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May 17, 2022

Ms. Amy DeBisschop, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

Re: (RIN) 1235-AA40

Dear Ms. DeBisschop,

The Laborers' International Union of North America (LIUNA) submits the attached comments to the U.S. Department of Labor in response to the Notice of Proposed Rulemaking on Updating the Davis-Bacon and Related Acts.

Your time and attention to the attached are appreciated. Should you have any questions, please contact this office.

With kind regards, I am

Sincerely yours,

Terry O'Sullivan

TERRY O'SULLIVAN
General President

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Attachment

Feel the Power

COMMENTS OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA TO THE NOTICE OF PROPOSED RULEMAKING "UPDATING THE DAVIS-BACON AND RELATED ACTS REGULATIONS" (RIN 1235–AA40)

The Laborers' International Union of North America ("LIUNA") is a diverse union representing nearly half a million members, most of whom work in the construction industry. LIUNA construction members work on a vast array of private and publicly funded projects, including federal and federally-assisted projects and state and locally funded projects. These include roads, highways, dams, bridges, tunnels, airports, rail and transit systems, energy generation and distribution systems, pipelines, hospitals and other health care facilities, schools, housing, buildings of all types, water and clean air works, demolition, emergency preparedness, environmental remediation and renovation projects. In short, Laborers build projects in both the vertical and horizontal sectors across the United States in many hundreds of local markets. As such, the Davis-Bacon and Related Acts ("DBRA") are of vital importance to LIUNA construction members because their local labor standards are protected by US Department of Labor (DOL or "Department") prevailing wage determinations every time they are employed on a federal or federally-assisted project.

It has been recognized since 1931 with the enactment of the Davis-Bacon Act ("DBA" or "Act") that as a major purchaser of construction services, the federal government has an enormous opportunity and obligation to protect the labor standards of workers constructing public buildings and public works. We support the Department in proposing Davis-Bacon regulatory reforms in this NPRM. We believe these changes will ensure that needed infrastructure construction will mirror – not erode – locally established labor standards, and at the same time benefit taxpayers, construction workers, their families, responsible contractors, and local communities.

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A. LIUNA SUPPORTS ADOPTION OF THE THREE-STEP PROCEDURE TO DETERMINE THE LOCAL WAGE PAID TO THE GREATEST NUMBER OF WORKERS IN A CLASSIFICATION

LIUNA supports revising the definition of the "prevailing wage" to follow a three-step process to ascertain the predominate locally prevailing wages and fringe benefits. The NPRM's conclusion is supported by two principal reasons: first, the original factual grounds advanced for promulgation of the current regulation are no longer supportable or valid, and, second, the Department's forty-years of experience with the current regulation have exposed its negative impact on local labor standards.

The Department now proposes to return to the definition of "prevailing wage" in § 1.2 that it used from 1935 to 1983. Under that three-step method (also known as the 30-percent rule), in the absence of a wage rate paid to a majority of workers in a particular classification, a wage rate will be considered prevailing if it is paid to at least 30 percent of such workers. NPRM at 15783.[1]

This proposed change is clearly within the Secretary of Labor's discretion to revise the survey methodology to determine a prevailing wage which "mirrors" actual wages paid to laborers and mechanics in a classification.[2] The term "prevailing wage" does not have a fixed meaning and has been defined in a variety of ways over the history of the DBRA and under state prevailing wage laws that mirror the DBA. The Act itself does not establish a method for determining prevailing wages. Rather, as noted in the NPRM at 15711, it "delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing." *Building & Constr. Trades' Dept., AFL-CIO v. Donovan*, 712 F. 2d 611, 616 (D.C. Cir. 1983).

THE 1981/82 FACTUAL CONCLUSIONS UNDERLYING THE ELIMINATION OF THE 30 PERCENT RULE ARE NO LONGER SUPPORTABLE.

The 1982 regulatory changes included a revision to the definition of "prevailing" rate which departed from the previous standard of a 30 percent modal to constitute a prevailing wage to a majority modal rate, premised largely on the argument that using a 30 percent modal threshold was "inflationary." NPRM at 15703. The Department in 1982 adopted the new two-step averaging procedure based on several erroneous premises, including that the use of the 30 percent modal rate led to increased project costs and thus had an inflationary impact on the

[1] A number of states have adopted similar definitions of "prevailing" under their state prevailing wage laws. For example, Illinois amended its prevailing wage law to adopt the CBA "**provided that said employers or members of said employer associations employ at least 30% of the laborers, workers, or mechanics in the same trade** or occupation in the locality where the work is being performed." Other states which utilize methodologies based on a "frequency of use" standard (i.e., the "mode") that is lower than 50% include: New York (30% mode), Maryland (40% mode), Nevada (40% mode), Minnesota and California.

[2] *Building & Construction Trades' Department, AFL-CIO v. Donovan,* 712 F. 2d 611, 616 (D.C. Cir. 1983).

economy. Moreover, the factual basis for these conclusions have been discounted over the past forty years by more sophisticated analytical tools available to economists and others with expertise in labor market economics.[3]

Agency reviews by the General Accounting Office (GAO) and the Council of Economic Advisors (CEA) became the principle basis for the Department's conclusion that the 30 percent rule led to increased project labor costs which were imposed upon the federal government and were inflationary.[4] The GAO circulated its work in a 1979 report.[5] That conclusion was based upon an erroneous wage differential calculation which has been thoroughly discredited by peer-reviewed scholarship published since 1981-82.[6] At the time, the GAO itself conceded that its conclusions did not have "statistical validity" and were only a "useful indication" of cost estimates. 1979 GAO Report at 15.[7]

Moreover, the GAO was forthright that it did not consider any of the key variables which are the foundation of modern economic regression analysis. Most important, the GAO admitted that it did not consider how productivity differences would influence its conclusion regarding the so-called "inflationary" impact of the survey methodology. GAO responded to the criticism that its analysis had "failed to include productivity as a variable" by incredibly stating that "**worker productivity is a procurement and contracting issue, and has little to do with Labor's administration of the Davis-Bacon Act."** 1979 GAO Report at 15-16.

More advanced statistical methods than used by GAO have since established that in the construction industry the substitution of lower wage, lower skilled workers for higher paid, higher skilled workers does not reduce project costs because the lower productivity of lower skilled workers offsets incrementally higher wages paid to more skilled workers. Contractors using higher skilled, higher wage workers make other cost-saving substitutions in choices impacting project costs such as a need for less supervision, substitution of more technological advanced construction methods, and alternative approaches to construction materials.[8]

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[3] Even if the Department had a defensible factual basis for its rescission of the 30% rule in 1981/82, consideration of costs and inflationary impact is not consistent with Congress' purpose in enacting the DBA. NPRM at 15756.

[4] The Department acknowledged "we used estimates of percent changes from Davis-Bacon rates to average rates derived from a CEA study of less unionized urban areas." 47 Fed. Reg. 23649.

[5] *The Davis Bacon Act Should be Repealed*, (1979) (1979 GAO Report). https:// www.gao.gov/assets/hrd-79-18.pdf.

[6] For a critique of the "wage differential" approach see Kevin Duncan and Russell Ormiston, "What Does the Research Tell Us About Prevailing Wage Laws." *Labor Studies Journal* 44 (2), 2018, pp. 141-142.

[7] The GAO stated: We "recognize **that our sample size was insufficient for projecting the results to the year's universe of construction costs with statistical validity.** However, because of the nature of our selection process, we have no reason to believe that our sample of projects was unrepresentative of the universe. Therefore, we believe that our cost estimates are a **useful indication** of the order of magnitude of the increased construction costs resulting from Davis-Bacon wage determinations." 1979 GAO Report at 15.

[8] William Blankenau and Steven Cassou, "Industry Differences in the Elasticity of Substitution and Rate of Biased Technological Change between Skilled and Unskilled Labor," *Applied Economics*, 2011, 43: 3129-3142; and

The GAO Report also relied in large part on the Goldfarb and Morrall *Analysis of Certain Aspects of the Administration of the Davis-Bacon Act* for its conclusions regarding the inflationary impact of the methodology.[9] But an examination of the Goldfarb and Morrall study reveals that the authors themselves made findings that refuted, rather than supported, the GAO's conclusions that the 30 percent rule always led to higher wages. Goldfarb and Morell stated their "**analysis does not support the contention that the present Davis Bacon procedures produce rates that are 'typically higher' than the actual average rate paid for the same craft** in the labor market." Goldfarb and Morrall at 11.

The factual analysis in the current NPRM's Regulatory Impact Analysis demonstrates when the 30 percent rule is substituted for the averaging methods that some wage rates would be higher and some wage rates would be lower.[10] Simply put, utilizing the 30 percent rule neither automatically produces a lower wage nor does it automatically produce a higher CBA-based wage.

Finally, the 1979 GAO Report, subtly entitled *The Davis Bacon Act Should be Repealed*, made it evident that the agency's goal was not to improve the methodology but to repeal the Act itself. As the NPRM correctly observes the "concerns about inflation at the time of the 1982 rule were based in part on a criticism of the Act itself." NPRM at 15704.

THE DEPARTMENT'S EXPERIENCE WITH THE CURRENT RULE SHOWS THAT IT HAS LED TO NEGATIVE CONSEQUENCES THAT DEPRESS LOCAL LABOR STANDARDS.

Over the past four decades under the current rule, the use of the weighted average methodology has become the norm in surveys.[11] Although the Department accepted the term "prevailing" as one that "contemplates that wage determinations mirror, to the extent possible, those rates 'actually paid' to workers (47 FR 23645)," the Department in 1982 nonetheless chose a methodology that delivered the opposite. The frequent result was the determination of wages

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Edward Balistreri, Christine McDaniel, and Eina Vivian Wong, "An Estimation of U.S. Industry-Level Capital-Labor Substitution Elasticities: Support for Cobb-Douglas," *The North American Journal of Economics and Finance*, 2003, 14: 343-356.

[9] Robert S. Goldfarb & John F. Morrall, "An Analysis of Certain Aspects of the Administration of the Davis-Bacon Act," Council on Wage and Price Stability (May 1976), reprinted in Bureau of Nat'l Affs., Construction Labor Report, No. 1079, D– 1, D–2 (1976).

[10] "Based on this demonstration of the impact of changing from the current to the proposed definition of 'prevailing,' some published wage rates and fringe benefit rates may increase and others may decrease." NPRM at 15773.

[11] "[T]he Department concludes that eliminating the 30-percent rule ultimately resulted in an overuse of average rates." NPRM at 15704. The Department's review of the evidence estimates that the implementation of the two-step rule in 1982 nearly doubled rate of wage determinations base on average rates before and after 1982 (from 15% to roughly 26%), and since then has steadily risen to currently 64% of wage determinations. NPRM at 15703.

which are paid to few if any workers in the local labor market, while at the same time ignoring the wage which is actually *most* frequently paid to workers in the local construction market. The average is neither an actual wage paid nor does it necessarily produce a predominate wage.

The NPRM concludes that "[a]n average rate does not reflect a true rate which is actually being paid by any group of contractors in the community being surveyed." Instead of using an artificial rate, the NPRM proposes to use the "current and predominant actual rate paid" (a modal rate) and to turn to an average rate only "as a last resort." NPRM at 15703. This 30 percent method is more consistent with the Act's purposes because the averaging method is highly sensitive to "outlier" wage rates paid to a very few workers that are far below the most frequently paid rate. For example, when a few low outlier rates are averaged with rates clustering toward the median, over time it produces a downward pressure on local labor standards and defeats the purpose of the Act.[12]

Protecting the actual, locally established wage rates ensures that contractors from the local community have an equal chance to compete for federal jobs with low-ball contractors not willing to abide by local labor standards, including wages, pension, and health benefits. (*"*A fundamental purpose of the Davis-Bacon Act was to limit low-bid contractors from depressing local wage rates. See 5 U.S. O.L.C. at 176". NPRM at 15704). As the NPRM finds:

> "Using an average to determine the minimum wage rate on contracts allows a single low-wage contractor in the area to depress wage rates on Federal contracts below the higher rate that may be generally more prevalent in the community—by factoring into (and lowering) the calculation of the average that is used to set the minimum wage rates on local Federal contracts". NPRM at 15704.

B. ALLOW VARIABLE RATES THAT ARE FUNCTIONALLY EQUIVALENT TO BE COUNTED TOGETHER

INTRODUCTION

The NPRM proposes to amend the regulations on compiling wage rate information to allow for variable rates that are "functionally equivalent" to be counted together for the purpose of determining whether a single wage rate prevails. The proposal is intended to correct the widespread consequences which followed in the wake of the 2006 decision in *Mistick Construction*: in particular, "the increased use of weighted average rates." NPRM at 15706.

[12] 5 Op. O.L.C.

LIUNA supports the proposed amendment with a clarification to ensure that variable rates arising from geographic applications in one or more collective bargaining agreements are considered "functionally equivalent."

Since the *Mistick Construction* ruling in 2006, the increasing use by the WHD of statewide surveys and the aggregation of counties within groups and supergroups has made the problem arising from *Mistick Construction* much more acute in local labor markets where multiple CBAs are applicable to a particular craft in that area. The *Mistick Construction* holding has a disproportionately adverse effect on classifications of laborers because contractors and LIUNA Local Unions commonly negotiate multiple collective bargaining agreements within a single state. These choices made by labor and management representatives who work and bid in local construction labor markets are precisely those local labor standards that the Davis-Bacon Act is designed to reflect. The ever-growing use of county groups, supergroups and state-wide survey areas has increasingly swept more than one CBA into these larger geographic areas resulting in widespread averaged rates that undermine the Act's intent.

Therefore, the final rule should clarify that variable rates covering the same classification are considered the "same wage" when they derive from one or more CBAs applicable to the counties encompassed within the survey area, whether that be a county, group of counties, a supergroup of counties. The language of the proposed regulation should be modified to reflect this geographic component as described in more detail below.

LIUNA SUPPORTS THE CORRECTION OF THE IMPACT OF THE MISTICK CONSTRUCTION DECISION IN THE FINAL RULE.

We support regulatory modification, with clarification, to the current methodology to revise language in the definition of "prevailing wage" as interpreted in the decision in *Mistick Construction.* In *Mistick Construction,* the ARB rejected the prior, long-standing practice of counting "variable" union rates toward a majority rate, in part, because it concluded that the practice gave "undue weight" to CBA wage rates.[13] To the contrary, the practical result of the decision is that in countless state-wide Davis-Bacon surveys, wage determinations are issued on an SU basis notwithstanding the fact that CBA rates clearly predominate in the locality.

One example occurred in West Virginia during its last statewide building survey published in 2012. In West Virginia, there were seven LIUNA collective bargaining agreements covering General Laborers throughout the state. The overwhelming majority of the data submitted during the survey was based on those CBA rates for the General Laborer classification, with over 90 percent of the data reported statewide based on LIUNA CBA rates and over 82 percent based on LIUNA CBA rates in the rural groups. Notwithstanding, a weighted average rate was published

[13] Rates for a given crafts may vary because of premiums, zones, type of construction, project size of construction, geographic location and by dollar volume.

for General Laborers in 13 of the 28 counties in the larger of the two rural groups. In two metropolitan groups, a weighted average rate for General Laborers was published in 4 of the 21 counties.

