WHD 1235 - AAA40 NPRK-1
Division of Regulations
Legislation and Interpretation
Wage and Hour Division
US Department of Labor, Rm. S-3502
200 Constitution Ave, N.W.
WA DC 20210
Via email: https://regulationa.gov

To whom it may concern:

REBOUND is a private, non-profit organization currently funded by the rank and file membership of a consortium of building and construction trades unions. Our mission is to promote voluntary compliance with State and Federal prevailing wage laws in Washington, Oregon, Idaho and, sometimes, Montana. Among the trades that we represent are the Bricklayers and Allied Trades [BAC]; the International Union of Elevator Constructors [IUEC]; Roofers and Waterproofers; International Brotherhood of Electrical Workers [IBEW]; the Heat & Frost Insulators and Asbestos Workers [H&F]; the Union of Roofers and Waterproofers [URW]; and Sheet Metal Workers [SMW]. We serve in a consulting capacity to other trades in WA such as the Plumbers and Pipefitters, and we work directly with State Departments of Labor and Industries and the US Department of Labor in all matters concerning the administration of State Public Works Acts and the Davis-Bacon Act. In the past two years alone, we have filed claims for back wages, on behalf of workers, for wage violations, and have collected just short of three million dollars on their behalf.

We are pleased that the USDOL has undertaken the herculean task of reviewing and revising the rules administering the law. On behalf of our Board of Directors, the following comments express REBOUND's position on the proposed revisions to the rules covering the administration of the Davis-Bacon Act for the purpose of modernizing and updating 29CFR parts 1, 3, and 5. We note that the last revisions to these rules were performed in 1981-1982, during the Reagan Administration and, it is our belief that some of those revisions did not reflect the intent of Congress in passing the Act.

To clearly determine the direction that these rule revisions should take, we seek guidance from the US Supreme Court in *United States v. Binghamton Construction Co., 347 U.S.171, 178 (1954)* which makes clear that the law was designed for the benefit of construction workers and that one of the primary ways in which this is accomplished is by preserving local wage standards. It was the specific intent of Congress to ensure that projects using federal funds would not be conducted at the expense of depressing local wage standards by having contractors bring in low wage workers from outside the project area. The WA State Supreme Court goes one step further in *Everett Concrete Products, Inc. v. WA Department of Labor & Industries 748 P.2d 1112, 109 Wn.2d 819 (1988), which states, in part:*

> The purpose behind Washington's prevailing wage law can be discovered by understanding the purpose behind the federal prevailing wage law, the Davis-Bacon Act, 40 U.S.C. § 276a, which served as a model for RCW 39.12. Drake v. Molvik & Olsen Elec., Inc., 107 Wash. 2d 26, 29, 726 P.2d 1238 (1986). The Davis-Bacon Act was enacted "to protect the employees of government contractors from substandard earnings and to preserve local wage standards . . . The employees, not the contractor or its assignee, are the beneficiaries of the Act." Unity Bank & Trust Co. v. United States, 756 F.2d 870, 873 (Fed. Cir. 1985). As stated in Building Trades Coun., at 45: a purpose of the Davis-Bacon Act was to provide protection to local craftsmen who

were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas.

Wage Surveys:
The law gives the USDOL the responsibility for establishing the prevailing wages. This is done primarily through the conduct of wage and hour surveys, which are often several years behind schedule. This means that when the wages are finally established, they are already out of date. While Collectively Bargained Wages are updated, when there is no prevailing wage (50% + at the "same rate,") a weighted-average is taken. In such cases, the already years old wages are never updated until a new survey is performed – and this can sometimes be more than a decade. When this happens, it forces contractors to request conformances because no one knows what wage should be used to bid effectively on the projects. Often, however, the wages derived from conformances are also not reflective of the wages paid.

It was the DOL's position that wage averaging should be used as a last resort, however, its increasing use for establishing wages should be seen as defying the intent of the Act. REBOUND supports all efforts to end, or at least reduce, the practice of wage averaging.

Toward this end, we believe that the 50% + same rate standard for establishing a prevailing wage adopted during the Reagan Administration, and it is simply too high a standard to meet for many geographic areas, thus resulting in an increase in the number of weighted averages prevailed, no benefits amounts established with no cost-of-living adjustments applied, and an increase in the number of requested conformances. Prior to the adoption of the current rules, the standard for prevailing a "same rate", was based on a 3-step process, ultimately allowing for the establishment of a prevailing wage rate based on a 30% same rate. Under the methodology used by the DOL, this 3-step process makes a lot more sense.

