BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

In the Matter of: PWCA, and NAPWC, Petitioners, SECRETARY OF LABOR, Respondent, INDIANA-ILLINOIS-IOWA FOUNDATION FOR FAIR CONTRACTING, Intervenor. Re: Annualization of Supplemental Unemployment Benefits Plan	ARB CASE NOS. 16-019 16-021

BRIEF OF PETITIONER NAPWC

IN SUPPORT OF ITS PETITION FOR REVIEW

Richard M. Freeman
Sheppard Mullin Richter & Hampton LLP
12275 El Camino Real, Suite 200
San Diego, CA 92130
858-720-8900
rfreeman@sheppardmullin.com

Attorneys for Petitioner NAPWC

Introduction

The National Association Prevailing Wage Contactors Sub Trust (hereafter "NAPWC") hereby submits is brief in support of its Appeal of November 20, 2015 (attached hereto as Exhibit 1).

On February 16, 2016, PWCA submitted its Brief in this matter (a copy of which is attached hereto as Exhibit 2). Like PWCA, NAPWC received an annualization exemption from the Department of Labor which is part of the record. The NAPWC Sub Trust has been administered and structured virtually identically to that of the PWCA in all relevant respects.

As a consequence, the evidence and legal arguments set forth in the brief of PWCA are identically applicable to the evidence and arguments of NAPWC. In so many words, the DOL seeks to change the legal standards applicable to annualization under the Davis Bacon Act and thereby revoke the annualization exemption of the Petitioners. As pointed out in detail in PWCA's brief, this is contrary to law in many respects.

NAPWC hereby incorporates in full the legal arguments and authorities set forth in the PWCA brief as if its own.

Conclusion

For the reasons set forth above, the October 22, 2015, ruling of the Administrator should be vacated and the Board should hold that annualization does not apply to employer contributions to NAPWC's sub-plan.

Dated this 17th day of February, 2016.

By: _____

RICHARD M. FREEMAN
Cal. Bar No. 61178
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
12275 El Camino Real, Suite 200
San Diego, California 92130-2006
Telephone: 858.720.8900
Facsimile: 858.509.3691

Attorneys for NAPWC

EXHIBIT 1

SheppardMullin

Sheppard Mullin Richter & Hampton LLP
12275 El Camino Real, Suite 200
San Diego, CA 92130-2006
858.720.8900 main
858.509.3691 main fax
www.sheppardmullin.com

Richard M. Freeman
858.720.8909 direct
rfreeman@sheppardmullin.com

File Number: 39VD-206985

November 20, 2015

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED

Administrative Review Board
Room S-5220
U.S. Dept. of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Appeal of October 22, 2015 Letter Ruling from DOL Administrator; Pursuant to 29 CFRA §7

Gentlemen:

This office is new legal counsel to the National Association of Prevailing Wage Contractors ("NAPWC") Supplemental Unemployment Benefit Trust ("the SUB Plan") relative to this matter. This letter constitutes an appeal of the Administrator's letter sent to former legal counsel David P. Wolds dated October 22, 2015 (a copy of this letter is attached for your easy reference as Exhibit 1 (hereafter the Administrator's letter referred to as "the Decision")). Essentially, the Decision purports to remove the SUB Plan's exception to annualization.

This appeal is based upon the positions previously taken by the NAPWC through Mr. Wolds as well the reasons stated below. My office is in the process of obtaining the correspondence that the NAPWC has had with the DOL in the past on this matter, but that process is not complete. The correspondence includes a letter dated September 6, 2013 to Mr. Timothy Helm of the DOL, a copy of which is attached as Exhibit 2. The arguments in Exhibit 2 for this appeal are incorporated herein by reference. As we understand it, essentially two years has passed since the parties have corresponded. Exhibit B to Exhibit 2 is correspondence from Mr. Helm of the DOL in 2007 acknowledging the annualization exception.

Additional Arguments Supporting the Appeal

First, the Decision is contrary to the ruling of the Federal District Court of Appeals, District of Columbia Circuit, in *Tom Mistick Sons, Inc. v. Reich*, 54 F.3d 900 (D.C. Cir. 1995). One of the critical passages in the *Mistick* case is as follows:

> "As described by its counsel at oral argument, Mistick's contributions were irrevocably placed in a separate interest-bearing trust account for each employee who performed Davis-Bacon work. While the employee worked for Mistick, he could

> draw monies from his trust account to pay for any of the benefits enumerated in the FBP. Once his Mistick employment ended, he could withdraw the balance of his trust account in cash. We find, therefore, that Mistick's contributions on an employee's behalf did not exceed but equaled the benefits received by him. **Each employee received the full value of each dollar contributed by Mistick, either as an enumerated benefit purchased with FBP funds or in cash at the end of his employment**. The one-to-one ratio between employer contributions on behalf of an employee and value received by the employee cannot be deemed unreasonable.
>
> The Department now argues that it is insufficient that an employee eventually receives the full value of the employer's contributions. According to it, the Davis-Bacon Act entitles an employee to the prevailing wage at the time of his Davis-Bacon work. At oral argument, the Department claimed that the "best plan" under the Davis-Bacon Act is "cash-full Davis-Bacon wages-given at the time of the Davis-Bacon work." **But the statute expressly allows irrevocable contributions to a "fund, plan, or program," 40 U.S.C. §276a(b)(2)(A), and thus necessarily permits an arrangement by which an employee does not receive every dollar he earns for Davis-Bacon work at the time he earns it**." (Bolding added).

As we understand the Decision, the Administrator does not contend that the employee beneficiaries are not receiving the full cash equivalent benefit from their accounts, sans administrative expenses, which the employer has contributed on Davis-Bacon projects. As the *Mistick* case points out, annualization is not required where the employee is receiving the economic equivalent of cash from a bona fide plan.

The Administrator, acknowledging that the plan is bona fide, appears to be incorrectly focusing on whether the employee last worked on a public or private construction project as a controlling factor as to whether annualization should be required. This is not the legal standard for annualization. The very nature of a supplemental unemployment insurance plan is that employee's receive supplemental unemployment insurance benefits during periods of lower or no employment in accordance with state law unemployment insurance criteria. Note that the SUB Plan here took great pains to amend and adjust its plan **at the outset and at the direction and approval of the DOL so that the annualization exception would be granted**. That has not changed.

The Administrator appears to have developed a new, unrecognized benchmark for supplemental unemployment insurance plans called "continuous nature of benefits." The Administrator cites no legal authority for this new benchmark. No case authority is cited for this proposition. Moreover, it does not appear to have any relationship to the "cash equivalent" test which *Mistick* established (for non-annualization) which clearly pertains to supplemental

unemployment insurance plans and defined contributions plans of the type described in the Decision.

The Administrator, in attempting to distinguish the *Mistick* case, states:

> "Finally, any reliance on immediate participation and essentially immediate vesting as justifications for an exception **mistakenly equates SUBs with defined contribution pension benefits** ("DC benefits"). DC benefits' narrow annualization exception emanates from the benefits' fundamentally deferred, **non-continuous nature – characteristics not shared by SUBs**. Whereas DC benefits are typically only available without penalty after a participant reaches a certain qualifying age, **SUBs are normally available immediately without penalty and accessible throughout the year. It is not appropriate to extend the DC benefits exception to SUBs, when their basic character is so distinct from DC benefits**." (Bolding added).

As stated above, the reason the D.C. Circuit Court of Appeals reversed the DOL in the *Mistick* case was that the benefit, from a bona fide program which was being provided, **was essentially equivalent to cash**. The SUB Plans are even more similar to a cash payment than a defined contribution plan and thus fall even more into the reasoning of the *Mistick* case. Moreover, if the employer were to pay the contribution in cash on the paycheck, by definition it would be even more continuous. DOL concedes that cash payments need not be annualized.

The Decision asserts, as a possible basis here for justifying annualization, the following:

> "WHD has, as NAPWC observes, granted annualization exceptions to SUB plans. WHD granted such exceptions in the "narrow circumstance[]" **where the plan design "ensure[d] that almost every employee will...receive the full cash benefit of the contributions made on the employee's benefit**." WHD has not had occasion to designate a numerical standard to determine whether the plan design is ensuring that almost every employee is receiving the full cash benefit of contributions made on their behalf. But such a standard presumably animated NAPWC's representation to WHD in September 2006, which it restated in October 2010, that "at least 90 percent of all employer contributions [are] paid out in distributable benefits to participants."
>
> NAPWC satisfied this standard two years later, in 2012, by paying out just over 90% of that year's employer contributions in unemployment benefits. But NAPWC did not meet this benchmark in 2009, 2010, or 2011, when benefit payments accounted for approximately 86%, 84% and 78% of yearly employer contributions, respectively. **The difference in**

> **employer contributions made and participant employee benefits received in the four-year period between 2009 and 2012 suggest that NAPWC may not be ensuring that almost every employee receives the full cash benefit of the contributions made on their behalf.**
>
> For the reasons set forth below, however, it is unnecessary to devise a specific numerical standard to which NAPWC, or other SUB plans, might adhere in order to qualify for an annualization exception. WHD traditionally annualizes any fringe benefit that is continuous in nature and compensation for both private and DBA work. The earlier SUB-related letters conclude annualization exceptions for SUBs are appropriate so long as nearly all employees will receive the full cash benefit of the contributions submitted on their behalf without addressing whether the fringe benefit is continuous in nature and actually constitutes compensation for private work." (Bolding added.)

The SUB Plan is at a loss as to the relevance of the total plan annual payout contributions cited above in relation to whether the employees are receiving their "full cash benefit." Why even mention it without having any relevant information? The total amounts received and paid out by the Plan have no relationship to whether **each** employee is receiving his full cash benefit. If more employees are entering the Plan, then it is likely that less amounts **in total** in the plan would be paid out than paid in, because total benefits accruing in all accounts would be **increasing**. By economic definition, **during economic periods of higher federal construction employment**, fewer unemployment benefits will be paid out and more will be accruing. This is driven by the amount of federal government construction in the area. It is not driven by anything related to the operation of the NAPWC or the amount of cash benefits which the employees will ultimately receive when federal construction decreases in the area. For DOL to go two years without asking a question about these statistics or inquiring about any relevant information, certainly cannot be used as a basis for reversing its exception to annualization. **Note that DOL cites not one instance where an employee has not received his full cash benefit.**

Finally, the Decision does not discuss how annualization would even be calculated. It is extremely complicated and impractical to annualize (weekly? monthly?) supplemental unemployment insurance benefits if private work is included in the calculation. It would be a jobsite to jobsite hours worked analysis changing weekly. The mathematical issues are different from medical premium annualization.

Conclusion

In conclusion, the Decision runs directly contrary to established case law. Moreover, the Decision neither identifies nor articulates a change in either the relevant facts nor the law justifying a reversal of DOL's previously granted exception to annualization. The DOL was well

aware of the *Mistick* decision when it granted the annualization exception to supplemental unemployment insurance plans. That case, as DOL acknowledges, is still good law.

The SUB Plan reserves the right to provide further evidence and facts once our office has received all of the previous correspondence with DOL.

The SUB Plan respectfully requests that DOL take no further action on this matter until a final legal conclusion has been reached in this matter. Moreover, because DOL is essentially reversing it annualization exception as to all supplemental unemployment insurance plans, it seems appropriate to hold off any enforcement until the public has been informed and had an opportunity to comment.

Respectfully submitted,

Richard M. Freeman
Professional Corporation
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:473841702.1
Enclosures

cc: Dr. David Weil, Administrator
Marc Poulos, Executive Director III F.F.C.

EXHIBIT 1

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

OCT 22 2015

David P. Wolds
Wolds Law Group
4747 Executive Drive, Suite 250
San Diego, CA 92121

RE: NAPWCs' SUB Plan's Annualization Exception

Dear Mr. Wolds:

This letter responds to a complaint filed on July 15, 2013 by the Indiana-Illinois-Iowa Foundation for Fair Contracting ("III FFC"), and an earlier request from the National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust ("NAPWC"). III FFC's complaint requests that the Department of Labor's Wage and Hour Division ("WHD") revoke the exception from annualization it provided to the NAPWC in a letter dated August 9, 2007. NAPWC had requested that WHD affirm that NAPWC participating employers remain entitled to the exception from annualization. The WHD served III FFC's complaint on NAPWC by letter of July 26, 2013; the letter requested that NAPWC submit a response, if any, to the complaint within thirty (30) days. NAPWC submitted a response on September 6, 2013 after receiving an extension of time from WHD.

At the outset, it is important to note what is not at issue in this matter. The parties do not dispute (nor could they legitimately dispute) that contractors' contributions to bona fide supplemental unemployment insurance benefit plans, like the NAPWC, or costs contractors reasonably expect to incur to provide such benefits, are creditable toward meeting the Davis-Bacon Act ("DBA") prevailing wage obligation. Indeed, the DBA permits contractors to credit fringe benefits provided at either the "rate of contribution irrevocably made" to a fringe benefit plan or at the "rate of costs" an employer "may reasonably anticipate in providing benefits" to covered individuals. 40 U.S.C. 3141(2)(B)(i)-(ii). The Act further identifies types of fringe benefit plans or programs it recognizes as "bona fide." 40 U.S.C. 3141(2)(B). This list includes "unemployment benefits." Id. See also 29 C.F.R. 5.29(a). Thus, for purposes of fulfilling their DBA prevailing wage obligations, contractors may unquestionably credit either the irrevocable supplemental unemployment benefit ("SUB") contributions they make to a bona fide plan, or the reasonable costs they anticipate incurring to provide such benefits under a bona fide plan.

In accordance with the right of contractors to credit SUB contributions or anticipated costs to meet their prevailing wage obligations under the DBA, III FFC's complaint does not seek a categorical prohibition on the use of SUBs to fulfill the DBA's requirements. Rather, it solely challenges the extent to which contractors can take credit for such contributions or costs. There is accordingly no dispute that the DBA entitles contractors, including those that contribute to the NAWPC, to credit contributions to bona fide SUB plans in order to fulfill their DBA prevailing wage obligations.

Background

The following recounts the relevant facts as we understand them based on information provided by NAPWC and III FFC.

The National Association of Prevailing Wage Contractors, Inc. is a California-based company offering the NAPWC Plan. The Plan provides SUBs to employees in the construction industry through a trust to which participating employers submit contributions on behalf of participating employees. As relevant here, participating employers elect, in a Plan "Adoption Agreement," whether to make contributions for employees engaged on state or federal prevailing wage construction projects and/or private construction projects. Thus, contractors may make contributions on behalf of laborers or mechanics on solely public prevailing wage projects, solely private construction projects, or on both.

The NAPWC Plan allocates contributions into individual, participant-specific accounts. As of September 6, 2013, there were 1625 active participants and 94 contributing employers in the Plan. The Plan permits funding of each individual account to a maximum of fifty-percent (50%) of the participant's previous years' gross annual earnings. Thus, once an employee reaches this cap, a participating employer can make no further contributions on his or her behalf.

According to the Plan's Summary Plan Description ("SPD"), an employee becomes eligible to participate in the Plan from his or her first hour of covered employment. SPD, pg. 8. The SPD further states that "[e]mployees are entitled to supplemental unemployment benefits if they are eligible for state unemployment benefits." It is WHD's understanding that NAPWC added this requirement to ensure that the IRS would not consider contributions to the Plan "wages" (and thus taxable). It is accordingly WHD's further understanding that participants are only eligible to receive Plan benefits if they prove they are also eligible for state unemployment benefits. SPD, pg. 8 ("You must meet the state requirements for unemployment insurance benefits to be eligible to receive supplemental unemployment benefits from the plan.").[1]

A participant may forfeit her benefits if she is incarcerated, discharged from employment for cause, or retires or dies before exhausting her account balance. *Id.* NAPWC has advised that only a single death-related forfeiture, and a single forfeiture based on a termination for cause, have occurred since the Plan's inception. It further advised that two additional forfeitures based on recent deaths would be forthcoming.

In the Plan year 2009, employers submitted contributions totaling $7,728,105.00 and the Plan made benefit payments totaling $6,690,024.00. In the Plan year 2010, employers submitted contributions totaling $10,867,917.00 and the Plan made benefit payments totaling $9,138,802.00. In the Plan year 2011, employers submitted contributions totaling $13,235,227.00 and the Plan made benefit payments of $10,312,546.00. In the Plan year 2012,

[1] NAPWC's submission asserts that the Plan "provides for the payment of a supplemental unemployment benefit because of a participant's reduction in work hours, seasonal work fluctuations, partial or total lay-off, discontinuance of project, or seasonal work patterns." WHD is not certain that in each of the listed circumstances an employee would be eligible to receive a particular state's unemployment insurance benefits.

employers submitted contributions totaling $13,487,037.00 and the Plan made benefit payments totaling $12,346,942.00. Plan administrative expenses for 2009 through 2012 were $954,380.00, $1,052,395.00, $1,270,658.00 and $1,263,629.00, respectively.

Annualization Pursuant to the Davis-Bacon Act

WHD normally bars an employer from applying all its fringe benefit contributions to a plan in a given year to meet the prevailing wage obligation when employees also work for the employer on private projects in that year. This prohibition prevents the use of DBA work as the disproportionate or exclusive source of funding for benefits that are continuous in nature and compensation for all the employee's work, both DBA and private. See Wage & Hour Field Operations Handbook ("FOH") 15f11(b) ("Normally, contributions made to a fringe benefit plan for government work generally may not be used to fund the plan for periods of non-government work"); see also, e.g., Miree Construction Corp. v. Dole, 930 F.2d 1536, 1546 (11th Cir. 1991) ("If an employer chooses to provide a year-long fringe benefit, rather than cash or some other fringe benefit, the annualization principle simply ensures that a disproportionate amount of that benefit is not paid for out of wages earned on Davis-Bacon work"). By precluding contractors from crediting contributions attributable to work on private jobs to meet their prevailing wage obligation, WHD assures mechanics and laborers receive the prevailing wage on DBA jobs.

The "annualization" principle operationalizes this policy by averaging the contributions an employer makes to a plan over all of an employee's hours of service for the employer in that year. For example, if an employer contributes $5,000.00 to a plan on behalf of an employee who performs one thousand hours of DBA work and one thousand hours of private sector or otherwise non-DBA work, under the annualization principle it can only declare $2.50 per work hour toward meeting its DBA prevailing wage obligation to that employee, i.e., $5,000.00/2,000 hours = $2.50 per hour. WHD has applied the annualization principle to contributions made to other fringe benefit plans, including health insurance plans, apprenticeship training plans, vacation plans and defined benefit pension plans.

WHD also requires contractors to annualize contributions to fund defined contribution pension benefits. But it makes an exception if the defined contribution benefit plan provides for immediate participation and essentially immediate vesting (100% vesting after an employee works 500 or fewer hours). *See* FOH 15f14(f)(1). WHD has previously granted annualization exceptions to three SUB plans, including NAWPC. In each instance, WHD specified it was making the exception because the applicable plan "ensure[d] that almost every employee will . . . receive the full cash benefit of the contributions made on the employee's behalf."

The annualization principle is a creature of WHD's interpretation of Congressional intent. The DBA's fringe benefit obligation resulted from the 1964 legislative amendments to the Act.

he amendments' legislative history suggests Congress viewed collectively-bargained plans requiring a uniform rate of contributions for all hours worked during the year as a model for the type of fringe benefits for which contractors could take DBA prevailing wage credit. *See, e.g.*, S. Rept. 963, 88th Cong., 2d Sess. (1964) 5 & H. Rept. 308, 88th Cong., 1st Sess. (1963) 3. In addition, there is no evidence that Congress intended to allow contractors to disproportionately finance, or subsidize, a benefit continuously available throughout the year with contributions

solely, or predominantly, made on DBA projects. WHD has accordingly interpreted the Act's prevailing wage requirement to require contractors to only take DBA credit for the effective annual rate of contribution to fringe benefit plans.

