



FLSA2019-14

November 7, 2019

Dear **Name***:

This letter responds to your request for an opinion regarding whether active duty servicemembers participating in job training with your business through the U.S. Department of Defense (DOD) SkillBridge program would be subject to the Fair Labor Standards Act (FLSA), the Davis-Bacon Act, the Service Contract Act (SCA), and the Contract Work Hours and Safety Standards Act (CWHSSA). This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

You inquire on behalf of a small business specializing in general construction and construction management that operates as a contractor on many federal construction projects, including one at a major military installation. Your letter states that your company is interested in participating in the DOD's Job Training, Employment Skills Training, Apprenticeships, and Internships program (known as the SkillBridge program)¹ in order to offer on the job training opportunities to active duty military servicemembers.

You state that the SkillBridge program is designed to provide active duty servicemembers with skill-building opportunities in a variety of fields with a goal of helping them build successful careers once they leave the military. Active duty military servicemembers who are within six months of leaving the military can choose to participate in the program.² According to the DOD instructions, there are three main goals of these job training programs: (1) to improve each servicemember's level of skill and broaden the range of skill by building directly upon the occupational skills acquired during military service; (2) to improve or provide skills that may not relate to the occupational skills acquired during military service, but do relate to the successful performance of a civilian occupation identified by the servicemember as his or her goal for civilian employment upon separation; and (3) to refine or enhance skills acquired during military service by redirecting skills that were acquired initially with a focus on the military mission

¹ See Job Training, Employment Skills Training, Apprenticeships, and Internships (JTEST-AI) for Eligible Service Members, No. PN910000000009823, 2014 WL 556073 (Jan. 24, 2014) (hereinafter "DOD Rules").

² According to DOD policy, participation in these programs is self-initiated. DOD Rules, Section 3(c); see also DOD Rules, Enclosures 3 and 4.

toward related skills that are required to successfully perform occupations in the civilian workforce.³

Your letter states that your business would like to provide servicemembers with on-the-job training opportunities through the SkillBridge program. You suggest that this training would include basic safety, tool, and classroom education. You also state that such on-the-job training would allow participants to shadow experienced craft professionals and gain holistic knowledge of how construction sites operate. You further state that this training would include supervised instruction appropriate for the servicemembers' skill levels and allow participants to utilize the skills they learn in a classroom or lab and apply them to an actual project under direct supervision of program personnel or experienced craft professionals, or both.

The DOD specifies criteria that servicemembers must meet in order to participate in such programs: (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment; (2) the internship experience is for the benefit of the intern; (3) the intern does not displace regular employees, but works under close supervision of existing staff; (4) the employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded; (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁴ DOD policy provides that participation in these programs is self-initiated, then reviewed and authorized by the first field grade commander in the servicemember's chain of command.⁵ DOD rules also provide that the "approval authority will put in place personnel accountability procedures as part of the condition of approval consistent with DOD and Military Department policies."⁶ The approval may be terminated based on mission requirements, which requires the participating servicemember to immediately withdraw from the program and report to his or her unit of assignment.⁷

During their time in the SkillBridge program, the servicemembers are still on active duty and are therefore employed by the military and continue to receive their military salary and benefits, which are established by federal law. A business participating in the SkillBridge program is not responsible for a servicemember's medical care, disability, or workers' compensation while participating in the program because "[t]he Service member remains employed by the

³ *Id.* Enclosure 4, Section 1.a.

⁴ *Id.* Enclosure 4, Section 3.a. These criteria mirror the six-part test WHD used to evaluate internships prior to January 2018. WHD has since adopted the "more holistic analysis" described below. See Field Assistance Bulletin No. 2018-2, available at https://www.dol.gov/whd/FieldBulletins/fab2018_2.htm.

⁵ DOD Rules, Enclosure 4, Section 3.c; see also DOD Rules, Enclosure 3. The DOD Rules specify that approval authority is the first field grade commander authorized to impose non-judicial punishment under Article 15 of the Uniform Code of Military Justice in the servicemember's chain of command. The DOD Rules also provide that this authority may not be delegated.

⁶ *Id.* Enclosure 3, Section 2.b.

⁷ *Id.* Enclosure 3, Section 2.c.

