International Union of Operating Engineers
AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS



International Union of Operating Engineers Comments on:

**"Updating the Davis-Bacon and Related Acts Regulations"**

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The International Union of Operating Engineers ("IUOE") respectfully submits this comment in support of the Department of Labor-Wage and Hour Division's ("WHD" or "USDOL") Notice of Proposed Rule Making ("NPRM") on Updating the Davis Bacon and Related Acts ("Davis Bacon", "DBA" or "The Act") Regulations published on March 18th, 2022.

The IUOE was founded in 1896 and proudly represents over 400,000 working people across the United States and Canada. Members of the IUOE are primarily operating engineers, who work as heavy equipment and crane operators, pipeliners, mechanics, and surveyors in the construction industry, and stationary engineers, who work in operations and maintenance in building and industrial complexes, as well as several job classifications in the petrochemical industry. While working and advocating on behalf of our members, the IUOE is intimately familiar on all matters surrounding the Davis Bacon and Related Acts since it was passed into law.

## I. INTRODUCTION

The IUOE applauds the WHD's proposed rules that reinvigorates the Davis Bacon Act back to its original conceptions to support the broadening of the middle class. The Davis Bacon Act was passed in 1931 to ensure that the US Government behaved responsibly by not undercutting area wage standards when entering the construction market as a consumer. The Act in part revolutionized the country's moral philosophy when dealing with the American worker and laid the groundwork for fundamental labor legislation such as: the National Labor Relations Act, the Fair Labor Standards Act, Walsh-Healey Public Contracts Act and McNamara-Ohara Service Contract Act.

However, as popular and political narratives began to shift, the Act became an easy target and in 1982 was re-made with negative consequences that still reverberate throughout the construction industry and society at large today. In the 40 years since the Act was regulatorily gutted, the United States economic outlook for working- and middle-class families has plummeted. Even before COVID-19 struck in March 2020, the United States

was experiencing levels of economic inequality unseen since the Gilded Age.[1] Since the 1982 regulations, the size of the middle class across America has continuously contracted year after year, at first gradually than severely accelerating after the millennium.[2] This outlook only worsened with the economic shock caused by COVID-19, when many working people had to leave their jobs while those at the top added more to their wealth.[3]

The moment called for the United States to re-analyze the policies that got us here, and the IUOE believes strongly the WHD's strengthening of Davis Bacon is an excellent first step to re-balance the scales and return to a regulatory environment where if you're willing to work hard you can prosper. The below represents the IUOE's in depth comments of the WHD's NPRM.

The IUOE will advocate for the following Wage and Hour Division proposals including re-instating the 30 percent rule, treating variant rates as equivalent rates, providing Davis Bacon Coverage for Surveyors, allowing local prevailing wages to be adopted in certain circumstances and many other proposals. Additionally, we will offer respectful critiques on some proposals, particularly highlighting enforcement issues, in those sections the IUOE will suggest improvements to the proposed rule that we believe should be considered when creating the final rule. Finally, the IUOE hopes on behalf of it's over 400,000 working men and women that these comments will provide an authentic insight to the tangible benefits and effects this proposal will have on countless lives and construction projects across the country.

## II. Analysis and Comments

### A. **Definition of Prevailing Wage** (Page 15703) 29 CFR 1.2 (A)

The IUOE welcomes the return to the original definition of prevailing wage by the WHD's re-adoption of "the three-step process". In 1982, when the WHD re-defined "prevailing wage" and abandoned the three-step process, the WHD unwittingly transformed the Government's primary objective from analyzing actual wages to select a prevailing wage to a pervasive ad-hoc creation and publication of construction wages that no actual worker is paid. Over the past 40 years this policy has operated directly in contrast with the original intentions of the Act and diluted construction wages on Federal projects across

[1] Andrias, K., *The New Labor Law*, 126 Yale L.J. 1, 5 (2017); Piketty T., Capital in the Twenty-First Century 23-24 (2014); Horowitz, J. M., Igielnik, R., & Kochhar, R., *Trends in Income and Wealth Inequality*. Pew Research Center's Social & Demographic Trends Project. Washington DC (2020).

[2] *America's Shrinking Middle Class: A Close Look at Changes Within Metropolitan Areas*, Pew Research Center, Washington DC (2016) Available at https://www.pewresearch.org/social-trends/2016/05/11/americas-shrinking-middle-class-a-close-look-at-changes-within-metropolitan-areas/#:~:text=The%20decline%20of%20the%20middle,ends%20of%20the%20income%20distribution.

[3] Collins, C., 2022. *U.S. Billionaires Got 62 percent Richer During Pandemic. They're Now Up $1.8 Trillion*. - Institute for Policy Studies. Available at: https://ips-dc.org/u-s-billionaires-62-percent-richer-during-pandemic/.

the country. The WHD is sound in its analysis that to properly effectuate the Davis Bacon Act the definition of prevailing wage must be re-assessed.