In short, a review of the total data in the West Virginia wage survey demonstrates that variable CBA rates were averaged across large multi-county areas leading to wage determinations for General Laborers in West Virginia which do not mirror the local labor market. In circumstances where CBA rates are clearly paid the greatest number of the workers in the classification, as was the case for General Laborers in the West Virginia building survey, the prevailing wage rate should be reflective of that local labor market practice.

A second example is illustrated by the following table showing the results of the last building survey in Ohio in 2012 where there were 21 LIUNA local unions which had negotiated 21 CBAs for 87 counties. In three Laborers classifications, the total statewide data shows overwhelming data submitted from LIUNA CBAs yet the published wage determinations disproportionately represented SU rates in every case.

2012 Ohio Building Survey	**% of CBA and SU Data Submitted for General Laborers**	**% of Wage Determinations Issued for General Laborer**
	CBA Based 75.06%	CBA Based 53.41%
	SU 24.94%	SU 45.45%
		Union AVG 1.14%

2012 Ohio Building Survey	**% of CBA and SU Data submitted for Mason Tender-Brick**	**% of CBA and SU Wage Determinations Issued for Mason Tender-Brick**
	CBA Based 95.3%	CBA Based 67.04%
	SU 4.7%	SU 19.32%
		Union AVG 13.64%

2012 Ohio Building Survey	**% of CBA and SU Data Submitted For Mason Tender-Cement/Concrete**	**% of CBA and SU Wage Determinations Issued Mason Tender-Cement/Concrete**
	CBA Based 95.9%	CBA Based 80.68%
	SU 4.1%	SU 12.50%
		Union AVG 6.82%

Changes made in the WHD survey methodology since the *Mistick Construction* decision have magnified the negative impact of the ruling. The practice of conducting statewide surveys in

order to gather a sufficient amount of wage data for key classifications such as the General Laborer, and the metro-rural data restriction, create larger county groupings with arbitrary configurations unrelated to labor markets. These larger county groups often include more than one CBA rate for the same classification. When *Mistick Construction* rules are applied, it often leads to predominantly CBA data - higher than 50% - yielding a weighted average rate in these counties because no *single* union rate was over 50%. Revisions to the regulations will reduce survey results such as West Virginia and Ohio in which "SU" rates are frequently issued in circumstances where CBA rates make up the majority of the wage data reported by Local Unions and contractors in the overall survey.[14]

As the specific examples described in these comments show, the *Mistick Construction* rule has had a disproportionately adverse effect on classifications of Laborers because contractors and LIUNA Local Unions commonly negotiate multiple collective bargaining agreements within a single state or region of counties within a state. These choices made by labor and industry representatives who work and bid in the local construction labor markets are precisely those local labor standards that the Davis-Bacon Act is designed to reflect.

THE RATE VARIATIONS IN MISTICK CONSTRUCTION INCLUDED RATES FOR THE SAME CLASSIFICATION THAT VARIED BECAUSE THE CBA FOR DIFFERENT GEOGRAPHIC LOCATIONS WITHIN THE SURVEY AREA.

Mistick Construction involved surveys for Allegheny County, Pa. and for Beaver, Butler, Fayette, Washington and Westmoreland Counties, Pa, in which WHD collected residential construction wage payment data from 385 projects that were under construction during a one-year time frame. The question of different wage and fringe benefit packages depending on geographic locations was directly before the ARB in *Mistick Construction*.

The Administrator in *Mistick Construction* presented a detailed description of the different types of variable rates from CBAs of painters, bricklayers and carpenters at issue.[15] The Painters CBA covered three counties - Allegany, Fayette and Washington. The CBA contained different wage rates for each county with variations in the base rate. Admin. Statement at 6. The Bricklayers CBA covered six counties divided into five areas. The Bricklayers' rates generally varied from county to county, but, in some instances, varied according to township. Admin. Statement at 23, fn. 15. The Carpenters CBA covered five counties, but its variations arose due to escalator

[14] The West Virginia and Ohio Survey examples are based upon data in the WD-22s in both surveys.

[15] Statement of the Administrator in Response to the Petition for Review, *Mistick Construction*, 2006 WL 861357, ARB No. 04-051 (ARB Mar. 31, 2006), USDOL/OALJ Reporter: ARB Decision Caselist -- March 2006 | U.S. Department of Labor.

clauses[16] and "did not provide for different wage and fringe benefit packages depending on geographic locations." Ad. Brief at 22, fn. 22.

The Administrator argued that WHD should be allowed to utilize differing rates coming from different geographic locations within the geographic area under survey. Specifically, the Administrator argued that 29 C.F.R. § 1.3(b)(2) permits her to consider "signed collective bargaining agreements" in making wage determinations. It is, clear, therefore, that the ARB in *Mistick Construction* was rejecting a variety of types of rate variations when it interpreted Sec. 1.2 (same wage) to prohibit the Administrator from utilizing variable union rates. One of these is when the union rate for the same classification varies by geographic area for different counties (or other geographic boundary i.e., township) being surveyed.[17] In some instances, the variation comes from a single collective bargaining agreement covering more than one county. Or in the case of LIUNA in the West Virginia and Ohio surveys - and in many other states - it comes from more than one CBA applicable to laborers' classifications in the area being surveyed. Indeed, in some instances, two CBAs from two LIUNA locals may cover different parts of the same county. Therefore, LIUNA urges a clarification to the NPRM proposed amended regulations to reflect variable rates based on geographic coverage of CBAs in the surveyed area.

LIUNA urges that both the final explanatory language and the final regulatory language clearly state that when variations in base rates for the same classification due to geographic locations explained in one or more CBAs applicable to the survey area that those rates are "functionally equivalent." The Department should uphold the local area practice by treating such varying rates as one, or risk generating a weighted average that will depress both negotiated rates.
The NPRM proposes to amend § 1.3 (Obtaining and compiling wage rate information) as follows:

> **"**(e) In determining the prevailing wage, the Administrator may treat variable wage rates paid by a contractor or contractors to employees within the same classification as the same wage where the pay rates are functionally equivalent, **as explained by a collective bargaining agreement** or written policy otherwise maintained by the contractor."

LIUNA urges a clarification in the final rule as follows:

> "Variable wage rates paid to laborers or mechanics in the same classification under <u>one or more</u> collective bargaining agreements applicable to the same classification in the same

[16] When a survey time period covers one or more CBA time periods wherein an escalation in the rates has occurred, the negotiated rates will differ when the survey time period straddles the date for escalation.
[17] Other variations rejected in *Mistick Construction* arose from differing rates submitted when commercial (i.e., "building "rates) were paid on residential projects. In others, the total compensation was identical but there were differences in the basic hourly rate.

area shall be deemed the 'same wage' for purposes of determining the prevailing wage under subsection 1.2".

C. LIUNA SUPPORTS ALLOWING PROJECT DATA FROM FEDERAL AND FEDERALLY-ASSISTED PROJECTS TO BE CONSIDERED IN BUILDING AND RESIDENTIAL SURVEYS IN ORDER TO MAXIMIZE THE SUFFICIENCY OF SURVEY DATA

LIUNA strongly urges the department to revise § 1.3(d), to allow survey data from federal or federally-assisted projects subject to Davis-Bacon prevailing wage requirements to be used in determining prevailing wages for building and residential construction wage determinations. NPRM at 15708.

In its 1981-82 rulemaking, the Department rescinded the 50-year practice of allowing the use of federal data and concluded without basis that "with respect to building and residential construction, invariably including Federal project data in calculating prevailing wage rates applicable to building and residential construction projects"…would "skew [ ] the results upward." NPRM at 15708. This conclusion was without support then and is without support now.

The NPRM concludes that there will be $217 billion in Federal and federally-assisted construction spending per year covering an estimated 1.2 million U.S. construction workers. The Department expects these numbers to continue to grow as Federal and State governments address the extraordinary infrastructure needs of the country, including the energy and transportation infrastructure. NPRM at 15699. Yet the current regulation omits data from projects on two of the four major subsectors of the construction market. The $217 billion in covered work referred to in the NPRM includes not only heavy and highway projects, but substantial amounts of residential and building work.

The current 1.3(d) regulation excludes data from large segments of the local construction markets.[18] This exclusion invariably exacerbates the problem of obtaining sufficient data in those surveys. While 29 C.F.R. 1.3(d) allows for an "escape hatch" if there is insufficient data in building and residential surveys, the various tests used over the years are narrowly defined and hard to meet.

[18] The current regulation provides that "[i]n compiling wage rate data for building and residential wage determinations, the Administrator will not use data from Federal or federally assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data. Data from Federal or federally assisted projects will be used in compiling wage rate data for heavy and highway wage determinations." 29 C.F.R. 1.3(d) (Obtaining and compiling wage rate information).

After some forty years of excluding federal and federally-assisted data, the Secretary has the discretion to now course-correct in the face of difficulties in obtaining sufficient data and the omission of data when large segments of local market data are excluded. The Administrator's reliance on various sufficiency standards is misplaced in this context because it often causes large swaths of relevant wage data from the local market to be excluded based solely on a disproportionately *de minimis* showing of private data. *See Plumbers Local Union No. 27*, ARB Case No. 97-106, July 30, 1998.[19]

Including federal and federally-assisted data would not only increase the amount of data, it would make it more likely that a wage determination can be made at the county level. The current exclusion of federal and federally-assisted data, when combined with the other administrative and regulatory practices discussed herein, exerts a powerful force to reduce local wage data. Eliminating wage data runs counter to the stated goals of the NPRM and the proper administration of the Act.

Finally, the current federal data exclusion discourages its submission in the first place, making survey outcomes even more unreliable. The NPRM recognizes this impact and the consequences of pushing the survey data collection area past the county level:

> The Department recognizes that some interested parties may believe that § 1.3(d) imposes an absolute barrier to the use of Federal project data in determining prevailing wage rates. As a result, survey participants may not submit Federal project data in connection with WHD's surveys of building and residential construction— thereby reducing the amount of data that WHD receives in response to its building and residential surveys…In the absence of such Federal project data, for example, a prevailing wage rate may be calculated at the surrounding-county group or even statewide level when it would have been calculated based on a smaller geographic area if more Federal project data had been submitted. NPRM at 15709.

LIUNA has extensive experience with its affiliate participation in surveys all over the nation. Those responsible for collecting project data for submission during surveys often believe that federal data cannot be included in building and residential surveys and do not submit that data.

LIUNA believes that given the challenges the Administrator faces in conducting surveys, that a simple approach is the most efficient and likely to bring clarity to all stakeholders. Applying a

[19] The Administrative Review Board (ARB) noted that there was a problem of insufficient data in the residential survey at hand. It found that excluding federal data in that case was inconsistent with the "underlying "object" or "purpose" of the wage determination process [which] is the … mandate to determine the locally *prevailing* rate of pay for laborers and mechanics engaged on construction projects, 40 U.S.C. §276(a)…". *Plumbers Local Union No. 27*, ARB Case No. 97-106, July 30, 1998.

sufficiency test makes the implementation of the surveys unnecessarily more complicated. It also will continue to cause confusion among stakeholders and have a chilling effect on the submission of viable wage data from federal project.

D. ADOPTION OF PREVAILING WAGE RATES ESTABLISHED BY STATES AND LOCALITIES UNDER SPECIFIED CIRCUMSTANCES MAY BE APPROPRIATE FOR DAVIS-BACON PURPOSES TO PROTECT LOCAL WAGE STANDARDS, AND COULD IMPROVE THE CURRENTNESS AND ACCURACY OF WAGE RATES

The Department proposes a clarification of the Administrator's authority to adopt prevailing wages determined by state or local officials. As described in the NPRM at 15710, this clarification broadens slightly the Administrator's existing authority under 29 C.F.R. 1.3(b) to consider a number of sources of wage data from state/local officials in determining prevailing wages, including: "[w]age rates determined for public construction by State and local officials pursuant to State and local prevailing wage legislation." The Administrator is additionally required per the Federal-Aid Highway Act to "consult" state departments of transportation and "give due regard" to wages thus obtained for highway construction. Further, state prevailing wage data is regularly considered in the Davis-Bacon survey process as a matter of course and the WD-10 form that is used to submit wage data asks submitters to "[i]ndicate if [the] project is subject to a Federal (Davis-Bacon) or state wage determination."[20]

Explicitly granting the Administrator discretion in adopting state/locally determined rates, therefore, is closer to current and past practice than a deviation from it. In the years before the 1981/1982 DBA rulemaking, adoption of state rates was not uncommon. The 1982 Final Rule noted in passing that "many Davis-Bacon determinations are not based on comprehensive wage surveys but rather on collective bargaining agreements or state surveys." 47 FR 23648 (May 28, 1982). The Department additionally notes that in its current administrative practice "WHD has sometimes adopted and published certain states' highway wage determinations in lieu of conducting wage surveys in certain areas." NPRM at 15709.

LIUNA agrees that there are clear benefits to allowing the adoption of state and locally determined rates as discussed. Adopting such rates under the criteria outlined in sec 1.3 (h) and (i) should produce rates that are more current than those that might derive from federal wage surveys. The overriding problem identified by the OIG in its 2019 report is that too many rates are based on theoretical averages, resulting in "SU" rates that quickly become outdated.[21] This

[20] U.S. Dept. of Labor, Wage & Hour Div., Report of Construction Contractor's Wage Rates, Form WD-10. OMB No. 1235-0015 (2022).

[21] *Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates*, US Department of Labor, Office of Inspector General, March 29, 2019.

can in part be remedied in adopting rates from states that have a formal and regular process for determining and updating such wage rates. OIG at 6, 10-11.

First, state determinations may be more current. States such as Maryland[22], Montana[23], and Minnesota[24] conduct annual surveys and Nevada[25] conducts them every two years. This is in contrast to DOL's previous commitment to survey no less frequently than *every three years* (NPRM at 15716).[26] Several other states refer to current collective bargaining agreements. These states may have a large percentage of CBA-based federal WDs as well, and that has tended to result in regularly updated WDs relative to those states and localities reliant upon SU rates that are not updated. However, there are administrative challenges evident in the updating of CBA rates at the national level. Updating CBA-based rates on WDs is generally a joint responsibility of local or international unions whose collectively bargained rate prevails *and* the Wage and Hour Division. While this process has proven far more effective than keeping SU wages current, there are over a thousand counties with CBA-based WDs each with multiple craft wage determinations. State agencies that are charged with determining and publishing the prevailing wages for their state generally have better contact with both stakeholders and local agencies responsible for updating rates. For this reason, WHD should be allowed to refer to state wage determinations in updating CBA rates for every classification where current Davis-Bacon wage determinations are also based on a CBA for that classification.

Finally, the adoption of state/locally determined rates for highway construction is effectively the practice in most circumstances where such rates exist. The vast majority of construction subject to the Davis-Bacon Act is conducted via federal assistance to states and localities, rather than direct contracting by federal agencies. Under the cooperative federalism of the federal grant-in-aid system, most aspects of the procurement function itself are a responsibility of states and subgrantees.[27] [28] Federally assisted construction under such programs generally requires a non-federal match (most DOT programs require 20% match) that implicates state or local moneys. The incorporation of state or local tax dollars in Davis-Bacon covered federally-assisted projects likewise triggers state prevailing wage coverage in nearly all cases. Federal construction dollars

[22] Md. Code Regs. 21.11.11.03. (2021).
[23] Mont. Code Ann. §18-2-414 (2021).
[24] Minn. Dept. of Labor & Industry. Prevailing Wage: Annual Statewide Survey. https://www.dli.mn.gov/business/employment-practices/prevailing-wage-annual-statewide-survey.
[25] Nev. Res. Stat. § 338.030 (2021).
[26] "While the goal of WHD is to conduct surveys in each area every 3 years, because of the resource intensive nature of the wage survey process and the vast number of survey areas, many years can pass between surveys conducted in any particular area."
[27] Congressional Research Service, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues*, (May 22, 2019).
[28] "When procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements from its non-Federal funds." 2 USC § 200.317 (2020).

are often then, within appropriate federal statutory limits, subject to state wage and hour laws in states with such laws.

