16-019

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November 10, 2015

By Certified Mail – Return Receipt Requested

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

RE: PWCA v. Secretary of Labor,
WHD Case
In the Matter of:

Indiana-Illinois-Iowa Foundation for Fair Contracting Request to Revoke the Annualization Exception of PWCA

Dear Executive Director:

Please find enclosed for filing in the above-referenced matter an original and four copies of the Complainant's Petition for Review.

If you have any questions or need additional information regarding this matter, please contact the undersigned at (614) 775-9134.

Sincerely,

Martha L. Hutzelman

Martha L. Hutzelman

Enclosures: as stated

BEFORE THE ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

REGARDING A MATTER RAISED BY THE
WAGE AND HOUR DIVISION (WHD),
U.S. DEPARTMENT OF LABOR

PWCA, Complainant	*	16-019
v.	*	WHD Case
SECRETARY OF LABOR, Respondent,	*	
In the Matter of:	*	
Indiana-Illinois-Iowa Foundation for Fair Contracting Request to Revoke the Annualization Exception of PWCA	*	
RE: Supplemental Unemployment Benefit provided under PWCA Welfare Benefit Plan	*	
Ruling Notice Date: October 22, 2015	*	
Before: The Administrative Review Board	*	

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PETITION FOR REVIEW

Complainant, PWCA (formerly Prevailing Wage Contractors Association, Inc.), by and thorough its counsel, in accordance with 29 CFR Part 7, hereby submits a Petition for Review of the attached ruling, dated October 22, 2015, issued by the Wage and Hour Division (WHD) of Respondent in response to the Indiana-Illinois-Iowa Foundation for Fair Contracting request to revoke the Davis-Bacon Act annualization exception for computing credit for contributions made to a fringe benefit plan that was previously granted by WHD to PWCA as follows:

Introduction

The annualization exception was recognized and granted by WHD to PWCA for the supplemental unemployment benefit offered under the PWCA Welfare Benefit Plan (PWCA SUB Plan or Plan) on September 16, 2002. *See,* attached WHD ruling letter regarding PWCA Welfare Benefit Plan, dated September 16, 2002. For more than thirteen (13) years, the participating employers and participants in the PWCA SUB Plan have understood that the Plan is excepted from the annualization requirement in accordance with the WHD ruling issued in 2002. The new ruling issued by WHD on October 22, 2015, suddenly revokes the annualization exception for the PWCA SUB Plan without any prior notice to PWCA, the participating employers and participants and requires compliance by all parties within 90 days of the ruling date. This is a totally new and sudden change to the operation of the PWCA SUB Plan that will have a massive negative impact on Plan participants.

If the annualization exception revocation for the PWCA SUB Plan stands, a majority of the participating employers will not be able to afford to make the same level of employer contributions to a supplemental unemployment benefit plan for private jobs as they do for prevailing wage jobs and the employers will have only one other available alternative to use in response to this change. As an alternative, the employer will stop offering the PWCA SUB Plan and will instead offer a defined contribution retirement plan (with immediate participation and essentially full vesting), which is the most comparable alternative plan to the PWCA SUB Plan. The employer will pay the fringe benefit amount that went to the PWCA SUB Plan as an employer contribution to the defined contribution retirement plan. This option will result in serious financial harm to the employees.

If the fringe benefit amount is contributed to a defined contribution retirement plan, the employee will intentionally terminate employment with the employer during the times the employee is not able to work due to cyclical or seasonal work periods in order for the employee to receive a distribution upon termination from employment from the defined contribution retirement plan and the employee will pay the 10% penalty excise tax for an early distribution from the defined contribution retirement plan plus income taxes on the distribution amount. In essence, the employee will treat the defined contribution retirement plan as a de facto supplemental unemployment benefit plan and will continually terminate employment and hope for rehire by the employer in order for the employee to access the funds in the defined contribution retirement plan during cyclical and seasonal layoff periods. By using the defined contribution retirement plan as a de facto supplemental unemployment benefit plan, the employee will continually lose 10% of the fringe benefit payment made to her account in payment of the early distribution penalty excise tax, will face the risk of significant investment losses on funds held in the defined contribution retirement plan as she will not be letting funds stay in her account long enough to experience the benefit of long-term investment gains and will have a checkered employment history due to her intentional employment terminations and rehires in order to access the defined contribution retirement plan fund distributions. All of these consequences result in serious financial harm and severe hardship to the Plan participants. It was in order to avoid these historic results that both the participating employers and the participants have been grateful to have the ability to make employer contributions of prevailing wage fringe benefits to the PWCA SUB Plan in order to give participants access to funds at the time that the participant experiences cyclical and seasonal layoff periods and eliminate the participant's loss

of funds in the payment of penalty taxes and investment losses and disrupted employment history.