The Views of Interested Parties

III FFC offers several arguments in support of its request to revoke NAWPC's annualization exception. First, it contends the Plan does not operate "similarly enough" to the defined contribution pension plans to which WHD has granted annualization exceptions. Second, it asserts the Plan's administration is inconsistent with IRS requirements, focusing on the Plan's failure to deduct payroll taxes on benefit payments and the Plan's provision of "short week" payments. Third, III FFC asks WHD to review the reasonableness of Plan administration fee payments in light of the services actually performed by third parties. Fourth, III FFC questions the propriety of extending an annualization exception to SUB plans that accept contributions solely from prevailing wage projects, instead of on all hours worked. Finally, III FFC requests that WHD eliminate the annualization exception entirely for all SUB plans.

NAPWC contends that the Plan, like the defined contribution plans to which WHD has granted an annualization exception, provides for immediate participation and immediate vesting of participants' benefits. NAPWC further argues that III FFC's allegations regarding the Plan's violation of IRS requirements are inaccurate. It asserts earlier IRS Revenue Rulings countenance the Plan's "short week" payments and that its non-deduction of payroll taxes on benefit payments is likewise consistent with IRS precedent and guidance. The Plan further submits that its deduction of a nine percent (9%) administrative charge on all contributions, plus the assessment of a $3.50 check fee for each benefit payment, is a reasonable administrative fee structure. Finally, the Plan contends that "since the record is clear that the NAPWC Trust ensures that almost every employee will receive the full cash benefit of the contributions made on his or her behalf," it is appropriate to continue to except the Plan contributions from annualization.

WHD Analysis

WHD has, as NAPWC observes, granted annualization exceptions to SUB plans. WHD granted such exceptions in the "narrow circumstance[]" where the plan design "ensure[d] that almost every employee will . . . receive the full cash benefit of the contributions made on the employee's behalf." WHD has not had occasion to designate a numerical standard to determine whether a plan design is ensuring that almost every employee is receiving the full cash benefit of contributions made on their behalf. But such a standard presumably animated NAPWC's representation to WHD in September 2006, which it restated in October 2010, that "at least 90 percent of all employer contributions [are] paid out in distributable benefits to participants."

NAPWC satisfied this standard two years later, in 2012, by paying out just over 90% of that year's employer contributions in unemployment benefits. But NAPWC did not meet this benchmark in 2009, 2010 or 2011, when benefit payments accounted for approximately 86%, 84% and 78% of yearly employer contributions, respectively. The differences in employer contributions made and participant employee benefits received in the four-year period between

2009 and 2012 suggest that NAPWC may not be ensuring that almost every employee receives the full cash benefit of the contributions made on their behalf.

For the reasons set forth below, however, it is unnecessary to devise a specific numerical standard to which NAPWC, or other SUB plans, might adhere in order to qualify for an annualization exception.[2] WHD traditionally annualizes any fringe benefit that is continuous in nature and compensation for both private and DBA work. The earlier SUB-related letters conclude annualization exceptions for SUBs are appropriate so long as nearly all employees will receive the full cash benefit of the contributions submitted on their behalf without addressing whether the fringe benefit is continuous in nature and actually constitutes compensation for private work.

In so doing, the earlier letters effectively focused on whether the benefit amounts contributed bore a reasonable relationship to the actual contributions required to provide the benefit. WHD employs reasonable relationship analysis to determine if a plan is "bona fide" under the Act. 40 U.S.C. 3141(2)(B). However, the determination of whether a plan is bona fide precedes, and is distinct from, WHD's determination of whether annualizing a benefit is necessary. For example, WHD might initially conclude the cost an employer incurs paying employees' entire health care premium during a period of DBA employment bears a reasonable relationship to the benefit provided – year-long health insurance. Even assuming this is true, however, WHD will subsequently compel annualization because the health care benefit is continuous in nature and is actually compensation for all services provided in the year, including private work.

It is accordingly our view that a SUB plan could only qualify for an annualization exception if (in addition to providing for immediate participation and essentially immediate vesting) the benefit provided is not continuous in nature and does not compensate employees for both private and public work. When a fringe benefit is continuously available and compensates employees for private as well as public work, the employer is effectively providing the benefit for all services rendered during the year. To not annualize such a benefit permits an employer to unduly subsidize the benefit's cost through DBA fringe benefit contributions, whereas compelling annualization produces a fringe benefit figure that is consistent with the actual value of the contribution the employer is making for DBA work. Thus, as with other fringe benefits, applying the traditional requirement will serve to ensure that laborers and mechanics on whose behalf employers make contributions to a SUB plan receive the prevailing wage on DBA jobs.

SUBs like those provided by NAPWC are available to participants on an uninterrupted basis throughout the year. Indeed, unemployment insurance's basic purpose is to be available to meet a contingent event, i.e., involuntary loss of work, which may occur at any time during the year. Thus, SUBs are continuous in nature. Furthermore, SUB plans finance a benefit that is available during periods of private work. For example, if a NAPWC participating employer lays off a participant from a private, non-prevailing wage job, the participant is eligible to receive Plan benefits. As the supplemental unemployment benefit is equally available to insure against loss

[2] It is likewise unnecessary, for purposes of determining whether to compel annualization of contributions to the Plan, to address III FFC's contention regarding NAPWC's compliance with IRS requirements or to conduct further inquiry regarding the Plan's administrative fee structure.

of private work as it is to insure against loss of prevailing wage/DBA work, SUBs compensate an employee for all service performed in a given year. Since we conclude SUBs are continuous in nature and compensation for both private and DBA work, SUBs are subject to annualization and participating employers in NAPWC must annualize their contributions to the Plan for purposes of meeting the DBA's prevailing wage requirement.

That a SUB is continuously available and compensates a participant for all her work renders it similar to health insurance benefits, which WHD has long annualized. Health insurance and unemployment insurance also share a common function. Both are vehicles to limit the economic risk attendant to an unpredictable, unwelcome contingency – in one case, the chance of illness, in the other, the possibility of an involuntary job loss. The similarities between health insurance benefits and unemployment insurance benefits further warrant subjecting SUBs to annualization.

NAPWC appeals to its plan design to justify an annualization exception. WHD understands NAPWC has attempted to limit the forfeiture of participant's benefits, to make benefits and participation available to participants on an expedited basis and to lower participant's contributions to administrative expenses. These measures do not, however, alter the fundamentally continuous nature of the benefits provided by the Plan. Thus, the Plan's design does not justify an annualization exception.

Nor does Mistick v. Reich, 54 F.3d 900 (D.C. Cir. 1995), based on the evidence received by WHD to date, require an annualization exception here. The Mistick court rejected annualization of the specific fringe benefit plan before it because the Department of Labor had "not established ... that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions[;]" therefore, "[t]he rationale for annualizing an employer's contributions . . . d[id] not apply." Mistick, 54 F.3d at 905, n.4. In fact, Mistick made separate contributions to a non-Davis-Bacon plan for its employees' private work. Id. at 904. Here, there is no record evidence that NAPWCs' participating employers submit contributions to a plan distinct from NAPWC (or to the NAPWC Plan itself) to finance the unemployment insurance that participants use during periods of private work. Therefore, based on the available evidence, the rationale for annualizing an employer's contributions to the Plan applies.[3]

Finally, any reliance on immediate participation and essentially immediate vesting as justifications for an exception mistakenly equates SUBs with defined contribution pension benefits ("DC benefits"). DC benefits' narrow annualization exception emanates from the

[3] There is record evidence, however, that the NAPWC Plan Adoption Agreement permits participating employers to elect to make contributions to the Plan on state or federal construction projects and/or private construction projects. But WHD has not received information from NAPWC related to whether any participating employers have chosen to make contributions on private projects. In the absence of such evidence, participating employers must annualize their contributions to the NAPWC Plan for purposes of meeting the DBA's prevailing wage requirement. In contrast, to the extent that participating employers have made Plan contributions in connection with private projects in a manner demonstrating that annualization of contributions in connection with DBA projects would not be appropriate based on the principles set forth in this letter, annualization of such contributions would not be required.

benefits' fundamentally deferred, non-continuous nature – characteristics not shared by SUBs. Whereas DC benefits are typically only available without penalty after a participant reaches a certain qualifying age, SUBs are normally available immediately without penalty and accessible throughout the year. It is not appropriate to extend the DC benefits exception to SUBs, when their basic character is so distinct from DC benefits.

In sum, contributions to NAPWC generally are subject to annualization because SUBs are continuous in nature and compensation for private and prevailing wage/DBA work. Except under the circumstances identified in footnote 3, supra, NAPWC participating employers accordingly must annualize Plan contributions. WHD's Davis-Bacon Resource Book 2010 did provide, however, that for "certain supplemental unemployment benefit plans," a "contractor may take Davis-Bacon credit at the hourly rate specified by the plan." WHD has eliminated the reference to an exception for certain SUBs in the Resource Book but, given its existence at the time NAPWC created the Plan, the effect of this ruling is solely prospective. Furthermore, WHD will permit employers that make contributions to NAPWC 90 days to come into compliance with this ruling. Thus, as of 90 days from the date of this letter, all NAPWC participating employers must annualize contributions to the Plan for purposes of meeting the prevailing wage requirements of the DBA.[4]

Appeals Process

This letter constitutes our final ruling. Any appeal should be initiated by timely filing a petition for review with the Department of Labor's Administrative Review Board pursuant to 29 CFR Part 7. The Board's address is:

Administrative Review Board
Room S-5220
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210
http://www.dol.gov/arb/welcome.html

Sincerely,

Dr. David Weil
Administrator

cc: Marc Poulos, Exec. Director III FFC

[4] WHD's understanding is that NAPWC can, and will, communicate this ruling to all participating employers. If NAPWC is unable to notify any, or all, participating employers, NAPWC must provide WHD with a complete list of the participating employers, with both a contact person and address information, by no later than 30 days from the date of this letter.

EXHIBIT 2

Wolds Law Group

September 6, 2013

VIA E-MAIL

Timothy J. Helm
Chief, Branch of Government Contracts Enforcement
Office of Enforcement Policy
Wage and Hour Division
U.S. Department of Labor
200 Constitution Ave., NW, Room S-3006
Washington, DC 20210

Re: National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust: Response to Request for Information in Support of Annualization Exemption

Dear Mr. Helm:

This office represents the National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust ("NAPWC Trust" or "Plan") and we have been asked to respond to the July 15 Indiana-Illinois-Iowa Foundation for Fair Contracting's ("FFC") request for revocation of the federal annualization exemptions granted by the United States Department of Labor ("DOL") to the NAPWC Trust, Prevailing Wage Contractors Association and National Association of Prevailing Wage Employers (collectively "SUB Plans"). The FFC contends the exemptions should be withdrawn because the SUB Plans "do not operate similarly enough to immediately-vesting defined contribution pension plans." This response is submitted on behalf of the NAPWC Trust only.

The NAPWC Trust currently has one contributing employer in Iowa and no employers in Indiana or Illinois. To date, there have been no complaints or concerns raised about NAPWC Trust operations in those states and we are unclear why FFC would expend valuable assets to request a review of the annualization exemption granted by the DOL to the NAPWC Trust which operates primarily in California. As the following discussion will show, the generic allegations of the FFC are inapplicable to the NAPWC Trust.

A. BACKGROUND

The NAPWC Trust initially requested DOL approval as a bona fide employee benefit plan under the Davis-Bacon Act in May 2006. Over a period of months, information was exchanged with the DOL concerning the Plan's operation and support for provisions or modifications to the Plan. Copies of communications reflecting these discussions regarding the terms of the Plan are attached as Exhibit "A." The NAPWC Trust received correspondence dated August 9, 2007, and signed by Paul DeCamp approving the Plan as a bona fide fringe benefit for Davis-Bacon purposes and approving the requested

annualization exemption. (See Exhibit "B.") The NAPWC Trust previously received a determination from the Internal Revenue Service ("IRS") that it is tax-exempt under IRC section 501(c)(17) and its regulations. A copy of the March 15, 2007, IRS exemption determination is available upon request.

In furtherance of its agreement to notify DOL of any changes, amendments, or revisions to Plan documents that may affect DOL's determination, in 2010 the NAPWC Trust corresponded with the DOL regarding certain administrative revisions and updates. Revisions to the Summary Plan Description were made in 2010 to ensure compliance with positions taken by the IRS and tax court decisions requiring that benefits paid from supplemental unemployment benefit plans be linked directly to a participant's eligibility for benefits under state unemployment insurance programs. A copy of the current Summary Plan Description reflecting the current Plan terms is attached as Exhibit "C."

The Adoption Agreement, a copy of which is attached as Exhibit "D," permits participating employers to elect to make contributions on private work as well as on prevailing wage projects. The Plan does not collect data that demonstrates the extent participating employees work primarily or exclusively on state or federal prevailing wage projects during any particular period of time.

To date there have been very few forfeitures of account balances. Plan experience data demonstrates the following:

- Currently there are 94 participating employers that actively contribute to the Plan;
- Currently there are 1625 participating employees whose employers contribute to the Plan;
- When a participant is determined to be eligible to receive a benefit payment from the Plan, the benefit payment is processed within 30 days, and typically within two (2) weeks;
- Since inception, only one participant has accumulated six months of benefits in his account balance. Under the terms of the Plan, contributions to the Plan are capped when a participant's account balance reaches 50 percent of the participant's previous years' gross annual earnings;
- Since inception, there has only been one (1) forfeiture of an account balance as the result of the death of the participating employee. The account balance forfeited was in the amount of $546.42;

- Two (2) additional accounts will be forfeited in the future as a result of the deaths of two participating employees. The account balances for those employees are $729.42 and $485.09; and

- Since inception, there has only been one (1) forfeiture of an account balance because an employee was terminated for cause. The employee admitted he fraudulently cashed another employee's benefit checks. The matter was referred to the bank's fraud unit for investigation. The employee was provided with an opportunity to dispute the termination for cause and forfeiture determination but failed to respond. The total account balance forfeited was $4,276.24.

Since its approval, the NAPWC Trust has expanded its geographical area of operation to accommodate participating employers contracting for work outside of California and has worked with numerous state agencies to obtain approval of the Plan for operation within the state and compliance with the various state prevailing wage and unemployment insurance requirements.

B. RESPONSE TO JULY 15, 2013 III FFC LETTER

1. Annualization and Vesting.

FFC contends the annualization exemption determinations issued to the SUB Plans should be withdrawn because they "do not operate similarly enough to immediately-vesting defined contribution pension plans." (FCC Statement, pp. 1, 3) The FFC's letter fails to specifically address how the operation of the NAPWC Trust contravenes DOL's established position concerning annualization standards for supplemental unemployment benefit plans. The DBA/DBRA Compliance Principles, DOL Prevailing Wage Resource Book 2010 provides as follows:

> Annualization
>
> For contributions made to defined contribution pension plans which provide for immediate participation and immediate or essentially immediate vesting schedules (100% vesting after an employee works 500 or fewer hours), and certain approved supplemental unemployment benefit plans, a contractor may take Davis-Bacon credit at the hourly rate specified by the plan. Under such plans, contributions are irrevocably made by the contractor, most, if not all, of the workers will become fully vested in the plan, and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account. The amount of contributions to such plans should be in conformance with any limitations imposed by the Internal Revenue Code. (emphasis added)

In his August 9, 2007, correspondence, Paul DeCamp states:

> I have concluded that employers participating in the plan may receive full credit, for DBA purposes, for contributions made to the plan with respect to DBA-covered work. I believe that this is appropriate in light of the amendments made to the plan to ensure that almost every employee will receive the full cash benefit of the contributions made on the employee's behalf. (See Exhibit "B.")

Participant account balances are vested immediately when received by the NAPWC Trust and immediately available to participants when eligible to receive benefits due to loss of work or reduction in hours. (See Exhibit C, Section A, Part 12, page 4.) Contributions to the NAPWC Trust Plan are "vested" in that they are made irrevocably to an ERISA trust and held for permitted purposes, the provision of employee benefits and payment of reasonable administrative costs. Contributions never revert to the participating employer. These requirements are consistent with IRC section 501(c)(17) and its regulations. See 26 C.F.R. §§ 1.501(c)(17)-(b)(1)(i) and (b)(3). These requirements are also consistent with the Davis-Bacon Act and its regulations concerning a bona fide fringe benefit plan. See 40 U.S.C. §3141; 29 C.F.R. §5.23.

Such payments serve to stabilize employees' compensation during periods of inclement weather, lay off, and economic downturn. They permit participating employers to increase employee retention by providing income supplemental to state unemployment benefits which allows employers to maintain employees on payroll and readily available for active employment. The 173-hour pay-out formula, which was discussed at length prior to the DOL's 2007 approval of the Plan, is not arbitrary, but developed as an objective, agreed-upon number of standard work hours during the course of a year that would permit payout of benefits to achieve the goal of maintaining a uniform rate of compensation for participants throughout the year.[1]

FFC's concerns about contingency requirements for benefit eligibility ignore the fact that the Davis-Bacon Act does not prohibit certain contingency requirements for receipt of benefits. (FFC Statement, p.1.) The DOL and regulations have long recognized that bona fide Davis-Bacon plans may specify contingencies. In addition, contributions must provide for a definite insurance benefit for employees in the event of the occurrence of specified contingencies such as death, sickness, accident, etc. (See 29 C.F.R. §5.26 and

---

[1] As we discussed and agreed upon prior to DOL's approval in 2007, participants may elect to "hold and release," waiving their right to distribution and deciding upon future release when the funds are needed; thus, assuring sufficient funds when needed during periods of longer unemployment. See Exhibit "A," Memorandum dated April 24, 2007, Issue 4. In addition, the 173-hour benchmark is based on 2,080 annual straight-time hours worked as an objective standard to make uniform, monthly distributions to participants. See Exhibit "A," Memorandum dated September 19, 2006, Question No. 4.

DBA/DBRA Compliance Principles, U.S. DOL Davis-Bacon Resource Book 2010.) The DOL rules further state that:

> It is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from the plan at all times. For example, an employee who is eligible to participate in an insurance plan may be prohibited from receiving benefits from the plan during a 30-day waiting period. Contributions made on behalf of these employees would be creditable against the contractor's fringe benefit obligations.
>
> (DBA/DBRA Compliance Principles, U.S. DOL Davis-Bacon Resource Book 2010 at p. 22.)

The benefit payment conditions of the Plan have not been altered since the Plan was approved by the DOL in 2007. FCC has presented no compelling information or argument to support its request that the NAPWC Trust's annualization exemption be withdrawn. The record is clear that the NAPWC Trust ensures that almost every employee will receive the full cash benefit of the contributions made on his or her behalf.

2. "Short Week" Payments.

