



International Union of Operating Engineers

AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

September 5, 2017

Via Electronic Mail
(WHDPRAComments@dol.gov)

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Ms. Melissa Smith, Director
Division of Regulations, Legislation, and Interpretation
Wage & Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue NW
Washington, D.C. 20210
(202) 693-0406

Re: Supporting Statement—Davis-Bacon Certified Payroll Form WH-347
OMB Control Number 1235-0008

Dear Director Smith:

The International Union of Operating Engineers (IUOE) submits these comments in response to the Wage and Hour Division's Notice in the July 7, 2017 Federal Registry (Vol 82, No 129, Page 31636) soliciting comments on concerning its proposal to extend Office of Management and Budget approval of the continued collection of certified payrolls and Statements of Compliance from contractors and subcontractors engaged in federally-funded or federally-assisted construction projects.

The International Union of Operating Engineers (IUOE) represents 400,000 working men and women across the United States and Canada. Members of the IUOE are primarily operating engineers, who work as heavy-equipment operators, mechanics, and surveyors in the construction industry, and stationary engineers, who work in operations and maintenance in building and industrial complexes, as well as a number of job classifications in the petrochemical industry.

The IUOE submits these commits to underscore the importance of the submission of certified payroll records as well as the collection of the information required on the "Statement or Compliance." As discussed herein, efficient investigation and enforcement of prevailing wage obligations are vital to prevent illegal underpayment schemes; the submission of certified payroll records and disclosure of at least the information required on the Form WH-347 is both legally required and indispensable to enforcement.



The Copeland "Anti-Kickback" Act prohibits federal contractors or subcontractors engaged in federal construction or repair from inducing an employee to give up any part of the compensation to which he or she is entitled under federal law and requires such contractors and subcontractors to submit weekly statements of compliance. The Anti-Kickback Act was enacted in 1935. With the exception of a three-year hiatus from 1948 to 1951, the U.S. Department of Labor (DOL) regulations have continuously required the submission of weekly payroll records since 1935.

Contractors who perform work on federal or federally-assisted construction projects must *"furnish a weekly statement with respect to the wages paid each employee during the preceding week."* The U.S. Department of Labor form used for that purpose is known as the Wage and Hour Division (WHD) Form 347, or the WH-347.

Compliance with weekly reporting obligations involves minimal amounts of clerical time. Indeed, the required payroll information is the same information that must be maintained by all employers to comply with obligations under overtime laws and/or IRS requirements, including hours worked, rates of pay, amounts and dates of all wage, annuity, and pension payments.

For example, the Fair Labor Standards Act's (FLSA) record-keeping obligations for covered employers include 1) time and day of week when employee's workweek begins, 2) hours worked each day, 3) total hours worked each workweek, 4) basis on which employee's wages are paid (e.g., "\$9 per hour", "\$440 a week", "piecework"), 5) regular hourly pay rate, 6) total daily or weekly straight-time earnings, 7) total overtime earnings for the workweek, 8) all additions to or deductions from the employee's wages, 8) total wages paid each pay period, and 9) date of payment and the pay period covered by the payment. Please see the requirements under FLSA here: <https://www.dol.gov/whd/regs/compliance/whdfs21.pdf>

Contractors are not even required to submit the payroll information on government forms. Contractors have the option of submitting required payroll data in virtually any format. Use of the Wage and Hour Division's Form WH-347 is optional.

The WHD estimates on its website and on the Form 347 that it will take an average of 55 minutes for a first time filer to complete collection of the required information, including time for reviewing the WHD's instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. This estimate includes tasks that a payroll clerk would be required to perform with obligations under other federal law. Please see the WHD website here: <https://www.dol.gov/whd/forms/wh347instr.htm>

In a 2008 rulemaking in which the WHD adopted to revisions that decreased the amount of information that contractors are required to submit on a weekly basis, the DOL sought comments on whether "permitting electronic submissions of responses" would "minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology."

In the DOL rulemaking in 2008, the Department of Navy commented that “electronic submittal would greatly increase efficiencies in receiving, reviewing and sharing” information. Contractor associations also expressed support for electronic submittal initiatives to “the extent that they ease the administrative and storage burdens on government contractors, enhance the privacy and security of sensitive information, are non-mandatory, and help contractors to identify errors before submission to the government.”

