Submitted via Federal e-Rulemaking Portal: https://www.regulations.gov

May 13, 2022

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

Re: Comments on Proposed Rule Updating Regulations Pertaining to the Davis-Bacon Act and Related Acts

I am the Executive Director of the Foundation for Fair Contracting ("FFC"), a joint labor-management fair contracting organization that operates in California's northern forty-six (46) counties. As one of the oldest and leading fair contracting organizations operating in California, FFC provides education, training, and outreach to the public works construction community. Additionally, FFC monitors and enforces prevailing wage laws through auditing certified payroll records, interviewing workers, and engaging in worker/employer resolution assistance.

I write this letter to provide our comments on the U.S. Department of Labor's ("DOL") Proposed Rule updating the Davis-Bacon and Related Acts ("DBRA") regulations ("Proposed Rule"). The Proposed Rule would update and modernize the regulations at 29 CFR parts 1, 3, and 5, which implement the DBRA. The Proposed Rule amends the regulations implementing the DBRA in two broad areas: first, by modernizing the rules for the determination of prevailing wage rates applicable to DBRA projects and, second, by revising and strengthening the enforcement of the DBRA. As a fair contracting organization with a specific focus on enforcing prevailing wage laws, including the DBRA, the FFC will be directly affected by the Proposed Rule's changes to existing regulations.

The FFC is very supportive of the Proposed Rule. It will improve the wage survey process, reduce the use of artificial average wages, make wage determinations more accurate, and speed up the survey process. The Proposed Rule aligns regulations with the intended purpose of the DBRA, to ensure that prevailing wages reflect those wages actually paid to workers in a community.

The FFC is also supportive of strengthening the enforcement mechanisms available to the DOL. DBRA wage and hour requirements are ignored in the construction industry far too often.

According to data collected by the DOL, the construction industry consistently ranks among the top three industries for non-compliance with wage and hour requirements.[1] Through the FFC's labor compliance efforts, I have also witnessed how often contractors are able to violate wage and hour requirements in California while suffering little to no consequences. The Proposed Rule strengthens front and back-end enforcement of DBRA requirements. The enforcement proposals will help ensure that the risk of non-compliance is mitigated and that the DOL is able to protect workers when non-compliant contractors take advantage of them.

To ensure that Davis-Bacon prevailing wage rates accurately reflect the actual wages paid to workers in a community, and to ensure that the DOL is able to effectively address non-compliance when it occurs, the FFC has ten recommendations: 1) the DOL should adopt the three-step method for calculating prevailing wages; 2) the DOL should adopt the new methodology which gives the DOL discretion and authority to adopt state or local wage determinations as the Davis-Bacon prevailing wage where certain criteria are satisfied; 3) the DOL should adopt the proposed revisions to §1.3 to allow for variable rates that are functionally equivalent to be counted together for the purpose of determining whether a single wage rate prevails in an area; 4) the DOL should adopt the proposed anti-retaliation provisions in §§ 5.5 and 5.18 to protect workers who report non-compliance with the DBRA from adverse employment actions; 5) the DOL should adopt the proposed changes to the cross-withholding procedure for recovering back wages; 6) the DOL should adopt the proposed revisions to debarment standards; 7) the DOL should adopt the proposed revisions requiring the payment of interest on any underpayment of wages; 8) the DOL should adopt the proposed revisions to § 5.5(a)(3) to better effectuate compliance and enforcement by clarifying and supplementing existing recordkeeping requirements: 9) the DOL should adopt the proposed additions to § 5.5(e) which provides that labor standards contract clauses and appropriate wage determinations are effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract; 10) the DOL should adopt the proposed revisions to §§ 5.5(a)(2), 5.5(b)(3), and 5.9 which provide that the DOL has priority to withhold funds for violations of the DBRA and CWHSSA; and 11) the DOL should adopt the proposed revisions to §§ 5.5(a)(6) and 5.5(b)(4) which clarify prime and subcontractor responsibility for compliance with DBRA requirements.

[1] U.S. DOL Website, Wage and Hour Division by the Numbers 2021, https://www.dol.gov/agencies/whd/data/charts/low-wage-high violation-industries.

Recommendation #1: the FFC supports the Proposed Rule's adoption of the three-step method for calculating prevailing wages

The DOL's Proposed Rule redefines the term "prevailing wage" in 29 CFR § 1.2 to return to the original methodology for determining whether a wage rate is prevailing in an area.[2] This methodology is referred to as the "three-step process." The three-step process identifies as prevailing: (1) any wage rate paid to a majority of workers; and, if there was none, then (2) the wage rate paid to the greatest number of workers, provided it was paid to at least 30 percent of workers, and, if there was none, then (3) the weighted average rate. The first two steps of the three-step process increase the likelihood that the prevailing wage as determined by the DOL will reflect an actual wage rate paid to workers in the area.

