureties, and payment bond sureties;
- (2) A contracting agency for its reprocurement 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. 3901-3907.

To the extent that a contractor did not have rights to funds withheld for Davis-Bacon wage underpayments, nor do their sureties, assignees, successors, creditors (e.g., the U.S. Internal Revenue Service), or bankruptcy estates have greater rights than the contractor. *See, e.g., Liberty Mut. Ins. Co.*, ARB No. 00-018, 2003 WL 21499861, at *7–9 (DOL 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 & Trust 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 DBRA wage claims before any 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 procurement 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 4.¹²⁵ 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); *see also Quincy Hous. Auth. LaClair Corp.*, WAB No. 87-32, 1989 WL 407468, at *3. 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 ; *see also* 29 CFR 5.9.

Similarly, the Department has priority over assignees (e.g., assignees under the Assignment 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

¹²⁵ *See* note 14, *supra*.

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 (Bankr. M.D. Pa. 1983); *cf. Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 135–36 (1962) (concluding, in a case under the Miller Act, that “the 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. Professional Tech. Servs., Inc. v. IRS*, No. 87-780C(2), 1987 WL 47833, at *2 (E.D. Mo. Oct. 15, 1987) (when DOL finds [an SCA] violation and issues a withholding letter, that act “extinguishe[s]” 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, 7–18 (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 sub nom on reconsideration Int'l Fidelity 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) (DOL's withholding claim for unpaid DBA wages prevailed over claims of payment bond surety and trustee in bankruptcy).

The Department proposes codifying its position that DBRA withholding has priority over claims under the Prompt Payment Act, 31 U.S.C. 3901–3907. 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) (concerning requirement that payments to prime contractors be for performance by such contractor that conforms to the specifications, terms, and conditions of its contract).

The Department welcomes 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.

xxiv. Subpart C - Severability

The Department proposes to add a new subpart C, titled “Severability”, which would contain a new § 5.40, also titled “Severability.” The proposed severability provision explains 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 intends that the remaining provisions remain in effect.

4. Non- substantive changes

xxv. 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 requests comment on the proposed rule with respect to clarity and effectiveness of the language used.

xxvi. Other changes

The Department proposes 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 proposes 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”).¹²⁶ These non-substantive revisions do not alter the substantive requirements of the regulations.

¹²⁶ See Office of the Federal Register, Drafting Legal Documents: Principles of Clear Writing § 18, available at <https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html>.

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.

This rulemaking 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 has submitted information collection revisions to OMB for review to reflect changes that will result from the proposed rule.

Summary: This rulemaking 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. The Department proposes to add two new recordkeeping requirements (telephone number and email address) to the collection under 1235-0008; however, it does not propose that such data be added to the certified weekly payroll submission. The Department proposes to add paragraph (a)(3)(iii) to 29 CFR 5.5, 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 notes that it is a normal business practice to keep such documents and does not expect an increase in burden associated with this requirement. The Department requests public comment on its assumption that contractors and subcontractors already maintain these records as a matter of good business practice. Further, the Department adds proposed regulatory citations to the collection under 1235-0023, however there is no change in burden.

Purpose and use: This proposed 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 and certain proposed new recordkeeping requirements. An Information Collection Request has been submitted to revise the approval to incorporate the regulatory citations in this proposed rule applicable

to the proposed rule and adjust burden estimates to reflect a slight increase in burden associated with the proposed new recordkeeping requirements.

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. This Information Collection Request is being submitted as the proposed rule proposes to revise the location within the regulatory text of certain requirements. An Information Collection Request has been submitted to OMB to revise the approval to incorporate the regulatory citations in this proposed rule.

Information and technology: There is no particular order or form of records prescribed by the proposed regulations. A respondent may meet the requirements of this proposed rule using paper or electronic means.

Public comments: The Department seeks comments on its analysis that this NPRM creates a slight increase in paperwork burden associated with ICR 1235–0008 and no increase in burden to ICR 1235-0023. Commenters may send their views on the Department’s PRA analysis in the same way they send comments in response to the NPRM as a whole (e.g., through the www.regulations.gov website), including as part of a comment responding to the broader NPRM. While much of the information provided to OMB in support of the information collection request appears in the preamble, interested parties may obtain a copy of the full copy of the supporting statements by sending a written request to the mail address shown in the ADDRESSES section at the beginning of this preamble or by calling the number listed in the ADDRESSES section of this preamble. Alternatively, a copy of the ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and

estimated total burden may be obtained free of charge from the RegInfo.gov website on the day following publication of this notice or by visiting <http://www.reginfo.gov/public/do/PRAMain> website. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for WHD, New Executive Office Building, Room 10235, Washington, DC 20503. The OMB will consider all written comments that the agency receives during the comment period of this proposed rule. As previously indicated, written comments directed to the Department may be submitted during the comment period of this proposed rule.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Total burden for the subject information collections, including the burdens that will be unaffected by this proposed rule and any changes are summarized as follows:

Type of review: Revisions 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: 154,500 (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 NPRM).

Capital/Start-up costs: \$0 (\$0 from this rulemaking).

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.

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.¹²⁷ 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 proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866 and is economically significant. Although the Department has only quantified costs of \$12.6 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.

¹²⁷ See 58 FR 51735, 51741 (Oct. 4, 1993).

Executive Order 13563 directs agencies to, among other things, propose or adopt a regulation only upon a reasoned determination that its benefits 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 proposed 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 proposes to update and modernize the regulations that implement the Davis-Bacon and Related Acts. The Davis-Bacon Act (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 DBA and Related Acts (collectively, 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. Among other proposals as discussed more fully earlier in this preamble, the Department proposes:

- To return to the definition of “prevailing wage” in § 1.2 that it used from 1935 to 1983.¹²⁸ 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 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 was paid to at least 30 percent of such workers. Only if no single wage rate is paid to at least 30 percent of workers in a classification will an average rate be used.
- 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. 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.

¹²⁸ The 1981–1982 rulemaking went into effect April 29, 1983. 48 FR 19532.

- To 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.
- To 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.
- To 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.
- To strengthen enforcement, including by making effective by operation of law 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.
- To 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 proposed 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 the Bureau of Labor Statistics Employment Cost Index.

This proposed rule predominantly affects firms that hold federally funded or assisted construction contracts because of its impact on 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 113,900 firms. The broader population (including those bidding on contracts but without active contracts, or those considering bidding in the future) includes 154,800 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 therefore potentially affected by this proposed 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 proposed 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 \$12.6 million. Average annualized costs across the first 10 years are estimated to be \$3.9 million (using a 7 percent discount rate). The transfer analysis discussed in Section IV.D. draws on two illustrative analyses conducted by the Department. However, the Department does not definitively quantify annual transfer 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 (2020 Dollars)

	Year 1	Future Years		Average Annualized Value	
		Year 2	Year 10	3% Real Rate	7% Real Rate
Firms: Narrow Definition [a]	154,500	154,500	154,500	--	--
Firms: Broad Definition [b]	192,400	192,400	192,400	--	--
Potentially Affected Workers (millions)	1.2	1.2	1.2	--	--
Direct employer costs (million)	\$12.6	\$2.5	\$2.5	\$3.7	\$3.9
Regulatory familiarization	\$10.1	\$0.0	\$0.0	\$1.2	\$1.4
Implementation	\$2.5	\$2.5	\$2.5	\$2.5	\$2.5

[a] Firms actively holding DBRA-covered contracts

[b] Firms who may be bidding on DBA 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. This includes both firms impacted by the DBA and firms impacted by the Related Acts. The more

narrowly defined population (firms actively holding DBA-covered contracts) includes 154,500 firms: 61,200 impacted by DBA and 93,300 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 192,400 firms: 99,100 impacted by DBA and 93,300 impacted by the Related Acts. Additionally, only a subset of these firms will experience a change in payroll costs. Those firms that already pay above the new wage determination rates calculated under the 30-percent rule will not be substantively affected. Because there is no readily usable source of 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 in 2020. 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. The pandemic could cause structural changes to the economy, resulting in shifts in industry employment and wages. The Department welcomes comments and data on how the COVID-19 pandemic has impacted firms and

workers on DBRA contracts, as well as the impact on construction and other affected industries as a whole.