Twenty-eight states have prevailing wage laws.[29] These state laws generally cover public works that involve some level of state or local financial assistance, although the precise thresholds and construction covered may vary. States likewise establish their prevailing rates and their definition of "area" or locality in a number of ways as well. Some of these prevailing wage states (CO (and City/Co. of Denver), RI and VA) rely upon the USDOL to conduct surveys to establish the prevailing rates across the state—that is, they simply adopt the DB wages as their state prevailing wage.[30] [31] But most states with prevailing wage statutes have other administrative means of establishing prevailing wages, most commonly through surveys.[32] [33] Twenty-six states establish prevailing wages for heavy and highway construction using methodologies that to some degree vary from the current Davis-Bacon wage determination methodology.

Due to the variation of state/local prevailing wage practice, we support the administrative "guardrails" outlined in sections Sec. 1.3 (h) and (i) of the proposed rule, as well as the requirement for the Administrator to "make an affirmative determination that the enumerated criteria have been met in order to adopt a State or local wage rate." However, we would recommend clarification to prevent potential adoption of wage determinations from the state or local level that might undermine wages otherwise established through a labor-management stakeholder process that result in protection for workers as consistent with the Davis-Bacon Act.

LIUNA recommends two additions to the criteria in Sec. 1.3 (h) and (i).

The adoption of state or locally determined rates should-

1. At no time substitute a lower wage for a higher wage on a federal wage determination;
2. At no time replace a federal wage determination based on a collective bargaining agreement subject to annual updating with one that cannot be so escalated.

[29] U.S. Dept. of Labor, Wage & Hour Div., Dollar Threshold Amount for Contract Coverage (Jan. 1, 2022).
[30] 2019. Colo. Sess. Laws 2946-2957.
[31] City and County of Denver, Colo., Rev. Muni. Ordnances title 2, ch. 20, art. 4 div. 3 (2021).
[32] Texas allows state agencies to use the Davis-Bacon wage but only if the rate is based on a survey conducted within three years. 10 Tex. Admin. Code §2258.022. (1995).
[33] Montana allows a state determined survey rate or adoption of the Davis-Bacon rate, whichever is higher. Mont. Admin, R. 24.17.121 (2011).

E. LIUNA SUPPORTS UPDATING NON-COLLECTIVELY BARGAINED WAGE DETERMINATIONS THAT ARE THREE OR MORE YEARS OLD.

Unlike wage determinations derived from collective bargaining agreements (CBAs), non-collectively bargained rates derived from surveyed weighted averages ("SU") remain unchanged until WHD conducts a new survey in a locality. As noted in the NPRM at 15717, the recent OIG report highlighted that the failure to escalate non-CBA wage determinations has so eroded those wage determinations over time that they are out-of-step with the local prevailing wage and, thereby, defeat the purpose of the Act.[34] More than *ten percent* of weighted average prevailing wage rates are more than 10 years old, while this is true of only 0.006% of those established by CBAs. (OIG at 6). Wage determinations in some markets may be entirely established by CBAs, while in others, WD may consist entirely of weighted averages susceptible to annual wage erosion as inflation eats away at worker earnings. Most markets contain some of both types of wage determinations. Escalating the non-CBA rates therefore benefits all construction workers and does not arbitrarily deprive some laborers and mechanics of accurate, updated rates simply because their local wages are not determined by a collectively bargained agreement.

We support the Department's proposal to update § 1.6(c) (*Revisions to wage determinations)* to allow the Administrator to escalate non-collectively bargained rates that are three or more years old. While timely surveys are the best solution to stale wage determinations, the WHD should use an escalator that includes industry wage data, such as is consistent with the Davis-Bacon Act, only as a last resort to prevent long out-of-date wage determinations from eroding local labor markets and undermining the purpose of the Act. In lieu of a new survey, a temporary remedy would require that at minimum, non-collectively bargained rates keep pace with the inflation rates affecting construction workers.

We note that in the final rule implementing President Biden's Executive Order 14026 "Increasing the Minimum Wage for Federal Contractors," WHD adopted the CPI-W as an indexing methodology for the federal contract minimum wage. 29 C.F.R. § 23.50(b)(2).[35] The coverage under the new federal contractor minimum wage will include contracts for construction that are covered contracts under the DBA though not DBRAs. See 29 C.F.R. § 23.30(a)(1). This essentially extends the CPI-W inflation index into DB wage determinations that are below the floor set annually by the Secretary under EO 14026. This may have the needed effect of increasing the lowest, most out-of-date non-collectively bargained wage determinations on direct DB contracts. However, the effect of this indexing is very narrow and will not address stale wages on projects covered under DBRAs nor non-CBA wage rates over three years old that may be above the threshold of the federal contractor minimum wage.

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[34] *Better Strategies Are Needed to Improve the Timeliness and Accuracy of Davis-Bacon Act Prevailing Wage Rates*, US Department of Labor, Office of Inspector General, March 29, 2019.

[35] Increasing the Minimum Wage for Federal Contractor, 86 Fred. Reg. 67126 (Nov. 24, 2021) (to be codified at 29 C.F.R. pts. 10 & 30).

The Department is proposing the use of the Bureau of Labor Statistics' *Employment Cost Index* (ECI), rather than a consumer-based index. We support this approach as most consistent with measuring wage differentials over time because the ECI incorporates wage and benefit data in its indexing. We support the Department's very clear intention to use "a compensation growth rate based on the change in the ECI total compensation index" – strictly limiting its use to escalating published non-collectively bargained rates to bring them into conformance with the purpose of the DBA.[36] Because the data collection method and reporting under BLS is inconsistent with the Davis-Bacon Act, never should BLS-derived wage data be used to set, determine, or otherwise modify the prevailing wage rates in a locality other than for this limited purpose to escalate and update non-collective bargained rates according to the change in the ECI index.

The escalation process would have additional benefit to the regulated contracting community by allowing DOL to bring each wage determination into compliance with the federal minimum wage and any federal contract minimum wage when systematically updating out-of-date wage determinations every three years. This should reduce uncertainty for contracting agencies and contractors who rely upon published wage determinations for bidding and awarding contracts under DBRA.

Finally, under no circumstances should the ECI index escalation method be used to lower a published prevailing wage rate. We propose the following modification to 1.6(c)(1):

> "Such rates may be adjusted based on ECI data no more frequently than once every 3 years, and no sooner than 3 years after the date of the rate's publication, provided such adjustment would not result in a wage less than the currently published rate".

F. THE ADMINISTRATOR HAS DISCRETION TO USE GROUPINGS OF "SURROUNDING COUNTIES" REGARDLESS OF DEMOGRAPHIC STATUS.

The prohibition against combining "metropolitan" and "rural" wage data originated in the Department's regulations in the 1981–1982 rulemaking. See 47 FR 23644 (May 28, 1982). NPRM at 15718-15719. In explaining its departure from longstanding policy, the Department shared industry comments claiming "that 'importing' higher rates from metropolitan areas caused labor disruptions where workers were 'unwilling to return to their usual pay scales after the project was completed'." The Department's choice to segregate data in this way runs counter to the Act by expressly implementing a rule designed to benefit employers over the interests of workers, counter to the finding in *Coutu* that the Act's purpose is "to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area."[37]

[36] *How to Use the Employment Cost Index for Escalation*, U.S. Bureau of Labor Statistics. (2016).
[37] *Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754, 773* (1981). NPRM at 15698.

The 1982 rule opted to depart from the longstanding method for treating counties with insufficient wage data, namely by considering in the first instance older project data and thereafter wages in "the nearest large city." Labor Department Regulation No. 503 section 7(2) (1935). As late as the 1981 interim DB final rule, the Department had argued for segregating data from metropolitan counties, but added: "However, we believe that it is also necessary to recognize that in extraordinary circumstances, such as when a specialized project is proposed in a rural county where there has been no similar type construction in the county or in surrounding counties, it may be necessary to obtain wage rate data from metropolitan counties where there have been such projects." 46 Fed. Reg. 4310 Jan. 16, 1981. Instead the Department chose in 1982 to require the grouping of counties by Census derived classification of "metropolitan" and "non-metropolitan" (often inappropriately called "rural"), and to prohibit the intermingling of wage data from either group during surveys.

In the years since, the absolute prohibition against combining wage data from so-called metropolitan and rural counties has frequently led to combining data from less populated areas that bear no reasonable relationship to each other in terms of real life contracting, bargaining, or employment practices. This practice has consolidated arbitrary groupings of low-wage data in rural areas. Large projects must necessarily utilize workers and wages from populous areas when large scale public works are performed in areas with few workers. The true disruption to labor markets has occurred because of the Department's metro-rural distinction fences off higher wage standards and job opportunities from workers in rural areas who already face greater employment challenges.

The Wage and Hour Division's use of county definitions based on OMB's Census-derived categorization has always been problematic and inappropriate for this purpose. The OMB itself, after revising its regulations governing the definitions of Metropolitan Statistical Areas and other demographic terms nearly 20 years ago, clarified that "Metropolitan and Micropolitan Statistical Area Standards do not equate to an urban-rural classification; many counties included in Metropolitan and Micropolitan Statistical Areas, and many other counties, contain both urban and rural territory and populations."[38] OMB cautioned agencies "that Metropolitan Statistical Area and Micropolitan Statistical Area definitions should not be used to develop and implement Federal, state, and local nonstatistical programs and policies without full consideration of the effects of using these definitions for such purposes," and clarified that non-statutory uses of such definitions required rulemaking by the appropriate agency.[39] The Department's current use of OMB definitions, and its regulatory prohibition against considering wage data across this invented "metro-rural" boundary prevents the Administrator from properly considering labor markets in instances when discretion is required. The absolutist approach to these definitions

[38] Office of Mgmt. & Budget, Executive Office of the President, Bulletin No. 05-02, *Update of Statistical Area Definitions and Guidance on Their Use*, (Feb. 22, 2005).
[39] *Id.*

created in 1981-1982 rulemaking led the Department to fall into what one expert has called "the county trap."

> The problem begins when we, as researchers and policy makers, knowingly fall into the county trap by referring to metropolitan counties as urban and all other counties as rural. Doing so ignores the blending of urban and rural populations within counties, the presence of rural people and places in metropolitan areas and urban people and places in nonmetropolitan counties, and the intent of the metropolitan system to measure urban-rural integration, not urban-rural differentiation.[40]

Depriving WHD of the discretion to aggregate related and proximate counties to obtain sufficient data, and to reflect local construction markets that cross county lines, is particularly impactful in surveys involving horizontal construction (also referred to as "civil construction") which includes the heavy and highway construction sectors. Vertical construction (office buildings, skyscrapers, and other commercial buildings) is usually performed in a single county on a discrete parcel of land. In contrast, civil construction project sites tend to move as they are being built along routes spanning several contiguous counties. Horizontal projects also often involve a workforce which follows the projects as they move during the construction process. In the survey process, counties should sometimes be combined to reflect this reality. Because horizontal projects are unique in their characteristics and often are so large that they span demographically diverse counties, finding comparable data for their surveys can be more challenging and supports an additional basis for eliminating the bright line between metropolitan and non-metropolitan counties in the proposed 1.7(b) and 1.7(c).

Providing WHD flexibility in regulation §1.7(b) can also make it easier for WHD to implement the regulation allowing consideration of state prevailing wage data and improve the efficiency of the overall survey system.[41] For example, the proposal in 1.3(h) and 1.3(i) allows WHD to consider the adoption of state-generated prevailing wage rates. Oftentimes the rigid demarcation between metropolitan and non-metropolitan counties in current 1.7(b) impedes the flexibility of WHD to consider state data because, while the states often have flexibility in identifying labor markets, those groupings are not consistent with current 1.7(b). Likewise, as noted elsewhere in our comment, it may be appropriate to issue multi-county project wage determinations or wage determinations that reflect state highway districts. In both of these cases, the Administrator must have the flexibility to consider the interconnectedness of counties in the labor market without

[40] Andrew M. Isserman, In The National Interest: Defining Rural And Urban Correctly In Research And Public Policy, *International Regional Science Review* 28, 4: 465–499 (October 2005) at 470.
[41] 29 C.F.R. 1.3(b) (3) and (4).

regard to any demographic designation by OMB or for another statutory purpose unrelated to the Davis-Bacon Act.

For these reasons, LIUNA supports the elimination of the absolute "metro-rural" distinction in grouping data during wage survey analysis, and supports giving the Administrator the discretion under 29 C.F.R. §1.7(b) to combine contiguous ("surrounding") county-level data from metropolitan and non-metropolitan counties in order to obtain greater amounts of wage data to meet sufficiency.

G. CONSIDERATION FOR ESTABLISHING PREVAILING WAGES FOR MULTI-COUNTY PROJECTS.

The NPRM proposes a minor revision to the definition of "area" for purposes of ascertaining a prevailing wage primarily on highway projects. Sec 1.2 (15783). The Department retains language from the Davis-Bacon Act that defines *area* as "the city, town, village, county or other civil subdivision in which work is to be performed." The NPRM then adds two provisions that clarify that the "area" may in some circumstances be defined as a multi-county project area. This proposed definition of "area" (NPRM at 15783) may be applicable for highway construction (1) within a district that is administratively defined by a state department of transportation, or (2) it may be applicable for large-scale projects covering multiple counties where a project wage determination is requested and approved per NPRM Sec. 1.5(b) (NPRM at 15785).

Current rules require a separate wage determination for each county for highway projects covering multiple counties. Therefore, highway workers must be paid a different rate for each county as they work across the counties. The Department proposes to use, when deemed appropriate, a single wage determination for each classification that would apply to all counties making up a project site or multi-county area as defined by a state DOT highway district. The issuance of such single wage determinations using the multi-county understanding of "area" **should be undertaken only by the request of a contracting agency or appropriate stakeholder**, and the Department should act to maintain the Davis-Bacon Act's intent in preserving a wage floor in each local labor market.

Therefore, LIUNA recommends adopting the following principles to guide the issuance of all multi-county or project wage determinations when their use is deemed appropriate by the Administrator:

1. *Deference to existing construction labor markets*. Wage determinations must maintain deference to established labor markets as indicated by: available wage data, the

jurisdictional coverage of current collective bargaining agreements, by contractor bidding practices, geography, and/or administratively established areas under state law.

2. *Use of highest rate*. In questions of determining wages for a multi-county area, the Department should ensure that judgements of the Administrator should accrue to the benefit of affected laborers and mechanics and should not erode wage standards **in any portion** of a multi-county area.