Department of Defense.”⁸ Moreover, “[t]he Service member’s parent Service will continue to be responsible for all pay and benefits for the member during their period of participation in the SkillBridge Program.”⁹ The DOD rules provide in relevant part that “[p]articipating Service members are not eligible to receive from the [program] provider wages, training stipends, or any other form of financial compensation for the time that the Service members spend participating in [the program].”¹⁰ Therefore, servicemember program participants receive financial compensation only from the military during the time in which they choose to participate in the SkillBridge program. Additionally, participating servicemembers may not request and will not be permitted to work more than 40 hours in any workweek.¹¹

Your letter states that you would like to participate in the SkillBridge program because your company feels “that the men and women in uniform deserve this opportunity as a reflection of our gratitude for their service to our country.” Rather than requiring these servicemembers to travel long distances for on-the-job training opportunities, your company would like to provide such opportunities to servicemembers on or near the bases where they are stationed.

Accordingly, your letter requests clarity regarding whether active duty servicemembers who participate in the SkillBridge program are subject to the FLSA, the Davis-Bacon Act, the SCA, and the CWHSSA. You seek guidance in order to bring these active duty servicemembers onto your jobsite and ensure that your small business is in compliance with the aforementioned laws.

GENERAL LEGAL PRINCIPLES

A. FLSA Legal Principles

The FLSA applies to those workers whom the FLSA defines as “employees.” *See* 29 U.S.C. §§ 206, 207. An “employee” is any individual whom an employer suffers, permits, or otherwise employs to work. *See* 29 U.S.C. §§ 203(e)(1), (g). This definition is broad, but it was “obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.” *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947). WHD uses the “primary beneficiary test” adopted by the courts to determine whether an intern is, in fact, an employee under the FLSA. *See* Fact Sheet No. 71: Internship Programs Under the Fair Labor Standards Act (rev. Jan. 2018). Under the primary beneficiary test, WHD examines the “economic reality” of the intern-employer relationship to determine which party is the primary beneficiary. When evaluating the primary beneficiary test, WHD considers seven non-exhaustive factors derived from case law:

⁸ DOD SkillBridge FAQs, available at <https://dodskillbridge.usalearning.gov/faq.htm>.

⁹ *Id.*

¹⁰ DOD Rules, Enclosure 4, Section 1.c.

¹¹ *See* Criteria for Career Skills Programs, available at <https://dodskillbridge.usalearning.gov/docs/Industry-Partners-Criteria-for-Career-Skills-Programs.pdf>.

- (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee and vice versa.
- (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- (4) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
- (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Id. Courts have noted that “[a]pplying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction ... to conclude that the intern is not an employee entitled to the minimum wage.” *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2016); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015) (same). This is an inherently flexible test. *Glatt*, 811 F.3d at 537. For example, factors tailored to training in the context of a formal academic program are inapplicable if a formal academic program is not at issue. *See Axel v. Fields Motorcars of Fla., Inc.*, 711 F. App'x 942, 947 (11th Cir. 2017).

If analysis of these circumstances reveals that an intern is actually an employee, then he or she is entitled to both minimum wage and overtime pay under the FLSA. On the other hand, if the analysis confirms that the intern is not an employee, then he or she is not entitled to either minimum wage or overtime pay under the FLSA.

B. Davis-Bacon Act, SCA, and CWHSSA Legal Principles

The Davis-Bacon Act requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. *See* 40 U.S.C. § 3142 *et seq.* Section 4 of the Davis-Bacon Act provides that the Act must not “supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates.” 40 U.S.C. § 3146.

The SCA generally requires government contractors to satisfy certain minimum compensation standards for service employees under covered contracts. *See* 41 U.S.C. § 6701 *et seq.*

The CWHSSA “is more limited in scope than the FLSA and generally applies to government contracts in excess of \$100,000 that require or involve the employment of laborers or mechanics, including guards and watchmen.” Field Operations Handbook 14a03; 40 U.S.C. § 3702. The CWHSSA requires contractors and subcontractors to pay covered laborers and mechanics time and one-half their basic rate of pay for all hours worked over forty each week. *Id.* §§ 3701, 3702(a).

OPINION

A. FLSA

Based on the information provided, if you were to offer servicemembers the type of training described in your letter in compliance with the DOD rules, the servicemembers engaged in your program would appear to be interns, rather than employees, and thus would not be subject to the FLSA.

According to the DOD rules, every servicemember participating in the SkillBridge program must enter the program with the understanding that the position will be unpaid and there is not a guaranteed offer of paid employment.¹² Assuming that you comply with the DOD rules, therefore, the first and seventh internship factors, governing the servicemember’s expectations of entitlement to compensation and eventual permanent employment by the private company, respectively, would strongly favor an internship classification. *See, e.g., Wang v. Hearst Corp.*, 203 F. Supp. 3d 344, 351 (S.D.N.Y. 2016), *aff’d*, 877 F.3d 69 (2d Cir. 2017) (affirming first and seventh factors favoring intern status where the intern understood “the position was unpaid and did not guarantee an offer of paid employment”); *Hollins v. Regency Corp.*, 144 F. Supp. 3d 990, 998-99 (N.D. Ill. 2015) (affirming the same where the intern acknowledged that internship participation “did not amount to a guarantee that she would be employed upon graduation”).