Because of the long-standing existence of the annualization exception for the PWCA SUB Plan and the serious financial harm and severe hardship that participants in the PWCA SUB Plan will experience if the annualization exception is revoked, it is respectfully requested that a review by the Administrative Review Board of WHD's revocation of the annualization exception be granted in order to give PWCA, the participating employers and the participants the opportunity to address WHD's ruling change and that the required compliance date (set for 90 days from October 22, 2015) be held pending until the appeal proceedings are concluded.

Statement of Case Proceedings

On July 15, 2013, the Indiana-Illinois-Iowa Foundation for Fair Contracting (III FFC) filed a request for review with the Wage and Hour Division (WHD) of the U.S. Department of Labor. The III FFC's letter requests that WHD review the requirement that contributions made by employers to fringe benefit plans on behalf of employees working on construction contracts subject to the Davis-Bacon Act be annualized and revoke the exception from annualization WHD provided to PWCA for the Supplemental Unemployment Benefit provided under the PWCA Welfare Benefit Plan (PWCA SUB Plan) in a letter dated September 16, 2002. *See,* attached WHD ruling letter regarding PWCA Welfare Benefit Plan, dated September 16, 2002. WHD provided PWCA with a copy of the III FFC's request for review in a letter dated July 26, 2013, and requested that PWCA submit a report to WHD within thirty (30) days of PWCA's position regarding the contention of III FFC that the exception from the annualization requirement is not appropriate with respect to the PWCA SUB Plan. PWCA submitted a report

on August 23, 2013, that addressed the contentions raised in the III FFC's request for review and provided information to indicate that the operational structure of the PWCA SUB Plan satisfies all of the requirements for an exception to the annualization requirements as set forth in the version of the U.S. Department of Labor Davis-Bacon Resource Book published as of the August 23, 2013 response date. PWCA received no further communication from WHD regarding this matter until its receipt of the WHD ruling letter, dated October 22, 2015. On October 28, 2015, PWCA received the WHD ruling letter, dated October 22, 2015, which revokes the annualization exception previously provided to the PWCA SUB Plan on a prospective basis and requires that employers that make contributions to the PWCA SUB Plan must come into compliance with this ruling within 90 days from October 22, 2015.

Statement of Facts

PWCA is a nonprofit organization incorporated under the laws of the state of Ohio. PWCA sponsors the PWCA Welfare Benefit Plan (formerly named the Prevailing Wage Contractors Association Inc. Members Welfare Benefit Plan). A supplemental unemployment benefit program (PWCA SUB Plan) is offered under the PWCA Welfare Benefit Plan to participating employers that employ individuals to work jobs subject to the Davis-Bacon Act, Service Contract Act and/or state prevailing wage laws.

Participating employers make contributions to the PWCA SUB Plan when the employee is working on a prevailing wage job. The employee may also work on private projects for the employer during the same year. The question at issue is whether the employer must annualize contributions to the PWCA SUB Plan by averaging the contributions over all of the employee's hours of service for the employer in that year and taking Davis-Bacon Act credit only for the

effective annual rate of contribution to the fringe benefit plan. WHD provides an exception to the annualization requirement for defined contribution benefit plans (and, until its current ruling, for certain supplemental unemployment benefit plans) if the plan provides for immediate participation and immediate or essentially immediate vesting (100% vesting after an employee works 500 or fewer hours). *See,* Wage and Hour Davis-Bacon Resource Book 2002 and 2010.

On September 16, 2002, in its ruling letter, WHD found that the PWCA SUB Plan satisfied the exception from the annualization requirement and concluded that "employers participating in the plan may receive full credit, for Davis-Bacon purposes, for the contributions made to the plan with respect to Davis-Bacon work." In making this determination, WHD stated that the annualization exception was appropriate because the terms of the plan "ensure that almost every employee will in fact receive the full cash benefit of the contributions made on the employee's behalf." *See,* attached WHD ruling letter regarding PWCA Welfare Benefit Plan, dated September 16, 2002.