DEFERENCE TO CONSTRUCTION LABOR MARKETS

Deference to local construction labor markets is a central tenet of the Davis-Bacon Act. The Department notes, however, that defining construction labor markets can be quite challenging. It has been a longstanding practice to use county boundaries in the first instance to ascertain and enforce a locally prevailing wage. This has been both a reasonable approach and an administrative convenience. LIUNA acknowledges that on occasion, there may be reasonable and convenient circumstances in which the Administrator may wish to grant the use of multi-county area wage determinations that utilize a single rate for each classification of worker. We caution that the establishment of such an area wage, whether by state/local agencies or by the scope of a public works construction site, be above all considerate of the existing labor market.

Multi-county areas are most appropriately used in situations where large-scale public works projects will extend across one or more sparsely populated counties from which, presumably, few of the laborers and mechanics working on the project will originate. In these circumstances, older wage determinations in such sparsely populated counties may reflect a prevailing wage that in fact is not reflective of the construction labor market for large projects. In these cases, the wage prevailing in nearby, more highly populated counties will more accurately represent the wages of the workers necessary to build such a large-scale project. Therefore, establishing a proper multi-county area should be done only to capture the boundaries of an existing labor market, where workers in one county will undoubtedly be travelling to work in a nearby, low population county for work.

Other situations appropriate for project wage determinations may arise when projects cross state boundaries shared by adjoining counties. Most commonly this occurs where metropolitan areas may expand across one or more states (e.g. Washington, D.C./Maryland/Virginia). In these cases, some variation in wages may result from the bargaining pattern of contractors and trade unions that are often organized consistent with state boundaries. In these cases, the Administrator should look to any such bargaining or bidding practices so as not to undermine established wages in any portion of a multi-jurisdictional area when applying a single project- or district-wide wage.

There are several means available to the Administrator in ascertaining the contours of the labor market in these situations. In addition to the currently established federal prevailing wages, state

and local wages may likewise indicate wage patterns. Current collective bargaining agreements are also useful in this context, because they include geographic boundaries to define their applicability and they represent a private sector understanding of the wage patterns within that area. Likewise, a reasonable consideration of geography is useful. The Department discusses (in the context of ascertaining a prevailing wage) that the original 1935 Davis-Bacon regulations adhered to the county as its primary locality except that where no recent wage data existed for type of construction, the Department should consider "wage conditions in the nearest large city." U.S. Department of Labor, Regulations No. 503 (Sept. 30, 1935). Such a process would be consistent with preserving the prevailing wages of the workers most likely to be employed locally on the project.

USE OF THE HIGHEST RATE IN MULTI-COUNTY AREA.

The use of a multi-county area for establishing a single wage determination should above all be consistent with the DBA's intention of preserving a local wage floor for the benefit of laborers and mechanics on public works. (NPRM at 15698) [42] There are understandably instances in which a contracting agency may wish to request a multi-county, area-wide wage determination. These might include the need to entice a large workforce in a higher wage area to work in a lower wage, rural area for a significant project; or an agency may make a request for administrative convenience in managing a sprawling highway contract. In these cases, the Department should, in addition to the above consideration of existing labor markets, take all precaution to guarantee that wage standards in any portion of a multi-county area wage determination (or "project wage determination") do no undermine the prevailing rate in any other portion of that area. When the Administrator is asked to navigate the question of selecting from multiple wage rates in a multi-county labor market area, she should default to the highest rate prevailing for each classification to prevent conflict and wage erosion, and to promote ease of compliance for contractors. Project labor agreements might also be considered in establishing a project wage determination.

Any alternative hypothetical wage set below the highest prevailing rate in an approved multi-county area runs counter to the Act and the intent of this rulemaking. The use of a "blended" rate that creates a mathematically derived theoretical rate from various prevailing rates in an area only exacerbates the two problems identified above: 1. Such rates undermine at least one portion of a multi-county area, and 2. blended rates are far more likely to be a rate that no worker in the locality is actually paid.

[42] "The Davis–Bacon Act, requiring that wages of workmen on government construction project be not less than minimum wages specified in schedule furnished by Secretary of Labor, was enacted, not for benefit of contractors, but to protect their employees from substandard earnings by fixing floor under wages on government projects. Davis–Bacon Act, §§ 1–6 as amended 40 U.S.C.A. §§ 276a to 276a–5." *United States v. Binghamton Const. Co.*, 347 U.S. 171, 74 S. Ct. 438, 98 L. Ed. 594 (1954).

H. LIUNA AGREES THAT REFORM OF THE CONFORMANCE PROCEDURE IS NEEDED

The NPRM proposes a new, alternative conformance procedure based on a finding that the current procedure is "burdensome on stakeholders, contracting agencies, and the Department." NPRM at 15735. LIUNA agrees that the current system is burdensome. WHD, according to the NPRM, receives an average of 3,000 conformance requests per year with many being repeated requests for job classifications. NPRM at 15723. GAO-11-152 at 31- 32.[43] Not only is the process a burden to all stakeholders and to WHD, it lacks transparency. Therefore, we urge several common-sense modifications outlined below to strengthen both the new proposed system and the current system.

The NPRM purposes a new procedure for "frequently recurring classifications" to be utilized by WHD when it has received insufficient data through its wage survey process to publish a prevailing wage for a classification for which conformance requests are regularly submitted. The proposed amendments also add to the current procedure a critical protection against the misuse of the conformance process, expressly stating that it "may not be used to split, subdivide, or otherwise avoid application of classifications listed in the wage determination." (5.5(a)(1)(iii)(B)).

LIUNA urges further strengthening of both the new and existing conformance protections as follows.

THE CLASSIFICATIONS ELIGIBLE TO BE CONFORMED UNDER THE NEW PROCEDURE SHOULD BE APPROVED IN ADVANCE OF THE IMPLEMENTATION OF THE PROCEDURE.

Before implementation of the new procedure in which WHD would be authorized to "pre-approve" certain conformed classifications and their wage rates, WHD should expressly identify the classifications which will be eligible for "pre-approval." Such classifications and rates on a wage determination should not be designated as preapproved conformed rates unless stakeholders have an opportunity in advance to provide input to WHD on a list of classifications which can be pre-approved.

While the NPRM gives some indication of which classifications could be conformed,[44] we urge that if this rule is issued in final form the Administrator provide guidance on the basis upon

[43] As we argue in other portions of these comments, significant reforms that would increase the amount of data received in all surveys by eliminating the metro-rural demarcation and the exclusion of federal data from building and residential surveys will also decrease the need for conformances.

[44] To address this issue, the Department proposes revising 29 CFR 1.3 and 5.5(a)(1) to expressly authorize WHD to list corresponding wage and fringe benefit rates on wage determinations for key classifications or other classifications for which conformance requests are regularly submitted […]. NPRM at 15723.

which each is selected. For example, if the new procedure is to be limited to the key classifications, the Administrator should identify those classifications as well as the classifications for which conformance requests are "regularly submitted." In short, if the stakeholders do not know in advance which classifications are eligible and the decision is only made known after surveys are published, it will increase, rather than reduce, uncertainty and a lack of transparency for stakeholders.

THE PROHIBITION ON SPLITTING, SUBDIVIDING, OR AVOIDING APPLICATION OF CLASSIFICATIONS LISTED IN THE WAGE DETERMINATION SHOULD BE ADDED INTO THE NEW PROCEDURE.

The proposed changes include a new prohibition in the conformance process that it may not be used to split, subdivide, or "otherwise avoid application of classifications listed in the wage determination". In the final rule, we urge that the prohibition on splitting, etc. classifications be expressly applied to the new pre-approval process.

THE CURRENT PROCESS SHOULD BE MADE MORE TRANSPARENT.

LIUNA further urges more transparency in the present conformance process whereby contracting agencies would still be required to submit conformance requests for any needed classifications not listed on the wage determination. NPRM at 15723. We suggest that the requests of the contracting agency for a conformance be made public by allowing public access to all submitted Standard Forms (SF) 1444 (Request for Authorization of Additional Classification and Wage Rate) on the WHD website. https://www.dol.gov/agencies/whd/government-contracts/construction/forms. We further suggest that the decisions by the WHD in response to the submission of Form 1444 be published on the WHD website. This would enable stakeholders to know if they have an interest in a particular conformance request or decision so that they may more easily exercise their appeal rights.

Finally, LIUNA notes that with respect to future guidance regarding the conformance process, WHD should continue to keep in mind the evolution of laborers' classifications with respect to determining the "reasonable relationship" requirement. For example, the current WHD guidance addresses the "reasonable relationship" requirement in the circumstance involving a wage determination where higher compensated laborers' classifications exceed other crafts, in the wage determination. It states[45] that "a wage determination may contain some wage rates for laborer classifications that are higher than some wage rates for the skilled classifications or power equipment operators."[46] Wage gradations within the laborers' craft are now more

[45] *See* AAM 213, Application of the Davis-Bacon and Related Acts requirement that wage rates for additional classifications, when "conformed" to an existing wage determination, bear a "reasonable relationship" to the wage rates in that wage determination (dol.gov)

[46] *See for example,* the building wage determination for Los Angeles County, California, Gunite Laborer (Group 1) https://sam.gov/wage-determination/CA20220022/5; building wage determination for Franklin County, Ohio - Mason Tender Brick & Cement/Concrete https://sam.gov/wage-determination/OH20220078/4; building wage

frequent as skill training for laborers have developed in recent decades with the growth of LIUNA apprenticeship programs. See Appendix A. Gradations in Laborers wage rates reflect increased training and skill levels. While the guidance finds this to be an infrequent wage pattern, the evolution of LIUNA apprenticeship training and consequent increase in skill levels will be a factor in rate patterns which need to be considered in the conformance process.

I. LIUNA SUPPORTS THE CLARIFICATION OF THE DEFINITION OF "BUILDING OR WORK" IN SEC. 3.2 *DEFINITIONS* AND SEC. 5.2 *DEFINITIONS* (NPRM 15789 & 15791).

LIUNA supports the clarification the Department brings to the definition of "Building or work" in Parts 3 and 5 of the proposed rule. In recent years, new technologies, especially in the energy sector, have led to the expansion of new types of construction work and expanded training for Laborers and other crafts. These subsectors of construction have been increasingly supported with public financial assistance and are covered by the Davis-Bacon and Related Acts.

The Department names, "without limitation," many well-known types of infrastructure work and also includes additional subsectors such as "solar panels, wind turbines, broadband installation, [and] installation of electric car chargers," some of which notably have been funded by the Infrastructure Investment and Jobs Act of 2021. Public Law No: 117-58 (Nov. 15, 2021). Work on these types of energy projects is commonly performed by construction workers, including Construction Laborers and is an integral part of Davis-Bacon covered construction.

SOLAR PANELS

New industry sectors like solar have struggled to provide consistent employment, living wage pay, and labor standards on the job.[47] [48] [49] Researchers have pointed to the important role that prevailing wage laws can play in improving and maintaining job quality in this fast-growing construction sector.[50] A number of states such as Connecticut have explicitly extended state

determination for Albany County, New York – Asbestos, Toxic, Bio-remediation. https://sam.gov/wage-determination/NY20220002/2.

[47] Reuters Staff, *Nuclear, coal, oil jobs pay more than those in wind, solar: report*, Reuters (Apr. 6, 2021), https://www.reuters.com/article/us-usa-energy-jobs/nuclear-coal-oil-jobs-pay-more-than-those-in-wind-solar-report-idUSKBN2BT2OT.

[48] Kelsey Tamborrino, *The wage gap that threatens Biden's climate plan*, Politico (April 5, 2021) https://www.politico.com/states/new-york/albany/story/2021/04/05/the-wage-gap-that-threatens-bidens-climate-plan-1371767.

[49] Noam Scheiber, *Building Solar Farms May Not Build the Middle Class*, NY Times (July 16, 2021) https://www.nytimes.com/2021/07/16/business/economy/green-energy-jobs-economy.html

[50] Betony Jones, *Prevailing wage in solar can deliver good jobs while keeping growth on track*, Berkeley Labor Center (November 12, 2020) https://laborcenter.berkeley.edu/prevailing-wage-in-solar-can-deliver-good-jobs-while-keeping-growth-on-track/.

prevailing wage coverage to this sector in the hopes of eliminating destructive bid competition that harms local workers.[51] Such state and federal prevailing wage coverage is not only important for creating wage stability in construction, but the monitoring and enforcement tools that come with these laws protect workers from wage theft and sets a level playing field for those contractors who abide by labor laws on public works.[52] [53] [54]

As in other new sectors, LIUNA has developed appropriate training standards and integrated them into our U.S. DOL Registered Apprenticeship standards for Construction Craft Laborer (CCL):[55]

> The CCL will install some or all of the components of a solar thermal or photo-voltaic system as directed specific to the job. The installations may be for residential, commercial or utility projects. The locations may be pitched roofs, flat roofs, ground array, or large solar farms. Job tasks performed by the CCL on these sites may include, but not be limited to: grubbing and clearing; excavation, trenching and backfilling; installation of pipe or conduit below or above ground; building access roads; installing site security measures; traffic control on site and off site as needed for access/egress, site preparation, forming, placement and finishing of concrete for any purpose; layout of array(s); installation of posts of all types as required by specifications; installation of racking system(s) and all components as specified; bending and installing conduit or thermal piping as specified; pulling wires as required by the job; installing and securing panels to racking system(s) as specified, including any additional components such as string converters; test or assist with testing of the system; final cleanup and landscaping of site as specified. Note that these tasks will vary by region and contractor. [p.9]

LIUNA has applied these skills on a large number of projects across the country over the last 15 years.[56]

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[51] 2021 Conn. Acts 21-43 ([Reg.] Sess.).

[52] *See…Us Department Of Labor Recovers $845k In Back Wages After Investigation Finds Northern California Roofing, Solar Panel Contractor Denied Overtime*, U.S. Dept. of Labor, Wage and Hour Division News Release, (December 1, 2021).

[53] Labor Dept. Secures Nearly $2m In Back Wages, Benefits For Nearly 150 Workers At Federally-Funded Solar Energy Project In Nevada, U.S. Dept. of Labor, Wage and Hour Division News Release, (October 23, 2014).

[54] This latter investigation was initiated after workers complained they were not paid appropriately for work subject to prevailing wage law. The investigation found 31 workers to be due $226,480 in back wages. *NJ Department of Labor and Workforce Development Cites Solar Company for Prevailing Wage Violations,* NJ Dept. of Labor & Workforce Development News Release (November 29, 2021).

[55] LIUNA Training and Education Fund (2021), "Solar Worker Skills Standards" for CCL at https://irecusa.org/wp-content/uploads/2021/09/LIUNA-Solar-Worker-Skills-Standards.pdf. See also: https://www.liuna.org/renewable-energy.