The second factor concerns whether an internship provides training that would be similar to that which would be given in an educational environment, including “hands-on” or “clinical” training during his or her internship. Here, it appears that the servicemembers would gain educational or vocational benefits from their potential internship. As discussed above, the internship would include basic safety, tool, and classroom education; shadowing of experienced craft professionals; supervised instruction; and the opportunity for participants to utilize the skills they learn in a classroom or lab and apply them to an actual project. Moreover, participants would gain holistic knowledge of how construction sites operate. As noted in your letter, the SkillBridge program is specifically designed to provide servicemembers with hands-on skills education in hopes of building successful careers after leaving the military. The second factor therefore suggests that servicemembers engaged in the training you intend to provide would be interns rather than employees.

¹² DOD Rules, Enclosure 4, Section 3(a).

The third and fourth factors are inapplicable here as they are tailored to training in the context of a formal academic program, which is not a component of the SkillBridge program. *See Axel*, 711 F. App'x at 947 (affirming district court conclusion that the factors tailored to training in the context of a formal academic program do not apply if a formal academic program is not at issue).

The fifth factor compares the duration of an internship to its beneficial value to the intern. In assessing this factor, courts “must keep in mind that designing an internship is not an exact science.” *Schumann*, 803 F.3d at 1213 (adopting the *Glatt* test). Courts “should consider whether the duration of the internship is grossly excessive in comparison to the period of beneficial learning.” *Id.* at 1213-14. Participants in the SkillBridge program must be within 180 days (*i.e.*, 6 months) of leaving the military.¹³ Courts have found that this length of time strikes an acceptable balance under the *Glatt* factors. *See, e.g., Wang*, 203 F. Supp. 3d at 353 (holding that an internship lasting approximately 6 months was not “‘grossly excessive’ in comparison to the tangible and intangible benefits they gained.”). Also, this duration factor is strengthened by the fact that the participating servicemember could be required to withdraw from the internship and report to their unit of assignment due to military mission requirements.¹⁴ This factor therefore suggests that a servicemember participating in the training you hope to offer through the SkillBridge program would be an intern rather than an employee.

The sixth factor addresses the extent to which the intern’s labor complemented, rather than displaced, the work of paid employees. *Wang*, 877 F.3d at 75 (explaining that an intern’s work is “complementary if it requires some level of oversight or involvement by an employee, who may still bear primary responsibility”). Thus, this factor is concerned with whether the intern’s work was “educational rather than mere scut work that the paid employees would rather avoid.” *Mark v. Gawker Media LLC*, No. 13-CV-4347(AJN), 2016 WL 1271064, at *11 (S.D.N.Y. Mar. 29, 2016). However, to qualify as complementary work, an intern’s labor need not be useless to an employer, and indeed, can provide considerable benefits to the employer’s business or “be work that paid employees would need to do ... in an intern’s absence.” *Id.* We understand from your letter that you would provide “supervised training appropriate for [the interns’] skill level.” Furthermore, DOD rules explicitly instruct that a servicemember participating in the SkillBridge program cannot “displace regular employees, but works under close supervision of existing staff.”¹⁵ Moreover, the fact that servicemembers have continued day-to-day supervision by the military,¹⁶ including, for example, the possibility of terminating participation in the SkillBridge program based on military mission requirements, suggests as a practical matter that the servicemembers are not engaged in a manner that displaces paid employees. Taken together, all of these facts make it less likely than not that these active duty servicemembers could be engaged

¹³ *See* 10 U.S.C. § 1143; *see also* DOD Rules, Enclosure 3, Section 2.a.

¹⁴ DOD Rules, Enclosure 3, Section 2.b.

¹⁵ DOD Rules, Enclosure 4, Section 3.a(3). The DOD Rules specify that the internship is limited to 6 months.

¹⁶ DOD policy requires that the first field grade commander in the servicemember’s chain of command review and authorize participation in these programs, and that approval authority cannot be delegated. The military approval authority is required to put in place personnel accountability procedures as part of the condition of approval consistent with DOD and military department policies.

in a manner that displaces paid employees and further bolster the weight afforded to the servicemembers' intern status under the sixth factor.¹⁷ As such, based on the information provided, the sixth factor also favors the servicemembers' intern status.