As noted in the statement of the case proceedings above, on July 15, 2013, III FFC submitted to WHD its request for review, contending that the exception from the annualization requirement is not appropriate with respect to the PWCA SUB Plan. WHD provided PWCA with a copy of the III FFC's request for review in a letter dated July 26, 2013, and PWCA submitted a report on August 23, 2013, that addressed the contentions raised in the III FFC's request for review.

PWCA received no further communication from WHD regarding this matter until its receipt of the WHD ruling letter, dated October 22, 2015. PWCA, the participating employers and the participants were not made aware that WHD was contemplating the revocation of the annualization exception for the PWCA SUB Plan and were not given any further opportunity to

address WHD's contemplated ruling change until PWCA's receipt of the WHD ruling letter, dated October 22, 2015.

It is PWCA's understanding that WHD significantly revised the annualization exception guidelines in the Wage and Hour Davis-Bacon Resource Book and published the revised Davis-Bacon Resource Book in May 2015. Neither PWCA or any of its participating employers received notice of or had any opportunity to comment on the annualization exception changes made in the revised Davis-Bacon Resource Book 2015. The changes made to the annualization exception guidelines in the Davis-Bacon 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 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)".

On October 22, 2015, in its ruling letter, WHD applied the changes made in the revised Davis-Bacon Resource Book 2015 and determined that the PWCA 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." *See,* attached Ruling Notice from Wage and Hour Division, U.S. Department of Labor, dated October 22, 2015. WHD found that supplemental unemployment benefit plans are available to participants on an uninterrupted basis throughout the year similar to unemployment insurance and, thus, supplemental unemployment benefit plans are continuous in nature. Because supplemental unemployment benefit plans are continuous in nature and compensation for private and prevailing wage/Davis-Bacon Act (DBA) work, WHD ruled that the PWCA SUB Plan does not qualify for the annualization exception.

WHD ruled that the contributions to the PWCA SUB Plan are subject to annualization on a prospective basis and requires that employers that make contributions to the PWCA SUB Plan must come into compliance with this ruling within 90 days from October 22, 2015.

Statement of Grounds for Review

1. PWCA Did Not Have Knowledge Of The New Guidelines Criteria That The Benefit May Not Be Continuous In Nature In Order For The Annualization Exception To Apply Nor The Opportunity To Address In Its Submitted Report The Application Of This New Guidelines Criteria To The PWCA SUB Plan.

   WHD significantly revised the annualization exception guidelines in the Wage and Hour Davis-Bacon Resource Book and published the revised Davis-Bacon Resource Book in May 2015. Neither PWCA or any of its participating employers received notice of or had any opportunity to comment on the annualization exception changes made in the revised Davis-Bacon Resource Book 2015. The changes made to the annualization exception guidelines in the Davis-Bacon 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 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 its October 22, 2015 ruling regarding the application of the annualization exception to the PWCA SUB Plan, WHD relied upon this additional statement and interpreted it as a requirement that annualization must occur for benefits that are continuous in nature and compensation for all the employee's work.

Because this additional "continuous in nature" statement was not included in the Davis-Bacon 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.

Further, upon revision of the guidelines in the Davis-Bacon Resource Book in May 2015 and as it was contemplating its ruling to revoke the annualization exception for the Plan, WHD did not contact PWCA to request any additional evidence or information as to whether the PWCA SUB Plan is "continuous in nature" and compensation for all the employee's work.

The revisions to the Davis-Bacon Resource Book in May 2015 without notice and without providing the opportunity for comment by PWCA, the participating employers, participants and other interested parties is a potential violation of the Administrative Procedure Act (5 USC Chapter 5) and could potentially render the changes made to the guidelines in the Davis-Bacon Resource Book 2015 invalid.

PWCA respectfully requests that review be made as to whether the revisions to the Davis-Bacon Resource Book 2015 followed applicable procedures under the Administrative Procedure Act. Further, PWCA respectfully requests that it be provided the opportunity to submit information to WHD regarding the terms and operation of the Plan to address whether the PWCA SUB Plan is "continuous in nature" and compensation for all the employee's work and that the participating employers and participants in the PWCA SUB Plan be given an opportunity to submit information to

WHD regarding the matter, before any ruling is made by WHD regarding the application of annualization to the PWCA SUB Plan.