REBOUND fully supports the reinstatement of the 3-step 30% rule for establishing prevailing wage rates and further supports the use of the BLS Employment Cost Index [ECI] wage statistics to apply cost of living adjustments to averaged prevailing wages on no less than an annual basis. REBOUND also fully supports allowing the Administrator to utilize slightly differing Collectively Bargained rates, rather than "identical rates" for the purposes of establishing the prevailing wage. Finally, REBOUND fully supports allowing the Administrator to adopt State prevailing wages when there is insufficient data.

Approximately half of American states have their own "Mini-Davis-Bacon Acts" or Prevailing Wage laws, and the wages established under these laws are generally reviewed no less than annually. This would likely make them far more accurate than the wages established through the DOL's dated, and often unchanging, survey results, which do nothing but deprive the workers, who are the intended beneficiaries of the Act, of their full wages.

The proposal, which also provides for the publication of insufficient data, rather than just excluding a given trade or occupation from the wage publication is also one which REBOUND favors in principle, but we are somewhat concerned how little data would be required. Further, this might tie in the proposal that a Supergroup be established and, if this would result in wages derived from a stratified random sampling methodology, we would have serious concerns. These types of methodologies are often subject to political manipulation, depending on who is running things. Any rules that allow for these types of methodologies would require further scrutiny and, if adopted, be ironclad.

REBOUND supports the elimination of metropolitan and rural county, we would, however, like to see the full methodology for determining how data aggregation will be done, especially if the Administrator has the authority to adopt wages resulting from insufficient data or from wages supplied by supergroups.

Overall, however, the WSA supports the proposed revisions to the methodology.

Anti-Retaliation:
REBOUND fully supports the Anti-Retaliation proposed revisions to §5.5(a) and (11), adding a new subsection, §5.5(18). These revisions are critical. Currently, workers have no redress for acts of retaliation by their employers, and the department does not have the authority to order reinstatement. This is, perhaps, the primary reason that workers are afraid to come forward and advise governments of violations of the law. Acts of retaliation can include such employer actions as discharge, demotion, intimidation, threats, blacklisting, harassment, or any other action that discriminates against workers who engage in protected activities, such as reporting violations of the law to the department. REBOUND supports every proposed rule, and all efforts that can be made by the DOL that will result in making these employees whole.

Reconsideration of Wage Determinations:
REBOUND does not take issue with the proposed changes to the reconsideration process; however, we do not believe that they address a primary flaw in the system. The initial appeal is usually submitted to someone who is involved directly in the project – sometimes the person who actually made the decision that is being appealed, sometimes their management, who approved their decision. In our experience, we have always been overruled at this level, making further appeals to the Administrator an expected part of the procedure. This not only places additional burdens on the Office of the Administrator, but it also drags out the appeals process from months to years – sometime several years. And if the Appeal is ultimately upheld, it takes all of that time before the workers will receive the wages that are owed to them.

We have received decisions where the Administrator has agreed with us, that a project should have been subject to the Act, but the decision by the Project Manager that it was not covered, was an honest mistake, thus the workers were not entitled to back wages. How is this kind of decision even possible?

The person to whom original appeals are sent should not be connected in any way with the project decision-making process, nor have authority over the Project Manager. These kinds of decisions can include resolving such questions as whether a project is, in fact, a public work, whether a correct scope of work and related wage is being used, whether a conformance has used the correct scope of work to establish a wage, whether the project falls under the DBA or the SCA, and several other types of questions. Agreement with the appeal would require the person reviewing the appeal to overturn his/her own decision. This would rarely happen. There should be an independent appeal review prior to going to the Administrator. We believe that this would result in fewer appeals to the Administrator, and result in much shorter periods of time for workers to receive the wages owed to them.

Definitions:
Since government agencies make their own decisions regarding whether a project is a public work, REBOUND would support all efforts to clarify the definitions so that the types of errors that result in the misclassification of projects as not being subject to the Act, are corrected, and workers are paid the wages that they are supposed to be receiving under the law.

REBOUND further agrees that the Davis Bacon Act should not only activate when the funds apply to all or most of the work, but also to projects that are only partially publicly funded.

REBOUND also proposes that there be consequences for a contract awarding agency that errs in not publishing wage determinations and/or not advising that a project is subject to the Act. At this time, too

much authority is given to Project Managers with respect to these determinations. Contractors, who bid on projects based on the information they receive from public agencies, should not have to bear the full consequences of errors made by those public agencies.