The original methodology was in place from 1935 until 1981, when the DOL published a final rule that eliminated the second step in the three-step process. The elimination of the second step of the three-step process resulted in an overuse of average rates. Average rates do not actually represent the wage rate prevailing in an area. The average rate should only be used as a fall-back method when there is no clear rate prevailing in a given area. Prior to the 1982 rule, the use of average rates was relatively rare. The DOL estimates that after the 1982 rule, the percentage of classifications across all wage determinations that were based on averages raised from 15 % to 26 %.[3] Today, the DOL's current use of average rates is significantly higher, with 64 % of Davis-Bacon wage determinations based on averages.[4] The overuse of averages is inconsistent with the text and purpose of the DBRA. 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 rate that is more prevalent in the community. Moreover, the plain meaning of the statutory term "prevailing" refers to a predominant single wage rate, or a modal wage rate, not an average.

A fundamental purpose of the Davis-Bacon Act ("DBA") is to limit low-bid contractors from depressing local wage rates.[5] The overuse of weighted averages directly enables a few low-wage contractors in an area to have an outsized influence on the prevailing wage in an area, lowering the quality of life for potentially thousands of other workers in that area. Under the current

---

2 Federal Register / Vol. 87, No. 53 / Friday, March 18, 2022 / Proposed Rules, "Updating the Davis Bacon and Related Acts Regulations," p. 15703.

3 *See* Robert S. Goldfarb & John F. Morrall II., ''The Davis-Bacon Act: An Appraisal of Recent Studies,'' 34 Indus. & Lab. Rel. Rev. 191, 199–200 & n.35 (1981).

4 Proposed Rule, *supra* note 1 at p. 15703.

5 Legislative history shows that the Act's sole focus is on protecting construction workers from substandard wages. See, e.g., U.S. v. Binghamton Constr. Co., 347 U.S. 171, 176-77 (1954); 74 Cong. Rec. 6,510, 6,513 (daily ed. Feb. 28, 1931) ("[I]t is our chief concern to maintain the wages of our workers and to increase them wherever possible. . . for to fail in this regard would be…permitting a gross injustice to be perpetrated upon our citizens.").

regulations, the DOL often uses a mathematical formula to contrive a prevailing wage rate that isn't actually paid to any workers. The Proposed Rule's three-step process would ensure the DOL uses the actual wages paid to the majority of workers in an area when determining prevailing wages.

The three-step process would also prevent the watering down of wages by unscrupulous contractors and make it less difficult for high-road contractors to pay their workers a wage that allows them to support themselves and their families. Protecting the actual, locally established wage rates ensures that contractors from the local community have an equal chance to compete for federal jobs. As a fair contracting organization operating for decades in California, the FFC has witnessed the outsized influence a small amount of contractors who undercompensate their workers can have on the prevailing wage in an area. Additionally, California prevailing wage laws direct the Director of the Department of Industrial Relations ("DIR") to consider Davis-Bacon wage determinations when determining the prevailing wage for a locality. Therefore, the three-step process will not only improve the accuracy of Davis-Bacon wage determinations, it will also improve the accuracy of California prevailing wage determinations.

The FFC therefore recommends that the Final Rule include the restoration of the three-step method for determining prevailing wage rates. Doing so will restore the law to its intended purpose of ensuring that prevailing wages actually reflect the wages paid to the majority of workers in a community. Additionally, restoration of the three-step method will prevent a minority of contractors that underpay their workers from having an outsized influence on the prevailing wage in a community.

Recommendation #2: the FFC supports the Proposed Rule's additions to § 1.3, which permit the DOL, under specified circumstances, to determine Davis-Bacon wage rates by adopting prevailing wage rates set by state and local governments

The Proposed Rule adds paragraphs (g), (h), (i), and (j) to § 1.3 to permit the DOL, under specified circumstances, to determine Davis-Bacon wage rates by adopting prevailing wage rates that have been set by state and local governments.[6] Under the current regulations, there are numerous constraints on the Wage and Hour Division's ("WHD") ability to issue wage determinations, such as geographic scope and the type of project data that may be used.[7] Current regulations permit WHD to "consider" state and local prevailing wage determinations and to give "due regard" to state rates for highway construction.[8] However, current regulations also provide that any information WHD considers when making wage determinations must "be

6 Proposed Rule at p. 15709.

7 *See* 29 CFR §§ 1.7, 1.3(d).

8 *See* 29 CFR §§ 1.3(b)(3)–(4).

evaluated in the light of [the prevailing wage definition set forth in] § 1.2(a).”[9] This creates inconsistencies when the prevailing wage practices of states and localities do not mirror the DOL’s practices.