2. The PWCA SUB Plan Is Not Continuous In Nature And Is Not Compensation For All Of The Employee's Work.

The benefits provided under the PWCA SUB Plan are not "continuous in nature" and compensation for all of the employee's work. The PWCA SUB Plan benefit is not an annual benefit, but rather the amount of the benefit is limited by the amount of the contributions made on behalf of the participant to the PWCA SUB Plan. Unlike health insurance or unemployment insurance, there is no annual cost or total cost of the supplemental unemployment benefit under the PWCA SUB Plan. Once a participant exhausts her benefit balance under the PWCA SUB Plan, there are no further benefit payments available to the participant until additional employer contributions are made to the Plan. Accordingly, the PWCA SUB Plan is more like a defined contribution pension plan with immediate participation and immediate vesting, which also provides that the amount of contributions made on behalf of the participant to the Plan determine the amount of benefits available to the Plan participant. The PWCA SUB Plan is not like health insurance, unemployment insurance, a defined benefit pension plan or defined contribution pension plans with a vesting schedule, which provide for premium payments or contributions that must be paid over an annual or other period of time.

Additionally, the types of benefits that WHD has determined are "continuous in nature" and compensation for all of the employee's work 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 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 are not provided at a guaranteed level of benefit payment. Instead, in defined contribution pension plans, 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 as the benefits available to a participant under the PWCA SUB Plan is determined by the amount of contributions made on behalf of the participant to the Plan. Therefore, both defined contribution pension plans and the PWCA SUB Plan do not provide benefit payments that are guaranteed for an annual or other specified period, unlike the other types of benefits that have been determined to be continuous in nature.

Accordingly, both the PWCA SUB Plan and defined contribution pension plans are non-continuous in nature in that the contribution amount is not determined on an annual basis and the benefit payment is not guaranteed for an annual or other specified period.

Because of the non-continuous nature of both the PWCA SUB Plan and defined contribution pension plans, the analysis regarding the application of the annualization

exception to the PWCA SUB Plan should be similar to the analysis made for a defined contribution pension plan and the annualization exception available to defined contribution pension plans should also be available to supplemental unemployment benefit plans like the PWCA SUB Plan.

3. The Basic Character Of The PWCA SUB Plan Is Fundamentally Similar To The Basic Character of Defined Contribution Pension Plans.

The basic characteristics of the PWCA SUB Plan are fundamentally similar to the basic characteristics of a defined contribution pension plan. For this reason, the analysis regarding the application of the annualization exception to the PWCA SUB Plan should be similar to the analysis made for a defined contribution pension plan and the annualization exception available to defined contribution pension plans (DC plans) should also be available to supplemental unemployment benefit plans (SUB plans) like the PWCA SUB Plan.

Like defined contribution pension plans, the PWCA SUB Plan credits employer contributions made on behalf of a participant to a Plan account for the benefit of the Plan participant; the Plan participant may immediately participate in the PWCA SUB Plan and is immediately and fully vested in the PWCA SUB Plan; the participating employer irrevocably makes contributions to the PWCA SUB Plan; in practice there have been essentially no forfeitures under the PWCA SUB Plan; the participant's PWCA SUB Plan account balance is tracked and the amount of benefits available under the PWCA SUB Plan equals the value of the participant's Plan account balance; and benefits are paid from the PWCA SUB Plan upon the occurrence of a distributable event (which is the

occurrence of missed work hours in which the participant is involuntarily unable to work due to cyclical, seasonal or similar conditions).

Contrary to WHD's conclusion that the characteristics of SUB plans are so distinct from that of DC plans, it is clear that the characteristics of the PWCA SUB Plan is fundamentally similar to that of DC plans. Both the PWCA SUB Plan and DC plans are considered cash equivalents (i.e., both have immediate participation and immediate and 100% vesting); both have a qualifying event (i.e., involuntary layoff from work, separation from employment or retirement) that triggers a benefit payment; and both the PWCA SUB Plan and DC plans are non-continuous in nature in that the contribution amount is not determined on an annual basis and the benefit payment is not guaranteed for an annual or other specified period. In addition, both the PWCA SUB Plan and DC plans have the purpose of helping to mitigate economic risk. The PWCA SUB Plan enables the participant to have funds set aside for the almost certain event of involuntary layoff from work when working a cyclical or seasonal job and DC plans enable the participant to have funds set aside for the almost certain event of retirement.