[56] *See* Press Release, *Wis Business*, LIUNA Local 113 and IBEW Local 127: Announce Project Labor Agreement with Blattner Energy for the 200+ megawatt (MW) Paris Solar Farm, (Feb. 2022),

WIND TURBINES

LIUNA members regularly perform laborer construction activities on wind turbine projects, on- and off-shore. Among the national agreements to which LIUNA is a party, Laborers maintain a national wind turbine agreement with major wind contractors.[57] This core energy construction sector has become a significant employment sector and increasingly involves public financial assistance. States such as Illinois and New York have explicitly named wind projects as covered by state prevailing wage laws.[58] [59]

Laborers were core workers on America's first off-shore wind project off Block Island, Rhode Island,[60] and in May 2022 LIUNA joined North America's Building trades and developer Ørsted in signing another historic agreement to build over 4,000 MW of generation in the coming years.[61] [62]

BROADBAND

Broadband or fiber optic installation in metropolitan areas is one type of underground utility work commonly performed by laborers. Fiber is also sometimes run underground in existing right of ways along state and federal highways.[63] This is construction work and it is important that the DBRA regulations explicitly list it as such. Some states have already taken steps to ensure that installation of fiber optic and other transmission infrastructure for broadband services are covered by prevailing wages.[64]

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https://www.wisbusiness.com/2022/liuna-local-113-and-ibew-local-127-announce-project-labor-agreement-with-blattner-energy-for-the-200-megawatt-mw-paris-solar-farm/.

[57] *See* LIUNA national agreements at https://www.liuna.org/agreements.

[58] "Public works' also includes the construction of a new wind power facility by a business designated as a High Impact Business under Section 5.5(a)(3)(E) of the Illinois Enterprise Zone Act" 48. 820. ILL. Comp. Stat. 130/12. (2015.

[59] Wage requirements for certain renewable energy systems" 2021 N.Y. Laws S2506. § 224-d.

[60] *See* Press Release, Deepwater Wind, America's First Offshore Wind Farm Powers Up (December 12, 2016) https://dwwind.com/press/americas-first-offshore-wind-farm-powers/.

[61] *See* Press Release, Ørsted, North America's Building Trades Unions and Ørsted Agree to Build an American Offshore Wind Energy Industry with American Labor (May 5, 2022) https://us.orsted.com/news-archive/2022/05/national-offshore-wind-agreement.

[62] *See* Press Release, North America's Building Trades Unions North America's Building Trades Unions and Ørsted Agree to Build an American Offshore Wind Energy Industry with American, Bloomberg News, (May 5, 2022) https://www.bloomberg.com/press-releases/2022-05-05/north-america-s-building-trades-unions-and-rsted-agree-to-build-an-american-offshore-wind-energy-industry-with-american.

[63]*See* Sterlite Tech, *Underground Installation of Optic Fiber Cable Placing*, (2013) https://www.stl.tech/optical-interconnect-products/optical-fibre-cable/pdf/Underground_Installation_of_Optic_Fiber_Cable_Placing-_New-_Final.pdf.

[64] *See* Town of Egremont, Massachusetts. Request for Proposals for Provision of Internet Service in Egremont. (Dec. 12, 2018) https://www.egremont-ma.gov/internetRFP181210.pdf "Construction of the network is subject to

ELECTRIC CAR CHARGERS

While we recommend replacing the term "car" with "vehicle," LIUNA supports inclusion of electric charging installation within the definition of a "building or work." While EV vehicles continue to evolve and the facilities for charging them vary, nearly all such public or commercial installations involve scopes of work typically performed by construction workers, including construction laborers.

Examples of project scopes of work in this sector regularly describe: "concrete pours";[65] "running conduits, cables and concrete foundation work etc."[66]; and "[t]renching and concrete work and repairs."[67] As this growing and commonly federally-assisted construction is performed, it will be vital for workers to have clear coverage of this work under the Davis-Bacon and Related Acts.

J. LIUNA SUPPORTS THE PROPOSED RULE TO CLARIFY COVERAGE OF DEMOLITION AND RELATED WORK

LIUNA supports the Department's goal to strengthen the scope of coverage under the DBRA by "better clarify[ing] when demolition and similar activities are covered by the Davis-Bacon labor standards," NPRM at 15764. As the NPRM finds "[t]hese clarifications will make it clear to both contractors and contract workers who is covered…" NPRM at 15776. The NPRM acknowledges that the lack of clarity in the regulations regarding the "extent to which demolition activities are covered by the DBRA" has created situations in which "some contracting agencies may not have been applying Davis-Bacon in accordance with those policies… the clarity provided by this proposed rule could lead to expanded application of the Davis-Bacon labor standards…". NPRM at 15779.

LIUNA has a strong interest in the proposed clarification in coverage of demolition and related activities. Its members engage in demolition and related activities on hundreds of construction

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the Massachusetts Prevailing Wage Law (MGL c.149, ss.26- 27). The Town will provide a relevant list of prevailing wages on request, or the bidder may download it from the Town website. http://www.egremont-ma.gov/bids.html.

[65] State of New Jersey, Dept. of the Treasury, SCOPE OF WORK, Electric Vehicle Charging Station Installations. NJDOT Regional Headquarters Complexes, Ewing, Mt. Arlington and Cherry Hill, N.J. Project No. T0652-00 (July 8, 2021) p.23 https://www.bidnet.com/bneattachments?/715020647.pdf.

[66] Napa Valley Transportation Authority, Request For Proposals For Design And Installation Of Electric Vehicle (Ev) Charging Stations (May 17, 2021) p. 6 at https://www.nvta.ca.gov/sites/default/files/RFP_2021-07%20Design%20-%20Install%20EV%20Charging%20Station.pdf.

[67] Electric Transportation Engineering Corporation, Electric Vehicle Charging Infrastructure Deployment Guidelines for the Greater San Diego Area, Version 3.2. (May 2010) P. 23 https://www.sandag.org/uploads/projectid/projectid_339_13251.pdf.

projects every year in localities across the nation which are covered by LIUNA CBAs. LIUNA members in apprenticeship programs across the country are trained on demolition and related construction work to perform at the highest skill level and in the safest manner possible. The nature of the demolition and related work and its related apprenticeship training is discussed in detail below.[68]

In order to assure coverage of this important construction work, the Department proposes to add a new sub-definition to the term "construction, prosecution, completion, or repair" in § 5.2, to better clarify when demolition and similar activities are covered by DBRA labor standards. The Department provides examples of when related work such as removal activities, hazardous waste, asbestos, and substantial landscaping are covered when these activities themselves "constitute construction, alteration, or repair of a public building or work." They include coverage of:

> 1. Removal of asbestos or paint from a facility that will not be demolished, even if subsequent reinsulating or repainting is not considered covered. The asbestos or paint removal is an "alteration" of the facility.
> 2. Certain hazardous waste removal contracts, because "substantial excavation of contaminated soils followed by restoration of the environment" is "construction work" under the DB.[69]
> 3. "Landscaping" when it involves "elaborate landscaping activities such as substantial earth moving and the rearrangement or reclamation of the terrain that, standing alone, are properly characterized as the construction, restoration, or repair of a public work."[70]

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[68] For example, one LIUNA Apprenticeship Program describes its training in this area of dangerous construction work to include "fifteen specialized courses…in demolition and hazardous remediation associated with environmental projects. … Environmental remediation training is a complex process that can cover multiple areas… Working on older buildings often implies contact with asbestos, lead, or some other hazardous materials… laborers are trained to prepare the site and dispose of these volatile materials without permanent damage. Adequately trained individuals can assess whether the situation is dangerous and know how to handle hazardous materials, taking steps to remove the material in question and decontaminate the area safely. …".
https://www.nwlett.edu/courses/construction-laborers-training/demolition/.

[69] The NPRM explains that certain activities under hazardous waste removal and remediation contracts, including "the dismantling or demolition of buildings, ground improvements and other real property structures and . . . the removal of such structures or portions of them" are covered by Davis-Bacon labor standards "if this work will result in the construction, alteration, or repair of a public building or public work at that location." Citing AAM 187 (Nov. 18, 1996), attachment: Superfund Guidance, Davis Bacon Act/Service Contract Act and Related Bonding, Jan. 1992).

[70] The NPRM cites to AAM 155 (Mar. 25, 1991) and AAM 190, noting that "hazardous waste removal contracts that involve substantial earth moving to remove contaminated soil and recontour the surface" can be considered DBA covered construction activities. NPRM at 15726.

The Department is also proposing to clarify its long-held position that when future construction is contemplated on a demolition site, it will be subject to the Davis-Bacon labor standards. The NPRM clarifies that demolition of a previously-existing structure is considered part of the construction of the subsequent building or work and within the scope of the Davis-Bacon labor standards when:

1. The demolition is part of a contract for such construction.
2. Demolition of a previously-existing structure is covered because construction of the subsequent building or work is contemplated as part of a future contract.

To ensure that all stakeholders and contracting agencies know the parameters of coverage in these areas, the Department proposes to add a new paragraph (2)(v) to the definition of "construction, prosecution, completion, or repair" to assist agencies, contractors, workers, and other stakeholders in identifying when demolition and related activities fall within the scope of the DRBA.[71]

Specifically, the Department proposes to clarify that demolition work is covered under any of three circumstances:

1. Where the demolition and/or removal activities themselves constitute construction, alteration, and/ or repair of an existing public building or work;
2. Where subsequent construction covered in whole or in part by the Davis-Bacon labor standards is planned or contemplated at the site of the demolition or removal, either as part of the same contract or as part of a future contract; or
3. Where otherwise required by statute…This third option accounts for Related Acts whose broader language may permit greater coverage of demolition work.[72]

The Department also proposes a non-exclusive list of factors that can inform the determination: "[t]he existence of engineering or architectural plans or surveys; the allocation of, or an application for, Federal funds; contract negotiations or bid solicitations; the stated intent of the relevant government officials; and the disposition of the site after demolition." NPPRM at 15727.

[71] 5.2 Definitions (2) [Reserved] Construction, prosecution, completion, or repair. The term "construction, prosecution, completion, or repair" mean all types of work done on a particular building or work at the site thereof as specified in § 5.2 of this subtitle, including demolition as reflected in § 5.2. NPRM at 15725.
[72] NPRM at 15727 and Footnote 77.

DEMOLITION AND RELATED WORK ARE CONSTRUCTION ACTIVITIES.

Demolition and related work are core construction activities.[73] Construction workers perform demolition and related activities in construction local labor markets across the United States.[74] Many of these construction workers perform this work under LIUNA CBAs and receive training in LIUNA apprenticeship programs to ensure that they perform this work safely and with the requisite skills training required to protect themselves and the public. *See* Appendix C. Davis-Bacon wage determinations frequently include laborers' classifications which perform demolition and related work under LIUNA CBA rates. *See* Appendix B (which includes some examples of wage determinations based upon LIUNA collective bargaining agreements for demolition and related activities.)

Under LIUNA CBA agreements, the terminology for naming classifications of laborers performing demolition and related activities varies according to local practice. *See* Appendix B. The non-exclusive list of work activities involving demolition and related activities are referred to in the NPRM, demonstrating the variety of the work activities encompassed under the scope of demolition and related activities.[75]

LIUNA APPRENTICESHIP PROGRAMS TRAIN CONSTRUCTION WORKERS TO PERFORM DEMOLITION AND RELATED ACTIVATES

Curricula from LIUNA Apprenticeship programs demonstrate that demolition and related activities are integral to the training and work activities of construction workers.[76] LIUNA

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[73] The definition of the construction sector in NAICS 23 includes contractors who are involved in the demolition of residential, industrial and commercial buildings and facilities. For example, NAICS 238910 includes in its description of the construction industry under *Site Preparation Contractors* a variety of demolition and related activities: "This industry comprises establishments primarily engaged in site preparation activities, such as excavating and grading, demolition of buildings and other structures, and septic system installation. Earthmoving and land clearing for all types of sites (e.g., building, nonbuilding, and mining) is included in this industry. … NAICS Code: 238910 Site Preparation Contractors | NAICS Association. The illustrative examples include "Blasting, building demolition; Concrete breaking and cutting for demolition; Demolition, building and structure; Excavating, earthmoving, or land clearing contractors; Wrecking, building or other structure…" NAICS Code: 238910 Site Preparation Contractors | NAICS Association .

[74] The Department notes that when demolition contracts do not fall within the DBA's scope and are instead covered by the SCA, the Department uses construction prevailing wage rates under DBA as a basis for the SCA wage determination. See AAM 190. NPRM at 15726 footnote 76.

[75] The NPRM refers to Demolition; removal; dismantling; reclamation; excavation; recontouring; restoration; landscaping; earth moving; removal of asbestos; paint removal; hazardous waste removal; land recycling; earth moving ;removal of contaminated soil ;excavation of contaminated soils; recontouring surfaces ;habitat restoration; excavation of contaminated soils. hazardous waste removal; restoration of the environment; elaborate landscaping; substantial earth moving; rearrangement of the terrain; reclamation of the terrain; substantial earth moving . NPRM at 15726.

[76] "We offer career long learning that benefits Construction Craft Laborers, employers and owners. We offer training programs specific for building, heavy-highway & utilities, **demolition/deconstruction**, pipeline, masonry, environmental, and landscaping." Commercial Construction | Home (liunatraining.org)

Training describes demolition and environmental remediation as one of the core concentrations of construction laborers:

> LIUNA Trained apprentices begin by learning the core construction skills that will form a foundation of safety and productivity, everything from general construction skills to OSHA, scaffolding to First Aid/CPR and Hazard Communication. With a solid understanding of the basics, the **apprentice can move on to training in one or more areas of concentration**: Building Construction, Heavy/Highway and Utility Construction, Masonry, **Demolition and Deconstruction,** Pipeline, Tunneling, **Environmental Remediation**, and Landscaping.…
> Owners and Contractors | Home (liunatraining.org)

Virtually every LIUNA apprenticeship program trains for these skills. A few examples are found in Appendix C.

FEDERAL AGENCIES HAVE PUBLISHED COMPETING GUIDANCE ON DEMOLITION AND RELATED COVERAGE, CONTRIBUTING TO A LACK OF COMPLIANCE BY CONTRACTING AGENCIES AND REQUIRING REGULATORY CLARIFICATION BY DOL.

The NPRM concludes that "clear standards for the coverage of demolition and removal and related activities in the DBA regulations" are needed for agencies, contractors, workers, and other stakeholders in identifying whether contracts for demolition are covered. LIUNA agrees. Stakeholders face a maze of subregulatory guidance and regulations from the Department of Labor, and from the federal contracting agencies whose procurements involve demolition and related activities.

Federal procurement is complicated and has layers that frustrate administration of the DBRA with respect to demolition and related activities. For example, the DOE describes in its Acquisition Manual the complexity of coverage determinations as well as the many regulatory sources that must be consulted in making these determinations and the many layers of agency personnel who may be involved in such decisions.[77] The Army Corps of Engineers (USACE) is the largest obligator of construction contracts in the DOD.[78] Its description of the bureaucratic

[77] While the Federal Acquisition Regulations (FAR) and Department of Energy Acquisition Regulations (DEAR) provide detailed guidance for the application of these labor statutes… the FAR and DEAR requirements, gives DOE personnel the kind of information needed to make decisions regarding application of relevant labor laws to Government contracts… Such determinations can only be made by the CO, who may seek the assistance of other Department personnel such as industrial relations personnel. DOE Acquisition Guide FY2018 Version 4 (energy.gov).

[78] The Corps obligated over $11 billion for domestic construction contracts in fiscal year 2019, more than any other component within the Department of Defense (DOD). And DOD obligated more contract dollars than any other

layers within the Corps which implements the Davis-Bacon Act demonstrates how complex its structure is and how difficult it is for any stakeholder to be aware of correct coverage decisions.[79] For example, in its Labor guidance, USACE denotes demolition coverage as a "common problem" for the USEA enforcement: "application of labor standards to demolition contracts, should be given careful consideration in procurement actions that involve demolition…ER 1180-1-8 Labor Relations in Construction (army.mil).