The Department identified firms working on DBRA contracts as contracts with 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 DBRA.^{129,130} The Department also 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.¹³¹

In 2019, there were 14,000 unique prime contractors with active construction contracts in USASpending. However, subcontractors are also impacted by this proposed rule. The Department examined 5 years of USASpending data (2015 through 2019) and identified 47,200 unique subcontractors who did not hold contracts as primes in 2019.

¹²⁹ 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 2 digits (most aggregated level) to 6 digits (most granular level). <https://www.census.gov/naics/>.

¹³⁰ 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 DBRA. Including these additional NAICS codes could result in an overestimate because they would only be affected by this proposed rule if Davis-Bacon covered construction occurs. The data does not allow the Department to determine this.

¹³¹ The DBA only applies in the 50 states and the District of Columbia and does not apply in the territories. However, some Related Acts provided federal funding of construction in the territories 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.

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 proposed rule they will not actually be impacted by the rule.

ii. All Potentially Affected Contractors (DBA Only)

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 General Services Administration's (GSA) 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 represent those that may be affected if the proposed 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 to bid on DBA-covered contracts after this proposed rulemaking; these firms are not included in the Department's estimate. The proposed rule could also impact them if they are awarded a future contract.

Using May 2021 SAM data, the Department identified 51,900 registered firms with construction listed as the primary NAICS code.¹³² The Department excluded firms with expired registrations, firms only applying for grants,¹³³ government entities (such as city or county governments)¹³⁴, 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 99,100 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

¹³² Data released in monthly files. Available at:

<https://www.sam.gov/SAM/pages/public/extracts/samPublicAccessData.jsf>.

¹³³ 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.”

¹³⁴ 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.

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 (9.5) in the construction industry.¹³⁵ This results in 93,300 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. The Department welcomes comments and data on the number of firms working on Related Acts contracts.

Table 2: Range of Number of Potentially Affected Firms

Source	Number
Total Count (Davis-Bacon and Related Acts)	
Narrow definition [a]	154,500
Broad definition [b]	192,400
DBA (Narrow Definition)	
Total	61,200
Prime contractors from USASpending	14,000
Subcontractors from USASpending	47,200
DBA (Broad Definition)	
Total	99,100
SAM	51,900
Subcontractors from USASpending	47,200
Related Acts	
Total	93,300
Related Acts workers	883,900
Employees per firm (SUSB)	9.5

[a] Firms actively holding DBRA-covered contracts

[b] Firms who may be bidding on DBA contracts or considering bidding in the future

¹³⁵ 2018 Statistics of U.S. Businesses (SUSB). U.S., NAICS sectors, larger employment sizes up to 20,000+. <https://www.census.gov/data/tables/2018/econ/susb/2018-susb-annual.html>.

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 implements Executive Order 14026.¹³⁶ 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 13658.¹³⁷ 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 determinations (e.g. laborers or mechanics).

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 workers and self-employed DBRA workers in the U.S. territories. Third, the Department estimated the number of potentially affected workers working on contracts covered by Davis-Bacon Related Acts.

¹³⁶ See 86 FR 38816, 38816-38898.

¹³⁷ See 81 FR 9591, 9591-9671 and 79 FR 60634–60733.

i. *Workers on DBA Contracts in the 50 States and the District of Columbia*

DBA contract employees were estimated by calculating the ratio of Federal contracting expenditures to total output in NAICS 23: Construction. Total output is the market value of the goods and services produced by an industry. This ratio is then applied to total private employment in that industry (Table 3).

$$\text{Potentially Affected Employees} = \frac{\text{Expenditures}}{\text{Total Output}} \times \text{Employment}$$

The Department used 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.

To determine the share of all output associated with federal Government contracts, the Department divided contracting expenditures by gross output in NAICS 23.¹³⁸ 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 Occupational Employment and

¹³⁸ 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."

Wage Statistics (OEWS), formerly the Occupational Employment Statistics.¹³⁹ 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 unincorporated self-employed in the estimate of workers.

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, these laws only apply to wages for mechanics and laborers, so some of these workers would not be affected by these changes to DBA.

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. The total number of potentially affected mechanics and laborers will likely exceed this number because affected workers likely do not work exclusively on DBA contracts.

ii. Workers on DBA 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

¹³⁹ Bureau of Labor Statistics. OEWS. May 2019. Available at: <http://www.bls.gov/oes/>.

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.¹⁴⁰ 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.¹⁴¹

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).¹⁴²

¹⁴⁰ GDP limited to personal consumption expenditures and gross private domestic investment.

¹⁴¹ In Puerto Rico, personal consumption expenditures plus gross private domestic investment equaled \$71.2 billion. Therefore, Puerto Rico gross output was calculated as $\$71.2 \text{ billion} \times 1.8 \times 2.7 \text{ percent}$.

¹⁴² 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.

iii. *Workers on Related Acts Contracts*

This proposed rulemaking will also impact workers on DBRA-covered 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.¹⁴³ Therefore, the Department used a different approach to estimate the number of potentially affected workers for DBRA contracts.

The Department identified that the total state and local government construction spending as reported by the Census Bureau was \$318 billion in 2019.¹⁴⁴ The Department then applied adjustment factors to adjust for the share of state and local expenditures that are covered by the Related Acts. Data on the share of state and local expenditures covered by the Related Acts are not available, therefore the Department used rough approximations. The Department requests comments and data on the appropriate adjustment factors. 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 U.S. Department of

¹⁴³ 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.

¹⁴⁴ Census Bureau. Annual Value of Public Construction Put in Place 2009 – 2020. Available at: https://www.census.gov/construction/c30/historical_data.html.

Housing and Urban Development (HUD) backed mortgage insurance for private construction projects.¹⁴⁵

As was done for DBA, the Department divided contracting expenditures by gross output, and multiplied that ratio by the estimate of private sector employment used above to estimate the share of workers working on Related Acts-covered contracts (883,900).

Table 3: Number of Potentially Affected Workers

	Private Output (Billions) [a]	Contracting Output (Millions) [b]	Share Output from Covered Contracting	Private-Sector Workers (1,000s) [c]	Workers DBRA Contracts (1,000s) [d]	
DBA, excl. territories	\$1,662	\$54,400	3.27%	9,100	297.9	
DBRA, territories	\$5	\$993	[e]	35	6.1	
Related Acts	\$1,667	\$161,297	9.68%	9,135	883.9	
Total	--	\$216,700	--	--	1,188.0	

[a] 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.

[b] For DBA, and DBRA 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.

[c] OEWS May 2019. For non-territories, also includes unincorporated self-employed workers from the 2019 CPS MORG.

[d] Assumes share of expenditures on contracting is same as share of employment. Assumes workers work exclusively, year-round on DBRA covered contracts.

[e] Varies by U.S. Territory.

¹⁴⁵ Estimate based on personal communications with the Office of Labor Standards Enforcement and Economic Opportunity at HUD.

3. *Demographics of the Construction Industry*

In order 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. The Department welcomes comments and data on how the demographics of workers on DBRA projects would differ from the demographics of workers in the construction industry as a whole. 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*.¹⁴⁶

¹⁴⁶ 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, 18. https://www.cpwr.com/wp-content/uploads/publications/The_6th_Edition_Construction_eChart_Book.pdf.

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.

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%
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 U.S. Department of Labor’s Office of Apprenticeship and national registered apprenticeship programs.¹⁴⁷ 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 58.4 percent of active apprentices are White, 10.5 percent are Black or African American, 2.4 percent are American Indian or Alaska Native, 1.5 percent are Asian, and 0.8 percent are Native Hawaiian or Other Pacific Islander. The data also show that 23.6 percent of active apprentices are Hispanic.