The Proposed Rule adds a new paragraph, § 1.3(g), which explicitly permits WHD to adopt prevailing wage rates set by state or local officials, even where the state’s or locality’s definition of prevailing wage and/or methods of deriving wage rates differ from those of the DOL.[10] The Proposed Rule allows WHD to adopt a state or local rate if the Administrator concludes that the state or local rate and the process used to derive the rate meet certain criteria listed in §1.3(g).[11] The Proposed Rule would also permit the adoption of state and local rates for all types of construction.[12]

The FFC strongly supports these revisions allowing the DOL to adopt state and local prevailing wage rates because state and local rates are often more accurate and current than the federal rates in the same area. In California, the DIR conducts surveys of contractors by collecting data on the wages paid to workers within the most recent twelve (12) month period. In addition, the DIR considers the collective bargaining agreements (“CBA”) of the union(s) in the locality.[13] If a rate is based on a CBA, it is increased concurrently with that CBA’s increases. The vast majority of wage determinations in California are based on CBAs.

The wage determinations based on CBAs are regularly updated based on predetermined increases contained in the applicable CBAs, meaning that the majority of wage determinations in California are updated with significantly greater frequency than Davis-Bacon determinations and are therefore more accurate. Furthermore, if the DIR has reason to believe a wage determination based on a CBA does not actually represent the prevailing wage in a locality, they may conduct an investigation to determine which wage rate prevails. The California process for determining prevailing wages therefore results in accurate wage determinations that are updated on a regular basis. Thus, allowing the DOL to adopt such state prevailing wage rates results in increased efficiency for the WHD and more accurate Davis-Bacon prevailing wage rates.

---

9 *Ibid.* at § 1.3(c).

10 Federal Register / Vol. 87, No. 53 / Friday, March 18, 2022 / Proposed Rules, “Updating the Davis-Bacon and Related Acts Regulations,” p. 15710.

11 *Id.*; The criteria the DOL proposes for the adoption of state or local wage rates are: 1) The State or local government must set prevailing wage rates, and collect relevant data, using a survey or other process that generally is open to full participation by all interested parties. 2) The State or local wage rate must reflect both a basic hourly rate of pay as well as any locally prevailing bona fide fringe benefits, each of which can be calculated separately. 3) The State or local government must classify laborers and mechanics in a manner that is recognized within the field of construction. 4) The State or local government’s criteria for setting prevailing wage rates must be substantially similar to those the Administrator uses in making wage determinations under 29 CFR part 1.

12 *Id.,* at 15711.

13 Cal. Code Regs. tit. 8, § 16200.

Allowing the DOL to adopt state wage rates will also help rectify a problem currently plaguing federal construction projects: outdated Davis-Bacon prevailing wage rates that don't accurately compensate workers based on the prevailing wage in their community. For example, the current California prevailing wage rate for Laborers in Alpine County is $32.80 with a total package rate of $59.29 including fringe benefits.[14] The equivalent Davis-Bacon prevailing wage rate for Laborers in Alpine County is $20.49 with no fringe benefits at all.[15] The California prevailing wage rate for Laborers in Alpine County was last updated in 2021 while the equivalent Davis-Bacon wage rate was last updated in 2015, a nearly 7 year difference. These outdated rates not only undermine the purpose of the DBRA of protecting local area wages, but also discourage workers from entering the construction workforce. The ability to attract and recruit new workers into the construction industry is especially important in light of the unprecedented amount of federal construction projects that will be funded by the recently passed Bipartisan Infrastructure Law.[16] The FFC has witnessed how much success high-road contractors who pay their workers a living wage have had in recruiting new workers to the construction industry.

The adoption of state prevailing wage rates will lead to more accurate, higher Davis-Bacon wage rates, which will help attract workers to the construction industry and provide the necessary labor force to construct the many federal infrastructure projects funded by the Bipartisan Infrastructure Law. The FFC therefore recommends that the Final Rule includes the Proposed Rule's additions to § 1.3, which allow the DOL to adopt state and local wage rates under specified criteria.

Recommendation #3: the FFC supports the Proposed Rule's revisions to § 1.3, which allow for variable rates to be counted together for the purpose of determining whether a single rate prevails in an area

The Proposed Rule revises § 1.3 to allow for variable rates that are functionally equivalent to be counted together for the purpose of determining whether a single wage rate prevails. For many years, the DOL previously followed the Proposed Rule's approach until the Administrative Review Board (ARB) issued its a decision in 2006 in a case called *Mistick Construction*, holding that wage data reflecting a functionally equivalent compensation package with slight variations in the basic hourly rate and fringe benefits did not reflect the same wage rate for the purpose of making prevailing wage determinations.[17] The Proposed Rule allows the use of variable rates if the rates are functionally equivalent and the variation can be explained by a CBA or the written

---

[14] California General Prevailing Wage Determination NC-23-102-1-2021-1, https://www.dir.ca.gov/oprl/2022-1/PWD/Determinations/Northern/NC-023-102-1.pdf.

[15] Davis-Bacon Act Wage Determination # CA20220029.

[16] In a 2020 survey of construction firms across the country, over 70% of respondents reported that they anticipate a labor shortage to be the biggest hurdle in coming years. *See* Associated General Contractors of America, 2020 Construction Outlook Survey.