LIUNA, therefore, supports the proposal in the NPRM to clarify demolition and related work in the regulations to provide clear, central guidance to the federal procurement agencies which engage in procurements of this work. This new regulatory definition is consistent with the Department's overall goal in this rulemaking of "enhancing the implementation of Reorganization Plan No. 14 of 1950." [80]

K. LIUNA SUPPORTS MODERNIZING THE DEFINITION OF THE SITE OF WORK REGULATION IN LIGHT OF TECHNOLOGICAL CHANGES TO CONSTRUCTION IN THE LAST TWENTY YEARS

LIUNA supports the Department's review of how coverage is determined for sites where construction occurs elsewhere than the location where the public building or work ultimately rests. It is appropriate for the Department to consider the massive technological changes involved in construction which have occurred in the industry in the past twenty years and to modernize the regulations to ensure that all laborers and mechanics receive coverage under the Act.[81]

The last regulatory proceeding which addressed the site of the work occurred in the rulemaking in 2000. At that time the Department amended the definition of "site of the work" to include a site away from the location where the building or work will remain (where the site is established specifically for the performance of the contract or project), and where a "significant portion" of a building or work is constructed. [82]

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federal agency in fiscal year 2019. GAO-21-203R, Davis-Bacon Act: Army Corps of Engineers Provides Guidance on Wage Requirements, but Opportunities Exist to Improve Monitoring.

[79] The Corps' domestic structure is organized into three tiers: headquarters in Washington, D.C.; eight regional divisions; and 38 local district offices. Each Corps district conducts its own efforts to monitor and enforce the Act, with headquarters and the divisions providing additional support in some instances, such as when contractors and district staff disagree with the proposed classification and rate. GAO-21-203R, Davis-Bacon Act: Army Corps of Engineers Provides Guidance on Wage Requirements, but Opportunities Exist to Improve Monitoring.

[80] NPRM at 15746.

[81] *See* https://www.nibs.org/oscc.

[82] 29 C.F.R. 5.2 (l) (1). The term site of the work is defined as follows: "(1) The site of the work is the physical place or places where the building or work called for in the contract will remain; *and any other site where a*

The 2000 change responded to technological developments that enabled the construction of significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work. 65 FR 80273. LIUNA strongly supported a re-examination of the "site of work" regulation in 2000 to reflect technological changes to the industry.[83] In the over twenty years which have elapsed, it is once again appropriate that the Department revise the site of work definition to reflect the experiences and developments of the last two decades in how- and where - the construction process takes place. [84]

This trend toward construction taking place at sites other than the resting place has and will continue to occur both in the building and residential sectors, as well as in the heavy and highway sectors (civil engineering) which gave rise to the 2000 revisions. Those revisions in large part grew out of the construction of the Braddock Lock and Dam project on the Monongahela River in Allegheny County, Pennsylvania, which employed many laborers, along with other crafts, who are routinely employed on such heavy construction projects. 65 Federal Register at 80273. As further described below, the growth and change since 2000 occurring in modular construction is taking place in all sectors, including the building, residential, heavy and highway sectors.

In response to requests for public comment on the types of off-site construction techniques and the extent to which they are used in government and government-funded contracting, LIUNA provides the following examples representing just a snapshot of the massive technological advances which have taken place since the year 2000.

GROWTH OF OFF-SITE INFRASTRUCTURE CONSTRUCTION

The Department revised the definition of the "site of work" regulation in 2000 based on "the development of new construction technologies."[85] Since then, off-site construction has continued its growth. This growth is not confined to the residential or building housing markets, but continues in the commercial and public infrastructure market, including constructing military installations,[86]

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significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project;"

[83] As the Department noted when it issued the 2000 final rule "LIUNA, the Building Trades, and the Operating Engineers have each, to a varying degree, provided detailed descriptions of the innovative construction techniques developed and currently in use, which allow significant portions of public buildings and public works to be constructed at locations other than the final resting place of the building or work." 65 Federal Register at 80273 (December 20, 2000).

[84] NPRM that "[s]ince 2000, technological developments have continued to facilitate off-site construction that replaces on-site construction to an even greater degree, and the Department expects such trends to continue in the future.". NPRM at 15731.

[85]65 Federal *Register* 80267-80278 (December 20, 2000).

[86] "Modular construction is one such technique that is worth considering. Industry experts have identified it as one of the key drivers of growth in 2020…. Modular construction growing trends represents new opportunities for companies to specialize in modular building such as bathrooms pods, school classrooms, hotel rooms, bedroom

airports, schools, prisons and large commercial and industrial properties off-site. A recent McKinsey report finds that "[b]eyond real estate, there are also many opportunities to apply modular techniques to infrastructure and industrial structures.[87] The report further found that:

> *In other areas of the construction industry beyond real estate, modular construction is also having an impact, or demonstrating the potential for significant impact.* ***We have estimated that modular construction could gain a market share of up to 10 percent in an upper scenario of infrastructure and industrial …****Today, modular construction is experiencing a new wave of attention and investment, and several factors suggest it may have renewed staying power.* ***The maturing of digital tools has radically changed the modular-construction proposition—for instance, by facilitating the design of modules and optimizing delivery logistics.*** [88] Modular construction: From projects to products | McKinsey

To reflect this growth, in 2013 the National Institute of Building Sciences established the *Off-Site Construction Council* (OSCC) to serve as a center for current information on off-site design and construction for both residential and building projects as well as for large industrial,[89] commercial, healthcare, and educational institutions. About NIBS | National Institute of Building Sciences

EXAMPLES OF OFF-SITE CONSTRUCTION IN THE HEAVY AND HIGHWAY SECTORS.

Government entities at both the federal and state level have continued since 2000 utilizing off-site construction techniques in all sectors. Below are a few examples of government agencies with programs designed to grow the off-site construction market.

FEDERAL HIGHWAY ADMINISTRATION (FHWA)

The Federal Highway Administration (FHWA) has an accelerated bridge program which seeks to develop innovations in bridge construction including the use of off-site construction: "**The**

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apartments, office buildings, relief housing, military installations and countless applications." Modular construction – forging a new path in rapid construction | Construction Dive.

[87] Modular construction: From projects to products (mckinsey.com), Box 1: Impact of modular outside of real estate, p. 7).

[88] Modular construction: From projects to products (mckinsey.com) at page 6.

[89] See *Design of Modular Structures for Industrial Facilities* (soon to be issued by the ASCE Energy Division's Task Committee on Onshore Modularization for Heavy Industrial Applications). It will provide guiding principles in petrochemical and other industrial facilities. ….include overview of onshore module types, philosophy, modularization study, detailed engineering, transportation, logistics, construction, and common professional practices for onshore heavy industrial modularization. Silky Wong, *An Overview of the Upcoming ASCE Report on Design of Modular Structures for Industrial Facilities*, ASCE (2022), https://ascelibrary.org/doi/abs/10.1061/9780784484180.036

Accelerated Bridge Construction uses safe and cost-effective planning, design, materials **and construction methods to reduce the onsite construction** time involved in building new bridges or replacing and rehabilitating existing bridges." The FHWA describes the new technologies involved in Prefabricated Bridge Elements and Systems (PBES) as follows:

> **PBES are structural components of a bridge that are built offsite, or near-site of a bridge** and include features that reduce the onsite construction time and the mobility impact time that occurs when building new bridges or rehabilitating or replacing existing bridges relative to conventional construction methods.[90]

It further describes the techniques of pre-fabricated bridge elements:

> **Prefabricating bridge elements and systems (PBES) offers major time savings, cost savings, safety advantages, and convenience for travelers. The use of PBES is also solving many constructability challenges while revolutionizing bridge construction in the US…**.With PBES, these components can be fabricated concurrently, and then shipped in as needed. PBES also permits a more effective use of work time.[91]

FEDERAL AVIATION ADMINISTRATION (FAA)

Within the Federal Aviation Administration (FAA), modular construction is becoming a route for the FAA to meet Airport Expansion needs:

> "Modular construction has now become an increasingly popular cost-effective option for airport expansion projects due to its ability to improve the efficiency of the building process while minimizing expenses and reducing the amount of exposure to airport operations. The evolution of modular construction also no longer suggests that the structure be void of aesthetics or have limited functionality. Whether it is for a permanent or temporary application, modular buildings can provide for a seamless and natural extension of the buildings they are adjacent or connected to. Modular construction can also meet the requirements of the Federal Aviation Administration (FAA) and all local and state building code requirements and certifications." Modular Construction Is Ideal for Airport Expansion (constructionbusinessowner.com)

One specific example of this approach is the Dallas-Fort Worth International airport expansion:

> Six prefabricated modules forming an 80,000-sq-ft new concourse have rolled into place at Dallas-Fort Worth International Airport. Delivered on self-propelled modular

[90] U.S. Dept. of Transportation, Federal Highway Admin, Prefabricated Bridge Elements and Systems (2021). https://www.fhwa.dot.gov/bridge/prefab/

[91] *Id.*

> transporters between Aug. 26 and Sept. 9, **the modules are a first of their kind for North American airports**…. the modules were designed for three conditions—at the prefabrication yard, for transport, and for final setting. … **"This is a paradigm shift" in airport construction…"**.[92] DFW Airport Module Move Is First of its Kind in the Nation | 2021-09-16 | Engineering News-Record (enr.com)

DOE

DOE has turned to new prefabricated and modular technologies on construction of large buildings associated with energy infrastructure:

> Transient Reactor Test (TREAT) Outdoor Chemical Storage Prefabricated Building: The Transient Reactor Test (TREAT) Facility at Idaho National Laboratory's Materials and Fuels Complex (MFC) needs flammable and combustible liquids storage space. **The proposed action is to procure an outdoor, prefabricated chemical storage building** designed for storage of 55 gallon drums containing flammable or combustible liquids. The facility would be a hazardous material storage building made with double-walled galvanized steel with 3" of insulated air space for extra strength and safety.[93]

DOE is exploring delivery infrastructure for hydrogen incorporating new technology including "**Modular gasification and electrolysis systems** for distributed and bulk power systems…; Solid oxide fuel cells …more suitable for use in modular and utility-scale stationary power systems; …stack and BOP systems integration, controls, and optimization for load following and modular applications.[94]

CORPS OF ENGINEERS

The Corps of Engineers describes technological developments in modular and prefabricated construction on its navigation projects following the 2000 rulemaking and its recommendation that "development **of designs for major rehabilitation or new construction of inland navigation projects must include an evaluation of using prefabricated structural elements** to eliminate the need for cofferdams." Specific examples of these techniques include:

> Prefabrication methods of construction involve some degree of assembling or fabrication of components at a location other than their permanent one. This is commonly done for many project components. Many large components are delivered to their permanent site in some state of completion. For example, **steel …gates are partially assembled offsite**

[92] Aileen Cho, *DFW Airport Module Move is First of its Kind in the Nation*, ENR (Sept. 16, 2021), https://www.enr.com/articles/52419-dfw-airport-module-move-is-first-of-its-kind-in-the-nation.

[93] Office of NEPA Policy and Compliance, *CX-270170: Transient Reactor Test (TREAT) Outdoor Chemical Storage Prefabricated Building*

[94] U.S. Dept. of Energy, Hydrogen Plan Program (Nov. 2020).

and then completed at their permanent location. Also serving as a precedent for **prefabricated construction methods are precast concrete shell-like barges, docks, dry docks, offshore platforms, tunnels, floating approach walls, etc**. Large sections can be made using segmental construction to connect precast concrete panels with bolts, closure pours of concrete, stressing cables, or some combination of each. In situ work would be performed to prepare the foundations in the wet, connect the superstructure to the foundations, and complete the monoliths. Various concrete components for navigation projects can be made of **precast concrete construction that are either built near the site or built offsite and transported to their final destination.**[95] Engineering for Prefabricated Construction of Navigation Projects (army.mil)

PROPOSED LIMITS, INCLUDING THE CLARIFICATION OF "SIGNIFICANT PORTION"

The Department has specifically sought public comment on whether the proposed limits, including the clarification of "significant portion" are appropriate. LIUNA urges that the proposed text defining a "significant portion" of a building or work be modified to ensure that portion(s), module(s) and/or individualized fabricated component(s) integral to the covered building or public work are covered:

> (1) "Site of the work" includes all of the following…
> (ii) the construction of significant portions of a covered building or public work away from the physical place or places where the building or work called for in the contract will remain, provided that such construction work is for specific use in that building or public work and does not simply reflect the manufacture or construction of a product made available to the general public. A ''significant portion'' of a covered building or public work means one or more portion(s), module(s) and/or individualized fabricated component(s) that are integral to the building or public work. For example, important segments of public works, such as lock and dam projects and bridges, at locations other than the locations where the permanent structures will remain when their construction is completed shall be considered a "significant portion" of such covered project and shall therefore be subject to the requirements of the DBA. A ''significant portion'' of a covered building or public work also means one or more portion(s), module(s) and/or individualized fabricated component(s) that are integral to a mechanical, electrical, piping/plumbing, or building envelope system of the building or public work. For example, where a pipe fabrication shop/plant develops custom pipe bends, formations, or assemblies that are to be incorporated into the piping system of a covered project that work shall be considered a "significant portion" of such covered project and shall therefore be subject to the requirements of the DBA.

[95] U.S. Army Corps. Of Engineers, Engineering for Prefabricated Construction of Navigation Project (Feb. 1, 2004).

L. LIUNA SUPPORTS THE NPRM'S PROPOSAL TO CLARIFY THE COVERAGE OF FLAGGERS

The NPRM proposes to revise the definition of the site of the work in 5.2 to include:

> Section 5.2 (1) "Site of the work" includes all of the following:
> (B) Locations adjacent or virtually adjacent to a primary construction site at which workers perform activities associated with directing vehicular or pedestrian traffic around or away from the primary construction site." NPRM at 15793.

The proposed language will clarify the application of "Site of the Work" principle to flaggers performing the following scope of work:

> Workers engaged in traffic control and related activities adjacent or nearly adjacent to the primary construction site are working on the site of the work. Often, particularly for heavy and highway projects, it is necessary to direct pedestrian or vehicular traffic around or away from the primary construction site. Certain workers of contractors or subcontractors, typically called "flaggers" or "traffic directors," may therefore engage in activities such as setting up barriers and traffic cones, using a flag and/or stop sign to control and direct traffic, and related activities such as helping heavy equipment move in and out of construction zones. Although some flaggers work within the confines of the primary construction site, others work outside of that area and do not enter the construction zone itself. The Department has previously explained that flaggers are laborers or mechanics within the meaning of the DBA...[96]

LIUNA supports the foregoing proposed regulation to clarify the application of the "site of work" principle to flaggers. LIUNA represents workers performing activities associated with directing vehicular or pedestrian traffic both on and around or away from the primary construction site on countless construction projects across the US. This clarification, already used in practice, [97] will ensure laborers employed as flaggers receive the benefits and protections of the DB and DBRA. This clarification is not only consistent with the original purpose of the DBA, but also furthers the Secretary's 1985 coverage decision reflected in AAM 141.

[96] NPRM at 15732.

[97] The NPRM notes that there are a variety of naming usages for workers engaged in directing vehicular or pedestrian traffic such as "flagger" or "traffic control." Under LIUNA CBAs, local practice may also establish varying terminology for workers performing activities directing vehicular or pedestrian traffic, including flag person, traffic control person, sign erector, signal person, traffic delineating device applicator, and flagperson pilot car.