C. Costs of the Proposed Rule

This section quantifies direct employer costs associated with the proposed rule. The Department considered employer costs associated with both (a) the return to the “three-step” method for determining the prevailing wage (i.e., the change from a 50 percent threshold to a 30 percent threshold) and (b) the incorporation of a mechanism to periodically update certain non-collectively bargained prevailing wage rates. Costs

¹⁴⁷ FY2019 Data and Statistics, U.S. Department of Labor, Office of Apprenticeship. <https://www.dol.gov/agencies/eta/apprenticeship/about/statistics/2019>.

presented are combined for both provisions. However, the Department believes most of the costs will be associated with the second provision, as will be discussed below. The Department estimated both regulatory familiarization costs and implementation costs. Year 1 costs are estimated to total \$12.6million. Average annualized costs across the first 10 years of implementation are estimated to be \$3.9million (using a 7 percent discount rate). Transfers resulting from these provisions are discussed in section V.D.

1. Regulatory Familiarization Costs

The proposed rule will impose 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. However, the Department believes these time costs will be small. Firms are simply required to pay no less than the prevailing wage and fringe benefit rates set forth in the wage determinations applicable to their covered contracts; they do not need to familiarize themselves with the methodology used to develop those prevailing wage rates in order to comply with them. Costs associated with ensuring compliance are included as implementation costs.

For this analysis, the Department has included all firms who either hold DBA or Related Acts contracts or who are considering bidding on work (192,400 firms). However, this may be an overestimate, because firms who are registered in SAM might not bid on a DBA contract, and therefore may not review these regulations. The Department assumes that, on average, 1 hour of a human resources staff member's time will be spent reviewing the rulemaking. Some firms will spend more time reviewing the rule, but others will spend less or no time reviewing the rule. The cost of this time is the

median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$52.65 per hour.¹⁴⁸ Therefore, the Department has estimated regulatory familiarization costs to be \$10.1 million ($\$52.65 \text{ per hour} \times 1.0 \text{ hour} \times 192,400 \text{ contractors}$) (Table 5). 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; had this rule not been proposed, they still would have incurred the costs of regulatory familiarization with existing provisions. Average annualized regulatory familiarization costs over 10 years, using a 7 percent discount rate, are \$1.4 million.

2. Implementation Costs

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.¹⁴⁹

The proposed periodic adjustment rule will generally affect the frequency with which prevailing wage rates are updated through both the provision to update old, outmoded rates, and moving forward, the provision to periodically update rates when that does not occur through the survey process (see section V.D.). Implementation costs may

¹⁴⁸ This includes the median base wage of \$32.30 from the 2020 OEWS plus benefits paid at a rate of 46 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>.

¹⁴⁹ With the exception of certain significant changes; see section III.B.1.vi.(B).

be incurred by affected firms through the need to update compensation rates in their relevant payroll systems. Currently, only a fraction of prevailing wages can be expected to change each year. Because the Department intends to update older rates to more accurately represent wages and benefits being paid in the construction industry, and, moving forward, more published wage rates will change more frequently than in the past, firms will spend more time updating prevailing wage rates for contractual purposes than they have in the past.

To estimate the additional cost attributable to the need to update out-of-date rates, it is necessary to estimate the number of firms that need to update rates each year and the additional time these firms will spend implementing the new wage and fringe benefit rates due to this provision. The Department estimates that on average new wage rates are published from 7.8 surveys per year.¹⁵⁰ 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 24,100 firms ($0.156 \times 154,500$ firms), might already be

¹⁵⁰ 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.

affected by changes in prevailing wage rates in any given year and thus will not incur additional implementation costs attributable to the rule.¹⁵¹

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 37,080 firms ($0.24 \times 154,500$) might already be affected by changes in prevailing wages in any given year. Combining this number with the 24,100 firms calculated above, 61,180 firms in total would not incur additional implementation costs with this rule. The Department welcomes comments and data on what is the appropriate share of firms who already update wage rates due to CBA increases.

Therefore, 93,320 firms ($154,500 \text{ firms} - 61,180 \text{ firms}$) are assumed to not update prevailing wage information in any given year because prevailing wage rates were unchanged in their areas of operation, and would therefore incur implementation costs. Under the proposed provisions, the Department intends to first update certain outdated non-collectively bargained rates¹⁵² (currently designated as “SU” rates) up to their current

¹⁵¹ The Department divided 7.8 surveys per year by 50 states. 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).

¹⁵² 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.

value to better track wages and benefits being paid in the construction industry over a staggered period. Then, in the future, the Department intends to update non-collectively bargained rates afterward as needed, and not more frequently than every 3 years. Therefore, all firms that intend to bid on future contracts may need to update relevant prevailing wage rates and thus incur implementation costs. The Department therefore assumes that these 93,230 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 proposed 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 so as 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 some firms will spend no time on implementation costs. Only a subset of firms will experience a change in payroll costs, because those firms that already pay above the new wage determination rates calculated under the 30-percent rule will not need to incur any implementation costs.

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 \$52.65. Therefore, total Year 1 implementation costs were estimated to equal \$2.5 million ($\$52.65 \times 0.5 \text{ hour} \times 93,320 \text{ firms}$). The average annualized implementation cost over 10 years, using a 7 percent discount rate, is

\$2.5 million. The Department welcomes comments on exactly how long it will take firms to adjust their wage rates each year.

Table 5: Summary of Costs (2020 Dollars)

Variable	Total	Regulatory Familiarization Costs	Implementation Costs
Year 1 Costs			
Potentially affected firms	-	192,400	93,320
Hours per firm	-	1	0.5
Loaded wage rate [a]	-	\$52.65	\$52.65
Cost (\$1,000s)	\$12,600	\$10,100	\$2,500
Years 2-10 (\$1,000s)			
Annual cost	\$2,500	\$0	\$2,500
Average Annualized Costs (\$1,000s)			
3% discount rate	\$3,700	\$1,200	\$2,500
7% discount rate	\$3,900	\$1,400	\$2,500

[a] 2020 OEWS median wage for Compensation, Benefits, and Job Analysis Specialists (SOC 13-1141) of \$32.30 multiplied by 1.63: the ratio of loaded wage to unloaded wage from the 2020 ECEC (46 percent) plus 17 percent for overhead.

3. Other Provisions not Analyzed

For certain provisions contained in this proposal, the Department expects that any impacts of the provision would be negligible, as discussed below. The Department welcomes comments with data to help analyze these provisions.

The Department proposes that prevailing wage rates set by State and local governments may be adopted as Davis-Bacon 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 possess sufficient data to conduct an analysis comparing prevailing wage rates set by State and local governments nationwide to those established by the Administrator. 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. The proposed change would 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 proposal could result in cost savings, which are discussed further in section V.E.

The Department also proposes to eliminate the across-the-board restriction on mixing rural and metropolitan county data to allow for a more flexible case-by-case approach to using such data. Under this proposal, if sufficient data were not available to determine a prevailing wage in a county, the Department would be permitted to use data from surrounding counties whether those counties may be designated overall as rural or metropolitan. While sufficient data for analyzing the impact of this proposal are not available, the Department believes this proposal 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.

The proposal 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 costly 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 proposal could make things more streamlined and efficient for the contractors.

There are a few places in the NPRM where the Department is proposing to add language that clarifies existing policies. For example, the Department proposes to add language to the definitions of “building or work” and “public building or public work” to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Also, the Department proposes to add language regarding the “material suppliers” exemption. Although 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 who

are newly applying Davis-Bacon labor standards because of the clarifications in this rule. This could result in additional rule familiarization and implementation costs for these firms, and transfers to workers in the form of higher wages if the contractors are currently paying below the prevailing wage.

The Department does not have data to estimate to what extent contracting agencies have not been implementing Davis-Bacon labor standards but welcomes comments and data to help inform an estimate of the impact of these provisions. Specifically, the Department welcomes comments from commercial building owners who lease space to the federal government on how this provision would affect costs and the wages paid to workers.