FFC contends the method of payment of benefits by the SUB Trusts may not be permissible under IRS Revenue Rulings 56-249 and 70-189. (FFC Statement, pp. 2, 5-8.) FFC's strained readings of the Revenue Rulings ignore the applicable regulations and need not be afforded deference. In Revenue Ruling 70-189 the IRS was asked whether payment of supplemental unemployment compensation benefits to employees who had their hours reduced each week due to lessened personnel needs was consistent with requirements of IRC section 501(c)(17). The employer in that matter elected to reduce hours in lieu of terminating employees. Each employee suffered a loss in pay, but no employee suffered a loss of employment. The Revenue Ruling provides, in relevant part:

> Section 501(c)(17) of the Code provides for the exemption from Federal income tax of trusts forming part of a plan to pay benefits to an employee because of his involuntary separation from employment resulting directly from a reduction in force, the discontinuance of a plant or operation, or other similar conditions.
>
> The workers in this case are not wholly separated from employment when they receive the short work week benefits. Nevertheless, their employment situation has been changed in a way equivalent to a partial separation.
>
> Accordingly, it is held that the payments by the trust will be treated as "supplemental unemployment compensation benefits" within the meaning of section 501(c)(17) of the Code. (emphasis added)

Treas. Reg. 26 C.F.R. §1.501(c)(17)-1(b) provides that supplemental unemployment compensation benefits, in addition to subordinate sick and accident benefits, consist of:

> Benefits paid to an employee because of his involuntary separation from the employment of the employer, whether or not such separation is one resulting directly from a reduction in force, the discontinuance of a plan or operation, or other similar conditions.

The NAPWC Trust Plan provides for the payment of a supplemental unemployment benefit because of a participant's reduction in work hours, seasonal work fluctuations, partial or total lay-off, discontinuance of project, or seasonal work patterns. The exclusive purpose is to provide income stability to participants who experience a loss of straight time employment hours in a particular month. The object is to normalize employee earnings during active employment and to provide a supplemental unemployment benefit during periods of complete or partial unemployment. The NAPWC Trust is part of a written Plan established and maintained solely for the purpose of providing supplemental unemployment compensation benefits as defined in section 501(c)(17)(D) and Treas. Reg. 26 C.F.R. §1.501(c)(17)-1(b)(1). These terms and conditions were fully disclosed to the IRS when the NAPWC Trust filed its exemption application.

FFC struggles to articulate how the irregular schedules experienced in the construction industry substantively differ from the reduction in hours described in the Revenue Ruling 70-189 because no reasonable distinction exists. For illustrative purposes, assume a contractor completes a job and has little work for the next three weeks. The employees wait for full-time work, but have not been terminated. Their employment situation has been changed in a way equivalent to a partial separation, a scenario practically identical to that discussed in Revenue Ruling 70-189.

There is no legitimate concern about whether or not the NAPWC Trust Plan complies with the IRS Revenue Rulings. In addition to the IRS determination the NAPWC Trust is exempt pursuant to IRC 501(c)(17) and related regulations, Legal Counsel to the State of Nebraska and a Special Programs Supervisor from The State of Montana's Department of Labor and Industry independently have also determined the NAPWC Trust's Plan complies with the applicable Revenue Rulings. (Exhibit "E".) All federal and state reviewing agencies have approved the NAPWC Trust Plan design and found it to be consistent with IRS requirements.

3. **Payment of FICA and FUTA Payroll Taxes.**

a. Plan Documents Mandate Compliance with State Unemployment Insurance Requirements.

FFC notes the obligation that the SUB Plans' payments "must be tied to state unemployment compensation" to qualify for Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA") exemptions consistent with Revenue Ruling 90-72. (FFC Statement, pp.2, 8-10.) However, FFC cannot support its assertion that the NAPWC Trust failed to comply with this mandate.

The NAPWC Trust has undertaken ongoing measures to assure consistency with these IRS administrative rulings and applicable federal case law which require that participants' entitlement to supplemental unemployment benefits be "linked" to state unemployment insurance benefits. (See CSX Corporation, Inc. v. United States, 518 F.3d 1328 (2008), exempting supplemental unemployment benefit payments from taxes imposed under FICA and FUTA.) The NAPWC Trust assures this. The Summary Plan Description at Section B, Part 2a provides:

> You are entitled to receive supplemental unemployment benefits for weeks in which you qualify for state unemployment insurance benefits, including benefits for partial unemployment, due to a reduction in your employer's workforce or layoff due to a reduction in hours worked. You must comply with all state unemployment insurance requirements to be eligible for supplemental unemployment benefits under the Plan.
>
> You also are entitled to receive supplemental unemployment benefits if you are ineligible for state unemployment insurance benefits because you have:
>
> 1. Not compiled sufficient wage credits under state law;
> 2. Exhausted unemployment insurance benefits under state law; or
> 3. Not met the state's eligibility waiting period for unemployment insurance benefits.

(See Exhibit "C" Section B, Part 2, page 8)

These provisions ensure compliance with the IRS Revenue Rulings as well as individual state policies, laws and regulations that incorporate the IRS requirements.[2] Eligibility for benefits under the federal requirements is consistent with eligibility for state unemployment benefits. Coordinating eligibility for benefits with eligibility for state unemployment benefits does not abrogate participants' right to receive the prevailing wage rate of pay or fringe benefits.

b. Approval by States' Unemployment Departments.

The link between state unemployment insurance eligibility and entitlement to supplemental unemployment benefits is established on a state-by-state basis. The NAPWC Trust Plan has been submitted to numerous state agencies responsible for review and administration of unemployment benefits. Attached as Exhibit "E" are letters from nine (9) states which confirm the NAPWC Trust Plan complies with federal and/or state laws, that the program is linked to state unemployment benefits, and that NAPWC Trust supplemental unemployment benefits payments do not constitute wages for state law purposes.

Certain states' statutory and administrative requirements expressly incorporate IRS standards and mandate linking receipt of supplemental unemployment benefits to eligibility for state unemployment insurance benefits. For example, correspondence from the State of Montana, State of Nebraska and State of Tennessee each reference mandatory compliance with IRS Revenue Rulings as a prerequisite to state approval for receipt of supplemental unemployment benefits. (See Exhibit "E.") These letters confirm that employees' receipt of benefits from the NAPWC Trust complies with the requirements of IRS Revenue Rulings and does not affect the employees' eligibility or entitlement to unemployment insurance benefits. The Iowa Workforce Development, Unemployment Insurance Division, and Illinois Department of Employment Security have also reviewed the NAPWC Trust Plan and raised no objection to use in those states.

Many states require that all supplemental unemployment benefit plans be approved prior to being used. The State of Iowa, for example, requires that all supplemental unemployment benefit plans be submitted to the Unemployment Insurance Division of the Iowa Workforce Development for approval prior to the participating employer's adoption of the plan for utilization in Iowa. Iowa Administrative Code section 871-23.3(2)e(1) and (7) provides, among other things, that an employee is not eligible to receive supplemental unemployment benefits unless the employee is eligible for benefits under a state employment security law. The Plan's failure to comply with this requirement would result in Plan benefits being treated as disqualifying "wages" under state law, with the effect of reducing or eliminating the participant's eligibility to receive the state unemployment benefits that Plan benefits are designed to supplement. The NAPWC Trust Plan was submitted to Iowa and it was determined to meet the requisite criteria for approval, including

---

[2] The Tennessee Department of Labor and Workforce Development, Division of Employment Security and State of Montana Unemployment Insurance Division specifically found that the NAPWC Trust Plan complies with Revenue Ruling 90-72. (See Exhibit "E.")

the requirement that the Plan provide no entitlement to receive supplemental unemployment benefits unless the employee is concurrently eligible for state unemployment benefits. (See Exhibit "E.")

Within each state, the participating employers must affirm eligibility for state unemployment benefits of those participants who are reported monthly to the Plan Administrator. The Plan Administrator would then apply the established formula for calculating benefits paid to each participant who is unemployed or under-employed. These terms do not affect vesting rights or increase forfeitures. Coordinating eligibility for Plan benefits with eligibility for state unemployment insurance benefits does not significantly interfere with participants' rights to receive the total amount of prevailing wage or have an impact on the annualization exemption.

c. Entitlement to Benefits for Partial Unemployment.

Under IRS standards, a participant in a supplemental unemployment benefit plan may be entitled to receive supplemental unemployment benefits for weeks in which the participant qualifies for state unemployment insurance benefits, including benefits for partial unemployment claims, due to a reduction in work hours, layoff or reduction in force. As discussed below, IRS standards include certain exceptions that broaden eligibility for supplemental unemployment insurance benefits. (See IRS Revenue Ruling 90-72.)

Under the terms of the Plan, as approved by IRS and DOL and consistent with IRC section 501(c)(17) and its regulations, participants are eligible to receive Plan benefits when they experience:

- Involuntary unemployment (not for cause) because of reduction in force, total layoff, discontinuance of projects, or seasonal work patterns; or

- Partial involuntary unemployment because of an employee's reduction in work hours or partial layoff.

Under these circumstances, participants are eligible for state unemployment benefits based on complete or partial unemployment. (See, for example, Cal. Unemployment Ins. Code §1252.) Under the state unemployment insurance program, an employee is eligible for state unemployment insurance benefits if the employee is:

- Involuntarily terminated (not for cause); or

- Experiencing a reduction in work hours because of a lack of available work from the employer (including a partial reduction).

California and many other states recognize a "partial unemployment" insurance claim for employees who work fewer than their normal full-time hours because of a lack of available work. Employees are "partially unemployed" when, through no fault of their own, they work fewer than regular full-time hours because of a lack of work, and their regular weekly earnings are reduced because of lack of work. If the employee is discharged from work, laid off, or will have no work for more than two weeks, the employee is not "partially unemployed," but may have a claim for full state unemployment insurance benefits. Partial claims under the state program apply to employees whose employers want to retain them but do not have sufficient work for full-time employment. Such employees are not required to look for work with other employers during periods of partial unemployment. This is consistent with the Plan's intent that employers may provide supplemental benefits to employees who are experiencing a reduction in hours or partial layoff to increase the likelihood of retaining such employees during periods of temporary downturn.

Under the terms of the Plan, participants are not eligible for Plan benefits when they are involuntarily terminated for cause, retired, incarcerated, or dead. (See Exhibit "C.") These restrictions on distribution of benefits under the Plan are consistent with eligibility requirements for state unemployment insurance, which does not provide unemployment insurance benefits under the same circumstances.

The IRS requirements reflect the statutory intent of IRC section 501(c)(17) that supplemental unemployment benefits supplement an individual's receipt of state unemployment insurance benefits, which provide replacement compensation at a reduced level of pay. The IRS recognizes broad exceptions that permit distribution from supplemental unemployment benefit plans under circumstances when an individual employee may not qualify for state unemployment benefits. These include when the individual has:

- Not compiled sufficient wage credits under state law;
- Exhausted unemployment insurance benefits under state law; and
- Not met the state's eligibility waiting period for unemployment insurance benefits.

(See IRS Revenue Ruling 90-72.)

These categories permit flexibility in providing benefits to participants who have exhausted state benefits or who have not yet met state unemployment insurance eligibility requirements. These exceptions further limit restrictions on receipt of benefits from the NAPWC Trust Plan.

d. Voluntary Termination of Employment Does Not Result in Forfeiture of Participant's Account Balance.

Under the terms of the Plan, account balances may be forfeited only when a participant retires, dies, is incarcerated, or is discharged for employment for cause. Voluntary termination of employment by a participant, which does not result in eligibility for state unemployment insurance, does not result in forfeiture of the participant's account balance.

Under IRS regulations, participants who voluntarily terminate their employment are not eligible for supplemental unemployment benefits. (26 C.F.R. §1.501(c)(17)-1(b).) Because their account balances are not forfeited, however, any remaining amount in the account balance would be held until such time as the individual is eligible for distribution, *i.e.*, experiences involuntary unemployment (without cause) or reduction in work hours, or until such time as the remaining account balance, if any, is forfeited under the terms of the Plan due to retirement, death or incarceration.

The NAPWC Trustees have harmonized the NAPWC Trust with IRS rules and requirements in order to protect its tax exempt status and assure that contributions are excluded from wages. Requiring eligibility for state unemployment insurance benefits, unless the participant is ineligible for state benefits based on one of the three broad exceptions expressly identified by the IRS, is not prohibited by the Davis-Bacon Act, its regulations, or DOL policy.

4. <u>Administrative Expenses</u>.

FFC's correspondence requests that your office review the fees of the SUB Plans. (FFC Statement, p. 11.) As set forth in the Summary Plan Description:

> Administrative charges on 9% will be deducted from contributions made in your behalf. A $3.50 check fee will be assessed when a benefit check is issued to you. (See Exhibit "C" Section B, Part 5, page 10.)

In practice, all employer contributions are paid into the NAPWC Trust with no deduction by the participating employer for any employer expense. Administrative expenses, aggregated at 9 percent of contributions, are paid from the NAPWC Trust to cover administrative expenses by the third-party administrator and fees paid to Plan consultants, including legal counsel, brokers, and accountants providing services to the NAPWC Trust and Plan. Participating employers' administrative expenses in providing fringe benefits are not included in the 9% fee and are not creditable towards discharging Davis-Bacon obligations. The Plan Administrator and consultants have executed services agreements detailing the scope of their services to the NAPWC Trust, as well as related costs, which are monitored regularly by the Trustees, consistent with their fiduciary

responsibilities and ERISA standards. In our experience, the IRS and DOL accept a range of reasonableness in ERISA benefit plan administrative expenses of between 10 percent and 15 percent of employer contributions. (See Exhibit "A," Memorandum, dated September 19, 2006, Question No. 2.) The administrative fees were disclosed and discussed at length prior to approval of the NAPWC Trust Plan and have not been increased in past seven (7) years.

5. Limited Forfeitures and Retention of Account Balances When an Employee Voluntarily Terminates Employment.

The Summary Plan Description provides that an employee's account balance may be forfeited if the employee is incarcerated, discharged from employment for cause, or if the employee dies or retires before the account balance is distributed. (Exhibit "C" Section B, Part 3, page 9.) Experience has shown that forfeitures are extremely rare. Consistent with ERISA requirements, forfeitures remain in the NAPWC Trust as trust assets for the exclusive purpose of providing employee benefits to participants under the terms of the Plan and for paying reasonable administrative expenses.

Forfeiture provisions in benefit plans are not prohibited under the Davis-Bacon Act. The DOL's established position is that while forfeiture provisions are not prohibited under Davis-Bacon, "the contractor may not use such forfeitures as a credit toward meeting the requirements of an applicable Davis-Bacon wage determination." (See DOL Field Operations Handbook Chapter 15, 15f13 and 15f14(e).) Consistent with IRC section 501(c)(17) regulations and Davis-Bacon Act regulations, contributions to the NAPWC Trust never inure to the participating employer and are never returned to the participating employer. As a result, no forfeiture can be used as a credit toward any applicable Davis-Bacon obligation.

Pursuant to IRC 501(c)(17) regulations, if an employee voluntarily terminates employment, is separated from employment for disciplinary reasons or because of the age of the employee, the employee receives no benefit from the NAPWC Trust. (26 C.F.R. § 1.501(c)(17)-1(b)(4).) Voluntary termination of employment does not, however, result in forfeiture of a participant's account balance. Neither is voluntary termination of employment a basis for distribution of benefits under the IRC regulations governing supplemental unemployment benefit plans. Rather, monies in participant account balances that have not been exhausted remain available to participants following any period of voluntary unemployment in the future.

C. CONCLUSION

The Plan terms related to annualization, administrative expenses, and forfeitures, which were discussed at length prior to DOL issuing its approval in 2007, have not been modified. Implementing revisions incorporating limited requirements to coordinate receipt of Plan benefits with state unemployment insurance benefit eligibility has not significantly

altered the availability of NAPWC Trust benefits to participants. There is no basis or need to revoke the federal annualization exemption issues to the NAPWC Trust.

Yours truly,

David P. Wolds

DPW:dy
Attachments

EXHIBIT "A"

MEMORANDUM

TO: Timothy Helm
U.S. Department of Labor

FILE NO: 113555.00

FROM: David P. Wolds
Procopio Cory Hargreaves & Savitch LLP

DATE: May 1, 2006

RE: National Association of Prevailing Wage Contractors, Inc.: Supplemental Unemployment Benefit Trust and Plan Approval

---

Here is our preliminary package of materials regarding the supplemental unemployment benefit plan which we have created for the use of members of the National Association of Prevailing Wage Contractors, Inc. ("NAPWC"). Thank you for reviewing this package and offering suggestions as to how to obtain recognition as a "bona fide" fringe benefit program and an exception from the annualization requirements. As you will see in the documents enclosed, the exception from the annualization requirements is based upon the immediate participation and vesting of all contributions and benefits for participants.

PLAN SPONSOR

The sponsor of the Supplemental Unemployment Benefit Plan and Trust is the NAPWC. This corporation is created as a tax-exempt mutual benefit corporation of the state of California and is organized as a tax-exempt organization under Internal Revenue Code §501(c)(6). Copies of the Articles of Incorporation, Bylaws, and tax exemption determination from the Internal Revenue Service are attached as Exhibit "A". The NAPWC is independent of any participating employer and administered by its directors who are the "plan sponsor" as defined in the Employee Retirement Income Security Act of 1974 ("ERISA").

NAMED FIDUCIARIES AND TRUST

The Board of Directors of the NAPWC appoints trustees of the National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust ("Trust"). The trustees constitute the "named fiduciaries" of the Trust as defined in ERISA. The trustees have the full authority, as fiduciaries, to administer the trust's assets and its employee benefit plans. The trustees are independent third parties, unrelated to any participating employer. The trust became effective as of January 1, 2006. Its purpose is to serve as a funding vehicle for the supplemental unemployment benefit payments that are made by participating employers for the benefit of participating employees. The trust constitutes a

third-party into which contribution payments will be made irrevocably by participating employers. No part of the assets of the trust may inure, or be used for the benefit of participating employers (except as permitted by ERISA) and the assets of the Trust will be held for the exclusive purpose of creating and administering a supplemental unemployment benefit plan and deferring reasonable expenses of administration as permitted by ERISA and related regulations of the U.S. Department of Labor. The trustees have submitted to the Trust to the Internal Revenue Service for a determination that it is exempt from taxes under Internal Revenue §501(c)(17). Copies of the Trust Agreement and the related application for recognition of exemption are attached hereto as Exhibit "B".

SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN

Contractor members of the NAPWC may participate in the Supplemental Unemployment Benefit Trust plan by executing an employer adoption agreement which specifies eligible employees, covered work and employer contribution rates calculated as a percentage of compensation or dollar amount per hour worked as elected by each employer. Copies of the adoption agreement signed by each employer and the attachment to the adoption agreement specifying the contribution arrangements are attached as Exhibit "C".

Contributions are made by participating employers to Polycomp Administrative Services, Inc., a professional third-party administrative firm with offices throughout the state of California. The employee contribution report and the Polycomp Administrative Services, Inc. administrative management agreement are attached hereto as Exhibit "D". Contributions are, therefore, paid by participating employers irrevocably to a third-party administrator which collects and distributes the funds pursuant to the terms of the plan and the exclusive benefit rule of ERISA.

The employer adoption agreement referred to above, and the summary plan description attached as Exhibit "E", constitute the employee benefit plan for ERISA purposes and contain the required notice and disclosure provisions under ERISA. The SPD confirms that contributions made by participating employers are immediately vested, and that employees will be entitled to supplemental unemployment benefit payments if they work fewer than 173 hours in a previous month. The SPD will be slightly modified to delete the language in "[ ]" once the exemption from the annualization requirements is confirmed.