FLAGGER WORK IS INTERGRALLY RELATED TO OTHER CONSTRUCTION WORK AT THE WORKSITE

As the NPRM notes, "work by flaggers and traffic operators is integrally related to other construction work at the worksite and construction at the site would not be possible otherwise. See AAM 141; FOH 15e10(a)."[98] Federal agencies also recognizes states role on construction projects. The Federal Highway Administration describes the important role and qualifications of a flagger in the construction process as follows:

> Because **flaggers are responsible for public safety and make the greatest number of contacts with the public of all highway workers**, they should be trained in safe traffic control practices and public contact techniques. Flaggers should be able to satisfactorily demonstrate the following abilities: Ability to receive and communicate specific instructions clearly, firmly, and courteously; Ability to move and maneuver quickly in order to avoid danger from errant vehicles; Ability to control signaling devices (such as paddles and flags) in order to provide clear and positive guidance to drivers approaching a TTC zone in frequently changing situations; Ability to understand and apply safe traffic control practices, sometimes in stressful or emergency situations; and Ability to recognize dangerous traffic situations and warn workers in sufficient time to avoid injury.[99]

That flaggers can be located in different locations on or adjacent to the site to achieve better safety outcomes is recognized in guidance from FAWA when describing "smart" automated flagging devices:

> Automated Flagger Assistance Devices (AFAD) are mechanically operated temporary traffic control devices that function under the same operational principles as traditional flagging. **AFADs minimize flaggers' direct exposure to traffic by allowing them to control the device in an area safely away from traffic, such as behind a guardrail**. Personnel should still be traditionally trained and available to step in as a manual flagger in case of a technology malfunction or driver intrusion. One type of AFAD recognized by the Manual on Uniform Traffic Control Devices (MUTCD) uses a remotely controlled red and yellow lens with a mechanical gated arm mounted to a portable trailer…. **AFAD systems increase the safety of construction workers by removing flaggers from the flow of traffic, whereas traditional flagging practices require workers to stand in the road.** Additionally, motorist compliance is higher with AFAD systems than it is with

[98] NPRM at 15732.

[99] U.S. Dept. of Transportation, Federal Highway Admin., Manual on Uniform Traffic Control Devices: 2009 Edition Chapter 6E. Flagger Control (2009).

traditional, human flaggers and AFAD systems may even reduce labor force requirements over time.[100]

State DOTs recognize the importance of flagger location both on and at locations near the work site:

> **Flagger stations must be located such that the traveling public has sufficient distance to stop at an intended stopping point before entering the work space**. Flagger stations should be preceded by advance warning signs. …**Location and visibility are important factors in flagging operations**…Flagger stations are at points of maximum visibility. Flagger stations are on the shoulder and **opposite the active work area**. Flaggers are easily identified by traffic and not confused with other workers in the area. All vehicles are parked away from the flagger station. The following chart shows the **distance of flagger stations in advance of work areas**…. The flagger should be **stationed sufficiently in advance of workers** to warn them, for example, with audible warning devices such as horns or whistles, of approaching danger by out-of-control vehicle.[101]

Flagging includes a variety of traffic control services, including work activities directing pedestrian or vehicular traffic on, around or away from the primary construction site, setting up barriers and traffic cones, using a flag and/or stop sign to control and direct traffic, and related activities such as helping equipment move in and out of construction zones. See Appendix D.

LIUNA agreements contain numerous ways of naming the "flagger" classification and describing the duties performed. This is a non-exhaustive list of some of those: flag person, flagman, flaggers, traffic control person I, traffic control person II, traffic control by any method, sign erector, traffic delineating device applicator, traffic protective delineating system installer, traffic lane closure (certified), signal men, traffic control signal men, traffic flaggers, cones, barricades, barrels-setter/mover/sweeper, traffic control (flagger), traffic control signalman, traffic control specialist, traffic signaler, installing temporary traffic control devices, work zone barricade servicer, and traffic control maintenance person.[102]

All of the foregoing work by flaggers is integrally related to the other construction work at the worksite and construction at the site would not be possible otherwise. The integral nature of traffic control is demonstrated by its inclusion in the curricula of LIUNA apprenticeship programs around the US. Examples of LIUNA training programs for flaggers are found in Appendix E.

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[100] U.S. Dept. of Transportation, Federal Highway Admin., Work Zone Best Practices Guidebook (2017).
[101] Cal Trans., Flagging Instruction Handbook (July 2020) https://dot.ca.gov/programs/construction/safety-traffic/flagging-handbook.
[102] Appendix D.

The importance of clarifying and thus ensuring DBRA coverage for flaggers is underscored by the dangerous nature of this work. As the curricula cited above shows, a flagger who is properly trained receives a wide variety of instruction on matters dealing with safety on the construction site that impinge on the protection of flaggers themselves, but equally for other workers and the driving and pedestrian public on or near the site. See, Work Zone Data — Work Zone Safety Information Clearinghouse. Over 60% of all fatal injuries at road construction sites are a result of vehicles striking workers who are on foot.[103]

It is for this reason that certifications and trainings are required in most states for flaggers. See, American Traffic Safety Services Association (ATSSA)[104] and the Transportation Development Foundation of American Road & Transportation Builders Association (ARTBA)[105] .

M. LIUNA STRONGLY SUPPORTS STRENGTHENING DBRA ENFORCEMENT TO PROTECT WORKERS AND ENSURE THAT ALL CONTRACTORS BID ON A LEVEL PLAYING FIELD

The Department's proposals to strengthen enforcement on DBRA projects come at a time when violations of labor standards laws are rampant in the construction industry. In the public construction sector, construction bids are usually awarded to the lowest bidder, leading some contractors to engage in illegal labor practices including wage theft, employee misclassification and other violations to achieve lower bids.[106] Studies show that by violating the law, employers can avoid as much as 30 percent from their legitimate labor costs.[107] As a result, the construction industry has some of the highest wage and hour violations in the country.[108] LIUNA

[103] National Work zone Safety, *Worker Fatalities and Injuries at Road Construction Sites* (2022). https://workzonesafety.org/work-zone-data/worker-fatalities-and-injuries-at-road-construction-sites/

[104] ATSSA, Training Certification (2022) https://www.atssa.com/Training/Certification#Recertification

[105] https://artbatdf.org/training_education/safety-certificate/.

[106] Juravich, Tom, Ablavsky, Essie, and Williams, Jake. 2015. "The Epidemic of Wage Theft in Residential Construction in Massachusetts," Labor Center, University of Massachusetts-Amherst. Accessed at: https://www.umass.edu/lrrc/sites/default/files/Wage_Theft_Report.pdf; Juravich, Tom, Russell Ormiston and Dale Belman. 2021. "The Social and Economic Costs of Illegal Misclassification, Wage Theft and Tax Fraud in Residential Construction in Massachusetts," University of Massachusetts-Amherst Labor Center Working Paper. Accessed at: https://www.umass.edu/lrrc/sites/default/files/Juravich%20Wage%20Theft%206%2028%2021.pdf.; Issue Brief and Economic Report, September 2019 , "Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry-Misclassifying Workers as Independent Contractors Harms Workers, the Industry, and the District" Accessed at:, OAG-Illegal-Worker-Misclassification-Report.pdf (dc.gov).

[107] Russell Ormiston, Dale Belman, Julie Brockman, & Matt Hinkel, "Rebuilding Residential Construction, in Creating Good Jobs: An Industry-Based Strategy" 75, 81 & 84 (Paul Osterman ed., MIT Press 2020).

[108] U.S. Dept. of Labor, Wage and Hour Division, Low Wgae, High Violation Industries (2021) https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

specifically highlights the following important enforcement measures proposed in the NPRM that will strengthen enforcement on DBRA projects:

PROTECTING AGAINST MISCLASSIFICATION OF WORKERS.
LIUNA supports DOL's proposal requiring that covered contracts include a provision expressly stating that independent contractors are also entitled to the prevailing wage. The proposal makes clear that Davis-Bacon labor standards apply even when there is no clear employment relationship between a contractor and worker and that the words "employee," "employed," or "employment" in the regulations are not to be interpreted so as to limit coverage to workers even when the employer categorizes them as "independent contractors."

NEW ANTI-RETALIATION PROVISIONS PROTECT WORKERS DURING INVESTIGATIONS.
LIUNA supports the addition of a new anti-retaliation provision to all contracts subject to the DBRA stating "it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or to cause any person to do the same," against any worker for engaging in a number of protected activities.

For example, the proposal will protect workers when notifying any contractor of any conduct which the worker reasonably believes constitutes a violation; filing any complaints, initiating any proceeding, cooperating in an investigation; or informing any other person about their rights under the DBRA. (NPRM at 15747).

LIUNA also supports the proposed remedies for violations of the anti-retaliation provisions, including make-whole relief and remedial actions to restore the worker economically and in terms of work or employment status (e.g., seniority, leave, health insurance coverage, etc.). (NPRM at 15747).

MAKING CONTRACT CLAUSES BINDING BY OPERATION OF LAW.
LIUNA supports the proposal to clarify that Davis-Bacon requirements apply by operation of law and are binding on contractors regardless of whether contracting agencies incorrectly omit contractual requirements. This will create a mechanism to enforce Davis-Bacon even where there have been errors or mistakes in initial coverage decisions.

The NPRM also proposes that contracting agencies must insert the contract clause after award into existing contracts when there is a modification or if the clause has been wrongly omitted. It also proposes that relevant contract clauses be retroactively incorporated upon a request from DOL.

PROMOTE CONSISTENT ENFORCEMENT OF DEBARMENT STANDARDS.
LIUNA supports the proposal to adopt a strong and uniform standard for contractor debarment by harmonizing the DBRA debarment standards by eliminating the DBRA's regulatory "aggravated or willful" debarment standard. The NPRM also proposes to use a mandatory three-year debarment and eliminate the options for early removal from the "debarment list."

CROSS-WITHHOLDING PROCEDURE FOR RECOVERING BACK WAGES.
LIUNA supports strengthening the remedies available when violations are discovered. The proposal clarifies the procedure for recovering back wages by providing that cross-withholding may occur on contracts held by agencies other than the agency that awarded the contract. The proposal also would create a mechanism through which contractors will be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities. Importantly, DOL would give priority to funds withheld for violations of Davis-Bacon prevailing wage requirements over competing claims from, for example, sureties and trustees in bankruptcy of a contractor.

INTEREST ON BACK WAGES.
LIUNA supports the proposal that provides for the payment of interest on back wages and makes clear that interest will be calculated from the date of the underpayment.

PRIME AND SUBCONTRACTOR RESPONSIBILITY FOR COMPLIANCE.
LIUNA supports strengthening DOL's current regulations with stronger language to ensure prime contractors and subcontractors are responsible for violations of lower-tier subcontractors, stating that being "responsible for compliance" means the prime contractor must cover any unpaid wages for subcontractor violations.

CLARIFY CERTAIN DEFINITIONS TO ENSURE CONTRACTOR RESPONSIBILITY.
LIUNA supports the proposed definition of the term "prime contractor" that makes clear when an entity may be considered a prime contractor in a variety of circumstances including, for example, based on its contractual relationship with the government.

REQUIRE THE INCORPORATION OF THE MOST RECENT WAGE DETERMINATIONS INTO CERTAIN ONGOING CONTRACTS.
LIUNA supports the proposal to add to § 1.6(c)(2)(iii) a requirement that the most recent version of any applicable wage determination be incorporated when a contract is changed to include "additional, substantial construction, alteration, and/ or repair work not within the scope of work of the original contract" or to require the contractor to perform work for an additional time period not originally obligated, including where an agency exercises an option provision to unilaterally extend the term of a contract.

UPDATE AND STRENGTHEN EXISTING DAVIS-BACON RECORDKEEPING REQUIREMENTS.

LIUNA supports the proposals to update and supplement existing Davis-Bacon recordkeeping requirements including clarifying DOL's "longstanding" approach to requiring contractors to maintain basic records and certified payrolls, including regular payroll and additional records relating to fringe benefit and apprenticeship and training. The NPRM would specifically require all contractors, subcontractors, and recipients of federal assistance to maintain Davis-Bacon and DBRA contracts, subcontracts, and related documents for three years after all the work on the prime contract is completed. This will greatly assist in enforcement after performance many have ended and both workers and contractors are no longer at the project site.

N. CLARIFY CREDIT RECOGNITION OF CONTRIBUTIONS MADE PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT TO BONA FIDE APPRENTICESHIP PROGRAMS.

In clarifying long-standing practice in the crediting benefit contributions to bona fide apprenticeship programs as noted in the NPRM at 15743, the Department should clarify practice as pertains to collectively bargained contributions to registered apprenticeship programs. The NPRM cites the guidance and case law on this issue in reference to "longstanding practice and interpretation," however the proposed section 59.2(g)(2) raises concern for administrators of registered apprenticeship programs funded through collectively bargained contributions. LIUNA supports a minor revision to the plain language of proposed 5.29(g) (2) that expressly recognizes that contributions at dollar-and-cents hourly rates set by a collective bargaining agreement are creditable.

We recommend Sec. 5.29(g)(2) be revised as follows:

"(2) The contractor or subcontractor may only take credit for the actual costs incurred for the apprenticeship program, such as instruction, books, and tools or materials, **or collectively bargained contributions**; it may not take credit for voluntary contributions beyond the costs actually incurred for the apprenticeship program."

APPENDIX A

LIUNA and the Associated General Contractors of America established LIUNA Training and Education Fund (LIUNA Training) in 1979 as a labor and management non-profit workforce development organization dedicated to apprenticeship, training and certification of workers in the construction industry. LIUNA Training now has a North American network of over 70 affiliated labor-management training centers and Joint Apprenticeship Training Committee sponsors. LIUNA apprenticeship training was first approved by the USDOL in 1994. LIUNA Training maintains the national Construction Craft Laborer apprenticeship standards and supports LIUNA affiliated training funds across the country by training instructors and apprenticeship coordinators. In 2019, there were over 20,000 apprentices in LIUNA Training's network.

Working with its employer-partners, LIUNA Training develops apprenticeship programs, shepherds their registration with the Department of Labor (DOL), trains and professionally certifies apprenticeship instructors and provides the necessary tools and technical assistance to its affiliate sponsors in implementing their programs. It has earned two independent, internationally recognized accreditations, ANSI - the American National Standards Institute and IAS – International Accreditation Services that cover curriculum development and product quality and Instructor and Apprenticeship Coordinator professional certification. It is associated with a growing number of 4-Year Career and Technical Education (CTE) high school programs and various pre-apprenticeship programs that serve youth, women, veterans, incarcerated individuals, immigrants and other underrepresented populations. LIUNA Training has partnerships and grant programs with the Department of Energy, National Institute of Environmental Health Sciences, OSHA, EPA, NRC, and the Department of Education.