Other proposed provisions are also likely to have no significant economic impact, such as the proposed clarification of the “material supplier” exception in § 5.2, and the proposal 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.

D. Transfer Payments

1. The Return to the “Three-Step” Method for Determining the Prevailing Wage

i. Overview

The proposed 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, under this proposal fewer future wage determinations will be

established based on a weighted average. Consequently, some future wage determinations may be different than they otherwise would as a result of this proposed provision. The Department is not able to quantify the impact of this proposed 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 rule had it been used to set the wage determinations for a few occupations in recent years.

Specifically, to demonstrate the impact of this provision, the Department compiled data for seven select classifications from 19 surveys across 17 states from 2015 to 2018 (see Appendix A).¹⁵³ This sample of rates 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

¹⁵³ 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.

extrapolated to definitively quantify the overall impact of the 30-percent rule. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this proposed 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.¹⁵⁴ The Department then applied the proposed 30-percent rule to the same sample of wage data.¹⁵⁵ Then the Department compared the wage rates determined by the proposed protocol with current wage determinations. Results are reported at the county level (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.

¹⁵⁴ The Department chose to calculate prevailing wages under the current and proposed definitions to ensure comparability between the methods. The Department compared calculated current rates to the published wage determinations to verify the accuracy of its method. The calculated current rates generally match the 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 proposed 30 percent prevailing definition.

¹⁵⁵ 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.

For Florida, calculated prevailing wage rates generally changed from an average rate (e.g., insufficient identical rates to determine a single prevailing rate under the current protocol) to a non-collectively bargained single 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

Table 6 compares 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 prevailing rate, and (3) a non-collectively bargained single prevailing rate. Fringe benefit rate results also include the number of counties where the majority of workers received zero fringe benefits. It also shows 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 prevailing collectively bargained rate, and 12 percent were a single prevailing non-collectively bargained rate. Using the 30 percent requirement for a single 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 single 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 proposed “three-step process” rates. The share determined as average rates decreased from 22 percent to 10 percent. The prevalence of single 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 by Publication Rule

	Laborers	Plumbers	Roofers	Brick-layers	Cement Masons	Elec-tricians	Total
Count	949	504	545	379	360	360	3,097
Current Hourly Rate							
Average	82%	57%	55%	42%	68%	53%	63%
Single Prevailing-Union	12%	40%	23%	39%	4%	44%	25%
Single Prevailing - Non-Union	6%	3%	22%	19%	28%	4%	12%
Proposed "Three-Step Process" Hourly Rate [a]							
Average	47%	22%	26%	18%	40%	11%	31%
Single Prevailing-Union	21%	46%	25%	45%	7%	80%	34%
Single Prevailing-Non-Union	32%	31%	49%	37%	53%	9%	36%
Change for Hourly Rate (Percentage Points)							
Average	-35	-35	-29	-23	-28	-42	-32
Single Prevailing-Union	9	7	2	5	3	36	9
Single Prevailing-Non-Union	26	28	27	18	25	5	23

Current Fringe Benefit Rate							
Average	23%	27%	12%	13%	9%	48%	22%
Single Prevailing-Union	14%	41%	23%	39%	4%	44%	25%
Single Prevailing-Non-Union	4%	5%	3%	2%	2%	0%	3%
No fringes	59%	27%	62%	46%	85%	8%	50%
Proposed "Three-Step Process" Fringe Benefit Rate [a]							
Average	13%	13%	9%	6%	5%	13%	10%
Single Prevailing-Union	21%	47%	25%	46%	7%	80%	34%
Single Prevailing-Non-Union	9%	13%	4%	2%	3%	7%	7%
No fringes	57%	27%	62%	46%	85%	0%	48%
Change for Fringe Benefit Rate (Percentage Points)							
Average	-11	-14	-3	-7	-4	-35	-11
Single Prevailing-Union	7	6	2	7	3	36	9
Single Prevailing-Non-Union	6	8	1	0	1	7	4
No fringes	-2	0	0	0	0	-8	-2

[a] Using a threshold of 30 percent of employees' wage or fringe benefit rates being identical.

Table 7 summarizes the difference in calculated prevailing wage rates using the proposed three-step process compared to the current process. The results highlighted in Table 7 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-counties are weighted equally in the calculations. On average:

- Across all observations, the average hourly rate increases by only one cent. Across affected classification-counties, the calculated hourly rate increases by 4 cents on average. However, there is significant variation. The calculated hourly rate may increase by as much as \$7.80 or decrease by as much as \$5.78.

- Across all observations, the average hourly fringe benefit rate increases by 19 cents. Across affected classification-counties, the calculated hourly fringe benefit rate increases by \$1.42 on average (with a range from -\$6.17 to \$11.16).

Based on this demonstration of the impact of changing from the current to the proposed 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 rule. Instead, these results should be viewed as an informative illustration of the potential direction and magnitude of transfers that will be attributed to this proposed provision.

Table 7: Change in Rates Attributable to Change in Definition of “Prevailing”

	Laborers	Plumbers	Roofers	Brick-layers	Cement Masons	Elec-tricians	Total
Hourly Rate							
Total	949	504	545	379	360	360	3,097
Number changed	330	175	160	89	101	150	1,005
Percent changed	35%	35%	29%	23%	28%	42%	32%
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
Fringe Benefit Rate							
Total	949	504	545	379	360	360	3,097
Number changed	137	69	17	26	14	184	447
Percent changed	14%	14%	3%	7%	4%	51%	14%
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

2. Adjusting Out-of-date Prevailing Wage and Fringe Benefit Rates

Updating old Davis-Bacon prevailing wage and fringe benefit rates will increase the minimum required hourly compensation required to be 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. Because the federal government generally 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 a transfer estimate, many assumptions need to be made with little or no supporting evidence. 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 on Wage Determinations (WDs) as of May 2019 to demonstrate the potential changes in Davis-Bacon wage and fringe benefit rates resulting from updating

old rates to 2021 values using the Bureau of Labor Statistics' (BLS) Employment Cost Index (ECI).¹⁵⁶ For this demonstration, the Department considered the impact of updating rates for key classification wage and fringe benefit rates published prior to 2019 that were based on weighted averages, which comprises 172,088 wage and fringe benefit rates lines in 3,997 WDs.¹⁵⁷ The Department has focused on wage and fringe benefit rates prior to 2019 because these are the universe of key classification rates that may be more than 3 years old by the time a final rule is issued, and the proposal calls for updating non-collectively-bargained wage rates that are more than 3 years old.

After dropping hourly wages greater than \$100 and wage rates that were less than \$7.25 but were updated to \$7.25, 159,545 wage rates were updated for this analysis.¹⁵⁸ To update these wage rates, the Department used the BLS' ECI, which measures the change over time in the cost of labor total compensation.¹⁵⁹ The Department believes that the ECI for private industry workers, total compensation, "construction, and extraction,

¹⁵⁶ At the time of the analysis, ECI was only available for the first two quarters of 2021. Thus, the wage and fringe benefit rates were updated to values representative of the first half of 2021.

¹⁵⁷ In each type of construction covered by the Davis-Bacon and Related Acts, some classifications are called "key" because most projects require these workers. Building construction currently 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 wage rate (or fringe benefit rate) for 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.

¹⁵⁸ The 54 wage rates greater than \$100 were day or shift rates. The remaining 12,489 rates excluded were less than \$7.25 prior to July 24, 2009, but were published from surveys conducted before the establishment of DOL's Automated Survey Data System (ASDS) in 2002. The Department no longer has records of the original published wage rates in these cases.

¹⁵⁹ Available at: <https://www.bls.gov/ect/>.

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 in the goods-producing industries was the most appropriate series to use that was available back to 1979.¹⁶⁰

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 original published rates.¹⁶¹ However, due to market conditions in some areas, workers 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’s Occupational Employment and Wage Statistics (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. 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 state 2020 OEWS data, then approximated a 2021 value using ECI.¹⁶²

¹⁶⁰ Continuous Occupational and Industry Series, Table 5.