[17] Proposed Rule, *supra* note 1 at p. 15706.

policy of a contractor. The Proposed Rule therefore provides more flexibility to the DOL while also taking necessary precautions to ensure accuracy.

The FFC supports the Proposed Rule's revisions to § 1.3 that allow the DOL to use variable rates when they are functionally equivalent and the variation can be explained by a CBA or the written policy of a contractor. As a joint labor-management organization, the FFC is intimately familiar with the various ways CBAs and management decisions can create slight variations in how workers are compensated. These slight variations are for unique or specialized circumstances, such as when a worker is compensated at a higher rate for working at night or during undesirable hours, working in hazardous conditions, or working in certain geographic areas. These variations do not represent a departure from the general compensation scheme a contractor has; they are simply minor variations to account for special circumstances. They should therefore be counted together for the purposes of determining prevailing wage rates. Additionally, the current regulations have created a chilling effect regarding negotiated wage differentials for unique or specialized circumstances. Contractors are reluctant to agree to wage premiums for such circumstances because they are concerned that the difference between the standard wage rate and the premiums will lead the DOL to adopt incorrect prevailing wage rates in their locality.

For these reasons, the FFC recommends that the Final Rule include the Proposed Rule's revisions to § 1.3 to allow for variable rates that are functionally equivalent to be counted together for the purpose of determining whether a single wage rate prevails under the proposed definition of "prevailing wage" in § 1.2.

Recommendation #4: the FFC supports the Proposed Rule's anti-retaliation provisions

The Proposed Rule adds anti-retaliation provisions at §§ 5.5(a)(11) and 5.5(b)(5), along with a related section at § 5.18 to enhance enforcement of the DBRA.[18] The new anti-retaliation provisions discourage contractors, responsible officers, and any other persons from engaging in business practices that discourage workers from participating in WHD investigations or other compliance actions. Under the current regulations, the only redress for workers who have been discriminated against for reporting violations of the DBRA is back wages. But back wages alone do not make a worker who has been fired for their cooperation in an investigation whole.

The new anti-retaliation provisions at §§ 5.5(a)(11) and 5.5(b)(5) state that it is unlawful for any person to discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate, or cause any person to do the same, against any worker for engaging in a number of protected activities.[19] The protected activities include notifying a contractor of any conduct that the worker reasonably believes constitutes a violation of the DBRA; filing any

[18] *Ibid.*, at p. 15746.
[19] *Id.,* at p. 15747.

complaints, initiating or causing to be initiated any proceeding, or otherwise asserting any right or protection; cooperating in an investigation or other compliance action, or testifying in any proceeding; or informing any other person about their rights under the DBRA.[20] The new anti-retaliation provisions also apply in situations where there is no current work or employment relationship between the parties.[21]

The new § 5.18 sets forth remedies for violations of §§ 5.5(a)(11) and 5.5(b)(5). These include, but are not limited to, any back pay and benefits denied or lost by reason of the violation; other actual monetary losses sustained as a direct result of the violation; interest on back pay or other monetary losses from the date of the loss; and appropriate equitable or other relief such as reinstatement or promotion; expungement of warnings, reprimands, or derogatory references; the provision of a neutral employment reference; and posting of notices indicating that the contractor or subcontractor agrees to comply with DBRA anti-retaliation requirements.[22]

One of the FFC's primary purposes is to monitor and enforce prevailing wage laws, including through interviewing workers who have been taken advantage of by unscrupulous contractors. The current regulations do not provide enough protection to workers reporting violations of the DBRA. Members of FFC tasked with interviewing workers when investigating violations of prevailing wage laws have witnessed how reluctant workers can be to report misconduct. This reluctance is due to the fear that they will lose their job and as a result compromise their ability to support themselves and their family financially. While providing back wages to workers who have been discriminated against for reporting violations of the DBRA is important, it is frequently not enough to make workers whole. If workers are not made whole when they are retaliated against, then they are disincentivized to come forward to report violations.

The new anti-retaliation provisions encourage workers to report violations, which in turn helps organizations like the FFC ensure that unscrupulous contractors are not able to continue abusing workers. The new anti-retaliation provisions not only protect workers, they also help ensure that unscrupulous contractors aren't able to gain an unfair economic advantage against high-road contractors who properly compensate their workers. The FFC therefore recommends that the Final Rule include the Proposed Rule's anti-retaliation provisions at §§ 5.5(a)(11), 5.5(b)(5), and § 5.18.

---

20 *Id.*
21 *Id.*
22 *Id.*, at p. 15759.