The Davis Bacon Act notably does not provide a definition for "prevailing" and instead leaves the definitional task to the Secretary of Labor.[4] Originally the "three step process", conceptualized by the framers of the DBA, guided the WHD Administrator that to create a prevailing wage the following criteria should be used to analyze reported survey data[5]:

1. Is there a majority 50% +1 rate?
2. If not, is there a wage paid to the greatest number of workers, that surpasses 30% of all data reported?
3. If not, then a weighted average of all data should be created and listed as "prevailing."

In 1982, the WHD abandoned the second step mandating that if a wage fails to demonstrate it is a clear majority of all data reported, no reported wage can be deemed prevailing, and the "weighted average" in step three must be followed.

The false premise used in the 1982 elimination of the second step was that any definition of prevailing wage that was deemed prevailing with the 30% standard was inflationary and favored CBA rates. However, this rationale completely and conveniently disregards the plain text definition of "prevailing." Prevailing is defined by Merriam Webster as "to be frequent."[6] The American Heritage Dictionary defines Prevailing as "widespread."[7] The Oxford English dictionary defines Prevailing as "having most appeal or influence; prevalent."[8] In conflating the concepts of a data point that "prevails" with that of a clear majority data point the 1982 WHD unilaterally changed the character of prevailing wage to instead require a clear majority wage or, in the absence of such, an artificially created wage paid, in fact, to no one.

To better exemplify the problem, under the 1982 standards if Wage Rate A is 45% of all reported data and 5 other union and non-union wildly varying wage rates are respectively reported at 10% each, the WHD cannot accept Wage Rate A as prevailing despite clearly meeting all commonly agreed upon definitions of "prevailing". The NPRM corrects this aberration and stops the Act from continuing to drive down wages with a questionable data analytical approach.

The NPRM astutely notes that the elimination of the second step has morphed the role of the US Government from publishing wages based on an analysis of real wages, to an ad-hoc wage creator as the 1982 regulations increased the publication of weighted survey rates from 15% in 1981 to 65% in present day. Under the 1982 regulations, construction workers can no longer expect the US Government to

[4] Bldg. & Const. Trades Dep't, AFL-CIO v. Donovan, 553 F. Supp. 352, 354 (D.D.C. 1982).

[5] Regulation 503 section 2 (1935); 47 FR 23644.

[6] *Prevailing*, Merriam-Webster Dictionary (11th ed. 2020).

[7] *Prevailing*, American Heritage Dictionary (5th ed. 2022).

[8] *Prevailing*, Oxford English Dictionary (11th ed. 2020).

responsibly analyze data to ensure area standards are not undercut. The WHD is correct in its approach that the three-step process must be restored.

**B.** **Variable Rates That Are Treated As Equivalent** (page 15706) 29 CFR 1.3

It is long past time for the WHD to fix the regression stemming from the *Mistick* decision. The IUOE believes the variable rate analysis proffered by the *Mistick*[9] case is rife with misanalysis that has watered-down interpretations of survey data and drives down construction wages across the country. IUOE Locals across the country negotiate and administer hundreds of construction collective bargaining agreements. These agreements often contain various bargained-for wage differentiations reserved for when employers require personnel for dangerous or technical work, night work or work in remote locations. However, there is no doubt that these so-called variant rates are collectively bargained rates, but under the inflexible *Mistick* analysis the WHD must always distinguish these rates as separate, distinct data.

Until the *Mistick* case was decided in 2006, the WHD took these industry standard variables into account when analyzing reported survey data and properly marked these variant rates as equivalent to other reported rates from the same base CBA. *Mistick* presents a deep misunderstanding of construction economics regarding the challenges to staffing undesirable shifts or dangerous work, an issue jointly contemplated by sophisticated parties in contract negotiations. In the construction market, workers, accustomed to a transient work schedule and frequent layoffs, will often not accept undesirable shifts, types of work, or remote located jobsites without added compensation that make these low demand jobs more attractive. This is understood by IUOE Locals and their signatory contractors across the country who negotiate and agree to additional pay under these circumstances. The "to the penny" rationale put forth by *Mistick* completely goes against the realities across projects around the country.

Further, the approach endorsed in *Mistick* has had dire consequences on interested parties reporting wage data. The USDOL Inspector General[10] and the Government Accountability Office[11] ("GAO") have criticized the WHD's inability to entice interested parties to provide enough usable data that provides a more accurate prevailing wage. Because of *Mistick*, interested parties, who participate in the survey process, re-consider submitting legitimate project data (that may slightly vary the primary rate they pay) so as not

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[9] *In the Matter of: Mistick Construction and Associated Builders and Contractors of Western Pennsylvania, Inc. With Respect To Review and Reconsideration of Davis-bacon Wage Det. Nos. Pa 020013, Pa 20030033, Pa 030013.* ARB CASE NO. 04-051 (2006) Available at: https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/DBA/04_051.DBAP.PDF?_ga=2.186938720.999134824.1652725844-1065806743.1610120323

[10] "WHD continued to face challenges in securing sufficient wage data from the local areas that prevailing wages represented. For 7 sampled surveys, the calculation of prevailing wages published for 31 counties did not include a single worker paid in those counties.." Dept. of Lab. Inspector General Rep. No. 04-19-001-15-001, *BETTER STRATEGIES ARE NEEDED TO IMPROVE THE TIMELINESS AND ACCURACY OF DAVIS-BACON ACT PREVAILING WAGE RATES* (2019) at 3.