<https://www.bls.gov/web/eci/eci-continuous-dollar.txt>

¹⁶¹ The hourly wage rate increase would only occur when the next contract goes into effect and a new WD with an updated wage rate is incorporated into the contract.

¹⁶² Because the May 2021 OEWS data are not yet available, the Department used the ECI for private industry workers, wages and salaries, “construction, and extraction, farming,

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.¹⁶³ 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 any income transfers to construction workers because most workers are likely already paid more than the updated Davis-Bacon rate. After removing the 99,111 updated Davis-Bacon wage rates that were less than the OEWS median, there remained 60,434 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 because they are a wage rate for a rural county, and the OEWS data represents the statewide median.

Further investigating the ECI-updated Davis-Bacon wage rates that were substantially above the OEWS median wage rate, the Department found that 24,044 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 WD for Iowa Heavy Construction River Work exceed the 2021 OEWS median

fishing, and forestry” occupations, not seasonally adjusted, applied to the May 2020 OEWS estimates to approximate the median wage rates for May 2021. May 2020, Sectors 21, 22, & 23: Mining, Utilities, and Construction.

https://www.bls.gov/oes/special.requests/oes_research_2020_sec_21-22-23.xlsx

¹⁶³ The Department used OEWS data for certain occupations matching key classifications in the construction industry by state.

rates for the same classifications in Iowa.¹⁶⁴ 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 more 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 updating of 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 originally published wage rates.

The second difference accounts for the 24,044 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 2022.¹⁶⁵ 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

¹⁶⁴ WD IA20190002.

¹⁶⁵ 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.

wage rate. Thus, the maximum 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 8 provides the summary statistics of the per hour transfers to workers that may occur due to updating old Davis-Bacon wage rates. Among the wage rates considered in this demonstration, there are 60,434 wage rates updates that may result in transfers to workers. On average, the maximum hourly transfer is \$3.92.

Table 8 Distribution of Potential Per-Hour Transfers Due to Updated Rates

Coverage	Number of Rates	Mean	Median	Standard Deviation
Wages				
Davis-Bacon Related Acts	60,434	\$3.92	\$3.11	\$3.92
Davis-Bacon Act	60,434	\$3.92	\$3.11	\$3.92
Fringe Benefits				
Davis-Bacon and Related Acts	75,495	\$1.43	\$1.02	\$1.58
Total Compensation				
Davis-Bacon and Related Acts	94,547	\$3.65	\$2.13	\$4.62

Of the 172,088 pre-2019 SU key classification wage and fringe benefit rates, 75,495 were non-zero, and thus would be updated, possibly resulting in some transfers to workers (Table 8). On average, these non-zero fringe benefits would increase by \$1.43 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, 94,547 Davis-Bacon total compensation hourly rates would increase by \$3.65 on average.¹⁶⁶

¹⁶⁶ 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.

The Department conducted these two demonstrations to 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.

However, 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. Due to these many uncertainties in calculating a transfer estimate, the Department instead tried to characterize what changes in rates might occur as a result of the rulemaking.

E. Cost Savings

This proposed rule could lead to cost savings for both contractors and the federal government, because the clarifications made in 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.3, the proposal 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 will increase certainty and reduce administrative burden for contracting entities. It would reduce the number of compliance requests needed, which could save time for the contractors, contracting agencies, and the Department. Additionally, the proposal which permits 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.

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. However, the Department welcomes any comments and data that could inform a quantitative analysis of these cost savings.

F. Benefits

Among the multiple proposals discussed above, the Department recognizes that the proposal 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. The Department welcomes comments and data on the benefits of this proposed rulemaking.

1. Improved Government Services

For workers who are paid higher wage rates as a result of this proposed 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).¹⁶⁷ In a study on the impact of bid competition on final outcomes of State Department of Transportation (DOT) 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.¹⁶⁸

2. Increased Productivity

For workers whose wages increase as a result of the Department's proposal 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.¹⁶⁹ Efficiency wages may elicit greater effort on the part of workers, making them more effective on the job.¹⁷⁰

Allen (1984) estimates the ratio of the marginal product of union and non-union labor.¹⁷¹ 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

¹⁶⁷ Thompson, J. and J. Chapman. (2006). "The Economic Impact of Local Living Wages," Economic Policy Institute, Briefing Paper #170, 2006.

¹⁶⁸ 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>

¹⁶⁹ Akerlof, G. A. (1982). Labor Contracts as Partial Gift Exchange. *The Quarterly Journal of Economics*, 97(4), 543-569.

¹⁷⁰ 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.

¹⁷¹ Allen, S. G. (1984). Unionized Construction Workers are More Productive. *The Quarterly Journal of Economics*, 251-174.

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 Federal Highway Administration from 1994 to 2002.¹⁷² 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.¹⁷³ 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).

¹⁷² The Construction Labor Research Council (2004). The Impact of Wages on Highway Construction Costs. <http://niabuild.org/WageStudybooklet.pdf>.

¹⁷³ Vedder, R. (1999). Michigan's Prevailing Wage Law and Its Effects on Government Spending and Construction Employment. Midland, Michigan: Mackinac Center for Public Policy.

Studies on absenteeism have demonstrated that there is a negative effect on firm productivity as absentee rates increase.¹⁷⁴ Zhang et al., in their study of linked employer-employee data in Canada, found that a 1 percent decline in the attendance rate reduces productivity by 0.44 percent.¹⁷⁵ Allen (1983) similarly noted that a 10-percentage point increase in absenteeism corresponds to a decrease of 1.6 percent in productivity.¹⁷⁶ 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.¹⁷⁷

Fairris et al. (2005) demonstrated that as a worker's wage increases there is a reduction in unscheduled absenteeism.¹⁷⁸ 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

¹⁷⁴ 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>.

¹⁷⁵ 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://healtheconomicsreview.biomedcentral.com/articles/10.1186/s13561-016-0138-y>.

¹⁷⁶ 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>.

¹⁷⁷ 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))

¹⁷⁸ 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.

increase in pay.¹⁷⁹ 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.¹⁸⁰ 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 the proposed rule.

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).¹⁸¹ 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

¹⁷⁹ 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>.

¹⁸⁰ 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>.

¹⁸¹ 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). doi: 10.1111/labr.12071.

Jardim, E., Long, M. C., Plotnick, R., van Inwegen, E., Vigdor, J., & Wething, H. (2018, October). *Minimum Wage Increases and Individual Employment Trajectories* (Working paper No. 25182). NBER. doi:10.3386/w25182.

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.¹⁸² Fairris et al. (2005)¹⁸³ 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 proposed 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 reduction in turnover.

VI. Initial Regulatory Flexibility Act (IRFA) 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 (March 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

¹⁸² 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>.

¹⁸³ 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.

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.

A. Why the Department is Considering Action

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 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 Davis-Bacon Act (DBA) and now 71 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 requirements, due to the substantial increases in federally funded construction provided for in legislation such as the Infrastructure Investment and Jobs Act.

In addition to expanding coverage of the prevailing wage rate requirements of the DBA, 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. Off-site construction of significant components of public buildings and works has also increased. The regulations need to be updated to assure their continued effectiveness in the face of changes such as these.

B. Objectives of and Legal Basis for the Proposed Rule

In this NPRM, 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 proposes to return 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 also proposes to periodically update non-collectively bargained prevailing wage rates to address out-of-date wage rates. The Department proposes to give WHD broader authority 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 prefabricated buildings, to ensure that DBRA requirements protect workers by operation of law, and to strengthen enforcement including debarment and anti-retaliation. See Section III.B. for a full discussion of the Department’s proposed changes to these regulations.

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

DBRA-covered construction projects.¹⁸⁴ *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.

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 154,500 to 192,400. 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.

¹⁸⁴ 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 both prime contracts and contractors and subcontracts and subcontractors of any tier.