VESTING, PORTABILITY AND FORFEITURES

Vesting is immediate and complete for all employees covered by the adoption agreement who are contributed upon. Employees do not lose credit for under-worked hours. These hours are tracked by the administrative manager and paid out of accumulated contributions from each employees' account. The benefit check request and under-worked hours report submitted by the employer for payment to employees is attached hereto as

Exhibit "F". Minimal forfeitures are anticipated, but forfeitures may occur in circumstances in which employees are terminated for cause by their employer, are incarcerated, or who retire before remaining amounts are distributed in accordance with the Internal Revenue Code and related regulations. It is not anticipated that there will be significant movement of participants between participating employers, but if that occurs, employee account balances will be transferred thereby achieving the objective of portability. These features of the program, and other relevant details, are included in the descriptive information distributed to participants attached hereto as Exhibit "G".

REQUEST FOR RECOGNITION

Thank you for the time that you have allowed us in the past to explain the purposes of this program and for giving us the consideration of a preliminary review. We seek recognition as a bona fide fringe benefit plan for Davis-Bacon purposes and exemption from the DOL annualization requirements in view of the immediate vesting features described above. I will be available to answer any questions or to discuss any aspect of this program that requires further attention. Please feel free to contact me at Procopio Cory Hargreaves & Savitch LLP, 2100 Union Bank Building, 530 B Street, Suite 2100, San Diego, CA 92101-4469; Direct (619) 525-3875; Facsimile (619) 398-0175; E-mail: dpw@procopio.com.

DPW:vlw

Wolds, David P.

Subject: RE: sub review

Thanks Tim. . .let me review your observations and questions with the plan administrator. I'll get a reply back to you early next week. Dave

---

From: Helm, Timothy - ESA [mailto:Helm.Timothy@dol.gov]
Sent: Thursday, September 14, 2006 4:14 PM
To: Wolds, David P.
Subject: sub review

dave,

reviewed the plan, here are some questions and issues:

what is the definition of aggregate fringe benefit component as used in sub plan information for participants? if the hourly contribution cannot exceed the fringe benefit amount listed in the wage determination, that information should be included in the summary plan, trust agreement, and draft adoption agreement.

FEES: 2% on deposits for administrative manager, 9% on withdraws, $3.50 check fee. plus funds may be used for office supplies and equipment, professional and other assistants, financial institutional services, administrative management services, reimbursements for fees of administrative manager, training costs etc. provision that manager can request additional fees and charges at any time in the future. are all these fees for the third party provider? is there a defined basis between the fees and actual expenses to administer the plan? what limits are there on future plan increases? are the fees justifiable?

disbursement of funds: one part of plan says it takes 90 days to process claims, and another part says that funds are paid automatically the next month when hours are less than 173. which one is it?

how is the 173 straight time hours established as the benchmark for monthly hours? if a worker is employed for 160 hours and 30 overtime hours, why would they still be entitled or in need of unemployment compensation in the next month?

termination of plan, page 5 of summary. says plan would continue after it terminates. workers should get their money refunded if the plan terminates.

will there be interest income from the funds deposited for this sub? if so, where will it go?

what provision in place if an employer decides to end participation in the plan?

the one disbursement plan calls for funds to be automatically disbursed the next month for any hours less than 173. explain how this short turnaround of deposits and release of funds is really an unemployment protection for employees and not simply a deferred savings plan?

the information for participants guide does not list incarceration as a reason for terminating benefits, intro letter and other places lists it as a reason for forfeiture. clarify.

explain the basis for establishment of a 50% previous year's gross income as the basis for a minimum cap on contributions. what is the relationship between the cap and the unemployment rate of covered workers?

timothy helm
team leader
government contracts enforcement
wage and hour division

u.s. department of labor

MEMORANDUM

TO: Timothy Helm
U.S. Department of Labor

FILE NO: 113555.00

FROM: David P. Wolds
Procopio Cory Hargreaves & Savitch LLP

DATE: September 19, 2006

RE: National Association of Prevailing Wage Contractors, Inc.: Supplemental Unemployment Benefit Trust and Plan Approval

---

This memo is in response to your e-mail message of September 14, 2006 regarding the Supplemental Unemployment Benefit Plan. Thank you again for your time in reviewing this and discussing it with us.

Question No. 1 – Definition of Aggregate Fringe Benefit Component:

Our preference is to advise employers, and employees, that participating employer contributions may be made pursuant to federal and state wage determinations. If a wage determination allows the reduction of the base hourly rate, as in the case of the U.S. Department of Labor for bona fide fringe payments, the contractor will be so entitled. In California and other states that do not permit the invasion of the basic hourly rate of pay, contractors will be limited to the payment of the aggregate amount of the fringes listed in the wage determination which applies. We will prepare appropriate changes to the employer adoption agreement, the summary plan description and the information for participants in this regard.

Question No. 2 -- Administrative Fee Limitations:

Aggregate fees for all plan administration will not exceed 10%. The current plan expenses are estimated to be 9% of employer contributions. Other than the $3.50 check charge, there are no additional administrative costs, fees, or charges. Accordingly, at least 90% of all employer contributions will be paid out in distributable benefits to participants. In my experience, the IRS and DOL accept a range of reasonableness in ERISA benefit plan administrative expenses of between 10% and 15% of employer contributions. This program will operate efficiently on the low side of this range. All fees will meet ERISA fiduciary standards of reasonableness.

Question No. 3 – Disbursement of Funds and Processing of Claims:

Disbursements to eligible participants will take place the month after hours dip below 173 straight time hours. If a participant disputes a payment or non-payment, the process for resolving disputed claims under the regulations of ERISA section 503 will take approximately 90 days. The longer 90 day period only concerns disputed claims and not normal pay out situations.

Question No. 4 – How Is the 173 Hour Benchmark Established?

It is an objective straight time work standard based upon 2,080 annual straight time hours divided by 12 months. The objective is to make uniform, monthly distributions to participants sufficient to support this 173 hour baseline. This number seems fair and non-discriminatory. If a 160 baseline is used, employees would only receive 1920 hours of compensation per year and lose 160 hours of entitlement.

Question No. 5 – Consequences of Plan Termination:

As stated in the summary plan description, if the plan and/or trust fund are terminated, remaining funds will be used to continue the payment of benefits to participants and to wind up the plan and/or trust affairs. No forfeitures will occur upon termination and there will be no reversion of assets to participating employers.

Question No. 6 -- Interest Accruals:

Interest earnings will remain in the trust. At this time, it is difficult to anticipate that interest earnings will be of any significance. The trustees anticipate that interest earnings will initially be minimal. The trustees hope to avoid the additional administrative expense of calculating daily interest on individual employee accounts. This would be unduly expensive and burdensome. If the plan accrues significant interest in the future because of sizeable deposits, this issue will be revisited.

Question No. 7 – Consequence of Employer Termination of Participation?

All benefits will be paid to participants through normal distributions. Future contributions will stop and appropriate notices will be sent to participants in that circumstance. We can add additional language to the summary plan description in section 16 at page 5 to confirm this.

Question No. 8 -- Is The Disbursement Plan a Deferred Savings Plan, Rather Than a Supplemental Unemployment Benefit Plan?

The SUB Plan has been designed to comply with Internal Revenue Code §501(c)(17). Consistent with the IRC regulations, the plan provides for the payment of supplemental unemployment benefits because of an employee's reduction in work hours, seasonal work fluctuations, partial or total lay-off, discontinuance of projects, or seasonal work patterns. The plan does not provide any prohibited death or retirement benefits. Its exclusive purpose is to provide income stability to participants who experience a loss of straight time employment hours in a particular month. The object is to normalize employee earnings during their active careers as employees, rather than to provide any type of deferred compensation program extending into a later period of retirement. Employees have no option to defer payments beyond their employment.

Question No. 9 – Where is the Reference to "Incarceration"?

The information for participants should have included this reference and will be so modified.

Question No. 10 – What is the Basis for a Minimum Cap on Contributions of 50% of the Prior Year's Gross Income?

The maximum amount of the regular unemployment insurance claim is calculated, in California, as one-half of the claimant's base period wages, or 26 times the claimant's weekly benefit amount, which ever is less. This cap on contributions exists to provide a maximum funding limit relative to the unemployment insurance limits. It is also intended to limit excess funding by employers and to act as an incentive to balance the distribution of contributions between different fringe benefit plans.

DPW:vlw

Procopio
Cory
Hargreaves
& Savitch
Founded 1946 LLP

530 B Street • Suite 2100 • San Diego, California 92101-4469
Telephone 619-238-1900 • Fax 619-235-0398
www.procopio.com

David P. Wolds
Direct Dial: (619) 525-3875
E-mail: dpw@procopio.com
Personal Fax: (619) 398-0175

November 29, 2006

VIA E-MAIL
Helm.Timothy@dol.gov

Timothy Helm, Team Leader
Government Contracts Enforcement Wage
and Hour Division
U.S. Department of Labor

Re: National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust: Application for Exemption from Annualization Requirements

Dear Tim:

This letter is a follow-up to recent conversations regarding the pending application for exemption from annualization requirements. We also wanted to reply to your comment that your counsel, Mr. Lesser, questions whether this plan provides for deferred compensation.

The National Association of Prevailing Wage Contractors, Inc. Supplemental Unemployment Benefit Trust ("Trust") was established under IRC section 501(c)(17), to provide supplemental unemployment benefits to employees of employer members of the National Association of Prevailing Wage Contractors, Inc. ("NAPWC"). Supplemental unemployment benefits are provided through a tax-exempt trust which conforms with the requirements of IRC section 501(c)(9) and section 501(c)(17). The Trust is a fully funded, ERISA regulated, welfare benefit plan that only provides periodic payment of benefits to participants whose employment has been involuntarily terminated or who are underemployed for specific periods.

Supplemental unemployment benefit ("SUB") plans generally are designed to provide income to laid-off workers to supplement unemployment benefits received from the state. Here, the SUB plan is funded only through employer contributions to the Trust. Employee deferrals are not accepted. The SUB plan does not discriminate in favor of highly compensated employees as to eligibility or benefits. Rather, the plan is a broad based supplemental unemployment benefit plan benefiting rank and file employees who experience lay off or underemployment. The employer will receive a deduction for a contribution made to the Trust in the year the contribution is made to the Trust, and the employee generally includes the amount of benefits received under the SUB plan in the

year in which the employee receives the benefits. Benefits under this plan are not compensation for services rendered and do not constitute a deferral of any compensation.

It is well established that supplemental unemployment benefits qualify as "other benefits" provided through a tax-exempt voluntary employees' beneficiary association ("VEBA") under IRC section 501(c)(9) and its regulations.[1] VEBA's are prohibited from providing deferred compensation benefits, such as pension, annuity, stock bonus, or profit-sharing benefits. The regulations treat a pension, annuity, stock bonus, or profit-sharing benefit as providing for deferred compensation where such benefits become payable by reason of the passage for time, rather than as the result of an unanticipated event. Regs. Section 1.501(c)(9)-3(f). Supplemental unemployment benefits that become payable, as here, as the result of an unanticipated layoff are permissible VEBA benefits because they are payable by reason of an unexpected event and not on account of the passage of time. Regs. Section 1.501(c)(9)-3(e); IRS PLR 200638027.[2]

Although employer contributions to a SUB trust are irrevocable by the employer, the employee participants have no vested interest in amounts the employer pays into the Trust. That is, no employee has any right, title or interest in or to any Trust asset unless or until the employee is qualified and eligible to receive a benefit. If the employee voluntarily terminates employment, is discharged for cause, is separated from employment for disciplinary reasons or because of the age of the employee, the employee receives no benefit from the Trust. Regs. section 1.501(c)(17)-1(b)(4); Rev. Ruls. 56-249, 1956-1 C.B. 488 and 77-347, 1977-2 C.B. 362. Under the terms of the plan, and as required under IRC section 501(c)(17), an employee participant is entitled to benefits provided through a SUB plan if separation from employment results from a reduction in force, the discontinuance of a plant or operation or other similar conditions such as cyclical, seasonal or technological causes. Regs. section 1.501(c)(17)-1(b)(3), (4). Benefits do not qualify as SUB plan benefits if they are, in effect, payment for past services. *NYSA-ILA Container Royalty Fund v. Comr.*, 847 F.2d 50 (2d Cir. 1988).

Similarly, supplemental unemployment benefits do not constitute wages for FICA and FUTA purposes. Rev. Rul. 90-72, 1990-2 C.B. 211; Rev. Rul. 56-249, 1956-1 C.B. 488. Moreover, SUB plan benefits do not constitute deferred compensation under recently

---

[1] IRC section 501(c)(9) exempts from federal income tax a voluntary employees' beneficiary association providing for the payment of life, sick, accident or other benefits to its members or designated beneficiaries. Section 1.501(c)(9)-3(d) of the regulations provides that the term "other benefits" includes only benefits that are similar to life, sick, or accident benefits. A benefit is similar to a life, sick, or accident benefit if: (1) it is intended to safeguard or improve the health of a member or a member's dependents, or (2) it protects against a contingency that interrupts or impairs a member's earning power.

[2] Under section 1.501(c)(9)-3(e), provision of job readjustment allowances, income maintenance payments in the event of economic dislocation, temporary living expense loans and grants at times of disaster, supplemental unemployment compensation benefits (as defined in section 501(c)(17)(D)(i)), certain severance benefits, and education or training benefits or courses are considered "other benefits" because they protect against a contingency that interrupts earning power. (Emphasis added.)

enacted IRC section 409A. Under section 409A, a plan provides for the deferral of compensation only if, under the terms of the plan, the employee has a legally binding right during a taxable year to compensation that has not been actually or constructively received and included in gross income and is payable to the employee in a later year. IRS Notice 2005-1, Q-3, 4. Broad-based supplemental unemployment benefits, welfare benefits, paid from a bona fide employee benefit plan and provided to rank-and-file employees are not included within the definition of deferred compensation. *Id.*

In addition, the supplemental unemployment benefits provided through the Trust constitute bona fide fringe benefits for purposes of discharging a contractor employer's prevailing-wage obligations. To be considered a bona fide fringe benefit for purposes of the Davis-Bacon Act, a fringe benefit plan, fund or program must constitute a legally enforceable obligation meeting the following criteria:

(1) the provisions of the plan, fund or program must be specified in writing and must be communicated in writing to the affected employees;

(2) contributions must be made pursuant to the terms of such plan, fund or program;

(3) any contributions made by employees must be voluntary;

(4) the primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death; disability; advanced age; retirement, illness, medical expenses, hospitalization, or supplemental unemployment benefits;

(5) the plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan;

(6) the contractor's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust, or other funded arrangement;

(7) the trustees must assume the usual fiduciary responsibilities imposed on trustees by applicable law;

(8) the trust or fund must be set up in such a way that the contractor will not be able to recapture any of the contributions paid in or in any way divert the funds to its own use or benefit; and

(9) no benefit required by any other federal law or by any state or local law, such as unemployment compensation, workers' compensation, or Social Security, is a fringe benefit for purposes of the Act.

Procopio
Cory
Hargreaves
& Savitch
LLP

Davis-Bacon Act 1(b)(2)(B); Reg. 29 CFR 5.23, Subpart B.

The Trust SUB plan meets the requirements of a bona fide fringe benefit plan for purposes of Davis-Bacon Act. Consistent with the requirements of IRC section 501(c)(17) and its regulations, the SUB plan does not provide any type of deferred compensation program extending to a later period of retirement. Our application for exemption from the annualization requirements has been under consideration since May, 2006 and our clients are very interested in bringing this review to a conclusion. If possible, I would like to schedule a brief telephone conference with you and Mr. Lesser to complete this process.

Thanks, again, for your consideration.

Yours truly,

David P. Wolds

DPW:alr

Procopio
Cory
Hargreaves
& Savitch
Founded 1946 LLP

530 B Street • Suite 2100 • San Diego, California 92101-4469
Telephone 619-238-1900 • Fax 619-235-0398
www.procopio.com

David P. Wolds
Direct Dial: (619) 525-3875
E-mail: dpw@procopio.com
Personal Fax: (619) 398-0175

April 24, 2007

VIA E-MAIL
Helm.Timothy@dol.gov

Timothy Helm, Team Leader
Government Contracts Enforcement Wage
and Hour Division
U.S. Department of Labor

Re: National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust: Exemption Letter Re Annualization Requirements

Dear Tim:

We have reviewed the comments in your e-mail message of April 12 with our clients and attach a memorandum that addresses these issues. Please give me a call at your convenience after reviewing our submission.

Thank you for moving this project along. I look forward to our discussion.

Yours truly,

David P. Wolds

DPW:vlw
Attachments

113555.000002/699388.01

MEMORANDUM

E-MAIL

TO: Timothy Helm
U.S. Department of Labor

FILE NO: 113555.02

FROM: David P. Wolds
Procopio Cory Hargreaves & Savitch LLP

DATE: April 24, 2007

RE: National Association of Prevailing Wage Contractors, Inc.: Supplemental Unemployment Benefit Trust and Plan Approval

---

This memo is in response to your e-mail message of April 10, 2007 regarding the remaining issues of clarification related to the NAPWC Supplemental Unemployment Benefit Trust. We look forward to discussing our responses with you at your convenience.

Issue No. 1 – Application of Interest Earnings:

As set forth in my memorandum of September 19, 2006, there will be no reversion of interest earnings to the plan sponsor, any participating employer or service provider consistent with the Davis-Bacon regulations. In addition, interest earnings cannot be used as an offset to employer contributions.

In order to control administrative costs, the SUB Trust does not do individual interest calculations related to participant accounts. Interest earnings remain in the trust to be used to pay legitimate administrative expenses pursuant to the provisions of the trust agreement and consistent with ERISA regulations.

Rather than distributing interest earnings among the plan participants accounts as you suggest, we request that the existing procedures be followed for these reasons: First, interest earnings are relatively nominal. For example, last month, the total interest involving 500 participants' accounts was only $161.00. The administrative cost of employing software to handle interest calculations for very small accounts is prohibitive and the trustees do not feel that it would be a prudent use of plan resources given the relatively small amounts involved. In many cases, attributable interest would amount to less than 5¢ per participant with a disproportionately high administrative cost to report and keep records of these nominal transactions. The advantage to participants is disproportionate to the cost of related administrative services. The current practice keeps overall participant fees lower.

Issue No. 2 – Limitations on Plan Contributions:

During our very first telephone conversation, we confirmed that the plan limited employer contributions to the employee benefit component of the wage determination in

conformity with the Davis-Bacon regulations. In addition, we confirmed that the employer would, under no circumstances, invade the basic hourly rate of pay.

We suggest that this approach makes more sense than imposing a limitation that caps hourly contributions at the health and welfare amount listed in a wage determination. Many wage determinations do not itemize fringes by type and the regulations clearly give contractors the ability to pay certain fringes, or no fringe benefits at all. In addition, this program will be available to employers that perform prevailing wage work in many states which to not impose line by line requirements, or offer fringe benefit allocations within the benefit package. Montana, Nevada and Oregon all follow this practice.

We would like our contractors to have the flexibility of paying the full fringe amount to the SUB Trust if, in their circumstances, it makes sense to do so. It is foreseeable in states like Montana and Alaska that contractors and employees will want to maximize the amounts paid into this program because of the long winter season. Limiting the contributions to the health and welfare amount will create ambiguity where no line items are established, and will not adequately address the needs of those participants in cold weather states.

Issue No. 3 – Review of Contribution Cap Formula:

The use of the 1,040 hourly cap for individual account contributions also followed our initial telephone conversation in which you noted that 2 years may be too much, but that a cap of 50% of annual wages would make more sense. We have made an effort to follow that original recommendation and any other cap amount seems arbitrary since the regulations, and other interpretations that we have seen, do not address this issue.