[11] Gov't Accountability Office, GAO-11-152, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey* (2011) at 24.

to undercut their chances at prevailing in the current regulatory landscape. For example, a CBA rate from the same job, for the same classification, but compensated slightly different because a section of the data is from a nightshift will incur "distinct" treatment. Because the two data points currently actively undermine each other, reporting parties now do a risk/reward analysis to determine whether it's worth reporting—undermining the purpose of the Act to delineate a prevailing wage based on as much data as possible.

29 C.F.R. § 1.3 directly encourages the Administrator to consider signed Collective Bargaining Agreements in interpreting survey data to create Wage Determinations ("WD"). Under this discretion the Administrator must look past the raw wage reported to ascertain whether facially distinct wage rates are the same CBA rate with industry standard variations. The IUOE is assured that the WHD sees the problem *Mistick* has caused for reporting wage data across the industry, and fully supports the regulatory measures suggested to correct the problem.

**C. <u>Laborer or Mechanic (Surveyor Crew)</u>** (page 15729) 29 CFR 5.2 (F)

The IUOE fully supports restoring survey crews as a covered "laborer or mechanic" classification under the Act. The IUOE represents thousands of surveyors across the United States on construction jobs and are well positioned to comment on the merits of this proposal.[12] The Trump Administration's illogical last minute All Agency Memorandum[13] is in direct conflict with the realities of the industry and past practice of the Act. Surveyors clearly perform physical duties while employed by a contractor in work performed immediately prior to or during actual construction in direct support of construction crews on the site of the work. Surveyors work in tandem routinely with craft workers who are universally deemed "laborers and mechanics" under the Act, the distinction excluding surveyors is simply arbitrary and unnecessarily punitive of craft workers performing survey work.

Under the Act, to define laborers or mechanics the WHD looks to see whether the workers duties are manual or physical in nature.[14] In addition to intellect and training, members of Surveyor Crews are on their feet most of the workday often walking several miles a shift up and down slope. Crew members are often expected to carry 30-40 lbs. worth of equipment with them to perform their task including but not limited to: GPS receivers & staff, lathe rub and hack bag, sledgehammer, and shovel. Additionally, Survey Crew members are expected to carry manual tools on utility belts including a 16 oz hammer, gloves, goggles, hand tape and knives. Surveyors are often tasked with navigating rough terrain and working with

[12] For example: IUOE Local 3 represents Surveyors throughout California, Nevada, Hawaii, and Guam, IUOE Local 12 represents Surveyors throughout California and Nevada, IUOE Local 15 represents Surveyors throughout New York City, IUOE Local 158 represents Surveyors throughout Upstate New York, IUOE Local 825 represents Surveyors throughout New Jersey, IUOE Local 302 represent Surveyors throughout Washington, Idaho, and Alaska.

[13] AAM 235 retracted AAM 212 which provided Surveyor's coverage under the Act. The scant basis for doing so was related to: "delay in implementations" and "confusion". AAM 235 is available at: https://cdn.ymaws.com/www.nsps.us.com/resource/resmgr/davis-bacon/AAM235.pdf

[14] 29 CFR 5.2(m).

a GPS to sink stakes, lathes, and hubs with a sledgehammer into the ground for equipment operators to use as a guide for excavating or grading. Additionally, Surveyors are often tasked with chiseling into concrete with steel hammers to mark where other trades are to locate walls and put-up machinery.

Surveyors under any definition, but specifically the one under DBRA, are covered "laborers and mechanics" should be surveyed and listed on Wage Determinations like the other craftsmen they work with every day on construction sites across the country.

**D. <u>Adoption of State/Local Prevailing Wage Determinations</u>** (Page 15709) 29 CFR 1.3 (g)-(j)

The IUOE fully supports the adoption of state prevailing wages on Wage Determinations when a state has a demonstrated history of successfully and fairly administering its own prevailing wage law. Adoption of state rates will help WHD administer the Act more efficiently in many ways by freeing more resources: to enforce against violations of the Act, to implement wage increases on WDs in a timelier fashion, and to quickly analyze survey data. The IUOE specifically will have further comments below on the vitality of the WHD having and dedicating more resources to enforce and monitor benefit plans. However, as will be discussed below the IUOE believes that clear guidelines must be maintained to ensure state legislatures are not able to circumvent the aims of the Act to artificially drive down wages.