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.”¹⁸⁵
- For subcontractors from USASpending, the Department identified those with “small” or “SBA” in the “Subawardee Business Types” variable.¹⁸⁶
- 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 103,600 to 135,200.

Table 9: Range of Number of Potentially Affected Small Firms

Source	Small
Total Count (Davis-Bacon and Related Acts)	
Narrow definition	103,600
Broad definition	135,200
DBA (Narrow Definition)	
Total	26,700

¹⁸⁵ 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>.

¹⁸⁶ The description of this variable in the USASpending.gov Data Dictionary is: “Comma separated list representing sub-contractor business types pulled from Federal Procurement Data System - Next Generation (FPDS-NG) or the System for Award Management (SAM).”

Prime contractors from USASpending	11,200
Subcontractors from USASpending [a]	15,500
DBA (Broad Definition)	
Total	58,300
SAM	42,800
Subcontractors from USASpending [a]	15,500
Related Acts	
Total	77,000

[a] Determination based on inclusion of “small” or “SBA” in the business types.

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 for by firm size. For example, 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.¹⁸⁷ Data on expenditures by firm size are unavailable for the Related Acts (Table 10). 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 10: Number of Potentially Affected Workers in Small Covered Contracting Firms

¹⁸⁷ 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.

	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.

In several places in the NPRM, the Department is proposing to add or revise language to clarify existing policies rather than to substantively change them. For example, the Department proposes to add language to the definitions of “building or work” and “public building or public work” to clarify that these definitions can be met even when the construction activity involves only a portion of an overall building, structure, or improvement. Also, the Department proposes to add language clarifying the applicability of the “material supplier” exemption to coverage, 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 proposed 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 proposes 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, which 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 and welcomes data and information on the extent to which small firms would newly be applying Davis-Bacon and what potential compliance costs they could incur.

D. Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

Many of the proposals in this rule only affect how the prevailing wage rate is calculated. For these proposals 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 proposing 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 proposing to clarify 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 proposing to clarify that electronic signatures and certified payroll submission methods may be used.

E. Calculating the Impact of the Proposed 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. 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.3.

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 future surveys, 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 proposed rule on prevailing wage rates.

The Department welcomes comments and data on whether small firms would incur increased payroll costs following this rule, and the extent to which firms are paying above the out-of-date prevailing wage rates.

Year 1 direct employer costs for small businesses are estimated to total \$8.7 million. Average annualized costs across the first 10 years are estimated to be \$2.6 million (using a 7 percent discount rate). On a per firm basis, direct employer costs are estimated to be \$78.97 in Year 1.

The proposed 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 (135,200 firms). The Department assumed that on average, 1 hour of a human resources staff member's time will be spent reviewing the rulemaking. The cost of this time is the median loaded wage for a Compensation, Benefits, and Job Analysis Specialist of \$52.65 per hour.¹⁸⁸ Therefore, the Department has estimated regulatory familiarization costs to be \$7.1 million ($\$52.65 \text{ per hour} \times 1.0 \text{ hour} \times 135,200 \text{ contractors}$) (Table 11). 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 \$1.0 million.

Table 11: Direct Employer Costs to Small Businesses (2020 Dollars)

Variable	Total	Regulatory Familiarization Costs	Implementation Costs
Year 1 Costs			
Potentially affected firms	-	135,200	62,574
Hours per firm	-	1	0.5
Loaded wage rate	-	\$52.65	\$52.65
Cost (\$1,000s)	\$8,700	\$7,100	\$1,600
Years 2–10 (\$1,000s)			
Annual cost	\$1,600	\$0	\$1,600
Average Annualized Costs (\$1,000s)			
3% discount rate	\$2,400	\$835	\$1,600
7% discount rate	\$2,600	\$1,000	\$1,600

¹⁸⁸ This includes the median base wage of \$32.30 from the May 2020 OEWS estimates plus benefits paid at a rate of 46 percent of the base wage, as estimated from the BLS's Employer Costs for Employee ECEC data, and overhead costs of 17 percent. OEWS data available at: <http://www.bls.gov/oes/current/oes131141.htm>.

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 proposed rule would generally affect the frequency with which prevailing wage rates are updated through the provision to update old, outmoded rates, and moving forward, to periodically update rates when that does not occur through the survey process. Currently, only a fraction of prevailing wages can be expected to change each year. Because the Department intends to update older rates to more accurately represent wages and benefits being paid in the construction industry, and, moving forward, more published wage rates will change more frequently than in the past, firms may spend more time updating prevailing wage rates for contractual purposes than they have in the past, leading to additional implementation costs than there otherwise would have been. 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 rule). This proposed change would 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 39.6 percent of firms are already checking rates due to newly published surveys (section V.C.2.). Multiplying the remaining 60.4 percent by the 103,600 small firms holding DBRA contracts results in 62,574 firms impacted annually (Table 11). The proposed change to update current non-collectively bargained rates will have an implementation cost to firms. The proposed change to update non-collectively bargained rates moving forward will result in ongoing implementation costs.

Each time the rate is updated, 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 (62,574 firms). For the initial increase, the Department estimated this will take approximately 0.5 hours per year for firms to adjust their rates. As with previous costs, implementation time costs are based on a loaded hourly wage of \$52.65. Therefore, total Year 1 implementation costs were estimated to equal \$1.6 million ($\$52.65 \times 0.5 \text{ hour} \times 62,574 \text{ firms}$). 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 seek to bid on 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 one and a half hours of time (1 hour for regulatory familiarization and 0.5 hours for implementation) valued at \$52.65 per hour. This totals \$78.97 in Year 1 costs per firm. The Department welcomes comments on all of the cost estimates presented here.

F. Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Proposed Rule

The Department is not aware of any relevant Federal rules that conflict with this NPRM.

G. Alternative to the Proposed Rule

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. Accordingly, the Department considered certain regulatory alternatives.

For one alternative, the Department considered requiring all contracting agencies—not just federal agencies—that use wage determinations under the DBRA to submit an annual report to the Department outlining proposed construction programs for the coming year. The Department concluded, however, that this requirement would be unnecessarily onerous for non-federal contracting agencies, particularly as major construction projects such as those related to road and water quality infrastructure projects may be dependent upon approved funding or financial assistance from a federal partner. The Department’s proposal to require only federal agencies to submit these annual reports would be simpler and less burdensome for the regulated community as some federal agencies have already been submitting these reports pursuant to AAM 144 (Dec. 27, 1985) and AAM 224 (Jan. 17, 2017).

Another alternative that was considered was the use of a different index instead of the Employment Cost Index (ECI) for updating out-of-date non-collectively bargained wage rates. The Department considered proposing to use the Consumer Price Index (CPI) but considers this data source to be a less appropriate index to use 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 welcomes comments on these and other alternatives to the proposed rule.

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 proposed rule in accordance with Executive Order 13132 regarding federalism and (2) determined that it does not have federalism implications. The proposed 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 proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposed 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	Pub Date	State	Metro/Rural	Construction Type(s)
Surveys Included				
2018	12/25/2020	Utah	Metro	Heavy
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 [a]
2016	12/14/2018	Connecticut	Metro [b]	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 [c]	Residential
2015	10/6/2017	Alabama	Both [d]	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 [c]	Building

[a] Building component not sufficient.

[b] Only one rural county so excluded.

[c] Rural component of survey was not sufficient.

[d] 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 is: For a classification to have sufficient responses there generally must be data on at least six employees from at least three contractors.

Additionally, if data is received for either exactly six employees or exactly three contractors, then no more than 60 percent of the total employees 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 employees and two contractors.

Aggregation: If the classification is not sufficient at the county level, data are aggregated to the group level, supergroup level, and state 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 employees are paid the exact same hourly rate, then that rate prevails. If not, the Department calculates a weighted average. If more than 50 percent are not exactly the same, but 100 percent of the data are union, then a union weighted average 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 employees 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 employees receiving fringe benefits are paid the same total fringe benefit rate, then that total fringe benefit rate prevails.
- more than 50 percent of the employees 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 employees 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.