REBOUND agrees with clarification of "Demolition" as proposed.

REBOUND agrees that the term "contract" needs to be redefined as proposed.

REBOUND agrees with the proposed definition of Prime Contractor.

REBOUND strongly agrees with the expansion of the definition of "site of work" to include certain construction of a building and certain work at a secondary worksite. Please see the Everette Concrete decision noted supra.

REBOUND agrees with the proposed definitions of Flaggers, delineating the Material Supplier exemption, and setting clear, consistent standards for the application of the Act to Truck Drivers, as proposed.

The proposed revised rules would also cover Laborers, Workers, or Mechanics who are employed in the development of a project, irrespective of whether this occurs onsite or offsite. REBOUND fully supports this proposed rule; however, we are not exactly sure on how this would work. For the purposes of inclusion of Laborers, Workers, or Mechanics, the DOL should clarify exactly what they might be doing as part of the development process.

Certified Payroll Requirements:
REBOUND support all proposed revisions to the Certified Payroll Requirements; however, we would ask that the department allow the use of some identification information with respect to the worker. We are not asking for any actual identification information, but if workers could be identified with a random number or letter that is consistent throughout their work on a project, it would provide a far better opportunity for the those outside of the government, in reviewing these public records, to determine whether there have been wage violations when monitoring public payroll records. Currently the public is only entitled to know the dates of work, the classifications used during a given week, and the rates of pay for those classifications. We have no way of knowing from day-to-day or week-to-week whether we are looking at the same worker. This makes it impossible to discern whether there are wage, overtime, or classification violations. Please consider this adding requirement to your revisions. We consider this to be a matter of FOIA's intended purpose of transparency in government.

Annualization of Benefits:
REBOUND supports the proposed revision to the current rule that requires the annualization of benefits when the benefit is not applied on private projects, is not continuous in nature, and has immediate (500 hours or lower) vesting. Annualizing these benefits, for the purposes of establishing a prevailing wage rate completely skews the wage determination. There has been an increase in the number of companies that now offer contractors the ability to purchase insurance (medical, pension, etc.) for their employees, during the hours that they are employed on public works projects, to comply with prevailing wage requirements, but they don't have to participate when they work on private projects. As long as these policies provide immediate vesting and coverage for each individual employee, we would oppose annualizing these amounts. These limited policies allows contractors to meet the requirements of prevailing wage law, and still maintain the regular operation of his/her contracting company. Annualizing these amounts would not only skew the result of a survey or wage determination, it might further look as

if the contractor was in violation of the DBA because the benefits were not paid out on a continuous basis. The WSA supports this exemption from annualization of benefits.

Apprenticeship:
REBOUND supports the proposed revisions to Apprenticeship regulations, and to Debarment; however, we find the explanation of "credible amounts" that can be included in benefits to be a bit confusing.

Omissions of DBA Requirements from Contracts:
REBOUND supports the proposed rules for when a wage determination is wrongly omitted from a contract, but notes that there should also be an obligation placed on the Prime Contractor to check with the Administrator regarding the status of the project's coverage under the Act. Further, because these decisions, actions, or lack of action, are generally made by Project Managers, we iterate here, that we believe some responsibility for owed wages should be borne by the contract awarding agency.

Debarment Standards:
REBOUND supports the proposed rules harmonizing the debarment standards of the DBA and related Acts, as well as the development of new debarment standards.

Cross Withholding:
REBOUND fully supports the proposed rules covering "Withholding" for joint ventures. The corporate form should not interfere with the mandates of the Davis-Bacon Act, and the DOL should have priority in withholding funds to ensure that funds are available to pay workers, prior to any other liens or claims that may otherwise take precedence. This aspect of the proposed rules is critical.

Conclusion

These are REBOUND's preliminary comments. We, our Board of Directors, and our membership, reserve the right to submit further, more in depth comments on specific aspects of these proposed rules, prior to the deadline for comment submission.

Overall, REBOUND is pleased that USDOL in its efforts to update and clarify the rules that administer the Davis-Bacon Act. We believe that the proposed revisions serve as a far better reflection of the requisites and purpose of the Act, itself, than those that are currently in effect. We look forward to their adoption.

Sincerely,

Nicole Blackwood
Executive Director

cc: REBOUND Board of Directors