Furthermore, benefits may be paid from both the PWCA SUB Plan and DC plans upon the occurrence of a qualifying event from either a prevailing wage job or a private job. For example, under a DC plan, a participant can work on one prevailing wage job and have contributions made to the DC plan during that prevailing wage job. Sometime later, the participant can terminate employment from a private job and can then receive benefit payments from the DC plan because of the participant's termination from employment from the private job. This is no different from the structure of the PWCA SUB Plan, where a participant receives a benefit payment from the Plan upon his

involuntary layoff from work (which must be all-inclusively both prevailing wage and private work).

In fact, the ability of participants to receive benefit payments from a DC plan upon termination from employment from either a private or prevailing wage job on a revolving basis (even if the participant must pay a penalty for early distribution of the DC plan benefits) is precisely the reason the PWCA SUB Plan was developed as an alternative vehicle for meeting the participants' needs. As stated above, before their employers began participating in the PWCA SUB Plan, the employees would treat the defined contribution retirement plan in which they were participating as a de facto supplemental unemployment benefit plan and would continually terminate employment and hope to be rehired by the employer in order for the employee to access the funds in the defined contribution retirement plan during cyclical and seasonal layoff periods. By using the defined contribution retirement plan as a de facto supplemental unemployment benefit plan, the employee would continually lose 10% of the fringe benefit payment made to her account in payment of the early distribution penalty excise tax, face the risk of significant investment losses on funds held in the defined contribution retirement plan as she will not be letting funds stay in her account long enough to experience the benefit of long-term investment gains and have a checkered employment history due to her intentional employment terminations and rehires in order to access the defined contribution retirement plan fund distributions. All of these consequences resulted in serious financial harm and severe hardship to the employee. It was in order to avoid these results that both the participating employers and the participants began participating in and making employer contributions of prevailing wage fringe benefits to the PWCA

SUB Plan in order to give participants access to funds at the time that the participant experiences cyclical and seasonal layoff periods and eliminate the participant's loss of funds in the payment of penalty taxes and investment losses and disrupted employment history. Functionally, there is no difference between the structure of the PWCA SUB Plan and the DC plan in the manner in which contributions are credited and benefits are paid.

Accordingly, because of the fundamental similarities between the PWCA SUB Plan and defined contribution pension plans, the analysis regarding the application of the annualization exception to the PWCA SUB Plan should be similar to the analysis made for a defined contribution pension plan and the annualization exception available to defined contribution pension plans (DC plans) should also be available to supplemental unemployment benefit plans (SUB plans) like the PWCA SUB Plan.

4. <u>It Is Unclear To PWCA How The III FFC Is An Interested Person As Defined Under 29 CFR Part 7 With Respect to WHD's Determination Regarding the Application of the Annualization Exception to the PWCA SUB Plan.</u>

An "interested person" is defined under Section 7.2(b) of 29 CFR Part 7 as:

"(1) any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any laborer or mechanic, or any labor organization which represents a laborer or mechanic, who is likely to be employed or to see employment under a contract containing a particular wage determination, and

(2) any Federal, State, or local agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to the Davis-Bacon Act or any of its related statutes,"

The letter dated July 15, 2013, filed by the III FFC with WHD to request review and revocation of the annualization exception granted by WHD to the PWCA SUB Plan does not state how III FFC is an "interested person" with respect to WHD's determination regarding the application of the annualization exception to the PWCA SUB Plan. Further, no statement has been provided in the communications from WHD as to how III FFC is an "interested person" in this matter.

PWCA respectfully requests additional information as to how III FFC qualifies as an "interested person" with respect to WHD's determination regarding the application of the annualization exception to the PWCA SUB Plan.

Request for Review

1. Complainant respectfully requests a review by the Administrative Review Board of WHD's ruling that the PWCA SUB Plan does not qualify for the annualization exception, that the contributions to the PWCA SUB Plan are subject to annualization on a prospective basis and that employers that make contributions to the PWCA SUB Plan must come into compliance with this ruling within 90 days from October 22, 2015.

2. Complainant respectfully requests that the Administrative Review Board remand this matter back to the Administrator of WHD for its review and consideration of additional evidence regarding the specific terms and operation of the PWCA SUB Plan and the making of new or modified findings in its determination as to whether the PWCA SUB Plan is continuous

in nature and provides benefits compensating for all of the employee's work and fundamentally similar to the basic character of defined contribution pension plans and whether the annualization exception available to defined contribution pension plans should also be available to the PWCA SUB Plan.