In light of the foregoing analysis, and given the totality of the circumstances, if you were to offer an internship to servicemembers through the SkillBridge program, along the lines you describe and in compliance with the DOD rules, the balance of the factors tips decidedly toward the conclusion that the servicemembers would be classified as interns, rather than employees, under the FLSA. Indeed, all of the applicable factors weigh in favor of an intern classification.

B. Davis-Bacon Act

The plain text of the Davis-Bacon Act, in pertinent part, cannot reasonably be read to cover the SkillBridge program and its participants, including your small business. The Davis-Bacon Act applies to government contracts that require or involve “the employment of mechanics or laborers.”¹⁸ We understand that the prospective servicemember participants are not eligible to receive from the program or your business any “wages, training stipends, or any other form of financial compensation” that would typically suggest paid employment during their time of participation.¹⁹ Instead, servicemember participants continue to earn their full military salaries and benefits, as provided by federal statute. DOD guidance similarly explains that the servicemembers are “employed by the Department of Defense” during their time of participation.²⁰ In the course of that employment, for example, the military is solely responsible for their wages and benefits, including each participating servicemember’s medical care, disability, or workmen’s compensation. As another example, DOD may, at any time, terminate a participating servicemember’s involvement in the SkillBridge program altogether and direct him or her to report back to his or her unit of assignment, according to military mission requirements.

Section 4 of the Davis-Bacon Act provides that the Act does not “supersede or impair any authority otherwise granted by federal law to provide for the establishment of specific wage rates.”²¹ Under this statute, therefore, when a separate federal authority explicitly establishes specific compensation for an applicable individual, he or she is not still bound to be covered by Davis-Bacon labor standards. Current WHD guidance contains numerous examples of instances in which the Davis-Bacon Act does not apply in certain factual circumstances, including when another federal program already provides the requisite compensation. For example, participants in certain federal programs, such as the American Conservation and Youth Service Corps (AmeriCorps), are “not covered by Davis-Bacon Act labor standards” because the authorizing statutes for those programs specifically establish the participants’ compensation, including a

¹⁷ See DOD Rules, Enclosure 3, Section 2.

¹⁸ 40 U.S.C. § 3142(a).

¹⁹ DOD Rules, Enclosure 4, Section 1.c.

²⁰ See, e.g., 37 U.S.C. §§ 203-205 (establishing basic pay for servicemembers); DOD SkillBridge FAQs, available at <https://dodskillbridge.usalearning.gov/faq.htm>.

²¹ 40 U.S.C. § 3146.

living allowance and other benefits.²² Similarly, here, in accordance with Section 4 and based on the facts outlined above, it is the Department’s position that Davis-Bacon Act labor standards would not cover, or apply to, a servicemember who participates in the SkillBridge program on your jobsite.

The conclusion that the Act does not apply to military members participating in the SkillBridge program finds additional support when examining the Act’s purpose. Congress passed the Davis-Bacon Act in 1931 “to set an earnings floor for federal contract employees, to protect against substandard wages, and to promote the hiring of local labor.” *See Amaya v. Power Design, Inc.*, 833 F.3d 440, 443 (4th Cir. 2016). The Supreme Court has recognized that the Act was “designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” *Univs. Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 773-74 (1981) (citation omitted). In the words of one of the Act’s named sponsors, Representative Bacon, the statute was intended to combat the practice of “certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, [who] have been going around throughout the country ‘picking’ off a contract here and a contract there.” *Id.* at 774. These concerns regarding “bootleg” labor or preventing substandard wages are clearly not at issue in the context of on-the-job training programs for active duty servicemembers. As already emphasized, participants would continue to receive their full military compensation throughout their time of participation, as set forth by federal statute. Moreover, the facts already highlighted strongly suggest that active duty servicemembers would not be displacing paid employees.²³

After examining the text and purpose of the Davis-Bacon Act, the case law, the relevant regulations and guidance, including the Field Operations Handbook, in light of the applicable facts you have described, we conclude that the Davis-Bacon Act does not cover the SkillBridge program and the military servicemembers who wish to participate.

C. SCA

As an initial matter, based on the information requested, it is unlikely that the SCA applies because your small business primarily engages in construction projects, which gives rise to Davis-Bacon Act coverage.²⁴ However, as the facts do not foreclose the possibility that the Davis-Bacon Act does not cover all contracts in which the SkillBridge program participants may be involved, WHD addresses the SCA as an alternative in response to your inquiry. For similar

²² *See* Field Operations Handbook 15e04 (“In accordance with section 4 of the [Davis-Bacon Act], participants in federal youth programs that establish specific compensation to be given participants would not be covered by [Davis-Bacon Act] labor standards.”).