The WHD has successfully used the regulations to implement this adoption practice for years with highway survey wages for as many as 15 states, and has responsibly monitored which states prevailing wage laws comply with the federal standard.[15] If the WHD can ascertain whether a state's prevailing wage survey metrics is "substantially similar" to the standards promulgated by the Act, there are compelling reasons it should expand this adoption into other types of construction besides Highway work.

While the regulatory framework of the DBA is important, the actual implementation and minutiae of the Act is sometimes even more vital as it directly affects the wages of working people. This important implementation specifically includes the updating of wages and fringes across the 4,339 DBA Wage Determinations, and many of these Determinations include hundreds of classifications. Taking these numbers into account, the WHD is completely responsible for the maintenance of hundreds of thousands of wages and fringes. Allowing states who already administer their own prevailing wage framework to validate, administer and publish updates would significantly free up WHD resources in innumerable ways.

The IUOE has firsthand seen the struggles the pandemic has presented the dedicated employees of the Wage and Hour Division. The WHD is the sole office responsible for the enforcement and administration of the Act including the maintenance of the Wage Determinations which lay out prevailing wages on the federal level.[16] The WHD is tasked with this goal but doesn't receive proper funding in the budget to complete this task, for example it's appropriated funding has seen a minimal increase since 2012.[17] The WHD has fluctuated full time employees and in 2021 was appropriated funding for 65 less

[15] 23 U.S.C. 113(b); 29 CFR 1.3(b)(4).

[16]Wage and Hour Div., *FY 2022 Cong. Budget Justification* (2021) at 10 Available at: https://www.dol.gov/sites/dolgov/files/general/budget/2022/CBJ-2022-V2-09.pdf.

[17] *Id.* at 9.

employees that it was in 2017.[18] In 2022 WHD was again rebuffed for the significant funding increase it asked for to complete its mission and it's 2022 budget received a paltry 2% increase from the 2021 budget.[19] Because the Wage and Hour Division has been consistently underfunded and asked to do more with less, the WHD must get creative and adopting this commonsense approach will help the Division run more efficiently and better dedicate funding and resources. The IUOE believes this proposal is a significant step in that creative direction that will lead to a much better implementation of the Act.

With that said the IUOE believes it is vital for the WHD to address the potential of some states to use this rule to artificially lower wages on federal Davis Bacon projects being performed in their states. For that purpose, we believe the WHD should add a clause to the final rule that the Administrator shall closely scrutinize a state's submissions if the state cannot demonstrate a 5-year history of successfully administering such a prevailing wage program. This scrutiny should allow the Administrator to not accept such wages if they significantly lower the wages already listed on the WD.

**E. <u>Frequently Conformed Rates</u>** (Pages 15722) 29 CFR 1.3 & 5.5

Conformances are a vital mechanism on DBA projects when WDs do not contain the job classifications necessary to complete covered construction projects. Under the current process when a contractor looks for the mandated wage to pay, and the type of work needed for a project is not performed by a labor classification already listed on the applicable WD, the contractor must request a job-specific conformance from the WHD. A job specific conformance is a determination that specifically lists a wage to be paid on the project after a local area practice test to determine a proper wage to be paid for the missing classification. The process is lengthy, complicated and leads to financial uncertainty for every party involved in the project and currently is repeated ad nauseum.

This comment, the DOL Inspector General, GAO and the NPRM have well covered the state of the Act in the regulatory wake of the 50% +1 rule, and *Mistick*, specifically that there is less and less useable data to make an informed analysis on prevailing wages. In this current framework, many classifications or pieces of equipment do not receive a wage at all after a survey. This has led to the Federal construction industry's severe over-reliance on conformances and has become a top concern of contractors who perform the work. The GAO specifically noted numerous concerns about the current state of the conformance process, including but not limited to, the fact that many contractors are unlikely to take federal work given the uncertainty of the actual wages that must be paid due to the job-specificity nature of the conformances[20].

The NPRM demonstrates that the WHD took these conformance criticisms seriously. Beginning a process that makes clear to contractors at the start which rates are to be paid on commonly utilized classification will not only encourage more contractors to bid projects but also allow the WHD to allocate resources away from creating thousands of job specific conformances per year. It is a universally accepted

[18] *Id.*

[19] Smith, P. and Harris, A., 2022. *Minimal DOL Budget Boost in 2022 May Be Blunted by Rescue Cash*. Available at: https://news.bloomberglaw.com/daily-labor-report/minimal-dol-budget-boost-in-2022-may-be-blunted-by-rescue-cash.

[20] Gov't Accountability Office, GAO-11-152, *Davis-Bacon Act: Methodological Changes Needed to Improve Wage Survey* (2011) at 32- 33.

bad business practice to execute a contract with several outstanding financial variables; however, under the current regulations this is the normal practice on all DBA projects. The WHD's proposal will fix the conformance process and better lay out all terms and conditions and is a benefit to all parties who interact with DBA projects.