In the preamble to the final rule, the WHD states that “Several commenters suggested that government agencies and stakeholders should consider increasing electronic submission of certified payroll records to improve efficiency, but did not believe that the current process was a public burden or endangered worker privacy.”

Two Government Accountability Office (GAO) Reports demonstrate that monitoring of **all** federal contractors regardless of the nature of the services or work performed is needed to ensure that federal dollars are not expended on contractors that defraud the federal government. Submission of weekly payroll reports is a key tool in the fight against fraud.

A 2009 GAO Report on the “Excluded Party List System” found that businesses debarred or suspended for “egregious offenses” – including tax fraud and bribery and kickbacks related to federal contracts - continue to “improperly receive federal contracts.” See the GAO Report here: *Excluded Parties List System – Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds* (GAO-09-173 (February 2009) <http://www.gao.gov/assets/290/286493.pdf>)

Certified payroll records are a key source of proof that contractors are misclassifying workers and committing other prevailing wage violations. The most common violation of prevailing wage law is misclassification of workers in a classification that is paid at a lower rate than the work that the workers actually perform.

The Copeland Act regulations require that contractor must simply verify that the data is correct and complete, that the amounts paid are the prevailing rates, that the classifications for each laborer or mechanic conform to the work done, and that no kickbacks have been deducted from amounts owed to covered workers. The contractor’s statement of compliance does **not** need to be notarized. The IUOE recommends that the Department of Labor require that certified payroll forms be notarized.

The weekly certified payroll report provides a central tool which allows the federal government to ensure compliance with the Davis-Bacon wage determinations. Armed with the certified weekly report, federal agencies can protect the labor standards of workers on federal construction contracts by preventing underpayment of wages and fringe benefits, misclassification of workers (particularly female and minority workers), fringe benefit abuses and illegal kickbacks on federal construction projects.

A separate GAO Report on “Employee Misclassification” cited studies conducted by states, universities, and research institutes finding that misclassification is especially prevalent in the construction industry. See the study here: *Employee Misclassification – Improved Coordination*,

Outreach, and Targeting Could Better Ensure Detection and Prevention (GAO-09-717 (August 2009) <http://www.gao.gov/new.items/d09717.pdf>).

The GAO report cited a study conducted by Harvard University, which estimated that in the construction industry in Maine, approximately 14 percent of construction firms misclassified at least some of their employees each year from 1999 to 2002. Maine state officials told the GAO that following the study, they began targeting construction firms for their unemployment insurance audits and found higher levels of misclassification—up to 45 percent of the firms audited misclassified at least some of their employees.

The GAO cited a study commissioned by DOL in 2000, which found that from 10 percent to 30 percent of firms audited in nine selected states had misclassified employees as independent contractors.

The GAO report says that in its last comprehensive estimate of misclassification, for tax year 1984, IRS estimated that nationally about 15 percent of employers misclassified a total of 3.4 million employees as independent contractors, resulting in an estimated revenue loss of \$1.6 billion (in 1984 dollars). Nearly 60 percent of the revenue loss was attributable to the misclassified individuals failing to report and pay income taxes on compensation they received as misclassified independent contractors. The remaining revenue loss stemmed from the failure of (1) employers and misclassified independent contractors to pay taxes for Social Security and Medicare and (2) employers to pay federal unemployment taxes.

For 84 percent of the workers misclassified as independent contractors in tax year 1984, employers reported the workers' compensation to IRS and the workers, as required, on the IRS Form 1099-MISC information return. These workers subsequently reported most of their compensation (77 percent) on their tax returns. In contrast, workers misclassified as independent contractors for whom employers did not report compensation on Form 1099-MISC reported only 29 percent of their compensation on their tax returns.

The extremely high costs of worker's compensation insurance in the construction industry relative to other industries provides a strong incentive for contractors to misclassify workers to gain a competitive advantage over other contractors in the bidding process. Employers who misclassify workers unfairly gain an advantage in bidding for projects, because such employers may save as much as 30 percent of their payroll costs, including employer-side FICA and FUTA tax obligations, state taxes, and worker's compensation premiums. Many of these workers are undocumented workers and are working illegally in the United States.