Issue No. 4 – The 173 Hour Pay-Out:

There appears to be no perfect answer to the question of when pay-outs should trigger. The trustees have, from the inception, had the objective of maintaining a uniform rate of compensation for participants throughout the year through the use of a 173 hour base line. A 173 hour uniform monthly baseline is not arbitrary. It is created by an objective, agreed upon number of standard work hours during the course of a year.

Your concern that participants may not have the money when they need it during periods of long employment is answered, we believe, through the use of the "Hold and Release" form attached by which participants may waive their right to distributions and then decide on a future release date when the funds are needed. Accordingly, employees have the option of waiving fund distributions on a month to month basis, and for a long a period of time as fits their circumstances.

Issue No. 5 – Copies of Plan Documents and Amendment Procedure:

Our clients are aware that once these last few points are ironed out, the SUB Trust and Plan must be administered consistent with the requirements that you have expressed, and that the Plan terms must be enforced and implemented as written. Any variation in the administration of these items will require review, consultation and approval by your office.

I look forward to discussing these remaining issues at your earliest convenience and can provide the final plan document for your approval, and the granting of the annualization exemption quickly thereafter.

Thank you again for your continuing attention and assistance.

DPW:vlw
Attachment

MEMORANDUM

E-MAIL

TO: Timothy Helm
U.S. Department of Labor

FILE NO: 113555.02

FROM: David P. Wolds
Procopio Cory Hargreaves & Savitch LLP

DATE: May 8, 2007

RE: National Association of Prevailing Wage Contractors, Inc.: Supplemental Unemployment Benefit Trust and Plan Approval

---

This memo is in response to your e-mail message of April 24, 2007 regarding application for an exemption from the annualization requirements by the NAPWC Supplemental Unemployment Benefit Trust.

Issue No. 2 – Limitations on Plan Contributions:

Under the SUB Plan, the employer would not, under any circumstances, invade the basic hourly rate of pay in the applicable wage determination. In response to your related question, and the example which you posed, the employer's basic hourly rate of pay would be:

(1) $10 on non-prevailing wage jobs; and

(2) $10 or more on Davis-Bacon jobs as required by the wage determination.

If the Davis-Bacon hourly rate of pay is more than $10, the amount of the wage in the wage determination governs. Under no circumstances would the employer be permitted to contribute more than the total aggregate fringe benefit amount to the SUB Trust (subject to the 1,040 hourly cap on annual wage as you state).

If no fringe benefit amount is provided in a Davis-Bacon wage determination, your suggestion of limiting contributions to amounts in excess of the employee's normal non-Davis-Bacon hourly rate of pay is acceptable and it make sense.

Thanks again for your quick response to my e-mail of April 24th. I will be available to discuss these few remaining questions at your convenience.

DPW:alr

Wolds, David P.

From: Helm, Timothy - ESA [Helm.Timothy@dol.gov]
Sent: Thursday, June 07, 2007 6:00 AM
To: Wolds, David P.
Subject: sub trust

hi david, i think we are ready to go. do you have a plan document that includes all of our discussions and issues?

Timothy J. Helm
Team Leader, Government Contracts Team
Office of Enforcement and Policy
Wage and Hour Division
U.S. Department of Labor
phone: 202-693-0574
fax 202-693-1087

Procopio
Cory
Hargreaves
& Savitch
Founded 1946 LLP

530 B Street • Suite 2100 • San Diego, California 92101-4469
Telephone 619-238-1900 • Fax 619-235-0398
www.procopio.com

David P. Wolds
Direct Dial: (619) 525-3875
E-mail: dpw@procopio.com
Personal Fax: (619) 398-0175

June 18, 2007

VIA E-MAIL
Helm.Timothy@dol.gov

Timothy Helm, Team Leader
Government Contracts Team
Office of Enforcement and Policy
Wage and Hour Division
U.S. Department of Labor

Re: National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust: Davis-Bacon Approval and Annualization Exemption

Dear Mr. Helm:

Thank you for your e-mail message of June 7, 2007. We have organized the suggested changes to document language that you requested and enclosed red-line revisions to those documents for your convenience and for final approval.

The attached documents contain revisions responsive to your suggestions as follows:

(1) Definition of aggregate fringe benefit component: The Summary Plan Description (Section A., subsection 10.), the Employer Adoption Agreement and the Contribution Schedule Attachment to the Adoption Agreement have been modified to reflect that contributions on federal and state prevailing wage projects cannot exceed the aggregate fringe benefit component set forth in the applicable wage determination or reduce an employee participant's basic hourly rate of pay;

(2) Consequences of Employer Termination of Participation: The Summary Plan Description (Section A., subsection 16.) has been revised to reflect that upon termination of a participating employer's participation, notices will be sent to participating employees and benefit eligibility will continue until all accrued benefits are distributed;

(3) Termination of Benefits for Incarceration: We have modified the "Information for Participants" Form to state that incarceration and other occurrences may result in the

termination of benefits. Similar language was previously added in Section B., subsection 3 of the Summary Plan Description, per your suggestion; and

(4) Limitations of Contributions: As most recently discussed, in the situation in which there is no fringe benefit component to a Davis-Bacon wage determination, the participating employer contributions may not exceed the employee's normal non-prevailing wage hourly rate of pay. Related language has been included with the changes to the Adoption Agreement, the Contribution Schedule Attachment to the Adoption Agreement, and the Summary Plan Description per your request.

We have carefully reviewed all of the correspondence and notes of our conversations related to plan changes and believe that the revisions to the attachments are inclusive of the issues discussed. There were other areas of clarification during our discussions that did not require document changes. We hope that your office will provide a letter recognizing that:

(1) The Plan and Trust constitute a "bona fide" employee fringe benefit plan for purposes of Davis-Bacon Act compliance; and

(2) That the SUB Plan and Trust and its participating employers are exempt from annualization requirements.

This will also confirm our understanding that this letter of approval and the annualization exemption will only apply insofar as the plan and its controlling documents are administered consistently with the requirements that we have discussed. Any changes in the documents will require review, consultation and approval by your office.

Thank you, again, for the careful review and helpful suggestions you provided during this process. It has the positive effect of attuning the fiduciaries to a variety of issues that will be extremely helpful to consider in the future for the plan and for the benefit of participating employees.

Yours truly,

David P. Wolds

DPW:vlw
Attachments

EXHIBIT "B"

U.S. Department of Labor

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

AUG - 9 2007

Mr. David P. Wolds
Procopio, Cory, Hargraves, & Savitch
530 B Street, Suite 2100
San Diego, California 92101

Dear Mr. Wolds:

This is in response to your correspondence, on behalf of the National Association of Prevailing Wage Contractors (NAPWC), for a review of the NAPWC's Supplemental Unemployment Benefit Trust, which is designed to provide supplemental unemployment benefits to laborers and mechanics employed on projects subject to the Davis-Bacon Act (DBA) labor standards provisions.

As a result of discussions with my staff, a number of changes have been made to the plan that are designed to ensure that workers receive the benefits contributed on their behalf, with little or no forfeitures. In addition, changes have been made to define the aggregate fringe benefit component and to place limitations on the hourly contributions per employee.

After a careful review of the plan documents, I have concluded that the NAPWC Supplemental Unemployment Benefit Trust, to the extent of its provision for supplemental unemployment benefits, is a bona fide fringe benefit plan for Davis-Bacon purposes. In addition, I have concluded that employers participating in the plan may receive full credit, for DBA purposes, for contributions made to the plan with respect to DBA-covered work. I believe that this is appropriate in light of the amendments made to the plan to ensure that almost every employee will receive the full cash benefit of the contributions made on the employee's behalf.

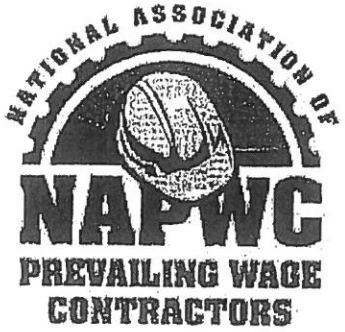
Please note that this determination is based on the plan documents and related materials submitted to the Wage and Hour Division on June 18, 2007. Any changes, amendments, or revisions to these documents could result in a different determination in this matter. Accordingly, in the event the NAPWC Trust plan documents are amended or changed in the future, please forward a copy of those changes to Timothy Helm of my staff.

Sincerely

Paul DeCamp

Paul DeCamp
Administrator

EXHIBIT "C"



SUMMARY PLAN DESCRIPTION

FOR

NATIONAL ASSOCIATION OF PREVAILING WAGE CONTRACTORS SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST PLAN

PARTICIPATING EMPLOYER

Name: _____
Address: _____
_____
_____
Phone #: _____

INTRODUCTION

This document is your Summary Plan Description for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). This summary highlights your rights and obligations under the NATIONAL ASSOCIATION OF PREVAILING WAGE CONTRACTORS SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST PLAN ("Plan"). Benefits under the Plan are provided through several participating employers, and are subject to the provisions of the Plan, the Trust Agreement, your employer's Adoption Agreement, and the determination of the Plan Administrator.

Since this is only a summary, all of the details of the Plan are not covered, and you should contact the Plan Administrator if you still have questions about your benefits. The Plan Sponsor reserves the right to change or discontinue the Plan at any time. This Summary Plan Description does not create a contract of employment.

Noticia de Asistencia de Lenguaje Extranjero: Este folleto contiene un sumario en ingles de sus derechos del Plan y los beneficios bajo NATIONAL ASSOCIATION OF PREVAILING WAGE CONTRACTORS SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST PLAN. Si tiene alguna dificultad entendiendo cualquier parte de este folleto communiquese con el Administrador del Plan a su oficina en Suite 608, 404 Camino del Rio South, San Diego, CA 92108. Horas de oficina son de 8:30 a.m. a 5:00 p.m. de Lunes a Viernes. Tambien se puede comunicar con el Administrador por telefono al (619) 683-2030 para asistencia.

SUMMARY PLAN DESCRIPTION

A. Basic Plan Information

1. Name of Plan.

NATIONAL ASSOCIATION OF PREVAILING WAGE CONTRACTORS SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST PLAN ("Plan").

2. **Name and Address of Plan Sponsor.**

National Association of Prevailing Wage Contractors, Inc.
404 Camino del Rio South, Suite 608
San Diego, CA 92108
(619) 683-2030

3. **Participating Employer.**

The employer identified at the top of page one. The Plan allows participation of more than one employer. You may receive upon written request of the Plan Administrator information as to whether a particular employer participates in the Plan.

4. **Plan Employer Identification Number (EIN)**: 03-6117102.

5. **Plan Number (PN):** 501.

6. **Type of Plan and Funding.**

This is a welfare benefit Plan that provides supplemental unemployment benefits through a multiple employer trust fund established under section 501(c)(17) of the Internal Revenue Code. The Plan is not collectively bargained and does not apply to employees covered by collective bargaining agreements. Contributions are paid by participating employers to the trust fund. The trust name is NATIONAL ASSOCIATION OF PREVAILING WAGE CONTRACTORS SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST.

7. **Plan Administrator and Type of Administration.**

The Plan is administered by a professional Plan Administrator. If you have questions about the Plan, please contact:

Polycomp Administrative Services, Inc.
404 Camino del Rio South, Suite 608
San Diego, CA 92108
(619) 683-2030

8. **Agent for Service of Legal Process.**

The name and address of the Plan's agent for service of legal process are:

David P. Wolds, Attorney at Law
Wolds Law Group PC
4747 Executive Drive, Suite 250
San Diego, CA 92121

Service of legal process may also be made on the Plan Administrator identified in the preceding Section or on any Plan Trustee identified in the following section.

9. Plan Trustees.

The names and addresses of the Plan Trustees are:

Scott McClure
Johnson, Finch & McClure
9749 Cactus Street
Lakeside, CA 92040

Richard Matthews
1286 Rippey Street
El Cajon, CA 92020

James O'Keefe
Prestige Concrete
13507 Midland Road
Poway, CA 92064

Denise Hartnett
Laser Electric, Inc.
9920 Scripps Lake Road, #105
San Diego, CA 92131

Kim Clark
Clark Steel Fabricators
12610 Vigilante Road
Lakeside, CA 92040

Jan Rethmeier
Western Pump, Inc.
3235 F Street
San Diego, CA 92102

10. Source of Plan Contributions.

Contributions are made by Participating Employers for their Employee Participants covered under the Plan. Contributions on federal and state prevailing wage projects cannot exceed the aggregate fringe benefit component set forth in the applicable wage determination or reduce an Employee participant's basic hourly rate of pay. If no fringe benefit component is included in a wage determination, Participating Employer contributions are limited to amounts in excess of the Participating Employee's normal, non-prevailing wage rate of pay.

11. Plan Year.

The Plan Year is January 1 through December 31.

12. Plan Benefits.

Eligible employees earn supplemental unemployment benefits based on contributions made by their employer as elected by the participating employer.

Employees are entitled to supplemental unemployment benefits if they are eligible for state unemployment benefits. Plan supplemental unemployment benefits are calculated by determining the difference between 173 hours and the participant's straight-time hours worked (not including any overtime). The difference is multiplied by the participant's highest base rate of pay, as reported by the participating employer.

This is a pre-paid plan, which means that benefit payments are based on an employee's existing account balance. The employer makes monthly contributions to the account of each eligible employee which are fully vested when made and based upon the previous month's hours worked. The amount contributed will be based on the election made by your employer in the adoption agreement. The benefits you receive will be reduced by applicable taxes and administrative expenses as described below. The employer may elect to contribute to the Trust for employees engaged in prevailing wage construction projects, and/or private construction projects as well as for administrative, office and/or managerial employees. You have no right to or interest in your account balance, however, until you meet the eligibility requirements for benefit payments.

Eligibility Rules for supplement unemployment benefits are set forth in Section B below.

13. Filing a Claim.

Any employee who thinks that he or she is entitled to receive a supplement unemployment benefit under the Plan will have the right to file with the Trustees a written notice of claim for such benefit. The Trustees will examine the claim and will normally decide within 90 days whether or not a benefit is actually due. If a claim is wholly or partially denied, notice of the decision will be furnished to the Claimant within ninety (90) days. The extension notice will indicate the special circumstances requiring an extension of time and the date by which the Plan expects to render a final decision.

The disposition of the claim will be decided by the Trustees or by the administrative manager in the discretion of the Trustees. Each claimant who is denied a claim for benefits will be provided with a written decision specifying the reason for the decision and referring to the relevant provisions of the Plan. The written notice of denial will describe any additional material or information necessary for the Claimant to perfect the claim and an explanation of why such material or information is necessary. The notification to the Claimant will also provide pertinent

information as to the steps to be taken if the Claimant wishes to submit the claim for review.

14. Appealing a Claim Denial.

If a claim is wholly or partially denied, the Claimant, within sixty (60) days of receipt of the denial, may appeal such denial by submitting a written request for review of the denial to the Trustees. The Claimant will have an opportunity to submit written comments, documents, records and other information submitted by the claimant, even if such information was not submitted or considered during the initial claim determination.

The disposition of the claim denial will be decided by the Trustees, and the Claimant will receive a written notice of the Trustees' decision. If the claimant's benefit claim is denied on appeal, the Claimant will be provided with a decision specifying the reason for the decision and referring to the relevant provisions of the Plan. The written notice of denial will also provide a statement of the Claimant's right to receive at no cost information relevant to the claim and a description of any voluntary appeals procedures, such as arbitration, which may be available. In addition, the written notice of denial will include a statement of Claimant's right to bring a lawsuit under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

Appeals of claim denials submitted at least thirty (30) days prior to the next scheduled meeting of the Trustees will be resolved at the meeting. Appeals of claim denials submitted within thirty (30) days of the next meeting of the Trustees will be resolved at the second meeting after the appeal was filed. If special circumstances require an additional extension to the third meeting of the Trustees, the Claimant will receive written notice before the extension period begins describing the special circumstances and the anticipated date the determination will be made. The Claimant will be notified of the decision of the Trustees within five (5) days.

In the event of the denial in whole or part of an appeal under the procedures set forth above, the Claimant may appeal to a third party neutral arbitrator. The appeal to an arbitrator is completely voluntary with neither the Claimant nor Trustees being required to arbitrate. The Claimant must appeal to the arbitrator with sixty (60) days of receiving the decision of the Trustees and before bringing a lawsuit in court. The arbitrator will be mutually selected by the Claimant and the Trustees from a list of arbitrators provided by the American Arbitration Association ("AAA"). If the parties are unable to agree on the selection of an arbitrator within ten (10) days of receiving the list from AAA, the AAA will appoint an arbitrator. The arbitrator's review will be limited to interpretation of the Plan document in the context of the particular facts involved and any financial award that may be granted by the arbitrator will be limited to the payment of benefits in accordance with the terms of the Plan document. The Claimant and the Trustees agree to accept the award of the arbitrator hereunder and such award will be final, conclusive and binding on all interested parties. The costs of arbitration will be borne equally by the parties.

15. Continuation of the Plan.

The Plan Sponsor and Participating Employers intend to continue the Plan, but reserve the right to terminate or change the Plan at any time.

16. Termination of the Plan.

The Plan Sponsor and Participating Employers do not promise the continuation of any benefits. Benefits may be terminated by the Participating Employer's failure to make contributions or by the termination or expiration of the Participating Employer's agreement adopting the Plan. Upon termination of a Participating Employer's participation, notices will be sent to Participating Employees and benefit eligibility will continue until all accrued benefits are distributed.

The Trust Fund and Plan may be terminated or amended at any time by the Trustees. Upon termination of the Trust Fund, the Trustees will wind up the affairs of the Trust Fund, and any remaining funds will be used to continue payment of benefits to Participants under the Plan.

17. Statement of ERISA Rights.

As a participant in the Plan you are entitled to certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that all plan participants shall be entitled to:

(a) Examine, without charge, at the plan administrator's office and at other specified locations, such as worksites, all documents governing the plan, including insurance contracts and a copy of the latest annual report (Form 5500 Series) filed by the plan with the U.S. Department of Labor and available at the Public Disclosure Room of the Employee Benefits Security Administration.

(b) Obtain, upon written request to the plan administrator, copies of documents governing the operation of the plan, including insurance contracts and collective bargaining agreements, and copies of the latest annual report (Form 5500 Series) and updated summary plan description. The administrator may make a reasonable charge for the copies.

(c) Receive a summary of the plan's annual financial report. The plan administrator is required by law to furnish each participant with a copy of this summary annual report.

In addition to creating rights for plan participants, ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your plan, called "fiduciaries" of the plan, have a duty to do so prudently and in the interest of you and other plan participants and beneficiaries.

No one, including you employer, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a plan benefit or exercising your rights under ERISA. If your claim for a benefit is denied or ignored, in whole or in part, you have a right to know why this was done, to obtain copies of documents relating to the decision without charge, and to appeal any denial, all within certain time schedules.

Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request a copy of plan documents or the latest annual report from the plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the plan administrator to provide the materials and pay you up to $110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the plan administrator.

If you have a claim for benefits which is denied or ignored, in whole or in part, you may file suit in a state or federal court. In addition, if you disagree with the plan's decision or lack thereof concerning the qualified status of a domestic relations order or a medical child support order, you may file suit in federal court.

If it should happen that plan fiduciaries misuse the plan's money, of if you are discriminated against asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay court costs and legal fees. If you are successful the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous.

If you have any questions about your plan, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, or if you need assistance in obtaining documents from the plan administrator, you should contact the nearest office of the Employee Benefits Security Administration, U.S. Department of Labor, listed in your telephone directory or the Division of Technical Assistance and Inquiries, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publication hotline of the Employee Benefits Security Administration.