**F. Rate of Contribution or Cost for Fringe Benefits** (Page 15743) 29 CFR 5.25

The NPRM includes three conditions to exempt defined contribution pension benefit fund from the otherwise required annualization rules. The proposed conditions for the exemption are as follows:

(A) the benefit provided is not continuous in nature; and

(B) the benefit does not compensate both private and public work; and

(C) the plan provides for immediate participation and essentially immediate vesting.

The IUOE opposes the continued interpretation of the phrase "essentially immediate vesting" to apply the annualization exemption to defined contribution pension plans that require up to as many as 500 hours of service before participants vest and obtain the benefit of the contributions in the first place (known as the "500-hour vesting rule"). The IUOE believes the final version of the regulations should eliminate the word "essentially" from the exception so that workers who participate in these plans receive all (rather than "essentially" all) of their prevailing wage compensation as intended by the Act.

Additionally, the regulations contemplate an expansion of the annualization exemption to other plan types. For example, the NPRM states "these (three) criteria are not necessarily limited to Defined Contribution Pension Plans ("DCPP")" while adding the WHD "does not currently have any public guidance explaining the extent to which other plans may also share those characteristics and warrant an exception from the annualization principle."

However no other benefit plan besides DCPPs meets the enumerated criteria. Defined Benefit Pension Plans contain vesting and service requirements, Health and Welfare Plans are continuous in covering individuals when working on public or private jobs, as do Apprenticeship and Training programs. Paid Time Off benefits are also continuous as benefits accrue when working on public or private jobs. Supplemental unemployed benefit plans do not vest to the individual at all, but to the plan, and the benefits are continuous in nature.

The three-part annualization exemption requirement has been narrowly constructed to only apply to certain DCPPs. To the extent that this exemption has any place in the proper administration of the Act at all, the final rule should expressly state its narrow application to DCPPs to avoid weakening even further the prevailing wage by allowing improper and excessive fringe benefit credits for benefits that employees will never see.

**G. Exception Requests, Contractors** (Page 15803) 29 CFR 5.25

The NPRM describes preclearance as "a new administrative process that contractors must follow to obtain approval for an exception from the annualization requirement." [21] The regulations state "Contractors and other interested parties may request an exception from the annualization requirement by

[21] NPRM at 15743.

submitting a request to the WHD Administrator."[22] Further, the regulations contemplate using this process for all previously exempt DCPPs, by sunsetting all previous exemptions after 18 months.

> Previous exceptions. In the event that ***a fringe benefit plan (including a defined contribution pension plan with immediate participation and immediate vesting)*** was excepted from the annualization requirement prior to the effective date of these regulations, the plan's exception will expire 18 months from the effective date of these regulations, unless an exception for the plan has been requested and received by that date under 5.25(c)(2), above. (Emphasis added)[23]

The IUOE believes a preclearance process is unnecessary because there is no evidence of widespread misuse of annualization by DCPPs. On the other hand, the BLS reports an annual average of 800,000 construction establishments; many of which offer a defined contribution pension plan. Under the proposed preclearance process, every contractor with a DCPP which has performed, or contemplates performing, DBA work, would need to submit plan documents for approval. Even if only 50,000 plans were submitted over the first year, the U.S. DOL would need to accept documents from some 1,000 plans a week, and then conduct a review process for each one. This would constitute a daunting and unnecessary task that the WHD should not take on.

Finally, the NPRM's broad language, however, may be read to mean the preclearance process could be available for all "fringe benefit plan[s]" rather than limited to DCPPs. As stated in Section F, the IUOE believes any exemption from the annualization requirements should only be available to that limited group of DCPPs.

**H. <u>Coverage of a Portion of a Building or Work</u>** (page 15724) 29 CFR 5.2 (B)(2)

The IUOE supports this important change which changes and expands the definition of projects covered under the Act and brings the goals of the DBA into the 21st Century with public works construction. When the Act was passed in 1931 Federal and municipal projects were generally funded under a basic municipal funding scheme with federal appropriation for a project which then was sent out for bid with a prevailing wage mandate in the request for proposal. However, accounting and management practices in the construction industry have since significantly transformed which complicates and potentially threatens the Act's role in the construction of federally funded public works. Through the rise of Public Private Partnerships, complex bond finance schemes, leasing agreements and other sorts of private involvement in public works, the WHD's rule proposal will ensure the DBA continues to play a role on public work projects of the future that are completed utilizing these modern funding schemes.

In addition to the sound analysis provided by the WHD in the NPRM, the Act must be transformed to be effectuated when the federal tax dollars threshold is surpassed in any manner on public works. When the Davis Bacon Act was signed into law, Websters defined public works as the following "all fixed works constructed or built for public use or enjoyment, as railroads, docks, canals, etc., or constructed with public funds and owned by the public; often, specif., such works as constitute public improvements, as parks, museums, etc."[24] The current definition of public works has not changed, as American Heritage Dictionary

[22] NPRM at 15803.