The information provided in the weekly certified payrolls is indispensable to enforcement, an oversight role shared by the contracting agency and the U.S. Department of Labor. During an investigation, these agencies can compare the payroll records to other employer and worker records to determine if there has been a wage underpayment.

In addition, building trades unions and their affiliated fair contracting entities use the information in the certified payrolls to support their monitoring efforts. Staff from these groups typically obtain certified payrolls from the contracting agency via a public records request, and then undertake site

visits and interview workers, along with collecting payroll documents about wages and fringes, to determine if the pay rate reported was in fact actually paid.

Finally, while no changes are being made to the certified payroll form in this revision, experienced prevailing wage investigators believe improvements are overdue. The current DOL certified payroll form has not been significantly updated since the All Agency Memorandum #77, issued on July 17, 1968. The current form identifies who is at the jobsite, the type of work performed, the number of hours worked at the site, and the hourly wage paid. For jobs in which a contractor failed to list all workers and/or all hours worked, or misclassified workers in a craft with a lower wage, or paid employees a lesser hourly rate than listed on the determination, the WH-347 provides sufficient information to identify noncompliance.

Prevailing wage underpayment schemes, however, increasingly involve questionable wage deductions and exaggerated fringe-benefit claims. Many state agencies recognize this and have created better certified payroll forms. (Please examples in attachments.) Moreover, since the Davis-Bacon Act contains no private right of action for a worker to bring his/her own claims against the employer, individuals who suffer wage theft on federally-assisted construction projects have only the DOL for recompense. As such, the agency should strive to implement the best possible enforcement policies with the following form revisions.

- Information on Other Deductions
- Itemized Fringe Benefit Credits
- Fringe Benefit Payments Plan Name

The WH-347 form contains a line called "other" deductions. The instruction for this section of the form states the following:

"Column 8 - Deductions: Five columns are provided for showing deductions made. If more than five deduction are involved, use the first four columns and show the balance deductions under "Other" column; show actual total under "Total Deductions" column; and in the attachment to the payroll describe the deduction(s) contained in the "Other" column. All deductions must be in accordance with the provisions of the Copeland Act Regulations, 29 C.F.R., Part 3. If an individual worked on other jobs in addition to this project, show actual deductions from his/her weekly gross wage, and indicate that deductions are based on his gross wages." (emphasis added)

Unfortunately, those who review certified payrolls almost never see such an attachment, in part because the contractors are not clearly informed of this requirement. The federal certified payroll form itself does not disclose this requirement; instead the rule is disclosed only on the form instructions. Other state certified payroll forms clearly explain the requirement by disclosing this rule on the certified payroll form itself, with something as simple as an asterisk and accompanying note on the other deduction section of the form.

The WH-347 provides three boxes for a contractor to check regarding the payment of fringe benefits; Box a if fringe benefits "as listed in the contract" are made to benefit plans, Box b if the

entire fringe amount is paid as cash, and Box c for any exceptions to these two methods. The instructions for Box c are quoted below in full.

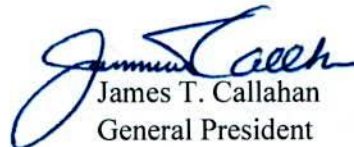
***“Use of Section 4(c), Exceptions:** Any contractor who is making payment to approved plans, funds, or programs in amounts less than the wage determination requires is obliged to pay the deficiency directly to the covered worker as cash in lieu of fringe benefits. Enter any exceptions to section 4(a) or 4(b) in section 4(c). **Enter in the Exception column the craft, and enter in the Explanation column the hourly amount paid each worker as cash in lieu of fringe benefits and the hourly amount paid to plans, funds, or programs as fringe benefits.** The contractor must pay an amount not less than the predetermined rate plus cash in lieu of fringe benefits as shown in section 4(c) to each such individual for all hours worked (unless otherwise provided by applicable wage determination) on the Federal or Federally assisted project. Enter the rate paid and amount of cash paid in lieu of fringe benefits per hour in column 6 on the payroll.” (emphasis added)*

There are several problems with these instructions. First, the federal certified payroll form does not clearly correspond to the instructions; the form contains a line labeled “explanation” but not a line that says hourly fringe contributions. As a result, few contractors complete the form properly. Second, even if the form were to contain a total hourly amount, it would not disclose how much per hour was taken as a fringe credit for each type of fringe benefit provided. It is exactly this information that is required to determine if a contractor has claimed an excessive fringe credit.