Recommendation #5: the FFC supports the Proposed Rule's changes to the DOL's cross-withholding procedure for recovering back wages owed to workers

The Proposed Rule strengthens the cross-withholding language at §§ 5.5(a)(2) and 5.5(b)(3) by giving the DOL greater ability to cross-withhold when contractors use single-purpose entities, joint ventures or partnerships, or other similar vehicles to enter into DBRA-covered contracts.[23]

Cross-withholding is a procedure that allows agencies to withhold money due to a contractor from contracts other than the contract on which the alleged violations occurred. However, the current regulations are of limited effectiveness because they do not allow cross-withholding against joint ventures and other similar contracting vehicles such as single-purpose LLCs. This is because the current regulations require a "mutuality of debts," i.e., that the creditor and debtor involved are exactly the same person or legal entity.[24]

The Proposed Rule amends §§ 5.5(a)(2) and 5.5(b)(3) to require that any entity that directly enters into a contract covered by the DBRA must agree to cross-withholding against it to cover any violations of specified affiliates under other covered contracts entered into by those affiliates.[25] Covered affiliates are those entities included within the proposed definition of prime contractor in § 5.2: "controlling shareholders or members, joint venturers or partners, and contractors (e.g., general contractors) that have been delegated significant construction and/or compliance responsibilities."[26]

The Proposed Rule also adds language to §§ 5.5(a)(2) and 5.5(b)(3) to clarify that the Government may pursue cross-withholding regardless of whether the contract on which withholding is sought was awarded by, or received federal assistance from, the same agency that awarded or assisted the prime contract on which the violations necessitating the withholding occurred.[27] The current regulatory language does not explicitly state that funds may be withheld from contracts awarded by other agencies. As a result, some agencies have questioned whether cross-withholding is appropriate in such circumstances.[28] The proposed language would dispel any such uncertainty or confusion. The proposed regulations would also add language to § 5.5(a)(3)(iv) clarifying that funds may be suspended when a contractor has refused to submit certified payroll or provide the required records as set forth at § 5.5(a)(3).[29]

---

23 *Ibid.*
24 *Id.*
25 *Id.,* at 15760.
26 *Id.*
27 *Id.*
28 *Ibid.*
29 *Id.*

The FFC has long witnessed how contractors have abused contracting vehicles, such as single purpose LLCs, to avoid liability for wage violations. The use of contracting vehicles has increased in recent decades and current regulations are not able to adequately address the increase in use of such legal arrangements.[30] Allowing contractors to shield themselves to escape liability for violations of the DBRA harms both workers and high-road contractors. Workers are harmed because they are unable to recover wages that they are owed. High-road contractors that comply with the DBRA are at an economic disadvantage by competing against contractors who change their corporate form in order to underpay their workers. Allowing unscrupulous contractors to abuse their workers and unfairly compete against other contractors clearly goes against the purpose of the DBRA.

The regulations implementing the DBRA must adjust according to new trends in the construction industry such as forming single purpose contracting vehicles to avoid liability to a parent company. The FFC therefore recommends that the Final Rule includes the Proposed Rule's revisions to the cross-withholding language at §§ 5.5(a)(2) and 5.5(b)(3).

Recommendation #6: the FFC supports the Proposed Rule's changes to the DOL's debarment standards

The regulations currently implementing the DBRA reflect inconsistent standards for debarment.[31] The DBA itself mandates a 3-year debarment "of persons . . . found to have disregarded their obligations to employees and subcontractors."[32] However, the Related Acts have a heightened standard for debarment which provides that "any contractor or subcontractor . . . found . . . to be in aggravated or willful violation of the labor standards provisions" of any DBRA will be debarred "for a period not to exceed 3 years."[33] The Related Act's heightened standard therefore makes it more difficult for contractors to be debarred by requiring that contractors can only be debarred for willful and aggravated violations of the DBRA.

The Proposed Rule adopts the DBA's debarment standard for all cases and eliminates the Related Acts' heightened debarment standard.[34] Additionally, the Proposed Rule adopts the DBA's mandatory 3-year debarment period for Related Act cases and eliminates the process under the Related Acts regulations for early removal from the debarment list.[35] Furthermore, the

---

[30] *See, e.g.,* John W. Chierichella & Anne Bluth Perry, Fed. Publ'ns LLC, Teaming Agreements and Advanced Subcontracting Issues, TAASI GLASS-CLE A at *1–6 (2007); A. Paul Ingrao, Joint Ventures: Their Use in Federal Government Contracting, 20 Pub. Cont. L.J. 399 (1991).

[31] Proposed Rule at p. 15754.

[32] 40 U.S.C. 3144(b)(1) and (b)(2).

[33] 29 CFR 5.12(a)(1).

[34] Proposed Rule at p. 15754.