[23] *Id.*

[24] Webster's New International Dictionary (2d ed.1934).

defines the term as "construction projects, such as highways or dams, financed by public funds and constructed by a government for the benefit or use of the general public."[25]

The Supreme Court defined public works in the context of Bonding laws that work hand in hand with the Act as "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public."[26] Other courts have defined public works as "any work in which the United States is interested, and which is done for the public and for which the United States is authorized to expend funds."[27] Supreme Court Justice Kavanaugh, while on the D.C. Circuit, expanded on these principles and reasoned that to qualify as a public work a "project must possess at least one of the following two characteristics: (i) public funding for the project's construction or (ii) government ownership or operation of the completed facility, as with a public highway or public park.[28]

All this background is important to highlight the fact that throughout all the changes in funding and leasing in the construction industry, the public works definition has not changed. The proposed rule will make clear that works or buildings that are public in nature but financed in a manner that currently circumvents the Act, will no longer threaten the integrity of the Act. The WHD's proposal that mandates the DBA apply even though only a part of the project would traditionally incur DBA coverage is a step in the right direction.

**I. <u>Building Work Data</u>** (page 15708) 29 CFR 1.3(d)

The WHD's plan to end the 1982 restriction on incorporating federal data on Building and Residential surveys is a commonsense proposal that will allow the DBA to be administrated more efficiently. To increase the quantity and quality of data to determine prevailing wages, the WHD has consistently increased outreach to encourage stakeholders to participate in the survey process. In 2019, the DOL Inspector General reported "contractors lack of participation in wage surveys remained a challenge to WHD's ability to publish accurate prevailing wages"[29]. The WHD's proposal to re-incorporate federal data on building and residential construction, as it already does with Heavy and Highway surveys, would solve two problems in that it would resolve some of the data response problems and allow data analyst staff to be more efficient.

The WHD's goal should be to incorporate as much legitimate survey data as possible regardless of where that data is submitted from, especially as struggles for stakeholder engagement remain a serious issue. The aims and goals of the DBA are to determine a prevailing wage for a given area, not a prevailing wage for a given area solely based on data submitted by stakeholders who have the time and resources to properly fill out and submit WD-10s. If the WHD has data easily accessible from Federal building and

[25] (5th ed. 2015 online).

[26] Noland Co. v. Irwin, 316 U.S. 28 (1942).

[27] Peterson v. U. S., for Use of Marsh Lumber Co., 119 F.2d 145, 147 (6th Cir. 1941).

[28] D.C. v. Dep't of Lab., 819 F.3d 444 (D.C. Cir. 2016).

[29] Dep't of Lab. Inspector General Rep. No. 04-19-001-15-001, *BETTER STRATEGIES ARE NEEDED TO IMPROVE THE TIMELINESS AND ACCURACY OF DAVIS-BACON ACT PREVAILING WAGE RATES* [2019] at 11.

residential projects, there is no compelling reason why it should not be used, just as it currently is utilized on heavy and highway surveys.

This proposal also makes sense when considering the vitalness of the infrastructure that are built under the Building and Residential sub-categories. Important examples of foundational building projects listed in the Department's AAM 130 that are likely to be federal or federally assisted include detention facilities, institutional buildings, museums, post offices, schools, and water and sewer treatment facilities. It is essential that data from these projects are included in a survey, as they reflect the wages paid by skilled and experienced contractors on these types of projects. These projects are just as important as the roads and tunnels we drive on, and the WHD should incorporate all data available to ensure they are built responsibly.

**J. <u>Periodic Adjustments to Survey Rates</u>** (Page 15716) 29 CFR 1.6(c)(1)

The IUOE believes every interested party should applaud this measure which will allow non-union designated rates to rise with inflation and will prevent workers from being paid near poverty wages for skilled work and provide more certainty on costs of federal contracts. Under the current process when a wage rate does not reach the level deemed for a CBA rate to prevail, the weighted average rate remains stagnant until the WHD is able to take the time and resources to be able to complete another survey. This process often takes at least 10 years, most times longer to re-survey.

As previously touched upon, the 1982 regulations have directly caused an influx of weighted average rates. One of the unanticipated consequences from this is the immediate rendering of nearly every weighted average rate as outdated from the moment it is published. The process for a weighted average rate to be created and published on a WD takes around two to three years from when the survey submission period ends. However, even if instantaneously posted inflation would still dilute the wage very quickly.