The WH-347 lacks any information on the name of the benefit plans used when fringe benefit credits are taken. This is a serious omission from the point of view of compliance work; the name of the plan is needed to review annual benefit plan filings to determine if the plan conforms to various prevailing wage fringe benefit rules. For example, the chapter on investigations in the 2015 edition of the U.S. DOL Prevailing Wage Resource Book states “Check certified payrolls for information on contributions to fringe benefit plans” and later “Examine documents which indicate the firm made contributions (or incurred costs) to fringe benefit plans.” (Page 11). Such work is hindered if the name of the plan is unknown.

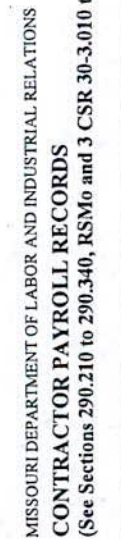
Thank you for the opportunity to comment on the need to continue and enhance the form and process for submission of certified payrolls – a key underpinning upon which public agencies of all sorts can fight fraud, abuse, and the employment of unauthorized workers.

Sincerely,


James T. Callahan
General President

Attachments

- The disclosure of other deductions. (Missouri form)
- The disclosure of the hourly fringe credits by each benefit type. (Pennsylvania form)
- The disclosure by name of each benefit plan used. (Oregon form)



(See Sections 290.210 to 290.340, RSMo and 3 CSR 30-3.010 to 8 CSR 30-3.060)

*** If a worker performs work in more than one occupational title, you must separately list the hours worked per occupational title and wage rates. ***

THE NOTARIZATION MUST BE COMPLETED ON FIRST AND LAST SUBMISSIONS ONLY. ALL OTHER INFORMATION MUST BE COMPLETED WEEKLY.

*FRINGE BENEFITS EXPLANATION (FB): Bona fide benefits contribution, except those required by Federal or State Law (unemployment tax, workers' compensation, income taxes, etc.)

Please specify the type of benefits provided and contributions per hour:

- 1) Medical or hospital care _____
- 2) Pension or retirement _____
- 3) Life insurance _____
- 4) Disability _____
- 5) Vacation, holiday _____
- 6) Other (please specify) _____

CERTIFIED STATEMENT OF COMPLIANCE

1. The undersigned, having executed a contract with _____
(AWARDING AGENCY, CONTRACTOR OR SUBCONTRACTOR)
_____ for the construction of the above-identified project, acknowledges that:
 - (a) The prevailing wage requirements and the predetermined rates are included in the aforesaid contract.
 - (b) Correction of any infractions of the aforesaid conditions is the contractor's or subcontractor's responsibility.
 - (c) It is the contractor's responsibility to include the Prevailing Wage requirements and the predetermined rates in any subcontract or lower tier subcontract for this project.
2. The undersigned certifies that:
 - (a) Neither he nor his firm, nor any firm, corporation or partnership in which he or his firm has an interest is debarred by the Secretary of Labor and Industry pursuant to Section 11(e) of the PA Prevailing Wage Act, Act of August 15, 1961, P.L. 987 as amended, 43 P.S. § 165-11(e).
 - (b) No part of this contract has been or will be subcontracted to any subcontractor if such subcontractor or any firm, corporation or partnership in which such subcontractor has an interest is debarred pursuant to the aforementioned statute.
3. The undersigned certifies that:
 - (a) the legal name and the business address of the contractor or subcontractor are: _____
 - (b) The undersigned is: ☐ a single proprietorship ☐ a corporation organized in the state of _____
☐ a partnership ☐ other organization (describe) _____
 - (c) The name, title and address of the owner, partners or officers of the contractor/subcontractor are:

NAME	TITLE	ADDRESS

The willful falsification of any of the above statements may subject the contractor to civil or criminal prosecution, provided in the PA Prevailing Wage Act of August 15, 1961, P.L. 987, as amended, August 9, 1963, 43 P.S. § 165.1 through 165.17.