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; R.S. 161, 64 Stat. 1267; 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; and Secretary of Labor's Order 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 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 (946 Stat. 1494, as amended; 40 U.S.C. 3141 *et seq.*), and any laws now existing or subsequently enacted, which provide for 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 is currently found at www.dol.gov/agencies/whd/government-contracts.

(2) Functions of the Secretary of Labor under these statutes and under Reorganization Plan No. 14 of 1950 (64 Stat. 1267, as amended; 5 U.S.C. Appendix), except for functions assigned to the Office of Administrative Law Judges (see 29 CFR part 6) and appellate functions assigned to the Administrative Review Board (see 29 CFR part 7) or reserved by the Secretary of Labor (see Secretary's Order 01-2020 (Feb. 21, 2020), 85 FR 13186 (Mar. 6, 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. Amend § 1.2 by revising 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.

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 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. Amend § 1.3 by revising introductory text and paragraphs (a) through (d) and adding new paragraphs (e) through (j) 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 of this part 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 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 title.

(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 § 1.3(b) of this part, 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 of this part.

(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 employees within the same classification as the same wage where the pay rates are functionally equivalent, as explained by a collective bargaining agreement or written policy otherwise maintained by the contractor.

(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), 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), 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 of this part, a geographic area or scope that differs from the standards in § 1.7 of this part, 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) 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), 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) precludes the Administrator from otherwise considering State or local prevailing wage rates, 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 this part.

5. Revise § 1.4 to read as follows:

§ 1.4 Report of agency construction programs.

At the beginning of each fiscal year, each federal agency using wage determinations under the Davis-Bacon Act or any of the laws referenced by § 5.1, must furnish the Administrator with a report that contains a general outline of its proposed construction programs for the upcoming 3 fiscal years. 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 10th 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. Amend § 1.5 by revising paragraphs (a) and (b) 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 in 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. Amend § 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)(ii) or a wage determination under § 1.6(f). 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 shall 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 his or her 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 shall be supported by a written finding, which shall 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 also 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 paragraph (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 (ii)(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 agency exercises an option provision to unilaterally extend the term of a contract, 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), or another similar anniversary date where the agency has sought and received prior approval from the Department for the alternative date. Such revised wage determination(s) will apply to any construction work that begins or is obligated under such a contract during the twelve 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 contracting and ordering agency must include the applicable updated wage determination in such task orders, purchase orders, or other similar contract instrument.

(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 paragraphs (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.* 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, the wage determination may not be used for the contract, without regard to whether bid opening (or initial endorsement or the signing of a housing assistance payments contract) has occurred.

(f) Post-award determinations and procedures.

(1) If a contract subject to the labor standards provisions of the laws referenced by § 5.1 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 (1) and (2), 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 statutes referenced by § 5.1 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.

(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).

(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. Amend § 1.7 by revising paragraphs (a) through (d) and adding new paragraph (e) 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. Amend § 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; 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) 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.

11. Remove Appendix A to part 1.

Appendix A to Part 1—[Removed]

12. Remove Appendix B to part 1.

Appendix B to Part 1—[Removed]

**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. Amend § 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. Amend § 3.2 to read as follows:

§ 3.2 Definitions.

As used in the regulations in this part:

Affiliated person. The term *any 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 title.

(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.

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, 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.

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 title, including, without limitation, altering, remodeling, painting and decorating, installation on the site of the work of items fabricated off-site, transportation as reflected in § 5.2 of this title, demolition as reflected

in § 5.2 of this title, 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 him and the real employer.

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 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 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. Amend § 3.3 by removing and reserving (a) and revising paragraphs (b) through (d) 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 shall 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. Amend § 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 Federal 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 has been completed on the prime contract. 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 his authorized representative, and by authorized representatives of the Department of Labor.

18. Amend § 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 shall 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 part 531 of this title. When such a deduction is made the additional records required under §516.25(a) of this title shall be kept.

(j) Any deduction for the cost of safety equipment of nominal value purchased by the laborer or mechanic as his or her own property for his or her personal protection in his or her 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 him or her 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. Amend § 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 shall 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, 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. Amend § 3.8 by revising 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. Amend § 3.11 by revising 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 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; R.S. 161, 64 Stat. 1267; 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; 40 U.S.C. 3701 *et seq.*; and the laws listed in 5.1(a) of this part; Secretary's Order No. 01-2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014); 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114-74 at § 701, 129 Stat 584.

23. Amend § 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 (946 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 is currently found at www.dol.gov/agencies/whd/government-contracts.

(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. Amend § 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.

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, railways, 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* mean 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 below):
 - (i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;
 - (ii) Painting and decorating;

- (iii) Manufacturing or furnishing of materials, articles, supplies or equipment, but only if such work is done
 - (A) 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*, which is defined as transportation under any of the following circumstances:
 - (A) Transportation that takes place entirely within a location meeting the definition of *site of the work* in this section;
 - (B) Transportation of 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 a *nearby 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—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

(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.

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 employees 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 parts 1 and 3 of this subtitle and this part.

Development statute. The term *development statute* means 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.

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, watchmen 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 part 541 of this title are not deemed to be laborers or mechanics. Working supervisors 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;
 - (ii) It also supplies materials, articles, supplies, or equipment to the general public; and
 - (iii) Its facility manufacturing the materials, articles, supplies, or equipment, if any, is neither established specifically for the contract or project nor located at the *site of the work*.

- (2) If an entity, in addition to being engaged in the activities specified in paragraph (1)(i), 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, any contractor (*e.g.*, a general contractor) that has been delegated all or substantially all of the responsibilities for overseeing any 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. For the purposes of the cross-withholding provisions in § 5.5, 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 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 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, or 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. A “significant portion” of a building or work means 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 of the portions or modules at the place where the building or work will remain.

(iii) Any *nearby dedicated support sites*, defined as:

(A) job headquarters, tool yards, batch plants, borrow pits, and similar facilities 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 *secondary construction sites* as defined above, *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 physical place or places where the building or work called for in the contract will remain, 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, but does not include the 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.

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 nonappropriated 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 shall be in accordance with the provisions of § 1.6 of this title.

25. Amend § 5.5 to 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 insert in full 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 §§ 5.5(d) and 5.5(e), 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 § 5.5(a)(4). 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.* 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 29 CFR 1.3(f), wage and fringe benefit rates for classifications of laborers and mechanics for which conformance requests are regularly submitted pursuant to § 5.5(a)(1)(iii), 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. The Administrator will establish wage rates for such classifications in accordance with § 5.5(a)(1)(iii)(A)(3). 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. 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, 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 (C) and (D) above. 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) 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) 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) 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 loan or grant recipient) must, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract 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 required by the clause set forth in paragraph (a)(1) of this section and monetary relief for violations of § 5.5(a)(11) of this contract, including interest, 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 paragraph 5.2 of this section). The necessary funds may be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract that is subject to Davis-Bacon prevailing wage requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency. 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 § 5.5(a)(3)(iv), 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 29 CFR 5.5(a)(2)(i), 5.5(b)(3)(i), 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 reprourement 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 29 CFR 5.5(a)(1)(v) 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 copies of 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 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 29 CFR 5.5(a)(3)(i), except that full Social Security numbers and last known addresses, telephone numbers, and email addresses must not be included on weekly transmittals. Instead the 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 Web site at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/wh347.pdf> or its successor site. 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 29 CFR 5.5(a)(3)(ii), the appropriate information and basic records are being maintained under 29 CFR 5.5(a)(3)(i), 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.

(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)–(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 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 worker hours on the job, may be grounds for debarment action pursuant to 29 CFR 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 or 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—

(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 journeymen 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. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, 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 the registered program must be paid not less than the applicable wage rate on the wage determination for the work actually performed.

(D) Reciprocity.

(i) 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. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyworker hourly rate specified in the applicable wage determination.