However, this immediate dilution is not the primary problem with weighted average rates, it is the weighted average rates' decades long stagnation and lack of escalation that is a crisis. The DOL Inspector General directly criticized the current practice which analyzed procurement statistics and highlighted multiple federal construction contracts across Texas, New York and Puerto Rico let out for bid with weighted average wages from the 1980's and well below the federal minimum wage.[30] In that report the Inspector General continued that this practice routinely underpays workers and leads to confusion on the financial responsibilities of the contract. The Inspector General pleaded with the WHD to begin the process to establish some wage escalatory measure to match inflation, and finally the WHD is acting on that.

It is clear from a worker, contractor, and government perspective that the current practice must be addressed immediately. The IUOE applauds WHD for taking proactive steps to fix this through this NPRM by implementing an Employment Cost Index yearly update to all non-union weighted average rates to ensure skilled work receives the compensation it deserves.

[30] Labor Inspector General Rep., BETTER STRATEGIES ARE NEEDED TO IMPROVE THE TIMELINESS AND ACCURACY OF DAVIS-BACON ACT PREVAILING WAGE RATES [2019] Rep No. 04-19-001-15-001. at 5 and 6 Available at: https://www.oig.dol.gov/public/reports/oa/2019/04-19-001-15-001.pdf.

**K. <u>Unfunded Plans</u>** (Page 15744) 29 CFR 5.28

The NPRM expands on an existing requirement that all "rate of cost plans," which under Davis Bacon regulations, are considered unfunded under the Act,[31] must be approved by the Secretary to qualify as bona fide benefit plans on prevailing wage jobs. Most individuals, and over 60% of construction employees, receive health care from self-funded plans, and we believe when sponsored by a single employer these should be considered unfunded/rate of cost plans.[32] [33] [34] These requests, which require substantial information, would be submitted to the WHD's Division of Government Contracts. The pre-approval process would be unnecessarily burdensome on WHD. Many "rate of cost" (so-called unfunded) plans are used for paid time off benefits, such as vacation, holiday, and sick leave. Such plans are bona fide, but largely informal, and may not even possess the documents the WHD contemplates collecting in the first place.

In addition, the authority to approve benefit plans brings up possible conflicts with matters ERISA assigns exclusively to the Employee Benefits Security Administration. The IUOE instead recommends that the final rule should establish clear rules for determining the hourly fringe benefit credit in lieu of wages for "rate of cost" plans.[35] This is particularly important as agency guidance has not kept up to date with new types of benefits.

The IUOE recommends four key points should be added to the final rule:

1. All "rate of cost" plans must use a yearly period for their fringe benefit credit calculations.
2. "Rate of cost" health care plans must use the IRS COBRA rules for determining the premium costs used for any fringe benefit credit calculations.
3. All "rate of contribution" plans must use the existing annual or monthly time period for annualizing fringe credit calculation; shorter periods are not allowed.
4. The annualization rule applies to all types of plans, including Health Savings Accounts and Health Reimbursement Accounts. The only exception to the annualization rule is for DCPPs.

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[31] *See*, 29 CFR 5.23.

[32] *See*, Dept. of Lab. Rep. to Cong., *Annual Report on Self Insured Group Health Plans*, (2019) Available at: https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2019.pdf.

[33] *See*, Dept. of Lab. Rep. to Cong., *Annual Report on Self Insured Group Health Plans*, Appendix A Group Health Plans Report (2019) Available at: https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2019-appendix-a.pdf.

[34] *See*, Dept. of Lab. Rep. to Cong., *Annual Report on Self Insured Group Health Plans*, Appendix B Self Insured Health Benefits Plans 2019 (2019) Available at https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2019-appendix-b.pdf.

[35] *E.g.*, NPRM language on apprenticeship credits, NPRM at 15744-15745.

**L. Construction, Prosecution, Completion, or Repair (Demolition)** (Page 15726) 29 CFR 5.2 (C)

The IUOE fully supports the commonsense application of the Act to demolition work. Demolition has traditionally been performed under the Service Contract Act because it was determined demolition did not fall under "alteration, construction, or repair". However, demolition was sometimes provided DBRA coverage in limited and unclear circumstances. With the WHD's addition of "prosecution" to 2(v) it will clarify that when a demolition project is done in contemplation of a DBA covered job, that demolition will also be covered by the DBA.

Frankly, the distinction between construction and demolition never matched the realities of the industry. In the private sector, developers and owners do not often bring in a contractor for demolition and a separate contractor to complete the construction of the project. The two are interconnected. The IUOE believes this clarification is positive step in the right direction and will help better reflect the realities of industry.

**M. Scope of Consideration (Metro/Rural)** (Page 15718) 29 CFR 1.6(f)

The IUOE believes this change will help the USDOL garner more useable data during the survey process. As has been touched upon the WHD faces a crisis in compiling enough data to make accurate determinations as to what wage prevails. This is partially because the current regulations prohibit DOL from considering urban county data in establishing Davis-Bacon rates for rural counties, and vice versa.[36] The proposed rule would restore the historical policy of permitting DOL to look to neighboring communities for wage data without regard to arbitrary geographic designations.