(DATE)

(SIGNATURE)

(TITLE)

SEAL

Taken, sworn and subscribed before me this _____ Day
of _____ A.D., _____

CERTIFIED STATEMENT

Date: _____

I, _____ (NAME OF SIGNATORY PARTY) _____ (TITLE)
do hereby state:

(1) That I pay or supervise the payment of the persons employed by:

_____ (CONTRACTOR, SUBCONTRACTOR OR SURETY)
on the _____ (BUILDING OR WORK) _____, that during the payroll period
commencing on the _____ day of _____ (MONTH) _____, (YEAR) _____, and ending the _____ day
of _____ (MONTH) _____, (YEAR) _____, all persons employed on said project have been paid the
full weekly wages earned, that no rebates have been or will be made either directly or
indirectly to or on behalf of said _____ (CONTRACTOR, SUBCONTRACTOR OR SURETY)
from the full weekly wages earned by any person, and that no deductions have been
made either directly or indirectly from the full wages earned by any person, other than
permissible deductions as specified in ORS 652.610, and as defined in Regulations, Part
3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as
amended (48 Stat. 948, 63 Stat. 108, 72 Stat. 967; 76 Stat. 357; 40 U.S.C. 276c), and
described below:

(2) That any payrolls otherwise under this contract required to be submitted for the above
period are correct and complete; that the wage rates for workers contained therein are
not less than the applicable wage rates contained in any wage determination
incorporated into the contract; that the classifications set forth therein for each worker
conform with work performed.

(3) That any apprentices employed in the above period are duly registered in a bona fide
apprenticeship program registered with a state apprenticeship agency recognized by the
Bureau of Apprenticeship and Training, United States Department of Labor, or if no such
recognized agency exists in a state, are registered with the Bureau of Apprenticeship
and Training, United States Department of Labor.

I HAVE READ THIS CERTIFIED STATEMENT, KNOW THE CONTENTS THEREOF
AND IT IS TRUE TO MY KNOWLEDGE:

(NAME AND TITLE)

(SIGNATURE AND DATE)

In addition to completing sections (1) - (3), if your project is subject to the federal
Davis-Bacon Act requirements, complete the following section as well:

(4) That:
(a) WHERE FRINGE BENEFITS ARE PAID TO APPROVED PLANS, FUNDS OR
PROGRAMS

☐ - In addition to the basic hourly wage rates paid to each laborer or mechanic
listed in the above referenced payroll, payments of fringe benefits as listed in
the contract have been or will be made to appropriate programs for the benefit
of such employees, except as noted in Section 4(c) below.

(b) WHERE FRINGE BENEFITS ARE PAID IN CASH

☐ - Each laborer or mechanic listed in the above referenced payroll has been paid,
as indicated on the payroll, an amount not less than the sum of the applicable
basic hourly wage rate plus the amount of the required fringe benefits as listed
in the contract, except as noted in Section 4(c) below.

(c) EXCEPTIONS:

EXCEPTION (CRAFT)	EXPLANATION

REMARKS:

NAME AND TITLE	SIGNATURE
THE WILLFUL FALSIFICATION OF ANY OF THE ABOVE STATEMENTS MAY SUBJECT THE CONTRACTOR OR SUBCONTRACTOR TO CIVIL OR CRIMINAL PROSECUTION. SEE SECTION 1001 OF TITLE 18 AND SECTION 231 OF TITLE 31 OF THE UNITED STATES CODE.	

FILE THIS FORM WITH THE CONTRACTING AGENCY

NOTE TO CONTRACTORS: YOU MUST ATTACH COPIES OF THIS FORM TO EACH OF YOUR PAYROLL SUBMISSIONS ON THIS PROJECT.

INSTRUCTIONS AND ADDITIONAL FORMS ARE AVAILABLE ON OUR WEBSITE: WWW.OREGON.GOV/BOLI.