B. Eligibility Rules

The following information describes the conditions pertaining to your eligibility to receive benefits. Please contact the Plan Administrator if you have any questions regarding your benefits.

1. Coverage of Employees.

The Participating Employer has elected to offer supplemental unemployment benefits to the following employees:

☐ Employees engaged in state or federal prevailing wage construction projects.

☐ Employees engaged in private construction projects.

☐ Administrative, office and/or managerial employees described in the following classifications:

_____

_____

2. Eligibility of Employees.

a. Becoming Participants.

Reported employees will become eligible for participation in the Plan from the first hour of covered employment. Employees who are covered by a collective bargaining agreement are not eligible to participate.

You are entitled to receive supplemental unemployment benefits for weeks in which you qualify for state unemployment insurance benefits, including benefits for partial unemployment, due to a reduction in your employer's workforce or layoff due to a reduction in hours worked. You must comply with all state unemployment insurance requirements to be eligible for supplemental unemployment benefits under the Plan.

You are also entitled to receive supplemental unemployment benefits if you are ineligible for state unemployment insurance benefits because you have:

1. not compiled sufficient wage credits under state law;

2. exhausted unemployment insurance benefits under state law; or

3. not met the state's eligibility waiting period for unemployment insurance benefits.

b. Participant Responsibilities

You must meet the state requirements for unemployment insurance benefits to be eligible to receive supplemental unemployment benefits from the Plan. It is your responsibility to provide complete and accurate information to your employer or former employer concerning your continued eligibility. You must also report any earnings from work, any job offers or refusal of work as required under state law.

If you have any questions concerning your benefits or eligibility for benefits, please contact the Plan administrator.

c. Termination of Your Participation.

Your benefits will end when you have no remaining account balance.

d. Reinstatement.

If for any reason your eligibility for benefit terminates, reinstatement will be as described under the previous section "Becoming Participants."

3. Loss of Entitlement.

The forfeiture of your account balance may occur, and your benefits lost, if you are incarcerated, discharged from your employment for cause, or if you die or retire before your account balance is distributed to you.

4. Maximum Eligibility.

Your account balance may not exceed 50% of your previous years' gross annual earnings. If this maximum cap is reached, no additional contributions may be made in your behalf until you have reduced your account balance referred to above.

5. Taxes and Administrative Fees.

Administrative charges of 9% will be deducted from contributions made in your behalf. A $3.50 check charge fee will be assessed when a benefit check is issued to you. The Internal Revenue Service also requires the Trust to withhold a portion of your distributions for federal income taxes based on your Form W-4. You will receive an IRS Form W-2 by January 31 for tax filing puposes from the Trust administrator.

EXHIBIT "D"

NATIONAL ASSOCIATION OF PREVAILING WAGE CONTRACTORS
SUPPLEMENTAL UNEMPLOYMENT BENEFIT TRUST

ADOPTION AGREEMENT

This Adoption Agreement is made and entered into by and between

_____
("Participating Employer") and the National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust ("Trust") effective as of _____, 20___.

The Participating Employer agrees to contribute supplemental unemployment benefit contributions to the Trust according to the terms described in the following sections:

ELIGIBLE EMPLOYEES

The Participating Employer elects to contribute to the Trust for the following employees (select one or more):

☐ Employees engaged in state or federal prevailing wage construction projects

☐ Employees engaged in private construction projects

☐ Administrative, office and/or managerial employees described in the following classifications at the contribution rates specified:

_____

_____

Elected classes of employees are eligible for immediate participation from the first hour of covered employment following the execution of this Agreement.

DEBIT CARD DISTRIBUTION OF BENEFITS

SUB Plan benefits are paid to employees through individual employee debit cards. The Participating Employer will receive a Cardholder Agreement to distribute to eligible employees. Participating Employers will distribute a Cardholder Agreement to each eligible employee. Participating Employers also will receive a debit card for each eligible employee. However, no debit card will be distributed by the Participating Employer to any employee until the employee has signed a Cardholder Agreement and provided a copy to the Participating Employer. The Participating Employer is responsible for maintaining copies of all Cardholder Agreements and providing copies to the Plan Administrator upon request.

Initials: _____

Initials: _____

COVERED COMPENSATION

For purposes of calculating the Participating Employer's contributions, compensation will be calculated only for work performed as elected above.

EMPLOYER CONTRIBUTIONS AND FUNDING

The Participating Employer's contributions for eligible employees engaged in prevailing wage and/or private construction projects will be calculated according to the contribution schedule attached to this agreement. Contributions for all administrative office and/or managerial employees are specified above. The Participating Employer will, upon request, submit a copy of its quarterly payroll tax report to the Trust. Contribution payments are due on the 15th of the month.

Contributions on federal and state prevailing wage projects cannot exceed the aggregate fringe benefit component set forth in the applicable wage determination or reduce an Employee Participant's basic hourly rate of pay. If no fringe benefit component is included in a wage determination, Participating Employer contributions are limited to amounts in excess of the Participating Employee's normal non-prevailing wage rate of pay.

The Participating Employer will not contribute to the Trust Fund for employees who are otherwise covered by the provisions of a collective bargaining agreement requiring the payment of fringe benefit contributions to any other employee welfare benefit plan.

The Participating Employer has received the Trust Agreement of the Trust adopted by the Trustees and agrees to be bound to the provisions contained therein, and any future amendments, which are incorporated into this Adoption Agreement by reference as though fully set forth.

The Trustees may terminate this Adoption Agreement at any time for the reasons set forth in Article VII, Section 2 of the Trust Agreement, or if continued participation by the Participating Employer would cause the Trust and/or the employee welfare benefit plan(s) to lose tax exempt status.

The Participating Employer will fully defend, indemnify and save harmless the Trust Fund and its Trustees, employees, consultants and administrators against any and all loss, damage, liability, claim, demand or suit resulting from injury or harm to any person or property arising out of or in any way connected with the participation of the Participating Employer under this Adoption Agreement. This is intended to include, but is not limited to, employment-related claims, statutory violations, breach of contract claims and claims for damages resulting from personal injury or injury to property.

Initials: _____

Initials: _____

EMPLOYER INFORMATION

Name: _____

Address: _____

Employer Identification Number: _____

Phone: _____ FAX: _____ E-mail: _____

Payroll Manager: _____

Phone: _____ FAX: _____ E-mail: _____

Form of Business Organization: _____

If applicable, designate: ☐ "C" Corp or ☐ "S" Corp

Name of Surety Company: _____

Contractor's State/License Number: _____

Contractor's License Bond Number: _____

Name of Corporate President or Business Owner: _____

The parties signatory to this Adoption Agreement are as follows:

TRUST FUND	PARTICIPATING EMPLOYER
By: _____ Authorized Representative	By: _____ Authorized Representative
	By: _____ Printed Name
By: _____ Title Date	By: _____ Title Date

EXHIBIT "E"

Chester J. Culver, Governor
Patty Judge, Lt. Governor
Elisabeth Buck, Director

IOWA WORKFORCE DEVELOPMENT
Smart. Results.

April 9, 2010

Laura B. Riesenberg, Esq.
Wolds Law Group
4747 Executive Drive, Suite 250
San Diego CA 92121

Re: National Association of Prevailing Wage Contractors, USA Staffing Supplemental Unemployment Benefit Plan

Dear Ms. Riesenberg:

I am writing in response to your letter regarding the Supplemental Unemployment Benefit ("SUB") Plan proposed by USA Staffing, 2010 Philadelphia St., Ames, Iowa 50010. The legal unit for the Department has received a copy of the plan and I have all of the information necessary to make a determination regarding the USA Staffing Plan.

After having fully reviewed the USA Staffing Plan, it is apparent the Plan does meet the basic requirements of our law for approval as a SUB Plan. Iowa Workforce Rule 871 – 23.2(2) "e" (1) and (7) defines a SUB Plan as including all the criteria contained in the Internal Revenue Code and which qualifies for exemption under Section 401(a). The Iowa law requires that the SUB payment be made in addition to the benefits paid pursuant to the Employment Security program. The SUB payments under the USA Staffing Plan would be paid to supplement employment security benefits.

The Plan specifically provides for the supplementation of unemployment benefits under the written terms of an agreement. The Plan requires that benefits are to be determined according to objective standards and the employee has no vested right in any of the monies paid into the trust fund or similar account except as the employee may qualify for benefits under the terms of the agreement.

Individuals receiving supplemental unemployment benefit payments are not to report money to Iowa Workforce Development since it is not deductible from

unemployment benefits. If no other payment were received, the individual would press "zero" for question 12. The individual should not report the SUB payments to Iowa Workforce Development.

The funds, which are set aside and used to pay benefits, are not taxable as wages pursuant to Iowa's Employment Security Law. The benefits that derive from the fund to former employees will not be deducted from the employment security benefits paid by the State of Iowa. This opinion is subject to modification in the light of any future ruling from the Internal Revenue Service regarding the Plan's establishment of all ERISA requirements. If I can be of any more assistance, please do not hesitate to call me at 515-281-8117.

Sincerely,

Shannon Archer

Joseph L. Bervid, Legal Counsel
Shannon Archer, Attorney
Unemployment Insurance Division

State of Montana
Department of Labor & Industry
BRIAN SCHWEITZER, Governor

UNEMPLOYMENT INSURANCE DIVISION
PO BOX 8020 HELENA MT 59604-8020
(406) 444-3783 FAX (406) 444-2699
TTY for the Deaf or Hearing Impaired (406) 444-0532

May 11, 2010

Laura B. Riesenberg
Attorney at Law
4747 Executive Drive, Suite 250
San Diego CA 92121

Re: SUB plan for National Association of Prevailing Wage Contractors

Dear Ms Riesenberg:

On May 10, 2010 you sent a request asking the Montana Unemployment Insurance Division to review the Supplemental Unemployment Benefits ("SUB-Pay") Plan for the National Association of Prevailing Wage Contractors for approval as a qualified SUB plan.

It is the policy of the Montana Unemployment Insurance Division that Supplemental Employment Benefit Plans that follow the IRS revenue rulings 56-249 and 90-72 and code section 501(c)(17) are not reportable by the employer as wages. Consequently, the receipt of SUB pay under a qualified plan does not affect an individual's eligibility or entitlement to unemployment insurance benefits.

I reviewed your plan and determined your plan meets the SUB plan requirements as set in IRS revenue rulings 56-249 and 90-72. Payments received under the National Association of Prevailing Wage Contractors Supplemental Benefits Plan as paid under the terms of the plan will not be considered wages in our state.

If you have any additional questions, or if I can provide additional information, please contact me at (406) 444-2594 or Colleen Scow at (406) 444-2611.

Sincerely,

Carol Filcher
Special Programs Supervisor

Illinois Department of Employment Security

Pat Quinn
Governor

Maureen T. O'Donnell
Director

July 28, 2010

Laura B. Riesenberg
Wolds Law Group
4747 Executive Drive, Suite 250
San Diego, CA 92121

Re: National Association of Prevailing Wage Contractors SUB Plan

Dear Ms. Riesenberg:

My office has reviewed the *Summary Plan Description*, dated July 19, 2010, for the *National Association of Prevailing Wage Contractors Supplemental Unemployment Benefit Trust Plan*, and finds that the Plan meets the requirements of 56 Ill. Adm. Code Part 2920.60. Therefore, a Plan beneficiary will not be rendered ineligible for Illinois unemployment insurance benefits by receipt of benefits under the Plan.

Sincerely,

GREGORY J. RAMEL
Deputy Legal Counsel

JEREMIAH W. (JAY) NIXON
GOVERNOR

MISSOURI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DIVISION OF EMPLOYMENT SECURITY
421 EAST DUNKLIN STREET, P.O. BOX 59
JEFFERSON CITY, MO 65104-0059
PHONE: 573-751-3215
www.labor.mo.gov/DES E-mail: esuiclaims@labor.mo.gov
esemptax@labor.mo.gov

LAWRENCE G. REBMAN
DEPARTMENT DIRECTOR

GRACIA Y. BACKER
DIVISION DIRECTOR

August 5, 2010

WOLDS LAW GROUP PC

AUG 09 2010

RECEIVED

Ms. Laura B. Riesenberg
Wolds Law Group
4747 Executive Drive, Suite 250
San Diego, CA 92121

Re: National Association of Prevailing Wage Contractors SUB Trust: Approval of Supplemental Unemployment Benefit Plan

Dear Ms. Riesenberg:

This is in response to your correspondence dated July 28, 2010 to Gracia Backer, Director of the Division of Employment Security (DES).

The DES does not approve Supplemental Unemployment Benefit (SUB) plans. The approval of these plans comes under the jurisdiction of the Internal Revenue Service (IRS).

Absent a statutory difference with the Missouri Employment Security law, the DES acts consistently with IRS interpretations of the Federal Unemployment Tax Act (FUTA). There is no state employment security statute that references SUB pay. Rather, the Division excludes SUB pay from Missouri wages because the Division is following federal interpretations that exclude the payments from FUTA wages. Because SUB pay is not wages, it does not decrease a claimant's weekly unemployment benefits.

Please call me at 573.751.3328 should you have questions concerning this matter.

Sincerely,

Cindy Guthrie

Cindy Guthrie
Chief, Employer Contributions
Missouri Division of Employment Security
Phone: 573.751.3328
Fax: 573.751.7483
Cindy.Guthrie@labor.mo.gov

Dave Heineman
Governor

STATE OF NEBRASKA
DEPARTMENT OF LABOR
Catherine D. Lang, Commissioner
P.O. Box 94600 • Lincoln, NE 68509-4600
Phone: 402.471.9912 • Fax: 402.471.9917
www.dol.nebraska.gov

WOLDS LAW GROUP PC

SEP 1[illegible] 2010

RECEIVED

September 13, 2010

Laura B. Riesenberg, Esq.
Wolds Law Group
4747 Executive Drive, Ste. 250
San Diego, CA 92121

Re: USA Staffing, Inc. Supplemental Unemployment Benefit Plan

Ms. Riesenberg:

The Supplemental Unemployment Benefit (SUB) payment plan which you submitted to this office on behalf of USA Staffing, Inc. has been reviewed for compliance with the provisions of *Neb. Rev. Stat.* §48-602(29)(g). The submitted plan was effective January 1, 2006 and is intended to supplement the unemployment benefits of certain employees involuntarily separated from their employment with USA Staffing. In order for the payments under the SUB payment plan not to be treated as potentially disqualifying wages or severance payments under the Nebraska Employment Security Law, the SUB payment plan must fall within the definition of a "supplemental unemployment benefit plan" as defined in *Neb. Rev. Stat.* §48-602(29)(g).

This office has now reviewed the submitted USA Staffing, Inc. SUB payment plan. It is our finding that the USA Staffing, Inc. SUB payment plan complies with the eight essential points of Internal Revenue Service Ruling 55-249 as further interpreted in Internal Revenue Service Rulings 5-128 and 60-330 and is, thus, a qualifying supplemental unemployment benefits plan under *Neb. Rev. Stat.* §48-602(29)(g). This ruling is specific to the SUB Plan submitted and not applicable to any prior SUB Plan(s) utilized by USA Staffing, Inc. or payments received by claimants under prior supplemental unemployment benefits plans maintained by USA Staffing, Inc.

Sincerely,

John H. Albin
Agency Legal Counsel

t:\legal\documents\ui\sub plans\usa staffing 09-13-2010.docxpc:

cc: Catherine Lang, Commissioner of Labor
Ronald Joyce, UI Benefits Administrator
Thomas Ukinski, Legal Counsel

Tennessee Department of Labor and Workforce Development
Division of Employment Security
220 French Landing Drive
Nashville, TN 37243-1002

July 18, 2011

Laura Riesenberg
Attorney at Law
Wolds Law Group
4747 Executive Drive, Suite 250
San Diego, CA 92121

RE: SUB Pay Plan for National Association
of Prevailing Wage Contractors

Dear Laura Riesenberg,

This is to advise that the plan for supplemental unemployment benefits for National Association of Prevailing Wage Contractors meets with the approval of this agency.

Our policy has been to approve SUB Pay plans which have been deemed tax exempt under the Internal Revenue Code pursuant to 26 U.S.C. 501(c)(17) and which pay benefits that do not constitute wages pursuant to T.C.A. § 50-7-213. This is consistent with the reasoning set forth in the Attorney General's June 1, 1956 opinion on Ford Motor Company's plan.

In the present case, the benefits meet the requirements of a SUB pay benefit under Revenue Ruling 90-72. They are not a payment for services that are being performed. The employees have no entitlement to the payments except under the plan. Eligibility for payments under the plan is tied to eligibility for state unemployment insurance benefits. Under these circumstances, the payments do not constitute wages within the meaning of T.C.A. § 50-7-213.

If you have any questions, you may contact Al Smith at 615-741-3170.

Sincerely,

James P. Anderson, Director
U. I. Integrity & Benefit Operations

JPA:jbp

pennsylvania
DEPARTMENT OF LABOR & INDUSTRY

WOLDS LAW GROUP PC

SEP 26 2011

RECEIVED

September 20, 2011

Mr. Jeffrey A. VanderWal
Wolds Law Group
4747 Executive Drive, Suite 250
San Diego, CA 92121

Dear Mr. VanderWal:

This will respond to your recent correspondence which requested a review of the National Association of Prevailing Wage Contractors Supplemental Unemployment Benefits plan (Plan) to determine whether the Plan meets Pennsylvania requirements to be considered an 'approved' Supplemental Unemployment Benefit (SUB) plan.

SUB benefits are paid from a privately operated fund created by an employer and are in addition to any unemployment compensation (UC) benefits that may be paid to an unemployed worker by the Department. For a SUB plan to be considered approved, it must be granted exempt status by the Internal Revenue Service (IRS) from Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes, as well as exempt status by the Department from Pennsylvania UC taxes.

A review of the National Association of Prevailing Wage Contractors SUB plan by the Department's Office of UC Tax Services, Office of Chief Counsel, and Office of Unemployment Compensation Benefits staff was conducted and was based upon the documents submitted which also indicate that the IRS has ruled that the trust involved is exempt under section 501(c) (17) of the Internal Revenue Code. Consistent with the Pennsylvania Department of Justice Formal Opinions Nos. 658 and 677 and with the Pennsylvania UC Law, the Department's review indicates the Plan does conform to all of the required major components of a SUB plan; and, therefore, is granted SUB plan approval by the Department.

The National Association of Prevailing Wage Contractors Plan is approved, and therefore has the following effect on any payments made to employees under the Plan:

1. Would not be subject to Pennsylvania UC quarterly taxes and would not be reportable on Form UC-2, Employer's Report for Unemployment Compensation, where the employer calculates both employer and/or employee contributions;
2. Would not be considered covered wages for UC purposes and would not be used to determine financial eligibility in subsequent applications, and;
3. Would not be deducted from UC benefits, as the payments are not considered remuneration for services performed under Section 4(x) of the Pennsylvania UC law.

Note: Under any actual SUB plan, SUB payments are not deductible from UC benefits. The Pennsylvania Department of Justice's Formal Opinion No. 658 held that SUB payments do not constitute remuneration and established the authority for the non-deduction of SUB payments from UC.

Please be aware that any changes, amendments or revisions to the documents submitted for review could result in a different determination in this matter. Accordingly, in the event the plan documents are amended or changed in the future, please forward a copy of those changes to my attention.

I trust this satisfactorily respond to your inquiry. Should you have any questions concerning this matter, please feel free to contact my office at (717) 787-3547.