The current urban/rural distinction does not account for the realities of the construction industry, in which workers tend to commute longer distances than other professionals, and they do so regardless of whether those localities are urban or rural.[37] Such movement is due to the cyclical nature of construction employment. When one project ends, workers are forced to follow the next project that will provide gainful employment – even if it means traveling to surrounding communities.

Moreover, as the North American Building Trades Unions points out, the current rule separating urban and rural counties has forced DOL to rely upon data from areas that are geographically remote and do not reflect the primary county's labor market. For example, one of DOL's urban county grouping in Virginia spans from Frederick to Spotsylvania County. The distance between these two counties is almost one hundred miles, yet DOL currently sources wage data from Frederick to calculate Spotsylvania's rate, and vice versa. Similarly, one urban county grouping in Missouri, spans from Caldwell to Bates County. The distance between these two counties is roughly one hundred and twenty miles. By eliminating the arbitrary urban/rural distinction, DOL can avoid such anomalies and simply source data from adjacent labor markets.

[36] 29 C.F.R. § 1.7(b).

[37] *See*, e.g., Keren Sun et al., *Hierarchy Divisions of the Ability to Endure Commute Costs: An Analysis Based on a Set of Data about Construction Workers*, J. of Econ. & Dev. Stud., Dec. 2020, at 1, 6.

**N.** **Requirement To Incorporate Most Recent Wage Determinations into Certain Ongoing Contracts** (Page 15715) 29 CFR 1.6(c)(2)(iii)

The IUOE believes this new proposal that incorporates CBA wage increases into the contract is common sense that will bring Federal projects into accordance with nearly every private project across the country. On job sites across the country, union and non-union, there is no principal barring pay raises from being implemented.

The policy that locks in the prevailing wages and fringes as soon as the contract is awarded does not make sense for a variety of reasons. Primarily, many workers may selectively choose not to take DBA job assignments if the wage and fringe is not up to par with what private jobs are offering; this could be particularly troubling on massive, years long DBA projects. Additionally, the heart of the Act requires that the employers pay the area standard. This current principal barring CBA increases ensures that many DBA projects will not do that after a certain amount of time. Modernizing the DBA regulations to reflect wage policies the rest of the private sector abides by and to better match the intent of the Act makes sense and should be included in the final rule.

O. **Administrative Expense of a Contractor or Subcontractor** (Page 15745) 29 CFR 5.33

The DBA currently prohibits a contractor from taking a prevailing wage fringe credit for administrative costs incurred by the contactor itself for "rate of cost" plans. However, existing WHD guidance state "reasonable costs incurred by a third-party fiduciary" are creditable under both the SCA and DBA.[38] Through the NPRM, the WHD "seeks public comment regarding whether it should clarify this principle further with respect to third-party administrative costs."

As an initial matter, the focus only on costs incurred by third-party "fiduciaries" is misplaced. There is no reasoned basis for a contractor to receive credit for the administrative cost of an investment manager (who typically accepts fiduciary responsibility) as opposed to an investment consultant (who typically does not accept fiduciary responsibility). Similarly, there is no reasoned basis to exclude the cost of health and welfare fund's administrator who typically does not accept fiduciary responsibility.

What is more, the IUOE does not believe that it is practical to create a set of rules that would provide a useful benchmark for determining whether a plan administrative expense is "reasonable." There are too many potentially relevant factors: the size of the plan, the nature of the benefits provided by the plan, the nature of the administrative services provided to the plan, the availability of the administrative services in the marketplace, the precise scope of the administrative services provided, the qualifications, expertise and reputation of the service provider, differences in regional costs, and so forth.

In light of the many complexities surrounding this issue additional rulemaking. The IUOE urges the Agency to forgo any action on this issue and instead continue to address this issue through the ordinary complaint process on a case-by-case basis.

[38] NPRM at 15745.

## III. CONCLUSION

The IUOE whole heartedly agrees that the WHD's proposed rules complete its stated goal at the beginning of the NPRM to" provide greater clarity and enhance [the Act's} usefulness in the modern economy." For too long the Davis Bacon Act has been allowed to meander and slowly wither away for the benefit of very few. These commonsense rule proposals will breathe new life into the Act at an extremely critical juncture for the country. With these proposed regulations the WHD indicates that the United States stands with construction workers across the country and ensures they have a fair shake when the US Government is a party to the contract.

The IUOE urges the Department of Labor and Wage & Hour Division to advance the vital proposals in the NPRM and discussed herein to be published in their final form as set forth in the IUOE's submission. We welcome inquiries and requests for further information.

Respectfully submitted,

JAMES T. CALLAHAN
GENERAL PRESIDENT

By: James J. Callahan
Assistant Director of Jurisdiction/Davis-Bacon
International Union of Operating Engineers
1125 17th St. NW Washington, DC 20036
(202) 429-9100