3. Complainant respectfully requests that the date by which participating employers that make contributions to the PWCA SUB Plan must come into compliance with WHD's current ruling revoking the annualization exception for the PWCA SUB Plan be held pending until the later of the Administrative Review Board's review of this matter and closing of these appeal proceedings or WHD's review and consideration of this matter upon remand. As discussed above, the sudden and immediate revocation of the annualization exception granted by WHD to the PWCA SUB Plan more than thirteen (13) years ago based on new guidance and reconsideration by WHD without opportunity for PWCA, its participating employers and participants to comment on the application of such new guidance to the Plan will have a massive negative impact on Plan participants. Because of the long-standing existence of the annualization exception for the PWCA SUB Plan and the serious financial harm and severe hardship that participants in the PWCA SUB Plan will experience if the annualization exception is revoked, it is respectfully requested that the required compliance date (set for 90 days from October 22, 2015) be held pending until the later of the Administrative Review Board's review of this matter and closing of these appeal proceedings or WHD's review and consideration of this matter upon remand.

4. Complainant respectfully requests review by the full Administrative Review Board and not by a single member of the Administrative Review Board.

5. Complainant respectfully requests the opportunity to present oral argument in this matter and to appear before the Administrative Review Board in person in order to simplify the issues presented and address the unique characteristics of the PWCA SUB Plan in a manner that will facilitate the disposition of the proceeding.

Conclusion

For more than thirteen (13) years, the participating employers and participants in the PWCA SUB Plan have understood that the Plan is excepted from the annualization requirement in accordance with the WHD ruling issued on September 16, 2002. The new ruling issued by WHD on October 22, 2015, suddenly revokes the annualization exception for the PWCA SUB Plan without any prior notice to PWCA, the participating employers and participants and requires compliance by all parties within 90 days of the ruling date. This is a totally new and sudden change to the operation of the PWCA SUB Plan that will cause serious financial harm and severe hardship and have a massive negative impact on participants in the PWCA SUB Plan.

PWCA and the participating employers in the Plan did not have knowledge of the new guidelines criteria that the Plan benefit may not be continuous in nature in order for the annualization exception to apply nor the opportunity to address in PWCA's submitted report the application of this new guidelines criteria to the PWCA SUB Plan. PWCA respectfully requests that review be made as to whether the revisions to the Davis-Bacon Resource Book 2015 followed applicable procedures under the Administrative Procedure Act and are valid changes to the guidelines. Further, PWCA respectfully requests that it be provided the opportunity to submit information to WHD regarding the terms and operation of the Plan to address whether the PWCA SUB Plan is "continuous in nature" and compensation for all the employee's work and

that the participating employers and participants in the Plan be given an opportunity to submit information to WHD regarding the matter, before any ruling is made by WHD regarding the application of annualization to the PWCA SUB Plan.

By the terms and operation of the Plan, the benefits provided under the PWCA SUB Plan are not "continuous in nature" and compensation for all of the employee's work. Unlike the types of benefits that WHD has determined are "continuous in nature" and compensation for all of the employee's work, the PWCA SUB Plan benefit is not an annual benefit and is not guaranteed to be provided to at a certain level of payment for a certain period of time. Accordingly, the PWCA SUB Plan is non-continuous in nature and is not compensation for all of the employee's work.

Furthermore, the basic characteristics of the PWCA SUB Plan are fundamentally similar to the basic characteristics of a defined contribution pension plan. Because the PWCA SUB Plan is non-continuous in nature like a defined contribution pension plan and its basic characteristics are fundamentally similar to the basic characteristics of a defined contribution pension plan, the analysis regarding the application of the annualization exception to the PWCA SUB Plan should be similar to the analysis made for a defined contribution pension plan and the annualization exception available to defined contribution pension plans should also be available to supplemental unemployment benefit plans like the PWCA SUB Plan.

Because of the long-standing existence of the annualization exception for the PWCA SUB Plan; the failure of WHD to consider the characteristics of the PWCA SUB Plan that are fundamentally similar to those of a defined contribution pension plan; and the serious financial harm and severe hardship that participants in the PWCA SUB Plan will experience if the annualization exception is revoked, it is respectfully requested that a review by the

Administrative Review Board of WHD's revocation of the annualization exception be granted in order to give PWCA, the participating employers and the participants the opportunity to address WHD's ruling change and that the required compliance date (set for 90 days from October 22, 2015) be held pending until the appeal proceedings are concluded.