[35] *Id.*

Proposed Rule expressly permits debarment of "responsible officers" under the Related Acts.[36] Finally, the Proposed Rule makes the scope of debarment under the Related Acts consistent with the DBA by providing that debarred persons and firms under the Related Acts may not receive "any contract or subcontract of the United States or the District of Columbia," as well as "any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1."[37]

The FFC supports the Proposed Rule's changes to the debarment standards. The changes create a consistent standard that is easier to understand for both workers and contractors. There is no reason for the Related Acts to require a heightened standard that makes it more difficult to debar contractors for violations of the DBRA. The DBRA should have a single consistent debarment standard that clearly discourages unscrupulous behavior of contractors. An ineffective debarment standard that makes it difficult to debar contractors allows for repeat violators to continue to abuse workers without real consequences. Studies have shown that contractors are able to save 30% or more on labor costs by ignoring federal and state labor laws.[38] An effective debarment standard will help to discourage cost-saving violations by providing a strong disincentive for violating the DBRA. The FFC supports the Proposed Rule because it simplifies the debarment standards under the DBRA and makes it easier to debar contractors under the Related Acts.

California Labor Code § 1771.1 provides that a contractor can be debarred for violating our state prevailing wage laws with intent to defraud. The California debarment standard is similar to the debarment standard under the Related Acts in it requires a contractor to have committed intentional and aggravated violations of the prevailing wage laws in order to justify debarment. This has made it far too difficult to debar contractors in California. The standard in California has unfortunately created a lengthy and cumbersome process that often allows contractors who repeatedly and egregiously violate the law to escape debarment. The federal government should adopt a more streamlined and effective process, and hopefully California will follow suit.

Furthermore, one of FFC's many purposes is to educate workers and contractors on prevailing wage laws, including the enforcement mechanisms available to government agencies when the laws are violated. A consistent debarment standard for under the DBRA will make it easier for the FFC and other fair contracting organizations to educate workers and contractors on the law. Additionally, the removal of a heightened standard for the Related Acts will make it easier to debar unscrupulous contractors. The debarment of unscrupulous contractors prevents them from continuing to take advantage of workers and unfairly competing with high-road contractors on

---

36 *Ibid.*

37 *See* 29 CFR 5.12(a)(1)–(2).

38 National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (July 22, 2015); 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).

DBRA-covered projects. The FFC therefore recommends that the Final Rule includes the Proposed Rule's changes to the debarment standards.

Recommendation #7: the FFC supports the Proposed Rule's provisions requiring the payment of interest on any underpayment of wages

The Proposed Rule adds language to the contract clauses at §§ 5.5(a)(1)(vi), 5.5(a)(6), and 5.5(b)(4) requiring the payment of interest on any underpayment of wages or monetary relief for violations of the Proposed Rule's anti-retaliation provisions.[39] The Proposed Rule states that interest will start to accrue from the date of the underpayment of wages or monetary loss.[40] Interest will be calculated using the percentage established for the underpayment of taxes pursuant to federal tax laws, 26 U.S.C. 6621, and will be compounded daily.[41]

Current regulations and contract clauses do not provide for the payment of interest on back wages. Without requiring interest on back wages and other monetary relief, workers will not be fully compensated for their losses. Various other regulations, such as Occupational Safety and Health Administration ("OSHA") whistleblower regulations, require interest on back-pay awards using the tax underpayment rate and daily compounding because it is the best way to achieve the purpose of a back-pay ward: to make a worker whole.[42] In California, an employee who is paid less than the minimum wage or the legally required overtime compensation is entitled to a back-pay award for the unpaid balance, including interest.[43] Additionally, California Labor Code § 218.6 requires that a court must award interest on all due and unpaid wages at a rate of 10% per year.[44]

The FFC supports the Proposed Rule's requirement that interest be paid on back wages and other monetary relief. One of the FFC's primary goals in enforcing compliance with prevailing wage laws is to ensure that workers who have been cheated receive the compensation they are entitled to. Unscrupulous contractors who underpay their workers and violate the DBRA in other ways already receive an unfair economic advantage against high-road contractors. Requiring such contractors to pay interest on back wages is an appropriate and necessary further penalty, and is commensurate with California state law, and presumably laws in other states with prevailing wage requirements.

---

39 Proposed Rule at p. 15735.

40 *Id.* at p. 15800.

41 *Id.*

42 *See* Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Final Rule, 80 FR 11865, 11872 (Mar. 5, 2015).

43 Cal. Lab. Code § 1194.

44 Cal. Lab. Code § 218.6.

It is also appropriate to award interest on back wages because workers are entitled to a true "make whole" remedy. When workers are deprived of the wages they should have earned, they are entitled to interest when those wages are finally awarded.

The FFC therefore recommends that the Final Rule includes the Proposed Rule's requirement that interest is paid on back wages and other monetary relief, to make workers legitimately whole for their losses.