(ii) Equal employment opportunity. The use of apprentices and journeyworkers under this part shall 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 29 CFR 5.5(a)(1) through (11), along with the applicable wage determination(s) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also 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 29 CFR 5.5. 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 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 29 CFR 5.12(a) or (b).

(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 29 CFR 5.12(a) or (b).

(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, or parts 1, 3, or 5 of this title;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting on behalf of themselves or others any right or protection under the DBA, Related Acts, or parts 1, 3, or 5 of this title;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under the DBA, Related Acts, or parts 1, 3, or 5 of this title; or

(iv) Informing any other person about their rights under the DBA, Related Acts, or parts 1, 3, or 5 of this title.

(b)

* * *

(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 watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$29 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) of this section.

(3) *Withholding for unpaid wages and liquidated damages.*

(i) The (write in the name of the Federal agency or the loan or grant recipient) must, upon its own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the contractor under this contract 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 unpaid wages and monetary relief, including interest, required by the clauses set forth in paragraphs (b)(2) and (b)(5) of this section and liquidated damages for violations of paragraph (b)(2) of this section or to satisfy any such liabilities required by any other Federal contract, or federally-assisted contract subject to Davis-Bacon prevailing wage requirements, that is held by the same prime contractor (as defined in paragraph 5.2 of this section). The necessary funds may be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract that is subject to Davis-Bacon prevailing wage requirements and is held by the same prime contractor, regardless of whether the other contract was awarded or assisted by the same agency.

(ii) *Priority to withheld funds.* The Department has priority to funds withheld or to be withheld in accordance with 29 CFR 5.5(a)(2)(i), 5.5(b)(3)(i), 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 paragraph (b)(1) through (5) of this section and also 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) of 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 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 part 5 of this title;

(ii) Filing any complaint, initiating or causing to be initiated any proceeding, or otherwise asserting on behalf of themselves or others any right or protection under CWHSSA or part 5 of this title;

(iii) Cooperating in any investigation or other compliance action, or testifying in any proceeding under CWHSSA or part 5 of this title; or

(iv) Informing any other person about their rights under CWHSSA or part 5 of this title.

(c) *CWHSSA payroll records clause.* In addition to the clauses contained in paragraph (b), 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 payrolls and basic payroll 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 watchmen, 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, 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. Amend § 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 subrecipient 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 clauses.

(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 29 CFR 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 5.5(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 5.5(b)(5). In other circumstances, the Federal agency will be furnished 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 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 will be governed by the provisions of the “Freedom of Information Act” (5 U.S.C. 552, see 29 CFR part 70) and the “Privacy Act of 1974” (5 U.S.C. 552a, see 29 CFR part 71).

27. Amend § 5.7 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 5.5(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. Amend § 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, upon its own action or upon written request of an authorized representative of the Department of Labor, must 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 or until sufficient funds are withheld to compensate workers for the wages to which they are entitled, any monetary relief due for violations of §§ 5.5(a)(11) or 5.5(b)(5), and to cover any liquidated damages and pre-judgment or post-judgment interest which may be due.

(b) *Cross-withholding*. In addition to the suspension and withholding of funds from the contract 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 prevailing wage requirements 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 5.5(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 entity's contract. Absent exceptional circumstances, cross-withholding is not permitted from a contract held by a different legal entity where the labor standards were incorporated only by operation of law into that contract.

29. Amend § 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 5.5(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. Amend § 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 5.5(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 29 CFR part 6.

(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 the Administrator. The petition for review must be filed in accordance with part 7 of this title.

(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. Amend § 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, or 29 CFR parts 3 or 5, 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 Comptroller General will distribute a list to all

Federal agencies giving the names of such ineligible person or firms, who will be ineligible for a period of 3 years (from the date of publication by the Comptroller General of the name(s) of any such person or firm 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, or 29 CFR parts 3 or 5, 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 29 CFR part 6. 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 which 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 at 29 CFR part 6.

(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 at 29 CFR part 7.

32. Amend § 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, and of the labor standards provisions of any of the statutes listed 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 dba.rulingrequest@dol.gov; by mail to Administrator, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210, 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 apply to any such request for reconsideration.

33. Amend § 5.15 to read as follows:

§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

(c) *Tolerances.*

(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) *Variations.*

(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.

34. Amend § 5.16 to read as follows:

§ 5.16 [Reserved]

35. Amend § 5.17 to read as follows:

§ 5.17 [Reserved]

36. Amend § 5.18 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 5.5(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 5.5(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, and promotion, together with back pay and interest; 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. Amend § 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. This subpart makes 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 for the guidance of contractors, their associations, laborers and mechanics and their organizations, and local, State and Federal agencies, who may be concerned with these provisions of the law. 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. Amend § 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. Amend § 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, (1) 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 (2) 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 new paragraph (c) as follows:

§ 5.25 Rate of contribution or cost for fringe benefits.

* * *

(c) Contractors must annualize all fringe benefit contributions to determine the hourly equivalent for which they may take credit against their fringe benefit obligation.

(1) *Method of computation.* To annualize the cost of providing a fringe benefit, a contractor must divide the cost of the fringe benefit by the total number of hours worked on Davis-Bacon and non-Davis-Bacon 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) *Exceptions requests.* Contractors and other interested parties may request an exception from the annualization requirement by submitting a request to the WHD Administrator. Requests must be submitted in writing to the Division of Government Contracts Enforcement via email at 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. A request for exception must demonstrate the fringe benefit plan in question meets the following three factors:

- (A) the benefit provided is not continuous in nature; and
- (B) the benefit does not compensate both private and public work; and
- (C) the plan provides for immediate participation and essentially immediate vesting.

(3) *Previous exceptions.* In the event that a fringe benefit plan (including a defined contribution pension plan with immediate participation and immediate vesting) was excepted from the annualization requirement prior to the effective date of these regulations, the plan's exception will expire 18 months from the effective date of these regulations, unless an exception for the plan has been requested and received by that date under 5.25(c)(2), above.

41. Amend § 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) The trustee or third person 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. Amend § 5.28 by:

- a. Revising paragraphs (a), (b), and (c); and
- b. Adding new paragraph (d).

The revisions and additions 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).

(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 subparagraphs (1) through (4) of paragraph (b) 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 e-mail to 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 to read as follows:

§ 5.29 Specific fringe benefits

* * * * *

(e) Where the plan is not of the conventional type described in the preceding paragraph (d), 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, it must meet the following requirements:

(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 the actual costs incurred for the apprenticeship program, such as instruction, books, and tools or materials; it may not take credit for voluntary contributions beyond the costs actually incurred for the apprenticeship program.

(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. Amend § 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 illustrations 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) Illustrations:

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	\$15.21	\$4.54
OPERATOR: Bulldozer	\$15.40	\$1.90
PLUMBER (Excludes HVAC Duct, Pipe and Unit Installation)	\$38.38	\$16.67

(This format is not necessarily in the exact form in which determinations will issue; it is for illustration only.)

45. Amend § 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 the illustration in paragraph (c) of § 5.30 will be met by the payment of a straight time hourly rate of not less than \$15.21 and by contributions of not less than a total of \$4.54 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 the illustration in paragraph (c) of § 5.30, by paying directly to the laborers a straight time hourly rate of not less than \$19.75 (\$15.21 basic hourly rate plus \$4.54 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) thru (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 \$19.75 (\$15.21 basic hourly rate plus \$4.54 for fringe benefits).

46. Add new § 5.33 to read as follows:

§ 5.33 Administrative expenses of a contractor or subcontractor.

Administrative expenses incurred by a contractor or subcontractor in connection with the administration of a fringe benefit plan are not creditable as fringe benefits. For example, a contractor or subcontractor may not take credit for the cost of an office

employee who fills out medical insurance claim forms for submission to an insurance carrier.

47. Add new Subpart C 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.

Signed this 8th day of February, 2022.

Jessica Looman,
Acting Administrator, Wage and Hour Division.