Sincerely,

Frank Vivier, Acting Director
For Unemployment Benefits

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
CHIEF DEPUTY ATTORNEY GENERAL

JOHN B. HOWARD, JR.
DEPUTY ATTORNEY GENERAL

ELIZABETH H. TRIMBLE
PRINCIPAL COUNSEL

JONATHAN R. KRASNOFF
DEPUTY COUNSEL

SUSAN M. CHERRY
CHIEF OF LITIGATION

DEPARTMENT OF LABOR, LICENSING AND REGULATION
500 N. Calvert Street • Suite 406
Baltimore, Maryland 21202-3651
(410) 230-6108 • Fax (410) 333-6503
Direct Dial (410) 230-6120

WOLDS LAW GROUP PC

RECEIVED

September 22, 2011

Jeffrey A. VanderWal, Esquire
Wolds Law Group
4745 Executive Drive, Suite 250
San Diego, CA 92121

RE: Supplemental Unemployment Benefit Plan

Dear Mr. VanderWal:

I am writing in response to your e-mail of September 13, 2011 inquiring about the status of supplemental unemployment benefit payments for purposes of Maryland Unemployment Insurance law. The Maryland Division of Unemployment Insurance does not have an approval process for SUB pay plans. Section 8-101(x)(3)(ix) of the Labor and Employment Article of the Maryland Annotated Code provides that payments into a fund that establishes a plan or system to supplement unemployment benefits are not considered wages. Accordingly, employees who are receiving these supplemental unemployment benefits in accordance with § 8-101(x)(3)(ix) do not need to report the payments to the Division of Unemployment Insurance. Additionally, the employer does not need to report the payments as wages for purposes of its quarterly unemployment insurance tax report.

I hope this information is helpful.

Sincerely,

Sarah P. Harlan
Assistant Attorney General

EDUCATION and WORKFORCE DEVELOPMENT CABINET
OFFICE OF EMPLOYMENT AND TRAINING

Steven L. Beshear
Governor

Joseph U. Meyer
Secretary

Unemployment Director's Office
275 East Main Street, 2-CD
Frankfort, KY 40621
502-564-2900
Fax 502-564-5502
www.oet.ky.gov

Beth A. Brinly
Commissioner

William Monterosso
Executive Director

WOLDS LAW GROUP PC

JUL 09 2012

RECEIVED

July 03, 2012

Worlds Law Group
Attn: Laura B. Riesenberg
4747 Executive Drive
Suite 250
San Diego Ca. 92121

Dear Ms. Riesenberg:

Regarding your request for approval of your client (National Association of Prevailing Wage Contractors) Supplemental Benefits Plan. The Division does not issue formal approvals of SUB-pay plans, however, for the purposes of your request be advised that Sub-pay in not treated as deductible income and therefore there would be no effect from Sub-pay on a claimant's eligibility or amount of benefits.

With regard to tax treatment, this will depend upon IRS approval to the plan. You have supplied us with a copy of the tax exempt letter from IRS. Assuming that this letter is still in good standing with IRS, we would exempt the SUB-pay from the definition of wages. As such they would be non-reportable and non-taxable.

The treatment described above is based on federal law and policy interpretation from the US Department of Labor, and is not reflected in any specific Kentucky statutory language. For our general definition of wages, see KRS341.030.

Please feel free to contact me if I can be of further assistance.

Sincerely,

Beverly Kincaid
Administrative Specialist II
Directors Office
275 East Main Street
Frankfort, Kentucky 40621
Phone: 502-564-2900
Fax: 502-564-5502

EXHIBIT 2

BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

In the Matter of:	*	
PWCA,	*	
and	*	
NAPWC,	*	
Petitioners	*	
v.	*	
SECRETARY OF LABOR,	*	ARB CASE Nos. 16-019 16-021
Respondent	*	
INDIANA-ILLINOIS-IOWA FOUNDATION FOR FAIR CONTRACTING,	*	
Intervenor	*	
Re: Annualization of Supplemental Unemployment Benefits Plans	*	
	*	

* *

BRIEF OF PETITIONER PWCA IN SUPPORT OF ITS PETITION FOR REVIEW

Maurice Baskin
Littler Mendelson, PC
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

Attorneys for Petitioner PWCA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The PWCA (formerly the Prevailing Wage Contractors Association, Inc.) sponsors the Prevailing Wage Contractors Association Inc. Members Welfare Benefit Plan, which offers a Supplemental Unemployment Benefit program to participating employer members (hereafter the "PWCA SUB Plan" or simply the "Plan"). The Plan benefits employees by providing cash equivalent benefits during involuntary work interruptions. In 2002, the Administrator ruled that contributing employers should receive full (non-annualized) credit for their contributions to the Plan because the Plan provides for immediate vesting and participation by employees and irrevocable contributions by employers, ensuring that almost every employee participant will receive the full cash benefit of contributions made on their behalf. For more than thirteen (13) years, participating employers and employees in the Plan have relied upon the Administrator's ruling that contributions to the Plan are not subject to any annualization requirement.

On October 22, 2015, however, a new ruling issued by the Administrator revoked the Administrator's previous ruling by imposing annualization on contributions to the PWCA SUB Plan, based upon a new and erroneous finding that the Plan is "continuous in nature" and that this false criterion requires annualization, even where the Plan's benefits are immediately and fully vested in employee accounts on a cash equivalent basis. Because there is no clear way to apply annualization to employer contributions to the Plan, the effect of the Administrator's new ruling will be to deprive employees of this important benefit during times of need, resulting in serious financial harm to the employees. The stated reasons for the Administrator's new ruling are wrong as a matter of fact and law and violate the DBA and the Administrative Procedure Act. As further explained below, the Administrator's new ruling must be set aside.

ISSUE PRESENTED FOR REVIEW

Whether the Administrator's ruling denying employers' full credit under the Davis-Bacon Act (DBA) for their contributions to the SUB Plan offered by PWCA (by "annualizing" such contributions) is arbitrary and capricious and violates the DBA and/or the Administrative Procedure Act.

JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to decide appeals from the Administrator's final decisions concerning the application of the DBA to covered fringe benefits. 29 C.F.R. § 7.9. "In considering matters arising under the Davis-Bacon Act within the scope of its jurisdiction, the Board acts as fully and finally as might the Secretary of Labor concerning such matters. 29 C.F.R. § 7.1(d)." *Barco Enterprises, Inc.*, ARB Case No. 13-041, at p. 4 (July 31, 2015). "Where appeal is from a ruling of the Administrator of the Wage and Hour Division, the Board will assess the Administrator's ruling to determine whether it is consistent with the applicable statute and regulations, and a reasonable exercise of the discretion delegated to the Administrator to implement and enforce the Davis-Bacon Act." *Id., citing In re Spencer Tile Co.*, ARB No. 01-052, 2001 WL 1173805 (ARB Sept. 28, 2001). PWCA is an aggrieved party with standing to petition the Board from the Administrator's final ruling dated October 22, 2015.

STATEMENT OF THE CASE AND FACTS

I. Description of the PWCA SUB Plan.

For more than thirteen years, the PWCA has sponsored the PWCA SUB Plan, which offers a supplemental unemployment benefit program to participating employer members. It is undisputed that the PWCA SUB Plan is a bona fide fringe benefit plan within the meaning and plain language of the DBA, which includes "unemployment benefits" within the types of fringe benefit plans or programs recognized as "bona fide." *See* Administrator's Ruling at p. 1; see also

41 U.S.C. 3141(2)(B); 29 C.F.R. 5.29(a).

Under the terms of the PWCA SUB Plan, employers who employ individuals on projects covered by the DBA, the Service Contract Act (SCA), and/or state prevailing wage laws are permitted to contribute funds for the benefit of those employees who are performing work on such prevailing wage projects. The Plan provides for immediate participation by the employees, for whom the contributed funds are held by the Plan in trust, and who are entitled to access the funds whenever they become involuntarily unable to work due to cyclical, seasonal or similar conditions. *See* A.R., PWCA Aug. 23, 2013 Response to Ill FFC Complaint. All employer contributions to the PWCA SUB Plan are irrevocably made to individual employee accounts that immediately and fully vest to the employees for whom they are made. *Id.* Each employee's account balance is tracked and disclosed to the employee participants. *Id.*

The PWCA SUB Plan has an established track record of paying out the full cash benefit of the contributions made by employers, on a dollar-for-dollar basis, to almost every employee for whom such contributions are made. *Id.* at p.6; *see also* Administrator's Ruling at p. 4.[1] The Plan does not provide "insurance" as that term is commonly defined, *i.e.*, the employers do not pay regular "premiums" and the benefits offered are not defined by the measure of a specific

[1] According to the Administrator's own findings, the PWCA SUB Plan made benefit payments constituting 89%, 96%, 93%, 94%, 90%, 87%, and 87.5% of contributions for the plan years 2005 through 2011. *See* Administrator's Ruling at p.4. Under the established Plan procedures, PWCA's third party plan administrator makes every effort to update addresses and forward benefit checks to those participants who relocate, and to otherwise locate missing employees so that new benefit checks can be issued to them if the original check is returned due to an incorrect address. The total amount of forfeitures over the period ending in 2010-2011 was only $4,977, out of contributions amounting to $17,149,711, a *de minimis* amount (0.029% of total contributions). *See* A.R. PWCA Aug. 23, 2013 Response at p. 6.

injury or medical condition.[2] Rather, the Plan provides ready access to cash in whatever amount is in the employee's account, for withdrawal by the employee, at any time when the employee is involuntarily unable to work. Also unlike insurance plans, the PWCA SUB Plan does not have an "annual cost," nor is it "continuously" funded by any employer. Instead, employers pay into the Plan only in the amounts needed to fund the fringe benefit portion of DBA or SCA wage determinations, which vary from project to project and even within projects depending on individual job duties that may change from day to day. *See* A.R. PWCA Aug. 23, 2013 Response.

II. Application of the Annualization Principle Generally, and the Administrator's 2002 Ruling That Annualization Does Not Apply to Contributions to the PWCA SUB Plan.

As noted above, the DBA expressly permits employers to receive credit for fringe benefits provided at either the "rate of contribution irrevocably made" to a fringe benefit plan or at the "rate of costs" an employer "may reasonably anticipate in providing benefits" to covered individuals. 40 U.S.C. 3141(2)(B) (i)-(ii). The word "annualization" does not appear in the Act. However, sometime during the 1970s, the Department established the concept in response to contractors seeking DBA credit for the entire annual cost of purchasing unfunded health insurance for their employees who worked on both government and private work. *See* WHD Davis-Bacon Resource Book (2010), DBA Compliance Principles at p. 21. As further explained therein:

> The Department took the position in opinion letters that the cost of such unfunded health insurance was appropriately apportioned among all hours worked by the employees, and that therefore the hourly Davis-Bacon credit would be derived by dividing the total annual cost of the health insurance by the total number of hours worked by employees on both Davis-Bacon and private work during the year.

[2] *See* Google.com definition of "insurance: "a practice or arrangement by which a company or government agency provides a guarantee of compensation for specified loss, damage, illness, or death in return for payment of a premium."

According to the Department's Resource Book, the annualization principle was later applied to other fringe benefit plans such as "apprenticeship and training plans, vacation plans, and most pension plans under which contractors sought to receive Davis-Bacon credit for the entire cost of the plans." *Id.* at p. 22. The Department's Resource Book does not make reference to any previous application of the annualization principle to supplemental unemployment benefit plans generally, and there is no record of any such application of annualization to a funded SUB plan featuring immediate and 100% vesting of fully funded benefits for the benefit of employees.

The Department has long held that annualization should not be applied to employer contributions made to defined contribution pension plans ("DCPPs") which provide for immediate participation and immediate or essentially immediate vesting schedules, regardless of whether the contractor makes contributions to the plan when working on non-Davis-Bacon projects. *Id.* at p. 23; see also Field Operations Handbook 15f11(b). As to such plans, the Department has stated that annualization should not apply because "contributions are irrevocably made by the contractor; most, if not all, of the workers will become fully vested in the plan; and the higher contributions made during Davis-Bacon work result in an increase in the value of the individual employee's account." *Id.* Each of these features applies to the PWCA SUB Plan.[3]

The foregoing recognition that annualization does not apply to irrevocable contributions to bona fide fringe benefit plans, so long as they are immediately and fully vested with the employees, has not been limited to DCPPs. In the seminal case of *Tom Mistick & Sons, Inc. v. Reich*, 54 F.3d 900 (D.C. Cir. 1995) (discussed at greater length below), the D.C. Circuit enjoined the Department from seeking to annualize irrevocable employer contributions to a *bona*

[3] As further discussed below, the PWCA SUB Plan actually provides a superior benefit to employees than a DCPP does under many circumstances, because employees in the Plan are not forced to pay early withdrawal penalties or taxes during periods when they are involuntarily unable to work, as would typically be imposed under a DCPP.

fide fringe benefit plan that was not a DCPP.[4] In *Mistick*, an employer established a trust into which the employer made irrevocable contributions that immediately vested on behalf of employees working on prevailing wage projects. Under the terms of the Mistick plan, employees could use the contributed funds to purchase approved fringe benefits or could receive the funds upon termination of employment. The court found that there was a "one-to-one ratio between employer contributions on behalf of an employee and value received by the employee." *Id.* at 904. The Court specifically rejected the Department's denial of DBA credit for such employer contributions "merely because they could underwrite fringe benefits used by an employee during private work periods." *Id.* at 905. To hold otherwise, the Court said, would "*dis*advantage employees." *Id.* The Court also rejected the Department's argument that annualization was necessary to prevent an employer from using Davis-Bacon work as the source of funding for benefits that are in fact "continuous in nature." *Id.*

In accordance with the foregoing principles, shortly after the formation of the PWCA SUB Plan, PWCA applied to the Administrator for a ruling regarding the *bona fide* nature of the Plan and the extent to which contributing employers should receive full (non-annualized) credit for their contributions to the Plan. On September 16, 2002, Administrator Tammy D. McCutchen issued such a ruling, which reads in pertinent part as follows:

> After a careful review of the plan documents and your commitments to make the additional revisions [discussed previously in the ruling], I have concluded that the PWCA Welfare Benefit plan, to the extent of its provision for supplemental unemployment benefits, is a bona fide fringe benefit plan for Davis-Bacon purposes. In addition, I have concluded that employers participating in the plan may receive full credit, for Davis-Bacon work. I believe that this is appropriate in the circumstances present here in light of the amendments made to the plan to ensure that almost every employee will in fact receive the full cash benefit of the contributions made on the employee's behalf.

The PWCA Plan has operated in compliance with the foregoing ruling from 2002 to the

[4] Present counsel for PWCA in this proceeding also represented Mistick.

present. *See* A.R., PWCA Aug. 13, 2013 Response.

III. Events Leading To Reversal of the 2002 Ruling and the Present Petition.

On July 15, 2013, the Indiana-Illinois-Iowa Foundation For Fair Contracting (Ill FFC) filed a complaint asking the Administrator to revoke the "exception from annualization" previously provided to PWCA. A.R., Ill FFC Complaint. The Department's Wage and Hour Division solicited a response to the Complaint from PWCA, which was submitted on Aug. 23, 2013. *Id.*

While the Ill FFC complaint was pending, the Department made an unannounced change to the WHD's on-line Davis-Bacon Resource Book. Whereas the previous 2010 edition of the Book indicated that for "certain supplemental unemployment benefit plans" a "contractor may take Davis-Bacon credit at the hourly rate specified by the plan," the May 2015 edition of the Resource Book deleted this language without explanation, notice or public comment. *See* Administrator's Ruling at p. 5.

Subsequently, on October 22, 2015, the Administrator issued a ruling that purports to overrule the 2002 Administrator's ruling by declaring that effective 90 days later, all contributions to the PWCA SUB Plan will be "subject to annualization because SUBs are continuous in nature and compensation for private and prevailing wage/DBA work."[5]

SUMMARY OF ARGUMENT

The Administrator's ruling violates the plain language of the DBA and the Administrative Procedure Act by overturning the Department's longstanding allowance of full credit to employers contributing to SUB Plans on an irrevocable, 100% immediately vested basis. Contrary to the Administrator's ruling, the PWCA SUB Plan cannot be subject to

[5] On January 29, 2016, the WHD informed PWCA that the effective date of the Administrator's ruling will be delayed until May 19, 2016.

annualization, because it meets all of the settled criteria for full credit and provides much needed cash equivalent benefits, on a dollar-for-dollar basis, to employees who are involuntarily unable to work due to cyclical, seasonal, or technological reasons.

The stated reasons for the Administrator's ruling are erroneous and arbitrary. The PWCA SUB Plan is not an "insurance" plan, nor is it similar to any type of fringe benefit to which annualization has previously been applied. Rather, the PWCA SUB Plan is much more similar to a defined contribution pension plan to which annualization clearly does not apply. The PWCA SUB Plan is also materially indistinguishable from the fringe benefit plan that was at issue in the *Mistick* case.

The Administrator erred in ruling that the PWCA SUB Plan was "continuous" in nature, which it is not, and in imposing this criterion at all. The Administrator's change in policy, without public notice or comment and without any rational justification, must be found to be arbitrary and capricious under the Supreme Court's *State Farm* standard for making such determinations.

Failure to reverse the Administrator's ruling here will deny employees access to a valuable fringe benefit. Annualization of the PWCA SUB Plan is unworkable and imposes unacceptable uncertainties and risks on employer contributors, the result of which will be that they will not contribute to the plan at all, to the disadvantage of employees. For all of these reasons, as further described below, the Administrator's ruling should be vacated and employers who contribute to the PWCA SUB Plan for the benefit of their employees should be given full credit for their contributions under the DBA.

ARGUMENT

I. The Administrator's Ruling Denying Employers Full Credit for Their Contributions to the PWCA SUB Plan Is Arbitrary and Capricious and Violates Both the DBA and the APA.

A. The Principle of Annualization Has No Application to PWCA's Irrevocably Funded and Immediately Vested SUB Plan.

As explained above, the annualization concept was developed by the Department, in its own words: "in response to contractors seeking DBA credit for the entire annual cost of purchasing [unfunded] health insurance for their employees who work on both government and private work." *See* WHD Prevailing Wage Resource Book, DBA Compliance Principles, at p. 21. Though the practice has since been extended to other unfunded fringe benefits similar to health insurance, where employers might otherwise be viewed as financing periods of their employees' private work with contributions made on Davis-Bacon projects, annualization has not previously been applied to fully funded fringe benefit plans comparable to the PWCA SUB Plan.

To the contrary, the PWCA SUB Plan at issue here meets all of the previously recognized criteria for allowing employers to receive full credit for their contributions to a funded fringe benefit plan. As noted above, the Plan provides for immediate participation, and employer contributions to the Plan are made irrevocably on an hourly basis to a funded plan, where they are held in trust by an entity independent of the employer solely for the benefit of participating employees. The amounts contributed by employers to the Plan are deposited into individual employee accounts that vest immediately with each such employee. Employees are entitled to access their fund benefits when they become involuntarily unable to work due to cyclical, seasonal or similar conditions. The amounts of the benefits are dollar for dollar the same as the amount of each employer's contributions. Finally, the PWCA SUB Plan is never used to

underwrite fringe benefits used by an employee during a period of private work – indeed, employee access to their SUB Plan benefits is contingent on their ***not working at all***, *i.e.*, they must be missing hours of work under involuntary circumstances in order to qualify for the benefits.