Recommendation #8: the FFC supports the Proposed Rule's changes to § 5.5(a)(3) clarifying and supplementing existing recordkeeping requirements

The Proposed Rule revises §§ 5.5(a)(3) and 5.5(c) to better effectuate compliance and enforcement of the DBRA by clarifying and supplementing existing recordkeeping requirements.[45] The Proposed Rule amends § 5.5(a)(3)(i) to require that contractors maintain and preserve basic records and information, as well as certified payrolls. The required basic records include but are not limited to regular payroll and additional records relating to fringe benefits and apprenticeship and training.[46]

The Proposed Rule also requires that the records be preserved for at least 3 years after all the work on the prime contract is completed. The Proposed Rule further requires that the records required by §§ 5.5(a)(3) and 5.5(c) must include last known worker telephone numbers and email addresses.[47] The Proposed Rule also requires that contractors and subcontractors must maintain records of each worker's correct classification or classification of work actually performed and the hours worked in each classification.[48] The Proposed Rule expressly requires that the records required to be maintained must be complete and accurate.

The Proposed Rule also adds language that allows contracting agencies and prime contractors to permit or require contractors to submit their certified payrolls through an electronic system.[49] It also adds language to § 5.5 to require all contractors, subcontractors, and recipients of federal assistance to maintain and preserve Davis-Bacon contracts, subcontracts, and related documents for 3 years after all the work on the prime contract is completed.[50] Finally, the Proposed Rule

---

45 Proposed Rule at p. 15735.
46 *Id.,* at p. 15736.
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*

adds a sanction for contractors and other persons who fail to submit the required records in § 5.5(a)(3) or make those records available to WHD upon request.[51] The sanction prevents contractors that fail to comply with WHD record requests from introducing as evidence any records that were not produced to WHD as required or requested.

The FFC strongly supports these vast improvements to recordkeeping requirements in the Proposed Rule. One of the primary methods FFC uses to enforce compliance with prevailing wage laws is by auditing certified payroll records. Recordkeeping requirements increase transparency and allow organizations like the FFC to ensure that contractors are complying with the law. The Proposed Rule's clarifications and supplemental requirements modernize the DBRA's recordkeeping requirements and ensure that contractors maintain their records for years after projects are completed. Under the current regulations, contractors are able to falsify records or generate them long after the work is done in order to cover up their violations of the DBRA. Increased transparency in recordkeeping is essential to preventing unscrupulous contractors from covering up violations of the DBRA and using falsified records in their defense after an investigation is initiated.

The modernization of the recordkeeping requirements and the requirements to maintain records after a project is completed would make it easier for the FFC to audit unscrupulous contractors and ensure that they do not continue to take advantage of workers and unfairly compete against high-road contractors. The FFC therefore recommends that the Final Rule includes the Proposed Rule's clarifications and supplements to the recordkeeping requirements.

Recommendation #9: the FFC supports the Proposed Rule's additions to § 5.5(e), which make the requirement to pay prevailing wage, the DOL's authority to enforce the DBRA, and the requirement to abide by applicable wage determinations effective by operation of law

The Proposed Rule adds language to § 5.5 providing that the requirement to pay prevailing wage, the DOL's authority to enforce the DBRA, and the requirement to abide by applicable wage determinations effective "by operation of law" in circumstances where they have been wrongly omitted from a covered contract.[52] The Proposed Rule's additions to § 5.5 ensure that, in all cases, the DOL has an enforcement mechanism available to them even if the applicable labor standards are omitted from a DBRA-covered contract, whether accidental or not. The Proposed Rule's additions ensure that workers receive the correct prevailing wages even if the correct wage determination was not attached to the applicable contract. Specifically, the Proposed Rule's language provides that all of the contract clauses set forth in § 5.5 are considered to be a part of

---

51 *Id.*
52 *Ibid.*, at p. 15739.

every covered contract, whether or not they are physically incorporated into the contract.[53] This includes the contract clauses requiring the payment of prevailing wages and overtime at § 5.5(a)(1) and § 5.5(b)(1), the withholding clauses at § 5.5(a)(2) and § 5.5(b)(3), and the labor-standards disputes clause at § 5.5(a)(9).

The FFC supports the Proposed Rule's additions to § 5.5, which make appropriate wage determinations and labor standards effective by operation of law. One of FFC's primary purposes is to enforce state and federal prevailing wage laws. An accidental omission of prevailing wage requirements from a covered contract should not absolve contractors from complying with the law or prevent workers from receiving the protections of the DBRA. It is crucial that the Final Rule includes the Proposed Rule's additions to § 5.5. This loophole must be closed.

Recommendation #10: the FFC supports the Proposed Rule's revisions to §§ 5.5(a)(2), 5.5(b)(3), and 5.9, which grant the DOL priority to withhold funds for violations for the DBRA and CWHSSA

The Proposed Rule's revisions to §§ 5.5(a)(2), 5.5(b)(3), and 5.9 codify the DOL's longstanding position that the DOL has priority to withhold funds (including funds that have been cross-withheld) for violations of DBRA prevailing wage requirements and Contract Work Hours and Safety Standards Act (CWHSSA) overtime requirements.[54] In order to ensure that underpaid workers receive the money they are owed, contract funds that are withheld to reimburse workers owed DBRA or CWHSSA wages, or both, must be reserved for that purpose and may not be used or set aside for other purposes until such time as the prevailing wage and overtime issues are resolved.[55]