Dated: November 10, 2015

Respectfully submitted,

Martha L. Hutzelman
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4264 Bridgelane Place
New Albany, Ohio 43054
(614) 775-9134
(614) 386-9053 (fax)
mhutzelm@insight.rr.com

Counsel for:
PWCA

Attachments:

(1) Copy of Ruling Notice from Wage and Hour Division, U.S. Department of Labor, dated October 22, 2015

(2) Copy of Ruling Letter from Wage and Hour Division, U.S. Department of Labor, regarding PWCA Welfare Benefit Plan, dated September 16, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 10 th day of November, 2015, I caused a copy of the foregoing Petition for Review to be served by certified mail, return receipt requested on the following:

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

Dr. David Weil
Administrator
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3006
Washington, DC 20210

Marc R. Poulos
Executive Director
Indiana-Illinois-Iowa Foundation for Fair Contracting
6170 Joliet Road, Suite 200
Countryside, IL 60525

Martha L. Hutzelman

U.S. Department of Labor

Wage and Hour Division
Washington, D.C. 20210

OCT 22 2015

Law Office of Martha L. Hutzelman
4264 Bridgelane Place
New Albany, Ohio 43054

Jimmie Profitt, PWCA Plan Administrator
4041 North High Street, Suite 400
Columbus, Ohio 43214

RE: Indiana-Illinois-Iowa Foundation for Fair Contracting Request to Revoke the Annualization Exception of PWCA

Dear Ms. Hutzelman:

This letter responds to a complaint filed on July 15, 2013 by the Indiana-Illinois-Iowa Foundation for Fair Contracting ("III FFC"). The III FFC's complaint requests that the Department of Labor revoke the exception from annualization it provided to PWCA (formerly Prevailing Wage Contractors Association, Inc.), in a letter dated September 16, 2002. The Department's Wage and Hour Division ("WHD") served III FFC's complaint on PWCA by letter of July 26, 2013; the letter requested that PWCA submit a response, if any, to the complaint within thirty (30) days. PWCA submitted a response on August 23, 2013.

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 or costs contractors reasonably expect to incur to provide such benefits are creditable toward meeting the Davis-Bacon Act 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 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 PWCA and the III FFC.

PWCA is a nonprofit organization incorporated under the laws of the state of Ohio. PWCA sponsors the Prevailing Wage Contractors Association Inc. Members Welfare Benefit Plan ("PWCA Welfare Benefit Plan"). The SUB Plan(s) at issue here is (are) offered under the PWCA Welfare Benefits Plan to companies which employ individuals subject to the DBA, Service Contract Act, and/or State Prevailing Wage Law.[1] The Department understands the terms of the Plan to permit contributions solely when an employee is on a prevailing wage job, but to generally permit payment of benefits whenever a participant experiences an involuntary termination of employment with a participating employer.

In the Plan year 2005, employers submitted contributions totaling $4,943,928.00 and the Plan made benefit payments totaling $4,402,186.00. In the Plan year 2006, employers submitted contributions totaling $5,807,816.00 and the Plan made benefit payments totaling $5,594,897.00. In the Plan year 2007, employers submitted contributions totaling $6,228,959.00 and the Plan made benefit payments totaling $5,780,346.00. In the Plan year 2008, employers submitted contributions totaling $5,575,535.00 and the Plan made benefit payments totaling $5,250,887.00. In the Plan year 2009, employers submitted contributions totaling $7,984,193.00 and the Plan made benefit payments totaling $7,162,676.00. In the Plan year 2010, employers submitted contributions totaling $14,088,783.00 and the Plan made benefit payments of $12,321,830.00. In the Plan year 2011, employers submitted contributions totaling $17,149,711.00 and the Plan made benefit payments totaling $15,015,528.00.

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.

[1] The Department is uncertain whether PWCA sponsors a single SUB plan in which multiple employers participate, or whether it sponsors a different SUB plan for each employer that uses PWCA as a plan sponsor. Solely for purposes of convenience in drafting, the remainder of the letter assumes that PWCA sponsors a single SUB plan.