²³ *See* DOD Rules, Enclosure 4, Section 3.a.

²⁴ *See* 41 U.S.C. § 6702(b)(1).

reasons as to why the Davis-Bacon Act does not cover the SkillBridge program, as discussed above, the SCA would also not cover the SkillBridge program pursuant to 41 U.S.C. § 6707(b).

Under the SCA, a “service employee” is defined as an “individual engaged in the performance of a contract made by the Federal Government and not exempted under section 6702(b).”²⁵ The Department’s regulations interpret the Act to apply to “all service employees . . . regardless of whether they are the contractor’s employees or those of any subcontractor under such contract.”²⁶

The structure and purpose of the statute and its accompanying regulations further support the position that the requirements of the SCA do not reasonably apply to the SkillBridge program. The statute’s stated chief priorities are “to provide wage and benefit protection to employees of federal contractors.”²⁷ However, as explained above, SkillBridge participants are expressly prohibited from receiving any compensation of any kind from your business or the SkillBridge program, as the DOD rules broadly prohibit servicemembers from receiving “wages, training stipends, or any other form of financial compensation” while they are participating in these programs. “Compensation,” the title of the very first definition of the Act, further highlights the disconnect between the underlying purpose of the SCA and the structure of the SkillBridge program that explicitly prohibits such compensation.²⁸ Applying the requirements of the SCA to the SkillBridge program would result in double payment to its participants, and would therefore epitomize government inefficiency. In addition, as discussed above, the facts you have provided strongly indicate that SkillBridge participants would not displace regular employees. Taken together, applying the wage requirements of the SCA to SkillBridge participants would not serve the purposes of the Act and accompanying Department regulations, in accordance with 41 U.S.C. § 6707(b).

For all of the reasons stated above, WHD concludes that the SkillBridge program and its participants are beyond the intended reach and scope of the SCA, pursuant to 41 U.S.C. § 6707(b), as the participants remain fully compensated through their military employment.

D. CWHSSA

Finally, based on the facts you have provided, the requirements of the CWHSSA do not appear to apply to SkillBridge participants.

²⁵ 41 U.S.C. § 6701(3).

²⁶ 29 C.F.R. § 4.150.

²⁷ *Halifax Tech. Servs., Inc. v. United States*, 848 F. Supp. 240, 244 (D.D.C. 1994) (citing 41 U.S.C. § 6703(1)-(2)); *see also* 29 C.F.R. § 4.104 (“The Act’s purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment.”).

²⁸ 41 U.S.C. § 6701(1) (defining compensation as “any of the payments or fringe benefits described in section 6703 of this title.”).

The CWHSSA “applies to all laborers and mechanics employed by a contractor or subcontractor in the performance of any part of the work under the contract.”²⁹ The CWHSSA assures that laborers and mechanics are paid overtime for work in excess of forty hours a week.³⁰ According to the SkillBridge criteria, “[u]nder no circumstances will a participating [servicemember] be requested or permitted to work more than 40 hours in any workweek.”³¹ Therefore, to the extent that your small business complies with the SkillBridge criteria, your business would not owe any overtime pay under the CWHSSA. Accordingly, there is no need to further analyze the scope of CWHSSA coverage as to the SkillBridge program.³²

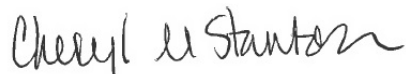
CONCLUSION

Under the facts and circumstances described in your letter, we conclude that active duty servicemembers who participate in the SkillBridge program would not be covered by the FLSA, the Davis-Bacon Act, the SCA, and the CWHSSA. As emphasized throughout, these aforementioned statutes were not intended to prevent potential businesses like yours from participating in the SkillBridge program by providing on-the-job training opportunities and instruction at a place and in a manner which would most benefit servicemembers who will soon be leaving the military. To find otherwise would be a disservice to those who serve our country in uniform.

This letter is an official interpretation by the Administrator of the Wage and Hour Division for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,



Cheryl M. Stanton
Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

²⁹ 40 U.S.C. § 3701(b) (emphasis added).

³⁰ *Masters v. Md. Mgmt. Co.*, 493 F.2d 1329, 1332 (4th Cir. 1974).

³¹ *See* Criteria for Career Skills Programs, available at <https://dodskillbridge.usalearning.gov/docs/Industry-Partners-Criteria-for-Career-Skills-Programs.pdf>.

³² Note that Section 105 of the CWHSSA authorizes the Department to grant an exemption where “necessary and proper in the public interest to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Federal Government business.”