Specifically, the proposed regulations codify that the DOL has priority to withhold funds for DBRA and CWHSSA wage underpayments over competing claims to such withheld funds by: 1) a contractor's surety(ies), including without limitation performance bond sureties, and payment bond sureties; 2) a contracting agency for its reprocurement costs; 3) a trustee(s) (either a court-appointed trustee or a U.S. trustee, or both) in bankruptcy of a contractor, or a contractor's bankruptcy estate; 4) a contractor's assignee(s); 5) a contractor's successor(s); or 6) a claim asserted under the Prompt Payment Act, 31 U.S.C. 3901-3907.[56]

The FFC supports the Proposed Rule's revisions to §§ 5.5(a)(2), 5.5(b)(3), and 5.9. The proposed revisions codify a longstanding practice by the DOL that ensures workers actually receive the funds they are entitled to when they are underpaid by unscrupulous contractors. One of FFC's

---

53 *Id.*
54 *Ibid.*, at p. 15760.
55 *Id.*
56 *Id.,* at 15671.

primary purposes is to enforce prevailing wage laws. Without the Proposed Rule's revisions, many of FFC's efforts on DBRA projects would be fruitless since the violations they uncover and refer to WHD wouldn't actually lead to workers being compensated for the wages they're owed if other creditors have priority. Additionally, the FFC has observed that contractors who underpay their workers or owe unpaid wages are highly likely to have other outstanding debts. When the payment of wages is not prioritized over other debts, the workers become unable to recover the wages owed to them for hours physically worked. Whether or not a worker is paid the wages owed to them should not be dependent on the financial solvency of the contractor who took advantage of them.

The FFC therefore recommends that the Final Rule includes the Proposed Rule's revisions to §§ 5.5(a)(2), 5.5(b)(3), and 5.9, which codify the DOL's longstanding position that the DOL has priority to withhold funds for violations of DBRA prevailing wage requirements and CWHSSA overtime requirements.

Recommendation #11: the FFC supports the Proposed Rule's revisions to §§ 5.5(a)(6) and 5.5(b)(4), which clarify prime and subcontractor responsibility for compliance with DBRA requirements

The Proposed Rule clarifies that upper-tier subcontractors, in addition to prime contractors, may be responsible for violations of the DBRA committed against the employees of lower-tier subcontractors. The Proposed Rule requires upper-tier subcontractors (and prime contractors) to pay back wages on behalf of their lower-tier subcontractors and also subjects upper-tier subcontractors to debarment in certain circumstances.[57] The Proposed Rule does not hold upper-tier subcontractors strictly liable for the violations of lower-tier subcontractors. Rather, the Proposed Rule's language assigns liability only to upper-tier contractors who have the ability to choose the lower-tier subcontractors they hire, notify lower-tier subcontractors of the prevailing wage requirements of the contract, and take action if they have any reason to believe there may be compliance issues.[58]

The FFC supports the Proposed Rule's provisions holding upper-tier subcontractors and prime contractors liable for their subcontractors' violations of DBRA requirements. One of the issues FFC faces when attempting to enforce compliance with prevailing wage laws is the inability to hold prime contractors accountable for selecting low-road subcontractors who cheat their workers or game the contracting system.

---

57 *Ibid.*, at p. 15740. The Proposed Rule states that upper-tier subcontractors and prime contractors will be subject to debarment where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors.

58 *Id.*

The Proposed Rule also makes it easier for the FFC to educate workers and contractors regarding their responsibilities under the DBRA, which would be shared among contractors at all tiers. Additionally, the Proposed Rule eliminates an unfair economic advantage that contractors who ignore the violations of their subcontractors have over contractors who do hold their subcontractors accountable. If upper-tier contractors are not responsible for the violations of their subcontractors, they are incentivized to hire cheaper subcontractors who save money by underpaying their workers and committing other violations of the DBRA. By ensuring that upper-tier contractors aren't able to avoid responsibility for the violations of lower-tier contractors, the Proposed Rule eliminates a potential unfair economic advantage.

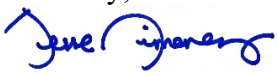
The FFC therefore recommends that the Final Rule includes the Proposed Rule's language clarifying the responsibility of prime contractors and upper-tier subcontractors for their subcontractors' non-compliance with the DBRA.

Conclusion

The FFC respectfully requests that the DOL adopt the eleven recommendations in this letter in order to modernize the regulations implementing the DBRA, ensure that workers are properly compensated when unscrupulous contractors violate the DBRA, and ensure that high-road contractors aren't unfairly competing with unscrupulous contractors who are able to evade liability for violations of the DBRA under current regulations.

If you have any questions about any of the recommendations or issues raised in this letter, please feel free to contact the undersigned.

Sincerely,



Jesse Jimenez, Executive Director
Foundation for Fair Contracting
Direct: (916) 549-6381