With regard to each of the foregoing aspects, as the WHD itself previously recognized in its Prevailing Wage Resource Book until arbitrarily deleting that recognition in 2015, the PWCA SUB Plan is materially indistinguishable from the DCPPs which the Department has consistently declared to be exempt from annualization. *See* Field Operations Handbook 15d11; WHD Prevailing Wage Resource Book, Compliance Principles, at p. 22. The PWCA SUB Plan is also materially indistinguishable from the fringe benefit plan which the D.C. Circuit declared to be exempt from annualization in *Tom Mistick & Sons, supra,* 54 F.3d 900. Finally, the plain language of the DBA requires the Department to credit fully the "rate of contribution irrevocably made" to a funded fringe benefit plan such as the PWCA SUB Plan. 40 U.S.C. 3141(2)(B). For each of these reasons, the Administrator was correct to declare in 2002 that employer contributions to the PWCA SUB Plan are entitled to full credit under the DBA; and the current Administrator's overruling of the 2002 decision in the new ruling presently under review is arbitrary and capricious and violates the plain language of the DBA.

In attempting to explain his new decision overruling the 2002 ruling, the Administrator has relied on a series of erroneous findings to support the conclusion that contributions to the PWCA SUB Plan should be annualized. First, the Administrator incorrectly found that "SUBs like those provided by PWCA participating employers are available to participants on an uninterrupted basis throughout the year." (Administrator's Ruling at p.5). To the contrary, it is undisputed that the supplemental unemployment benefits offered by the PWCA SUB Plan are

not available on an uninterrupted basis throughout the year. The benefits are ***only*** available when an employee is involuntarily unable to work due to cyclical, seasonal or technological causes, discontinuation of a plant or operation or reduction in force or layoff. Thus, the availability of benefits is frequently interrupted, *i.e.*, every time the individuals return to a normal work schedule; and such interruptions are a regular occurrence in the construction industry.

For similar reasons, the Administrator's ruling is mistaken in finding that PWCA's supplemental unemployment benefits are "continuous in nature." (*Id.* at p.5). Again, contrary to the Administrator's ruling, the benefits can only be used when the conditions of the Plan are met, *i.e.*, when an employee becomes involuntarily unable to work due to the qualifying reasons, just as the funds contributed to a defined contribution pension plan can only be accessed upon the occurrence of a specific distributable event, such as death, disability, termination of employment or retirement. The Administrator's ruling offers no principled reason to treat PWCA's SUB Plan as "continuous" when the Department treats defined contribution pension plans as "non-continuous."

Likewise, the Administrator's ruling erroneously characterizes the SUB Plan as "unemployment insurance." See Administrator's Ruling at p.5. ("As the supplemental unemployment benefit is equally available to insure against loss of private work as it is to insure against loss of prevailing wage/DB A work, SUBs compensate an employee for all service performed in a given year."). Contrary to this ruling, PWCA's SUB Plan is ***not*** unemployment insurance; nor does the Plan insure against loss of any work, private or public. Indeed, if the PWCA SUB Plan were a form of unemployment insurance, then the Plan would not be a recognized fringe benefit under the DBA at all. *See* Prevailing Wage Resource Book at p. 21 (excluding unemployment insurance from the list of qualified fringe benefits under the DBA).

No one has made that contention here. The SUB Plan is thus not insurance and is instead a "supplemental unemployment benefit," expressly recognized by the Act, and intended to provide dollar-for-dollar cash to employees at the time of the employees' greatest need.

The Administrator's ruling further errs in concluding that a SUB is "similar to health insurance benefits, which WHD has long annualized." *See* Administrator's Ruling at p. 5. To the contrary, as noted above, the PWCA SUB Plan does not provide "insurance" at all. Rather, the Plan provides ready access to vested cash in the employee's account, for withdrawal in amounts unrelated to the extent of the employee's "injury" (to use an inapplicable insurance term), at any time when the employee is involuntarily unable to work. Also unlike insurance plans, the PWCA SUB Plan does not have an "annual cost," nor is the Plan "continuously" funded at guaranteed rates by any employer, unlike health insurance premiums which are truly continuous. Instead, employers pay into the Plan only in the amounts needed to fund the fringe benefit portion of DBA or SCA wage determinations, which vary from project to project and even within projects depending on individual job duties that may change from day to day.

The non-continuous aspect of the PWCA SUB Plan leads to another important distinction from typical health insurance plans: Specifically, when an employer stops paying continuous insurance premiums, the employee's insurance coverage is soon thereafter *lost*, absent election by the employee to take on the employer's share of insurance premium under the COBRA insurance continuation statute. By contrast, under the PWCA SUB Plan, a stoppage of contributions by the employer does not deprive the employee of the benefit already accrued in the employee's account. Unlike insurance, the money previously contributed remains fully vested and usable by the employee whenever the employee is involuntarily unable to work.

The Administrator's ruling also errs in rejecting "any reliance on immediate participation

and essentially immediate vesting for an exception to annualization" because such reliance "mistakenly equates SUBs with defined contribution pension benefits." *Id.* at p.5. According to the Administrator, the "narrow" annualization exception for DCPP benefits "emanates from the benefits' fundamentally deferred, non-continuous nature – not shared by SUBs." The Administrator cites no authority for this novel proposition, and there is none. The Administrator's own Resource Book identifies only the following justifications for not annualizing DCPP contributions: that they "provide for immediate participation and immediate or essentially immediate vesting." *Id.* at p. 21. These qualities are shared by PWCA's SUB Plan, as the Administrator previously recognized.

But even if the Administrator were correct in asserting that DCPP benefits are exempt from annualization only because they are "fundamentally deferred" and "non-continuous," this would be no justification for applying annualization to the PWCA SUB Plan, because the Plan shares both of these qualities also. Like the DCPP plans, the SUB Plan benefit is "fundamentally deferred" because it cannot be used by an employee until the employee experiences a distributable event when the employee becomes involuntarily unable to work. Similarly, the PWCA SUB plan is no more "continuous" than a DCPP plan. Exactly like the DCPP plan, employers contribute to the SUB Plan only so long as the employee is working on a DBA-covered project. The money is not "continuously" paid into any employee's account when the employee is not working; and the benefits are not paid continuously to any employee when they are in fact working. Only when the employee becomes involuntarily unable to work, just as in the case of the DCPP plan when the employee terminates employment, does the employee have access to the SUB benefits under the Plan. The Administrator's ruling to the contrary is irrational and arbitrary.

It must be reiterated that the types of benefits that the Department has previously determined to be "continuous in nature" are benefits that are guaranteed to be provided to participants at a certain level of payment for a certain period of time. For example, health insurance benefits are guaranteed to be provided to participants at a certain level of coverage if monthly premiums are continuously paid. Similarly, unemployment insurance benefits are guaranteed to be provided to participants during the entire period of unemployment at a certain level of coverage if monthly premiums are paid. Likewise, defined benefit pension benefits are guaranteed to be provided to participants upon retirement at certain monthly annuity amounts and the employer has the obligation to make plan contributions required to satisfy this guaranteed benefit obligation.

In contrast, defined contribution pension benefits and SUB benefits are not provided at a guaranteed level of benefit payment. Instead, in DCPPs, benefits are dependent upon the amount of contributions made to the plan on behalf of the plan participant and on any investment gains and losses on those contributions credited to the participant's plan account. The PWCA SUB Plan is fundamentally similar to the defined contribution pension plan structure, in as much as the benefits available to a participant under the PWCA SUB Plan are determined solely by the amount of contributions made on behalf of the participant to the Plan, NOT based on how "continuous" such payments are. Therefore, the Administrator has erred in claiming that there is any material difference between defined contribution pension plans and the PWCA SUB Plan with regard to the reasons for annualization.

B. The Administrator's Ruling Violates the D.C. Circuit's Holding in the *Mistick* Case.

As noted above, in the *Mistick* case, 54 F.3d 900, the Administrator attempted to impose the annualization requirement on a fringe benefit plan that, like the PWCA SUB Plan, created a

trust into which the employer irrevocably contributed money for hours worked under the DBA, to be withdrawn by employees upon their termination of employment. *Id.* at 904. As the D.C. Circuit found, there was a "one-for-one ratio between employer contributions on behalf of an employee and value received," just as is the case under the PWCA SUB Plan. "Each employee received the full value of each dollar contributed by Mistick, either as an enumerated benefit purchased with [Plan] funds or in cash at the end of his employment." *Id.*

Also, just as in the present case, the Administrator argued in *Mistick* that "because part of the employees' compensation for Davis-Bacon work paid for fringe benefits used by them during periods of private work, the Department concludes that they did not receive the prevailing wage for their Davis-Bacon work." The Court "reject[ed] this argument." *Id.* The D.C. Circuit further held as follows:

> If we uphold the invalidation of a plan because employer contributions to it could finance fringe benefits used during private work, employers would then have to limit employees' use of their Davis-Bacon trust accounts to only those fringe benefits used during Davis-Bacon work. Such a result would disadvantage employees. We decline, therefore, to uphold the Department's denial of Davis-Bacon credit for Mistick's contributions to the [Plan] merely because they could underwrite fringe benefits used by an employee during private work periods.

The court went on to reject the identical argument for annualization that the Administrator has made in the ruling against the PWCA SUB Plan, as follows:

> We reject annualization of Mistick's contributions for the same reasons. Mistick made contributions to the [Plan] only for the Davis-Bacon work performed by its employees whereas Mistick employees could draw on the funds in their trust accounts whether they were performing Davis-Bacon work or private work. The Administrator concluded that even if Mistick's [plan] were bona fide, Mistick would receive only annualized credit. * * * The Administrator explained that annualization ensures that an employer does not receive Davis-Bacon credit for contributions made for Davis-Bacon work but which pay for benefits used by an employee while performing private work. But the Administrator has not shown that Mistick's contributions to its [plan] for Davis-Bacon work financed benefits which were used by employees during private work periods and which would have been funded by a separate fringe benefit plan for private work but for the

> [plan]. It was therefore unreasonable for the Administrator to annualize Mistick's contributions to its [plan].

Contrary to the Administrator's ruling, the existence of an additional fringe benefit plan did not determine the outcome in the *Mistick* case. This is confirmed by the Court's footnote distinguishing the annualization of apprenticeship benefits in *Miree Construction Co. v. Dole*, 930 F.2d 1536 (11th Cir. 1991). The *Mistick* court held:

> The Department emphasized that annualization "prevents [an employer from] using the Davis-Bacon work as the disproportionate or exclusive source of funding for benefits that are in fact continuous in nature and compensation for all the employee's work, both Davis-Bacon and private." (citation omitted). It has not established, however, that the fringe benefits used by Mistick's employees during periods of private work were financed primarily by Davis-Bacon contributions. The rationale for annualizing an employer's contributions therefore does not apply.

In the present case, Petitioner PWCA has already shown that no private work of PWCA employer members is being financed by the SUB Plan. This is so because participating employees cannot receive any SUB benefits unless they are in fact involuntarily *unable to work* for qualifying reasons. The Administrator's argument for annualizing PWCA's SUB Plan contributions is therefore even weaker than it was in *Mistick*, and the holding of the D.C. Circuit compels the reversal of the Administrator's ruling.[6]

C. The Administrator's Ruling Effectively Deprives Employees of a Valuable Fringe Benefit, Contrary To the Intent of Congress under the DBA.

As discussed above, the ability of employees to access SUB Plan funds in addition to or instead of funds that are vested in a DCPP is highly beneficial to the employees, because it

[6] It must also be noted that in *Mistick*, the Court placed the burden on the Department to prove that benefits received during private work were not funded by an unidentified private fringe benefit plan to which Mistick allegedly contributed, and there was no such evidence in the Administrative Record. Here also, the Administrator has failed to establish that individual employers who contribute to the PWCA SUB Plan do not also provide separate fringe benefits for their employees on private work. Indeed, there is no evidence in the record on this point at all. For this reason as well, the Administrator's ruling must be reversed.

allows them to avoid withdrawal penalties and taxes that are imposed on early withdrawals from DCPPs. Unfortunately, the practical effect of the Administrator's ruling imposing annualization on PWCA's SUB Plan is to deprive employees of access to this or any similar plan due to the uncertainties and risk created by the annualization process.

The concept of annualization assumes that there is an "annual cost" of the particular benefit at issue. That is not the case with employer contributions to the PWCA SUB Plan. There are no set premiums, and there is no ability to predict how much money any employer will contribute to any employee's account. The amount contributed varies by project, by employee and by the employee's job duties from day to day, or even within individual days. As a result, the unwarranted imposition of annualization on employer contributions to the PWCA SUB Plan will result (and already has resulted) in tremendous uncertainty and risk to employers. In particular, employers contributing to the Plan will be unable to determine their costs of performing work on Davis-Bacon projects until after the project has been completed. Alternatively, employers who make such contributions for employees on public projects will have no way of knowing how much time such employees will spend working on private projects and therefore what portion of employer contributions will receive reduced (annualized) credits.

Faced with this dilemma, most if not all employers will choose instead to make contributions only to DCPP's, for which no annualization is required. Employees will thereby be deprived of one of the fringe benefits authorized by the DBA, because without employer contributions the PWCA SUB Plan cannot continue to function. PWCA has already been advised by numerous employers that they will be unable to offer the SUB Plan benefit to their employees if annualization is required. PWCA has been further advised by a union, the United Steelworkers Union (USW), that the employers with whom they collectively bargain cannot

continue to contribute to the SUB Plan while bearing the risk that they will not receive credit for every dollar contributed to the Plan. Approximately 660 members of the USW currently participate in the Plan and rely on the Plan to provide them with income during the portion of the year when weather makes their work difficult and often impossible, resulting in significant periods of missed hours of work.

As noted above, the PWCA SUB Plan offers a benefit that is more advantageous to employees than a DCPP, while otherwise sharing the identical features of irrevocable contributions and immediate, 100% vesting. The D.C. Circuit has held that it is unreasonable to interpret the fringe benefit provisions of the DBA in such a way as to "disadvantage employees." *Mistick*, 54 F.3d at 905. For the same reason, the Administrator's new ruling should be found to be contrary to legislative intent, and should be overturned for the benefit of employees who will otherwise be unable to receive this important benefit during times of need.

D. The Administrator's Decision to Overrule the WHD's Previous Ruling That Annualization Has No Application to the PWCA SUB Plan Violates the Administrative Procedure Act.

As noted above, the Administrator's ruling in this case overturned a longstanding declaration of WHD policy *not* to require annualization of employer contributions to SUB Plans in general, and PWCA's SUB Plan in particular. In such circumstances the Supreme Court has held that the agency bears the burden to explain and justify its reversal of policy. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."); *see also Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (reaffirming this holding).

Under *State Farm*, an agency action is deemed to be arbitrary and capricious if any of the

following are met: (1) the agency relied on factors which Congress has not intended it to consider; (2) the agency entirely failed to consider an important aspect of the problem; (3) the agency offered an explanation for its decision that runs counter to the evidence; or (4) the agency's explanation is so implausible that it could not be ascribed to agency expertise. In the present case all of these indicators of arbitrary and capricious conduct by the Administrator are present: (1) The plain language and legislative history of the fringe benefits section of the DBA show that Congress intended to allow employers to take full credit for irrevocable contributions to funded fringe benefit plans like the PWCA SUB Plan; (2) The Administrator failed to consider how employees would be disadvantaged by reversing course and requiring annualization of Plan contributions; (3) The Administrator offered explanations for the decision that run counter to the undisputed evidence, including the fact that the benefit does not fund private work by employees because they cannot access it unless they are involuntarily *unable* to work, as well as the claim that the Plan is more like insurance than it is like a DCPP, and the failure to adhere to the plain holding of the *Mistick* case; and (4) The Administrator's explanation is so implausible that it cannot be ascribed to agency expertise.

It must also be noted that the WHD significantly revised the annualization guidelines in the Wage and Hour Prevailing Wage Resource Book with no public notice or comment when it republished the revised Prevailing Wage Resource Book in May 2015. Neither PWCA nor any of its participating employers received notice of or had any opportunity to comment on the annualization changes made in the revised Prevailing Wage Resource Book 2015. The changes made to the annualization exception guidelines in the Prevailing Wage Resource Book 2015 included the removal of the reference that the annualization exception could also apply to "certain supplemental unemployment benefit plans" and the addition of a statement that wrongly

implies that annualization must occur for "benefits that are continuous in nature and compensation for all the employee's work (*e.g.*, for a benefit that is in effect during both Davis-Bacon covered and non-covered work)". In the ruling presently under review, the Administrator relied upon this additional, unsupported statement, and interpreted the statement as a requirement that annualization must occur for benefits that are continuous in nature and compensation for all of the employee's work. Because this additional "continuous in nature" statement was not included in the Prevailing Wage Resource Book guidelines at the time PWCA submitted its report to WHD on August 23, 2013 and because this issue was not specifically raised by the III FFC in the contentions it raised in its request for review letter of July 15, 2013, PWCA did not address in its report whether or not the PWCA SUB Plan is "continuous in nature" and compensation for all the employee's work. For this reason as well, the Administrator's October 22 ruling should be set aside.

CONCLUSION

For the reasons set forth above and in PWCA's Petition, the October 22, 2015 ruling of the Administrator should be vacated and the Board should hold that annualization does not apply to employer contributions to PWCA's SUB Plan.

/s/ Maurice Baskin
Maurice Baskin
Littler Mendelson, PC
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

Attorneys for Petitioner PWCA

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2016, I caused a copy of the foregoing Brief in Support of Petition for Review to be served by electronic mail, on the following:

Executive Director
Administrative Review Board Room S-5220
U.S. Department of Labor
200 Constitution Avenue, N.W. Washington, DC 20210

Quinn Philby
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Suite N-2716
Washington, D.C. 20210

Richard Freeman
Sheppard, Mullin, Richter & Hampton
12275 El Camino Real
San Diego, CA 92130

Melissa Binetti
Indiana-Illinois-Iowa Foundation for Fair Contracting
6170 Joliet Rd
Countryside, IL 60525

/s/ Maurice Baskin

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 12275 El Camino Real, Suite 200, San Diego, CA 92130-2006.

On February 17, 2016, I served true copies of the following document(s) described as **BRIEF OF PETITIONER NAPWC IN SUPPORT OF ITS PETITION FOR REVIEW** on the interested parties in this action as follows:

See Attached Service List

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing via Certified Mail, Return Receipt Requested, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 17, 2016, at San Diego, California.

Joanna E. Keeping

SERVICE LIST

Administrative Review Board S-5220 200 Constitution Avenue, N.W. Washington. D.C. 20210	**BY CERTIFIED MAIL – RETURN RECEIPT REQUESTED**
Marc R. Poulos Executive Director Indiana-Illinois-Iowa Foundation of Fair Contracting 6170 Joliet Road, Suite 200 Countryside. IL 60525	**BY MAIL**
Dr. David Weil Administrator Wage and Hour Division U.S. Department of Labor 200 Constitution Avenue, N.W., Suite S-3006 Washington. D.C. 20210	**BY MAIL**
Wage & Hour Administration U.S. Dept. of Labor 200 Constitution Avenue, N.W. Suite S3502 Washington. D.C. 20210	**BY MAIL**
Jonathan Rees Division of Fair Labor Standards U.S. Department of Labor Room 2716, FPB 200 Constitution Avenue, N.W. Washington. D.C. 20210	**BY MAIL**
Quinn Philby U.S. Dept. of Labor Office of the Solicitor 200 Constitution Avenue, N.W. Suite N-2716 Washington. D.C. 20210	**BY MAIL**
Maurice Baskin Littler Mendelson, PC 815 Connecticut Ave., N.W. Washington. D.C. 20006	**BY MAIL**