APPENDIX B

Selected Examples of General Wage Determinations Based upon Rates from LIUNA Collective Bargaining Agreements for Demolition and Related Work

Demolition laborer: (CA20210022), (AK20210001), (CA20210022), (NV20210001), (KY20210093), (WV20210038), (KY20210038); Demolition, Wrecking and Salvage Laborers: (HI20210001), (HI20210001), (HI20210001), (WI20210010), (DC20210001); Demolition, Wrecking, and Moving: (OR20210001), (WA20210001); Demolition Laborer Tier A (removal of interior/structural petitions): (NY20210003); Demolition Laborer Tier B (shoveling of debris into containers): (NY20210003); Demolition Burner: (RI20210001), (RI20210001), (PA20210003), (WA20210001); Wrecking Laborer: (RI20210001), (MO20210001), (RI20210001); Demolition Torch Operator: (DC20210001), (WI20210010); Cutting torch operator (demolition): (CA20210022); (CA20210017), (CA20210022), (CA20210022); Demolition except Burners: (PA20210003); Cutting and Burning Torch (demolition): (HI20210001), (HI20210001), (HI20210001), (IN20210006); Demolition Laborer, cleaning of brick, cleaning of lumber: (CA20210017); Cleaning of brick if performed by a worker performing any other phase of demo work: (CA20210022); Selective Demolition: (NV20210001); Solar Demolition: (NV20210001); Surgical Demolition: (NV20210001); Chain and Demolition Saw Operators: (IN20210006); Toxic and Hazardous Waste Removal Laborers (IL20210009), (IN20210006); Asbestos Abatement Laborer (NJ20210031) (MA20210001) (CA20210018) (WI20210001) (NY20210003) (DC20210001) (CA20210022) (PA20210003) (AK20210001) (IL20210004) (MN20210117) (CA20210017) (CA20210019) (IL20210004) (AZ20210008) (CA20210018) (CT20210001) (CT20210003) (MI20210101) (RI20210001) (NY20210003) (IL20210009) (IN20210006) (KY20210038) (NV20210001) (RI20210001) (IN20210006) (MA20210008); Laborer (Lead Removal) (CA20210018) (PA20210003) (NV20210001) (OR20210001) (CT20210013) (CT20210014) (IL20210009) ;Hazardous Waste Laborers (NY20210003) (CA20210019) (CA20210018) (AZ20210008) (CA20210022) (CT20210001) (DC20210001) (IL20210009) (IN20210006) (MI20210001) (NY20210002) (OH20210001) (WA20210001) (OR20210001) (PA20210004) (DC20210001) (NY20210002) (PA20210003) (RI20210001); Lead (NY20210003) (AZ20210008) (CA20210018) (CA20210019) (NV20210001); Asbestos Removal and Hazardous Waste Removal (IN20210002) (HI20210001); Handling of toxic materials damaging to clothing (IN20210002) (IN20210006); Certified hazardous waste worker including Lead Abatement (CA20210018); Toxic Waste Remover (RI20210001) (CA20210022) (IL20210009) (CT20210001) (CT20210003); Environmental Laborer (AK20210001) (HI20210001); Dosimeter use (any device) monitoring nuclear exposure (IL20210009); Radiation remediation (NV20210001); Environmental - Nuclear, Radiation, Toxic & Hazardous Waste Levels (KY20210038); Microbial Remediation (NV20210001); Petro-chemical Abatement (NV20210001); Mold Remediation Laborer (OR20210001); Toxic Waste Remover

(RI20210001) (CT20210014) (CT20210013); Environmental Laborer (asbestos) (AK20210001); Environmental Laborer (marine work, oil spill, small boat operator) (AK20210001); Certified hazardous waste worker including Lead Abatement (CA20210018); Asbestos Work with Complete Demolition/Wrecking or Strip Out Work (IL20210009); Toxic and Hazardous Waste Removal Laborers (IL20210009); Handling of Toxic Materials Damaging to Clothing (IN20210006); Hazardous and Toxic Material Handler (IN20210006); Laborer (Asbestos, lead, hazardous waste removal) (NY20210003); Skilled Asbestos Abatement Laborer (DC20210001); Excavations and foundations for buildings, piers, foundations and holes, and all other construction. (HI20210001); Landscape Laborer (NJ20210031) (NJ20210002) (NJ20210052) (WI20210001) (MN20210117) (MI20210075) (WI20210010) (MN20210031) (WI20210015) (PA20210003) (WV20210038) (UT20210097) (MD20210013) (MA20210024) (OR20210001) (KY20210038) (OH20210001) (CA20210022) (NV20210038) (WA20210001) (AK20210001) (CA20210022); Hardscaping (NJ20210002); Waterscape/Hardscape Laborers (HI20210001); Landscape Specialist (MI20210101) (MI20210028) (MI20210075); Top soil grading (MI20210001)

APPENDIX C

Examples of LIUNA Apprenticeship Training Curricula For Demolition And Related Construction Work

Examples from several LIUNA apprenticeship programs include a variety of courses in this field. All focus heavily on ensuring the safety aspects of a sector of the construction market which is particularly dangerous:

- One program has specialized courses which include specialized bridge demolition as well as demolition in environmental training with an emphasis on safety issues involved in remediation:

"The Bridge Construction, Renovation, and **Demolition (BCRD) manual covers the many topics Construction Craft Laborers should know to work safely and productively on bridge construction**. An overview of work procedures, the hazards encountered, and personal protective equipment will be provided…The **Lead Awareness manual covers the hazards and work activities of jobs involving lead exposure such as demolition or the cutting of steel covered with lead-based paint.** This manual is intended as providing awareness to workers and does not comply with EPA or OSHA training for workers who may be potentially exposed to elevated levels of lead…The Silica Awareness manual covers the **hazards and work activities of jobs involving silica exposure such as building and/ or bridge demolition**. OSHA standards that apply to workers exposed to silica also are included…" Layout 1 (squarespace.com); Training Courses — (nelaborerstraining.org):

- A second program teaches a course in *The Introduction to Demolition and Deconstruction* covering an overview of demolition terminology, types of demolition processes, types of structures that undergo demolition and the planning required for a successful and safe demolition project. Specific areas studied include Safety; Site Control; Protection of Utilities and Chemical Process Systems; Mechanical Demolition; Special Working Conditions; and Deconstruction. ThemeNcode PDF Viewer SC [Do not Delete] - NORCALTC; [1] NORCALTC – Training, retraining and apprenticeship programs and opportunities

- A third LIUNA apprenticeship program has both basic and advanced demolition and related courses.

DEMOLITION

Demolition, or razing, is the science and engineering in safely and efficiently tearing down of buildings and other man-made structures. DEMOLITION (40 HOURS / 5 DAYS)- This course presents a combination of classroom and hands-on experience in the basics of demolition,

introducing students to the equipment (boom and scissor lift, skid steer) regulations, and techniques (torch cutting, power-actuated tools) used in today's demolition projects… In addition, some fifteen specialized courses train in demolition and hazardous remediation associated with environmental projects: "**Environmental remediation training** is a complex process that can cover multiple areas. … to be adequately trained to handle and dispose of certain materials and substances…Working on older buildings often implies contact with asbestos, lead, or some other hazardous materials. Competent laborers are trained to prepare the site and dispose of these volatile materials without permanent damage. Adequately trained individuals can assess whether the situation is dangerous and know how to handle hazardous materials, taking steps to remove the material in question and decontaminate the area safely. Environmental remediation training is a complex process that can cover multiple areas…" Demolition – NWLETT; NWLETT

ASBESTOS ABATEMENT

Asbestos abatement is a highly complex operation that … [includes] every process required to manage asbestos safely…Due to the health hazards this material poses, laborers must successfully pass the training and get certified before being allowed to work in this industry. **COURSES for ASBESTOS ABATEMENT include:** Asbestos Awareness Class Iv (Work Only) (3 Hours**),** Asbestos Abatement (Worker) (40 Hours / 5 Days)**,** Asbestos Abatement (Supervisor) (40 Hours / 5 Days**),** Asbestos Abatement Recertification (Worker) (8 Hours / 1 Day)

HAZARDOUS WASTE OPERATIONS

Hazardous waste remediation is a major division of the environmental remediation industry... State and federal regulations require training and certification to work in this industry. The Hazardous Waste Worker course uses both classroom and hands-on training to teach common types of hazardous materials and safe methods to remediate them… **COURSES for HAZARDOUS WASTE OPERATIONS include:** Hazardous Waste Operations & Emergency Response (Hazwoper) (40 Hours / 5 Days), Hazardous Waste (Worker) (40 Hours / 5 Days), Hazardous Waste (Supervisor) (40 Hours / 5 Days), Hazardous Waste Recertification (Worker) (8 Hours / 1 Day), Hazardous Waste Recertification (Supervisor) (8 Hours / 1 Day)

LEAD ABATEMENT

Lead abatement is the process of reducing lead levels and, in some cases, its complete removal. Since prolonged exposure to lead paint can cause an array of health problems, it is imperative to know how to handle it properly. " **COURSES FOR LEAD ABATEMENT RENOVATOR include:** Lead Abatement Renovator (40 Hours / 5 Days)**,** Lead Abatement (Worker) (40 Hours / 5 Days)**,** Lead Abatement (Supervisor) (40 Hours / 5 Days)**,** Lead Abatement Recertification (Supervisor) (8 Hours / 1 Day)**,** Lead Awareness (8 Hours / 1 Day)**,** Lead Renovator (16 Hours / 2 Days)". Asbestos Abatement - NWLETT**;** NWLETT

Appendix D

Examples Of General Wage Determinations Reflecting Laborers' Classifications Engaged In Directing Vehicular Or Pedestrian Traffic With Rates Based On LIUNA Collective Bargaining Agreements

Flag person (CA20210018) (CA20210022) (AK20210001) (HI20210001) (WA20210011) (MA20210001) (CA20210017) (CA20210019) (OR20210017) (DC20210001) (IN20210006) (KY20210038) (MO20210001) (NJ20210002) (NV20210001) (NY20210002) (OH20210001) (OR20210001) (PA20210004) (RI20210001) (WA20210001) (WI20210010) (IN20210006) (HI20210001) (CA20210022)

Traffic Control Person (CA20210018) (CA20210022) (CA20210017) (CT20210001) (CT20210003) (NJ20210002) (OH20210001) (NV20210001) (WY20210046) (WI20210010)

Sign Erector (subdivision traffic, regulatory, and street-name signs) (HI20210001)

Traffic delineating device applicator (HI20210001)

Tape traffic stripes and markings, including traffic control (CA20210022)

Traffic protective delineating system installer (CA20210022) (CA20210017)

Traffic Lane closure, Certified (CA20210017)

Sign Erector (subdivision traffic, regulatory, and street-name signs) (HI20210001)

Signal Person on all construction work defined herein, incl. Traffic Control Signal Person (HI20210001)

Traffic delineating device applicator (HI20210001)

Flagperson pilot car (NV20210001)

Appendix E

As part of its Heavy Civil and Highway Training for Laborers, one LIUNA Training Program includes multiple traffic control and flagging courses. [109] There are three full, one day courses:

> **TRAFFIC CONTROL** -This traffic control course is recognized and valid for flaggers in Washington, Oregon, and Idaho. Written traffic scenarios are used for hands-on exercises. Topics covered include: Clothing and equipment, Safety and positioning of traffic elements, how to stop and release traffic, Slowing and directing of traffic to other lanes, Stopping distance, Road conditions, One-way control, Taper length, Channeling devices, Signage, and Night flagging.
>
> **UDOT CERTIFIED FLAGGING** -This course is designed to instruct students on how to deal with traffic in and around work zones. They include: Proper clothing and personal protective equipment (PPE,) Safety, Positioning, Traffic elements, stopping distances, Road conditions, Slowing, stopping, and releasing traffic, Direction of traffic to other lanes, One-way traffic control, Taper length and channeling devices, Signage placement, Night time and freeway flagging, and dealing with road rage. It also covers environmental hazard awareness, including spiders, snakes. biohazards, and UV protection. This class is twice the required length for current certification requirements.
>
> **HIGHWAY WORK ZONE SPECIALIST** -This is an advanced flagger course that expands on highway work zone safety for workers and is a prerequisite for becoming certified as a Traffic Control Maintainer (TCM); hours worked as a highway work zone specialist are applied toward the 2,000 hours of experience required to qualify for TCM certification. The course focuses on internal traffic safety control techniques, proper safety and handling of traffic control devices, and roadway work zone safety. It is unique to the development of our TCM participants and partner employers.

Then there are then three courses of three full days in length in the progression of training.

> **TRAFFIC CONTROL SUPERVISOR** - The supervisory skills, duties, and responsibilities necessary to successfully control traffic are the focus of this course. Over three days, students receive instruction with legal issues such as liabilities, emergencies, documentation, governing documents (i.e., MUTCD, specifically part IV), contracts, and WSDOT or ODOT guidelines (depending on the state). Participants must complete the TCS and pass the exam with a score of 80% or better…. Applicants must have/provide the following to be considered for this course: A current, state-approved flagging card

[109] https://www.nwlett.edu/courses/heavy-civil-highway-laborers-training/traffic-control/

from Idaho, Oregon, or Washington; TWO signed letters (typed and on company letterhead) verifying the applicant has at least 2,000 hours of work in traffic-related tasks,

UDOT CERTIFIED TRAFFIC CONTROL MAINTAINER ("TCM") - This comprehensive course teaches the duties, responsibilities, and safety necessary to keep the motoring public and highway workers safe from traffic vehicles, including heavy equipment (backovers). TCMs configure work zones, set speed limits, and prepare tapers using traffic devices (barrels, cones, vertical panels, messaging boards, and arrow panels), place concrete barriers, set type three barricades, and oversee flagger positioning and supervision. Each UDOT project requires at least one TCM; this course provides three times the minimum length currently required for certification…. Applicants must have/provide the following to be considered for this course: Northwest Laborers Flagging UDOT certification [and] 2,000 hours' Highway Work Zone experience.[110]

Another example is a "Flagger Certification Training" which meets the Illinois requirement for workers "who direct or work around vehicular traffic. Training will focus on how to protect yourself, other workers and the public in work zones through the proper use of signs, signals and barricades."[111]

One LIUNA Training Fund has a Highway Work Zone Safety[112] training course:

HIGHWAY WORK ZONE SAFETY -is a 40 hours course and includes The Highway Work Zone Safety manual [which] covers work practices and procedures in the work zone as well as "behind the barrel." Topics covered: Flagger Safety, Traffic Control, Personal Protective Equipment, Environmental Hazards, Hazard Communication, Work Processes, Work Site Safety, Hand and Power Tools, Communication.[113]

A LIUNA Training fund includes basic and advanced Traffic Control and Flagging Courses in which safety and certification is emphasized.[114].

TRAFFIC CONTROL SAFETY & FLAGGING-The "Flagging" class is basic requirement for working in the right of way. Both the Cal Trans and Watch manual are covered in details. The course is designed as a minimum requirement for addressing taper

[110] Traffic Control - NWLETT

[111] Flagger Certification Training - LiUNA Chicagoland Laborers' District Council Training and Apprentice Fund (chicagolaborers.org)

[112] https://nelaborerstraining.org/training-courses

[113] Layout 1 (squarespace.com)

[114] https://local585.org/laborers-training/

lengths and advanced warning for heavy and highway work. Course covers Cal OSHA requirements for flagging.

ADVANCED TRAFFIC CONTROL- [Prerequisites: Safety/Flagging] **-** Municipal Lane closures policy and procedures is the focus of this course. Plan reading for T.C., trailering and towing, practical application of set up and take down are covered. Laborer's Training - Local 585 LiUNA