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 granted similar annualization exceptions to three SUB plans. 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. The 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. Rep. No. 88-963 (1964); H. Rep. 88-308 (1963). 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 permit contractors to take DBA credit only 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 PWCA's annualization exception. First, it contends PWCA's Plan does not operate "similarly enough" to the defined contribution pension plans to which WHD has granted annualization exceptions. Second, it asserts PWCA's Plan's administration is inconsistent with IRS requirements, focusing on its failure to deduct payroll taxes on benefit payments and its provision of "short week" payments. Third, III FFC asserts that evidence of a related party transaction precludes PWCA from claiming the annualization exception. 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.

Our understanding is that PWCA is making two arguments in support of maintaining the Plan's annualization exception. First, it contends its plan design warrants an exception because it is consistent with those of other SUB plans for which WHD has provided an exception, i.e., its plan design guarantees receipt by the participants of the full cash benefit of the contributions made on

the participant's behalf. Second, directing WHD's attention to Mistick v. Reich, 54 F.3d 900 (D.C. Cir. 1995), PWCA asserts that revoking its annualization exception is improper absent evidence that the Plan benefits provided to employees during periods of private work are financed primarily by Davis-Bacon contributions.

WHD Analysis

WHD has, as PWCA observes, previously 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's calculations indicate that the PWCA Plan made benefit payments constituting 89%, 96%, 93%, 94%, 90%, 87% and 87.5% of contributions for the Plan years of 2005 through 2011, respectively. While 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, the PWCA's Plan's payment record suggests it is ensuring the vast majority of contributions made on employees' behalf are being received in benefit payments.

WHD traditionally annualizes any fringe benefit that is continuous in nature and constitutes compensation for both private and DBA work. The earlier SUB-related ruling 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 appropriate. For example, WHD might initially conclude the cost an employer incurs when 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 in connection with 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 PWCA participating employers 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 PWCA participating employer lays off a participant from a private, non-prevailing wage job, WHD understands that the participant is eligible to receive Plan benefits. 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/DBA work, SUBs compensate an employee for all service performed in a given year. Since we conclude SUBs are continuous in nature and constitute compensation for both private and DBA work, SUBs are subject to annualization and participating employers in PWCA 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.

PWCA contends Mistick requires 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 evidence that PWCA's participating employers submit contributions to a plan distinct from PWCA to finance the unemployment insurance that participants use during periods of private work. Therefore, the rationale for annualizing an employer's contributions to the PWCA Plan applies.

Finally, any reliance on immediate participation and essentially immediate vesting as justifications for an exception to annualization 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.

In sum, contributions to PWCA are subject to annualization because SUBs are continuous in nature and compensation for private and prevailing wage/DBA work. Thus, PWCA participating employers 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 subsequently eliminated the reference to an exception for certain SUBs in the Resource Book but, given the

prior reference, the effect of this ruling is solely prospective. Furthermore, WHD will permit employers that make contributions to PWCA 90 days to come into compliance with this ruling. Thus, as of 90 days from the date of this letter, all PWCA participating employers must annualize contributions to the Plan for purposes of meeting the prevailing wage requirements of the DBA.[2]

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

[2] WHD's understanding is that PWCA can, and will, communicate this ruling to all participating employers. If PWCA is unable to notify any, or all, participating employers, PWCA 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.

U.S. Department of Labor

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

SEP 16 2002

Leonard I. Fischer, Esquire
1775 Hancock Street, Suite 285
San Diego, California 92110

Dear Mr. Fischer:

This is in response to your correspondence, on behalf of the Prevailing Wage Contractors Association (PWCA), for a review of PWCA's Welfare Benefit Plan, which is designed to provide supplemental unemployment benefits to laborers and mechanics employed on projects subject to the Davis-Bacon Act 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 in fact receive the benefits contributed on their behalf, with little or no forfeitures. In addition, changes have been made to increase the accountability of employers for required contributions, to enhance communication with employee participants, and to clarify other plan provisions.

After a careful review of the plan documents and your commitments to make the additional revisions, I have concluded that the PWCA Welfare Benefit plan, to the extent of its provision for supplemental unemployment benefits, is a *bone 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 purposes, for the contributions made to the plan with respect to 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. Of course, any contributions may not exceed any limitations that may be imposed by the Internal Revenue Code.

Sincerely,

Tammy D. McCutchen
Administrator